

**STUDENTS' CODE
OF
CIVIL PROCEDURE**

BY
**THE RIGHT HONOURABLE
SIR DINSHAH F. MULLA, KT.,**
ASSISTED BY

B. K. DESAI, B.A., LL.B., ADVOCATE (O. S.)

Seventh Edition

1934

Price Rs. 7-8-0.

For the use of students no other or better edition of the Code of Civil Procedure exists than Mr Mulla's book. It is abridged from the well-known work of the learned author for practitioners. The comments are particularly useful to students. The rules framed by the different Courts of final jurisdiction in India have been given in appendices. The book has been so popular with students that they need only be reminded that a new edition of their tried favourite has appeared—*The Bombay Law Reporter* (January 15th, 1922).

**STUDENTS' EDITION
OF
MULLA'S
INDIAN CONTRACT ACT,
SALE OF GOODS ACT AND
INDIAN PARTNERSHIP ACT**

BY
**THE RIGHT HONOURABLE
SIR DINSHAH F. MULLA, KT.,**
ASSISTED BY

B. K. DESAI, B.A., LL.B., ADVOCATE (O. S.)

This book has been abridged for students from the

1931-1933.

2nd Edition.

The Bombay Law Reporter,
Price Rs. 9.

THE
CODE OF CIVIL PROCEDURE

§ 5 r

ACT V OF 1908

• 17 •

EXPLANATORY NOTES AND COMMENTARIES

TENTH EDITION

PRICE Rs. 22 (Nett)

CALCUTTA:
THE EASTERN LAW HOUSE
1934

(All rights including right of translation reserved)

PRINTED BY H W SMITH AT THE TIMES OF INDIA PRESS, BOMBAY,
AND
PUBLISHED BY THE EASTERN LAW HOUSE, COLLEGE SQUARE, CALCUTTA

To The Memory
OF THE LATE
THE RIGHT HONOURABLE
SIR LAWRENCE HUGH JENKINS, K.C.I.E.
CHIEF JUSTICE
OF
THE HIGH COURT OF JUDICATURE AT BOMBAY.

PREFACE TO THE TENTH EDITION.

THIS edition has been thoroughly revised by the author who died on the day he was to write the preface. Sir Dinshah Mulla's works have achieved an unique position in the legal literature of India, and it was my privilege to assist him in the preparation of this and previous editions of the Code of Civil Procedure.

The present edition contains cases in the authorised and unauthorised reports upto January 1934.

I shall be carrying out the wishes of the author in stating that he felt indebted to Mr Justice Pratt for the valuable assistance rendered by him in the preparation of this edition.

The proofs have been revised by B K Desai, Esquire, M A , LL B , Advocate (O S), High Court Bombay , B P. Sethna, Esquire, Advocate (O S), High Court, Bombay , and M J C Mistree, Esquire, Advocate (O S), High Court, Bombay. The Table of cases has been prepared by B D. Mehta, Esquire, Advocate (A S), High Court, Bombay, and A J Poonavalla, Esquire, Barrister-at-Law, Middle Temple.

K S S.

July 1934.

PREFACE TO THE THIRD EDITION.

In preparing the present edition I had the unique assistance of the services of Sir Lawrence Jenkins—the eminent and illustrious lawyer who filled the office of Chief Justice of the High Court of Bombay with great ability and distinction for well nigh ten years. The notes above referred to were prepared by Sir Lawrence Jenkins while he was on the Special Committee which met at Simla in June 1907 and modelled the Code of Civil Procedure in its present form. That the Code of 1908 is a considerable improvement upon its predecessor is beyond all question. The arrangement, though novel is scientific. It proceeds upon the lines of the Judicature Acts and the Rules framed under those Acts. It consists of two parts: the first containing provisions of a substantive character and the second containing provisions which relate to “matters of mere machinery.” The 158 sections which form the body of the Code constitute the first part. The Rules and Orders comprised in Schedule I constitute the second part. The provisions of the Code of 1882 relating to arbitration have been transferred to a separate schedule, being Schedule II, the object being to facilitate the repeal of these provisions on the passing of a new and comprehensive Arbitration Act. Sections 321 to 325 C of the same Code which relate to execution of decrees by Collectors have been transferred to Schedule III. Schedule IV contains a list of enactments amended and Schedule V a list of enactments repealed by the new Code.

The arrangement of the present work is a simple one. Long familiarity with the section numbers of the Code of 1882 has rendered it necessary to give a comparative table of the sections of the old and the new Code. Such a table has accordingly been given, and to facilitate reference to it, which is likely to be constant, the table portion has been marked off by a piece of tape attached to the volume. At the same time we have given at the beginning of each section and rule of the new Code references to the corresponding sections of the Code of 1882 in thick black types enclosed in square brackets. There are, besides, a large number of rules comprised in the First Schedule which have been borrowed from the Rules made under the Judicature Acts. References to the latter rules also have been given in square brackets at the beginning of the corresponding rules of this Code, and are indicated by the letters ‘RSC,’ being an abbreviation of the words ‘Rules of the Supreme Court of England’—see, for instance, Order 1, rule 1, at p. 304.

There have been numerous alterations and additions introduced into the new Code, of which the following require the immediate attention of practitioners.—

- 1 S 2, cl 2,—definition of decree
- 2 S 2, cl 11,—definition of legal representative
- 3 S 7, O 50,—Provincial Small Cause Courts
- 4 S 8, O 51,—Presidency Small Cause Courts
- 5 S 20, cl (c),—arising of *part* of cause of action within jurisdiction
- 6 S 21,—objections to jurisdiction
- 7 S 24,—general power of transfer and withdrawal of suits
- 8 S 25,—power of Governor General in Council to transfer suits
- 9 S 35,—costs
- 10 S 37,—definition of Court which passed a decree
- 11 S 40,—transfer of decree to Court in another province
- 12 S 46,—precepts
- 13 S 47,—questions to be determined by the Court executing decree
- 14 S 48,—execution barred in certain cases
- 15 S 53,—liability of ancestral property in execution
- 16 S 55 sub s (1) second proviso and sub s (4),—arrest and detention
- 17 S 60, sub s (1), cls (a), (b), (h) and (k),—property liable to attachment and sale in execution of decree
- 18 S 61, O 21, rr 44 45, rr 74 75, O 39, r 12—agricultural produce
- 19 S 62, sub s (2),—seizure of property in dwelling house
- 20 S 61, *Explanation*,—private alienation pending attachment
- 21 S 65,—execution purchaser's title
- 22 S 73,—sub s (2), rateable distribution
- 23 S 88 —interpleader
- 24 S 91,—public nuisances
- 25 S 92 sub s (2) —public charities
- 26 S 96, sub s (3),—appeal from original decree
- 27 S 97,—appeal from preliminary decree
- 28 S 99,—material irregularity
- 29 S 103 —power of High Court to determine issues of fact in second appeal
- 30 S 104, O 43,—appeal from orders
- 31 S 105, sub s (2),—appeal from order of remand
- 32 Ss 121 131,—Rules See also Index, under the head " Rules "
- 33 S 141,—application of procedure provided in Code to miscellaneous proceedings
- 34 S 141,—application for restitution
- 35 S 145,—enforcement of liability of surety
- 36 Ss 146 to 153,—these sections are new
- 37 O 1, rr 1 to 5, r 7,—joinder of parties
- 38 O 2, r 2 *Explanation* r 4, r 7,—frame of suit
- 39 O 5, r 17,—procedure where defendant refuses to accept service or cannot be found
- 40 O 6,—pleadings The whole of this order is new

- 41 O 6, rr 7 & 8—*per se*
- 42 O 6, rr 2 & 3 rr 7 & 8—*exemption of*
- 43 O 9, r 18—*setting aside decree as void*
- 44 O 11, r 12, r 18, r 19—*decrees as to appointment*
- 45 O 12—*decree as to custody of children and maintenance*
- 46 O 16, r 1,—*without court order*
- 47 O 21, r 11, r 12, r 17, r 19—*decree*
- 48 O 21, r 2, r 11, r 22, sub r (2) r 22, sub r 3, rr 47-49, rr 49-50, r 53, r 56,
r 57, r 58—*decree nisi*
- 49 O 22, rr 2 & 3, r 6—*abatement*
- 50 O 22, r 2—*exemption of suit*
- 51 O 23—*suit by or against firm*
- 52 O 23, r 4—*next friend and guardian*
- 53 O 33, r 5, cl (1)—*petition of petition for leave to sue as a pauper*
- 54 O 34, suits relating to the rigages of immovable property
- 55 O 37, r 2,—*leave to appear in summary suit*
- 56 O 40, r 1,—*appointment of receiver*
- 57 O 41, r 2, r 5, sub r. 1 r 6, r 11, r 22, sub r 4, r 33,—*appeal from original decrees*
- 58 O 43, r 1, cl (m)—*appeal from orders*
- 59 O 45, rr 4 & 5,—*appeal to the Privy Council*
- 60 Schedule II, para 1, para 15, cl (c), para 18, para 21,—*arbitration*

The High Courts Act and the Charters of the High Courts have been set out respectively in Appendix I and Appendix II.

D. F. M

26th October, 1908

CONTENTS.

| | PAGE |
|---|-------|
| TABLE I | v |
| TABLE OF CASES | xviii |
| COMPARATIVE TABLE OF THE SEVENTH BOOK OF THE OLD AND THE NEW CODE | cl |
| CRIMINAL TABLE (TABLE DES DELITS) AND AMENDING ACTS | clv |
| ATTACHMENT TO THE INDEX | clvi |

| Sections | PRELIMINARY | |
|----------|---|----|
| 1 | Scope of the code and its extent | 1 |
| 2 | Interpretation | 5 |
| 3 | Subordination of Courts | 19 |
| 4 | Severage | 19 |
| 5 | Application of the Code to Lexicue Courts | 20 |
| 6 | Procuratory jurisdiction | 21 |
| 7 | Provisional Small Cause Courts | 22 |
| 8 | Provisional Small Cause Courts | 23 |

PART I.

SUITS IN GENERAL.

JURISDICTION OF THE COURTS AND ITS JUDICATA

| | | |
|----|---|----|
| 1 | Courts to try all civil suits unless barred | 24 |
| 10 | Stay of suit | 33 |
| 11 | <i>Res judicata</i> | 36 |
| 12 | Bar to further suit | 91 |
| 13 | When foreign judgment not conclusive | 91 |
| 14 | Presumption as to foreign judgments | 98 |

PLACE OF SUING

| | | |
|----|---|-----|
| 15 | Court in which suits to be instituted | 98 |
| 16 | Suits to be instituted where subject matter situate | 103 |
| 17 | Suits for immovable property situate within jurisdiction of different Courts | 107 |
| 18 | Place of institution of suit where local limits of jurisdiction of Courts are uncertain | 109 |
| 19 | Suits for compensation for wrongs to person or movables | 110 |
| 20 | Other suits to be instituted where defendants reside or cause of action arises | 111 |
| 21 | Objections to jurisdiction | 123 |
| 22 | Power to transfer suits which may be instituted in more than one Court | 129 |
| 23 | To what Court application lies | 129 |
| 24 | General power of transfer and withdrawal | 130 |
| 25 | Power of Governor General in Council to transfer suit | 134 |

INSTITUTION OF SUITS.

| | | |
|----|----------------------|-----|
| 26 | Institution of suits | 135 |
|----|----------------------|-----|

SUMMONS AND DISCOVERY

| SECTIONS | PAGE |
|---|------|
| 27 Summons to defendant | 13 |
| 28 Service of summons where defendant resides in another province | 13 |
| 29 Service of foreign summonses | 13 |
| 30 Power to order discovery and the like | 13 |
| 31 Summons to witness | 13 |
| 32 Penalty for default | 13 |

JUDGMENT AND DECREE

| | |
|------------------------|-----|
| 33 Judgment and decree | 137 |
|------------------------|-----|

INTEREST

| | |
|-------------|-----|
| 34 Interest | 137 |
|-------------|-----|

COSTS

| | |
|---|-----|
| 35 Costs | 141 |
| 35a. Compensatory costs in respect of false or vexatious claims of defences | 149 |

PART II.

EXECUTION

GENERAL

| | |
|--|-----|
| 36 Application to orders | 151 |
| 37 Definition of Court which passed a decree | 153 |

COURTS BY WHICH DECREES MAY BE EXECUTED

| | |
|---|-----|
| 38 Court by which decree may be executed | 156 |
| 39 Transfer of decree | 159 |
| 40 Transfer of decree to Court in another province | 161 |
| 41 Result of execution proceedings to be certified | 162 |
| 42 Powers of Court in executing transferred decree | 162 |
| 43 Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory | 164 |
| 44 Execution of decrees passed by Courts of Native States | 165 |
| 45 Execution of decrees in foreign territory | 165 |
| 46 Precepts | 166 |

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

| | |
|---|-----|
| 47 Questions to be determined by the Court executing decree | 167 |
|---|-----|

LIMIT OF TIME FOR EXECUTION

| | |
|--------------------------------------|-----|
| 48 Execution barred in certain cases | 188 |
|--------------------------------------|-----|

TRANSFERRES AND LEGAL REPRESENTATIVES.

| | |
|-------------------------|-----|
| 49 Transferee | 196 |
| 50 Legal representative | 197 |

PROCEDURE IN EXECUTION

| | |
|---|-----|
| 51 Powers of Court to enforce execution | 200 |
| 52 Enforcement of decree against legal representative | 200 |
| 53 Liability of ancestral property | 204 |
| 54 Partition of estate or separation of share | 206 |

ATTACHMENT

| | | |
|----|----------------------------------|-----|
| 67 | Attachment | 208 |
| 68 | Attachment of immovable property | 210 |
| 69 | Attachment of movable property | 212 |
| 70 | Attachment of property | 212 |
| 71 | Attachment of property | 212 |

ATTACHMENT

| | | |
|----|----------------------------------|-----|
| 68 | Attachment of immovable property | 210 |
| 69 | Attachment of movable property | 212 |
| 70 | Attachment of property | 212 |
| 71 | Attachment of property | 212 |
| 72 | Attachment of property | 212 |

SALE

| | | |
|----|-----------------------|-----|
| 68 | Purchase of the | 230 |
| 69 | Not a purchase of the | 230 |
| 70 | Not a purchase of the | 230 |
| 71 | Not a purchase of the | 230 |
| 72 | Not a purchase of the | 230 |

DELEGATION TO COLLECTOR OF POWER TO EXECUTE
DECREES AGAINST IMMOVABLE PROPERTY

| | | |
|----|--------------------------------------|-----|
| 68 | Delegation of power to the Collector | 231 |
| 69 | Delegation of power to the Collector | 231 |
| 70 | Delegation of power to the Collector | 231 |
| 71 | Delegation of power to the Collector | 231 |
| 72 | Delegation of power to the Collector | 231 |

DISTRIBUTION OF ASSETS

| | | |
|----|------------------------|-----|
| 73 | Distribution of assets | 235 |
|----|------------------------|-----|

RESISTANCE TO EXECUTION

| | | |
|----|-------------------------|-----|
| 74 | Resistance to execution | 270 |
|----|-------------------------|-----|

PART III.

INCIDENTAL PROCEEDINGS

COMMISSIONS

| | | |
|----|-------------------------------------|-----|
| 75 | Commission to issue commissions | 271 |
| 76 | Commission to another Court | 271 |
| 77 | Letter of request | 271 |
| 78 | Commission issued by foreign Courts | 272 |

PART IV

SUITS IN PARTICULAR CASES

SUITS BY OR AGAINST THE GOVERNMENT OF PUBLIC
OFFICERS IN THEIR OFFICIAL CAPACITY

| SECTIONS | PAGE |
|--|------|
| 79 Suits by or against Government | 273 |
| 80 Notice | 274 |
| 81 Exemption from arrest and personal appearance | 280 |
| 82 Execution of decree | 280 |

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND
NATIVE RULERS

| | |
|---|-----|
| 83 When aliens may sue | 281 |
| 84 When Foreign States may sue | 281 |
| 85 Persons specially appointed by Government to prosecute or defend or Princes or Chiefs | 282 |
| 86 Suits against Princes Chiefs ambassadors and envoys | 283 |
| 87 Style of Princes and Chiefs as parties to suits | 286 |

INTERPLEADER

| | |
|--|-----|
| 88 Where interpleader suit may be instituted | 286 |
|--|-----|

PART V

SPECIAL PROCEEDINGS

ARBITRATION

| | |
|----------------|-----|
| 89 Arbitration | 288 |
|----------------|-----|

SPECIAL CASE

| | |
|---|-----|
| 90 Power to state case for opinion of Court | 289 |
|---|-----|

SUITS RELATING TO PUBLIC MATTERS

| | |
|--|-----|
| 91 Public nuisances | 289 |
| 92 Public charities | 293 |
| 93 Exercise of powers of Advocate General outside Presidency towns | 314 |

PART VI

SUPPLEMENTAL PROCEEDINGS

| | |
|--|-----|
| 94 Supplemental proceedings | 315 |
| 95 Compensation for obtaining arrest attachment or injunction on insuffi- cient grounds | 315 |

PART VII

APPEALS

APPEALS FROM ORIGINAL DECREES

| | |
|---|-----|
| 96 Appeal from original decree | 319 |
| 97 Appeal from final decree where no appeal from preliminary decree | 324 |

PART VI

PART VI

| | | |
|----|--|-----|
| 98 | How an appeal is made by the appellant | 326 |
| 99 | Notice to be served on the respondent | 327 |

APPEALS FROM APPELLATE DECISIONS

| | | |
|-----|---|-----|
| 100 | How an appeal is made | 328 |
| 101 | How an appeal is made by the respondent | 329 |
| 102 | Notice to be served on the respondent | 330 |
| 103 | Time of High Court to determine appeal | 331 |

APPEALS FROM ORDERS

| | | |
|-----|-------------------------------|-----|
| 104 | Orders from which appeal lies | 332 |
| 105 | Other orders | 333 |
| 106 | What Courts may hear appeals | 334 |

GENERAL PROVISIONS RELATING TO APPEALS

| | | |
|-----|--|-----|
| 107 | Power of Appellate Court | 335 |
| 108 | Procedure in appeals from appellate decrees and orders | 336 |

APPEALS TO THE KING IN COUNCIL

| | | |
|-----|-------------------------------------|-----|
| 109 | When appeals lie to King in Council | 337 |
| 110 | Value of subject-matter | 338 |
| 111 | Bar of certain appeals | 339 |
| 112 | Savings | 340 |

PART VIII

REFERENCE, REVIEW AND REVISION

| | | |
|-----|-------------------------|-----|
| 113 | Reference to High Court | 341 |
| 114 | Review | 342 |
| 115 | Revision | 343 |

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED
HIGH COURTS

| | | |
|-----|--|-----|
| 116 | Part to apply only to certain High Courts | 344 |
| 117 | Application of Code to High Courts | 345 |
| 118 | Execution of decree before ascertainment of costs | 346 |
| 119 | Unauthorized persons not to address Court | 347 |
| 120 | Provisions not applicable to High Courts in original civil or insolvent jurisdiction | 348 |

PART X

RULES

| | | |
|-----|--|-----|
| 121 | Effect of rules in First Schedule | 349 |
| 122 | Power of certain High Courts to make rules | 350 |
| 123 | Constitution of Rule Committees in certain provinces | 351 |
| 124 | Committee to report to High Court | 352 |
| 125 | Power of other High Courts to make rules | 353 |

| RULES | PAGE |
|--|------|
| 7 Summons to order defendant to produce documents relied on by him | 513 |
| 8 On issue of summons for final disposal defendant to be directed to produce his witnesses | 513 |
| <i>Service of Summons</i> | |
| 9 Delivery or transmission of summons for service | 513 |
| 10 Mode of service | 513 |
| 11 Service on several defendants | 514 |
| 12 Service to be on defendant in person when practicable or on his agent | 514 |
| 13 Service on agent by whom defendant carried on business | 514 |
| 14 Service on agent in charge in suits for immovable property | 515 |
| 15 Where service may be on male member of defendant's family | 515 |
| 16 Person served to sign acknowledgment | 515 |
| 17 Procedure when defendant refuses to accept service, or cannot be found | 515 |
| 18 Endorsement of time and manner of service | 518 |
| 19 Examinations of serving officer | 518 |
| 20 Substituted service | 518 |
| Effect of substituted service | 519 |
| Where service substituted time for appearance to be fixed | 519 |
| 21 Service of summons where defendant resides within jurisdiction of another Court | 519 |
| 22 Service within Presidency towns and Rangoon of summons issued by Courts outside | 520 |
| 23 Duty of Court to which summons is sent | 520 |
| 24 Service on defendant in prison | 521 |
| 25 Service where defendant resides out of British India and has no agent | 521 |
| 26 Service in foreign territory through Political Agent or Court | 521 |
| 27 Service on civil public officer or on servant of railway company or local authority | 522 |
| 28 Service on soldiers | 522 |
| 29 Duty of persons to whom summons is delivered or sent for service | 523 |
| 30 Substitution of letter for summons | 523 |

ORDER VI.

Pleadings generally

| | |
|---|-----|
| 1 Pleading | 523 |
| 2 Pleading to state material facts and not evidence | 524 |
| 3 Forms of pleading | 529 |
| 4 Particulars to be given where necessary | 530 |
| 5 Further and better statement of particulars | 533 |
| 6 Condition precedent | 535 |
| 7 Departure | 537 |
| 8 Denial of contract | 538 |
| 9 Effect of document to be stated | 538 |
| 10 Malice knowledge etc | 539 |
| 11 Notice | 539 |
| 12 Implied contract or relation | 540 |
| 13 Presumptions of law | 540 |
| 14 Pleading to be signed | 541 |
| 15 Verifications of pleadings | 541 |
| 16 Striking out pleadings | 542 |

175

| | | |
|----|----------------------------------|-----|
| 17 | Summons to defend a writ | 116 |
| 18 | Take out a writ of habeas corpus | 117 |

ORDER VII

Plaint

| | | |
|----|--|-----|
| 1 | Form of writ of habeas corpus | 118 |
| 2 | Form of writ of habeas corpus | 119 |
| 3 | When the writ is a writ of habeas corpus | 120 |
| 4 | When the writ is a writ of habeas corpus | 121 |
| 5 | When the writ is a writ of habeas corpus | 122 |
| 6 | When the writ is a writ of habeas corpus | 123 |
| 7 | When the writ is a writ of habeas corpus | 124 |
| 8 | When the writ is a writ of habeas corpus | 125 |
| 9 | When the writ is a writ of habeas corpus | 126 |
| 10 | When the writ is a writ of habeas corpus | 127 |
| 11 | When the writ is a writ of habeas corpus | 128 |
| 12 | When the writ is a writ of habeas corpus | 129 |
| 13 | When the writ is a writ of habeas corpus | 130 |

Documents relied on in plaint

| | | |
|----|--|-----|
| 14 | Production of document on which plaintiff sues | 131 |
| 15 | Production of document on which plaintiff sues | 132 |
| 16 | Production of document on which plaintiff sues | 133 |
| 17 | Production of document on which plaintiff sues | 134 |
| 18 | Production of document on which plaintiff sues | 135 |

ORDER VIII

Written Statement and Set off

| | | |
|----|---|-----|
| 1 | Written statement | 136 |
| 2 | New facts must be specially pleaded | 137 |
| 3 | Denial to be specific | 138 |
| 4 | Expressive denial | 139 |
| 5 | Specific denial | 140 |
| 6 | Particulars of set off to be given in written statement | 141 |
| 7 | Effect of set-off | 142 |
| 8 | Defence or set off founded on separate ground | 143 |
| 9 | New ground of defence | 144 |
| 10 | Subsequent pleadings | 145 |
| 11 | Procedure when party fails to present written statement called for by Court | 146 |

ORDER IX

Appearance of Parties and Consequence of Non appearance

| | | |
|---|---|-----|
| 1 | Parties to appear on day fixed in summons for defendant to appear and answer | 147 |
| 2 | Dismissal of suit where summons not served in consequence of plaintiffs' failure to pay costs | 148 |
| 3 | Where neither party appears, suit to be dismissed | 149 |

| FILES | PAGE |
|--|------|
| 4 Plaintiff may bring fresh suit or Court may restore suit to file | 584 |
| 5 Dismissal of suit where plaintiff after summons returned unserved, fails for three months to apply for fresh summons | 584 |
| 6 Procedure when only plaintiff appears | 585 |
| When summons duly served | 585 |
| When summons not duly served | 585 |
| When summons served but not in due time | 585 |
| 7 Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non appearance | 586 |
| 8 Procedure where defendant only appears | 587 |
| 9 Decree against plaintiff by default bars fresh suit | 588 |
| 10 Procedure in case of non attendance of one or more of several plaintiffs | 591 |
| 11 Procedure in case of non attendance of one or more of several defendants | 591 |
| 12 Consequence of non attendance without sufficient cause shown or party ordered to appear in person | 595 |
| <i>Setting aside Decrees ex parte</i> | |
| 13 Setting aside decree ex parte against defendant | 595 |
| 14 No decree to be set aside without notice to opposite party | 606 |
| ORDER X | |
| <i>Examination of Parties by the Court</i> | |
| 1 Ascertainment whether allegations in pleadings are admitted or denied | 606 |
| 2 Oral examination of party or companion of party | 606 |
| 3 Substance of examination to be written | 607 |
| 4 Consequence of refusal or inability of pleader to answer | 607 |
| ORDER XI | |
| <i>Discovery and Inspection</i> | |
| 1 Discovery by interrogatories | 608 |
| 2 Particular interrogatories to be submitted | 612 |
| 3 Costs of interrogatories | 612 |
| 4 Form of interrogatories | 613 |
| 5 Corporations | 613 |
| 6 Objections to interrogatories by answer | 613 |
| 7 Setting aside and striking out interrogatories | 615 |
| 8 Affidavit in answer filing | 615 |
| 9 Form of affidavit in answer | 616 |
| 10 No exception to be taken | 616 |
| 11 Order to answer or answer further | 616 |
| 12 Application for discovery of documents | 616 |
| 13 Affidavit of documents | 617 |
| 14 Production of documents | 623 |
| 15 Inspection of documents referred to in pleadings or affidavits | 624 |
| 16 Notice to produce | 625 |
| 17 Time for inspection when notice given | 625 |
| 18 Order for inspection | 626 |
| 19 Verified copies | 627 |
| 20 " " | 628 |
| 21 " " | 628 |
| 22 " " | 628 |
| 23 " " apply to minors | 629 |

CHAPTER XII

Examination

| | | |
|-----|------------------------------|-----|
| 1 | Examination of witnesses | 615 |
| 2 | Examination of documents | 616 |
| 3 | Examination of exhibits | 617 |
| 4 | Examination of the jury | 618 |
| 5 | Examination of the judge | 619 |
| 6 | Examination of the court | 620 |
| 7 | Examination of the parties | 621 |
| 8 | Examination of the witnesses | 622 |
| 9 | Examination of the documents | 623 |
| 10 | Examination of the exhibits | 624 |
| 11 | Examination of the jury | 625 |
| 12 | Examination of the judge | 626 |
| 13 | Examination of the court | 627 |
| 14 | Examination of the parties | 628 |
| 15 | Examination of the witnesses | 629 |
| 16 | Examination of the documents | 630 |
| 17 | Examination of the exhibits | 631 |
| 18 | Examination of the jury | 632 |
| 19 | Examination of the judge | 633 |
| 20 | Examination of the court | 634 |
| 21 | Examination of the parties | 635 |
| 22 | Examination of the witnesses | 636 |
| 23 | Examination of the documents | 637 |
| 24 | Examination of the exhibits | 638 |
| 25 | Examination of the jury | 639 |
| 26 | Examination of the judge | 640 |
| 27 | Examination of the court | 641 |
| 28 | Examination of the parties | 642 |
| 29 | Examination of the witnesses | 643 |
| 30 | Examination of the documents | 644 |
| 31 | Examination of the exhibits | 645 |
| 32 | Examination of the jury | 646 |
| 33 | Examination of the judge | 647 |
| 34 | Examination of the court | 648 |
| 35 | Examination of the parties | 649 |
| 36 | Examination of the witnesses | 650 |
| 37 | Examination of the documents | 651 |
| 38 | Examination of the exhibits | 652 |
| 39 | Examination of the jury | 653 |
| 40 | Examination of the judge | 654 |
| 41 | Examination of the court | 655 |
| 42 | Examination of the parties | 656 |
| 43 | Examination of the witnesses | 657 |
| 44 | Examination of the documents | 658 |
| 45 | Examination of the exhibits | 659 |
| 46 | Examination of the jury | 660 |
| 47 | Examination of the judge | 661 |
| 48 | Examination of the court | 662 |
| 49 | Examination of the parties | 663 |
| 50 | Examination of the witnesses | 664 |
| 51 | Examination of the documents | 665 |
| 52 | Examination of the exhibits | 666 |
| 53 | Examination of the jury | 667 |
| 54 | Examination of the judge | 668 |
| 55 | Examination of the court | 669 |
| 56 | Examination of the parties | 670 |
| 57 | Examination of the witnesses | 671 |
| 58 | Examination of the documents | 672 |
| 59 | Examination of the exhibits | 673 |
| 60 | Examination of the jury | 674 |
| 61 | Examination of the judge | 675 |
| 62 | Examination of the court | 676 |
| 63 | Examination of the parties | 677 |
| 64 | Examination of the witnesses | 678 |
| 65 | Examination of the documents | 679 |
| 66 | Examination of the exhibits | 680 |
| 67 | Examination of the jury | 681 |
| 68 | Examination of the judge | 682 |
| 69 | Examination of the court | 683 |
| 70 | Examination of the parties | 684 |
| 71 | Examination of the witnesses | 685 |
| 72 | Examination of the documents | 686 |
| 73 | Examination of the exhibits | 687 |
| 74 | Examination of the jury | 688 |
| 75 | Examination of the judge | 689 |
| 76 | Examination of the court | 690 |
| 77 | Examination of the parties | 691 |
| 78 | Examination of the witnesses | 692 |
| 79 | Examination of the documents | 693 |
| 80 | Examination of the exhibits | 694 |
| 81 | Examination of the jury | 695 |
| 82 | Examination of the judge | 696 |
| 83 | Examination of the court | 697 |
| 84 | Examination of the parties | 698 |
| 85 | Examination of the witnesses | 699 |
| 86 | Examination of the documents | 700 |
| 87 | Examination of the exhibits | 701 |
| 88 | Examination of the jury | 702 |
| 89 | Examination of the judge | 703 |
| 90 | Examination of the court | 704 |
| 91 | Examination of the parties | 705 |
| 92 | Examination of the witnesses | 706 |
| 93 | Examination of the documents | 707 |
| 94 | Examination of the exhibits | 708 |
| 95 | Examination of the jury | 709 |
| 96 | Examination of the judge | 710 |
| 97 | Examination of the court | 711 |
| 98 | Examination of the parties | 712 |
| 99 | Examination of the witnesses | 713 |
| 100 | Examination of the documents | 714 |

CHAPTER XIII

Examination, Impounding and Return of Documents

| | | |
|----|--|-----|
| 1 | Examination of documents to be produced at first hearing | 635 |
| 2 | Examination of documents to be produced | 636 |
| 3 | Examination of irrelevant or inadmissible documents | 637 |
| 4 | Examination of documents to be produced in evidence | 638 |
| 5 | Examination of documents to be produced in evidence | 639 |
| 6 | Examination of documents to be produced in evidence | 640 |
| 7 | Examination of documents to be produced in evidence | 641 |
| 8 | Examination of documents to be produced in evidence | 642 |
| 9 | Examination of documents to be produced in evidence | 643 |
| 10 | Examination of documents to be produced in evidence | 644 |
| 11 | Examination of documents to be produced in evidence | 645 |
| 12 | Examination of documents to be produced in evidence | 646 |
| 13 | Examination of documents to be produced in evidence | 647 |
| 14 | Examination of documents to be produced in evidence | 648 |
| 15 | Examination of documents to be produced in evidence | 649 |
| 16 | Examination of documents to be produced in evidence | 650 |
| 17 | Examination of documents to be produced in evidence | 651 |
| 18 | Examination of documents to be produced in evidence | 652 |
| 19 | Examination of documents to be produced in evidence | 653 |
| 20 | Examination of documents to be produced in evidence | 654 |
| 21 | Examination of documents to be produced in evidence | 655 |
| 22 | Examination of documents to be produced in evidence | 656 |
| 23 | Examination of documents to be produced in evidence | 657 |
| 24 | Examination of documents to be produced in evidence | 658 |
| 25 | Examination of documents to be produced in evidence | 659 |
| 26 | Examination of documents to be produced in evidence | 660 |
| 27 | Examination of documents to be produced in evidence | 661 |
| 28 | Examination of documents to be produced in evidence | 662 |
| 29 | Examination of documents to be produced in evidence | 663 |
| 30 | Examination of documents to be produced in evidence | 664 |
| 31 | Examination of documents to be produced in evidence | 665 |
| 32 | Examination of documents to be produced in evidence | 666 |
| 33 | Examination of documents to be produced in evidence | 667 |
| 34 | Examination of documents to be produced in evidence | 668 |
| 35 | Examination of documents to be produced in evidence | 669 |
| 36 | Examination of documents to be produced in evidence | 670 |
| 37 | Examination of documents to be produced in evidence | 671 |
| 38 | Examination of documents to be produced in evidence | 672 |
| 39 | Examination of documents to be produced in evidence | 673 |
| 40 | Examination of documents to be produced in evidence | 674 |
| 41 | Examination of documents to be produced in evidence | 675 |
| 42 | Examination of documents to be produced in evidence | 676 |
| 43 | Examination of documents to be produced in evidence | 677 |
| 44 | Examination of documents to be produced in evidence | 678 |
| 45 | Examination of documents to be produced in evidence | 679 |
| 46 | Examination of documents to be produced in evidence | 680 |
| 47 | Examination of documents to be produced in evidence | 681 |
| 48 | Examination of documents to be produced in evidence | 682 |
| 49 | Examination of documents to be produced in evidence | 683 |
| 50 | Examination of documents to be produced in evidence | 684 |
| 51 | Examination of documents to be produced in evidence | 685 |
| 52 | Examination of documents to be produced in evidence | 686 |
| 53 | Examination of documents to be produced in evidence | 687 |
| 54 | Examination of documents to be produced in evidence | 688 |
| 55 | Examination of documents to be produced in evidence | 689 |
| 56 | Examination of documents to be produced in evidence | 690 |
| 57 | Examination of documents to be produced in evidence | 691 |
| 58 | Examination of documents to be produced in evidence | 692 |
| 59 | Examination of documents to be produced in evidence | 693 |
| 60 | Examination of documents to be produced in evidence | 694 |
| 61 | Examination of documents to be produced in evidence | 695 |
| 62 | Examination of documents to be produced in evidence | 696 |
| 63 | Examination of documents to be produced in evidence | 697 |
| 64 | Examination of documents to be produced in evidence | 698 |
| 65 | Examination of documents to be produced in evidence | 699 |
| 66 | Examination of documents to be produced in evidence | 700 |
| 67 | Examination of documents to be produced in evidence | 701 |
| 68 | Examination of documents to be produced in evidence | 702 |
| 69 | Examination of documents to be produced in evidence | 703 |
| 70 | Examination of documents to be produced in evidence | 704 |
| 71 | Examination of documents to be produced in evidence | 705 |
| 72 | Examination of documents to be produced in evidence | 706 |
| 73 | Examination of documents to be produced in evidence | 707 |
| 74 | Examination of documents to be produced in evidence | 708 |
| 75 | Examination of documents to be produced in evidence | 709 |
| 76 | Examination of documents to be produced in evidence | 710 |
| 77 | Examination of documents to be produced in evidence | 711 |
| 78 | Examination of documents to be produced in evidence | 712 |
| 79 | Examination of documents to be produced in evidence | 713 |
| 80 | Examination of documents to be produced in evidence | 714 |

CHAPTER XIV

Statement of Issues and Determination of Sustained Issues of Law or on Issues agreed Upon

| | | |
|---|---|-----|
| 1 | Framing of issues | 640 |
| 2 | Issues of law and of fact | 642 |
| 3 | Materials from which issues may be framed | 643 |
| 4 | Court may examine witnesses or documents before framing issues | 644 |
| 5 | Power to amend and strike out issues | 645 |
| 6 | Questions of fact or law may by agreement be stated in form of issues | 646 |
| 7 | Court if satisfied that agreement was executed in good faith may pronounce judgment | 647 |

CHAPTER XV

Disposal of the Suit at the first hearing

| | | |
|---|--|-----|
| 1 | Parties not at issue | 646 |
| 2 | One of several defendants not at issue | 647 |
| 3 | Parties at issue | 648 |
| 4 | Failure to produce evidence | 649 |

CHAPTER XVI

Summoning and Attendance of Witnesses

| | | |
|---|---|-----|
| 1 | Summons to attend to give evidence or produce documents | 647 |
| 2 | Expenses of witness to be paid into Court on applying for summons | 648 |

| RULES | PAGE |
|---|------|
| Experts | 648 |
| Scale of Expenses | 648 |
| 3 Tender of expenses to witness | 649 |
| 4 Procedure where insufficient sum paid | 649 |
| Expenses of witnesses detained more than one day | 649 |
| 5 Time, place and purpose of attendance to be specified in summons | 650 |
| 6 Summons to produce document | 650 |
| 7 Power to require persons present in Court to give evidence or produce document | 650 |
| 8 Summons how served | 650 |
| 9 Time for serving summons | 650 |
| 10 Procedure where witness fails to comply with summons | 651 |
| 11 If witness appears attachment may be withdrawn | 651 |
| 12 Procedure if witness fails to appear | 652 |
| 13 Mode of attachment | 652 |
| 14 Court may of its own accord summon as witnesses strangers to suit | 653 |
| 15 Duty of persons summoned to give evidence or produce document | 653 |
| 16 When they may depart | 653 |
| 17 Application of rules 10 to 13 | 653 |
| 18 Procedure where witness apprehended cannot give evidence or produce document | 653 |
| 19 No witness to be ordered to attend in person unless resident within certain limits | 654 |
| 20 Consequence of refusal of party to give evidence when called on by Court | 654 |
| 21 Rules as to witnesses to apply to parties summoned | 654 |

ORDER XVII

Adjournments

| | |
|--|-----|
| 1 Court may grant time and adjourn hearing | 655 |
| Costs of adjournment | 655 |
| 2 Procedure if parties fail to appear on day fixed | 655 |
| 3 Court may proceed notwithstanding either party fails to produce evidence etc | 657 |

ORDER XVIII

Hearing of the Suit and Examination of Witnesses

| | |
|--|-----|
| 1 Right to begin | 659 |
| 2 " " | 660 |
| 3 " " | 660 |
| 4 " " | 660 |
| 5 " " | 661 |
| 6 When deposition to be interpreted | 662 |
| 7 Evidence under section 138 | 662 |
| 8 Memorandum when evidence not taken down by Judge | 662 |
| 9 When evidence may be taken in English | 663 |
| 10 " " | 663 |
| 11 " " | 663 |
| 12 " " | 663 |
| 13 " " | 663 |
| 14 " " | 664 |

| RULES | PAGE |
|---|------|
| 5 Mode of transfer | 703 |
| 6 Procedure where Court desires that its own decree shall be executed by another Court | 703 |
| 7 Court receiving copies of decree etc., to file same without proof | 704 |
| 8 Execution of decree or order by Court to which it is sent | 704 |
| 9 Execution by High Court of decree transferred by other Court | 705 |
| <i>Application for execution</i> | |
| 10 Application for execution | 705 |
| 11 Oral application | 705 |
| Written application | 706 |
| Power to direct immediate execution of decree for money not exceeding Rs 1 000 | 707 |
| 12 Application for attachment of movable property not in judgment debtor's possession | 709 |
| 13 Application for attachment of immovable property to contain certain particulars | 709 |
| 14 Power to require certified extract from Collector's register in certain cases | 709 |
| 15 Application for execution by joint decree holder | 710 |
| 16 Application for execution by transferee of decree | 713 |
| 17 Procedure on receiving application for execution of decree | 722 |
| 18 Execution in case of cross decree | 724 |
| 19 Execution in case of cross claims under same decree | 727 |
| 20 Cross decrees and cross claims in mortgage suits | 728 |
| 21 Simultaneous execution | 728 |
| 22 Notice to show cause against execution in certain cases | 728 |
| 23 Procedure after issue of notice | 732 |
| 24 Process for execution | 732 |
| 25 Endorsement on process | 733 |
| <i>Stay of execution</i> | |
| 26 When Court may stay execution | 734 |
| Power to require security from or impose conditions upon, judgment debtor | 734 |
| 27 Liability of judgment debtor discharged | 734 |
| 28 Order of Court which passed decree or of Appellate Court to be binding upon Court applied to | 734 |
| 29 Stay of execution pending suit between decree holder and judgment debtor | 735 |
| <i>Mode of execution</i> | |
| 30 Decree for payment of money | 736 |
| 31 Decree for specific movable property | 736 |
| 32 Decree for specific performance for restitution of conjugal rights or for an injunction | 737 |
| 33 Discretion of Court in executing decrees for restitution of conjugal rights | 740 |

| | | |
|----|--|-----|
| 34 | Decree for execution of document or enforcement of negotiable instrument | 741 |
| 35 | Decree for immovable property | 742 |
| 36 | Decree for delivery of immovable property when in occupancy of tenant | 746 |

Arrest and detention in the civil prison.

| | | |
|----|---|-----|
| 37 | Discretionary power to permit judgment-debtor to show cause against detention in prison | 746 |
| 38 | Warrant for arrest to direct judgment-debtor to be brought up | 748 |
| 39 | Sustenance allowance | 748 |
| 40 | Proceedings on appearance of judgment-debtor in obedience to notice or after arrest | 749 |

Attachment of Property

| | | |
|----|---|-----|
| 41 | Examination of judgment-debtor as to his property | 750 |
| 42 | Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined | 751 |
| 43 | Attachment of movable property, other than agricultural produce, in possession of judgment-debtor | 751 |
| 44 | Attachment of agricultural produce | 752 |
| 45 | Provisions as to agricultural produce under attachment | 753 |
| 46 | Attachment of debt, share and other property not in possession of judgment-debtor | 754 |
| 47 | Attachment of share in movables | 758 |
| 48 | Attachment of salary or allowances of public officer or servant of railway company or local authority | 758 |
| 49 | Attachment of partnership property | 759 |
| 50 | Execution of decree against firm | 761 |
| 51 | Attachment of negotiable instruments | 765 |
| 52 | Attachment of property in custody of Court or public officer | 765 |
| 53 | Attachment of decrees | 767 |
| 54 | Attachment of immovable property | 772 |
| 55 | Removal of attachment after satisfaction of decree | 773 |
| 56 | Order for payment of coin or currency notes to party entitled under decree | 774 |
| 57 | Determination of attachment | 774 |

Investigation of claims and objections

| | | |
|----|---|-----|
| 58 | Investigation of claims to, and objections to attachment of attached property | 775 |
| | Postponement of sale | 776 |
| 59 | Evidence to be adduced by claimant | 778 |
| 60 | Release of property from attachment | 779 |
| 61 | Disallowance of claim to property attached | 781 |
| 62 | Continuance of attachment subject to claim of encumbrancer | 782 |
| 63 | Saving of suits to establish right to attached property | 783 |

Sale generally

| | | |
|----|--|-----|
| 64 | Power to order property attached to be sold and proceeds to be paid to person entitled | 791 |
|----|--|-----|

| RULES | PAGE |
|--|------|
| 65 Sales by whom conducted and how made | 701 |
| 66 Proclamation of sales by public auction | 702 |
| 67 Mode of making proclamation | 706 |
| 68 Time of sale | 707 |
| 69 Adjournment or stoppage of sale | 708 |
| 70 Saving of certain sales | 709 |
| 71 Defaulting purchaser answerable for loss on re sale | 800 |
| 72 Decree holder not to bid for or buy property without permission | |
| Where decree holder purchases amount of decree may be taken as payment | 800 |
| 73 Restriction on bidding or purchase by officer | 803 |
| <i>Sale of movable property</i> | |
| 74 Sale of agricultural produce | 803 |
| 75 Special provisions relating to growing crops | 804 |
| 76 Negotiable instruments and shares in corporations | 804 |
| 77 Sale by public auction | 805 |
| 78 Irregularity not to vitiate sale but any person injured may sue | 805 |
| 79 Delivery of movable property debts and shares | 806 |
| 80 Transfer of negotiable instruments and shares | 806 |
| 81 Vesting order in case of other property | 807 |
| <i>Sale of immovable property</i> | |
| 82 What Courts may order sales | 807 |
| 83 Postponement of sale to enable judgment debtor to raise amount of decree | 807 |
| 84 Deposit by purchaser and re sale on default | 809 |
| 85 Time for payment in full of purchase money | 809 |
| 86 Procedure in default of payment | 810 |
| 87 Notification on re sale | 810 |
| 88 Bid of co sharer to have preference | 811 |
| 89 Application to set aside sale on deposit | 811 |
| 90 Application to set aside sale on ground of irregularity or fraud | 818 |
| 91 Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest | 832 |
| 92 Sale when to become absolute or be set aside | 833 |
| 93 Return of purchase money in certain cases | 835 |
| 94 Certificate to purchaser | 839 |
| 95 Delivery of property in occupancy of judgment debtor | 842 |
| 96 Delivery of property in occupancy of tenant | 843 |
| <i>Resistance to delivery of possession to decree holder or purchaser</i> | |
| 97 Resistance or obstruction to possession of immovable property | 843 |
| 98 Resistance or obstruction by judgment debtor | 844 |
| 99 Resistance or obstruction by bona fide claimant | 845 |
| 100 Dispossession by decree holder or purchaser | 846 |
| 101 " " " | 847 |
| 102 " " " | 848 |
| 103 " " " | 848 |

ORDER XVII

Death, Marriage and Insolvency of Parties

| PAGES | | PAGE |
|-------|--|------|
| 1 | No abatement by party's death if right to sue survives | 849 |
| 2 | Procedure where one of several plaintiffs or defendants dies and right to sue survives | 853 |
| 3 | Procedure in case of death of one of several plaintiffs or of sole plaintiff | 853 |
| 4 | Procedure in case of death of one of several defendants or of sole defendant | 861 |
| 5 | Determination of questions as a legal representative | 869 |
| 6 | No abatement by reason of death after hearing | 870 |
| 7 | Suit not abated by marriage of female party | 871 |
| 8 | When plaintiff's insolvency bars suit | 871 |
| | Procedure where assignee fails to continue suit or give security | 871 |
| 9 | Effect of abatement or dismissal | 873 |
| 10 | Procedure in case of assignment before final order in suit | 876 |
| 11 | Application of Order to appeals | 880 |
| 12 | Application of Order to proceedings | 891 |

ORDER XVIII

Withdrawal and Adjustment of Suits

| | | |
|---|--|-----|
| 1 | Withdrawal of suit or abandonment of part of claim | 892 |
| 2 | Limitation law not affected by first suit | 893 |
| 3 | Compromise of suit | 894 |
| 4 | Proceedings in execution of decrees not affected | 904 |

ORDER XXIV

Payment into Court

| | | |
|---|---|-----|
| 1 | Deposit by defendant of amount in satisfaction of claim | 905 |
| 2 | Notice of deposit | 906 |
| 3 | Interest on deposit not allowed to plaintiff after notice | 906 |
| 4 | Procedure where plaintiff accepts deposit as satisfaction in part | 906 |
| | Procedure where he accepts it as satisfaction in full | 907 |

ORDER XXV

Security for costs

| | | |
|---|--|-----|
| 1 | When security for costs may be required from plaintiff | 907 |
| | Residence out of British India | 908 |
| 2 | Effect of failure to furnish security | 911 |

ORDER XXVI

*Commissions**Commissions to examine witnesses*

| | | |
|---|---|-----|
| 1 | Cases in which Court may issue commission to examine witness | 912 |
| 2 | Order for commission | 913 |
| 3 | Where witness resides within Court's jurisdiction | 913 |
| 4 | Persons for whose examination commission may issue | 913 |
| 5 | Commission or request to examine witness not within British India | 915 |
| 6 | Court to examine witness pursuant to commission | 915 |

| RULES | PAGE |
|---|------|
| 3 Agreement to be filed and registered as suit | 1028 |
| 4 Parties to be subject to Court's jurisdiction | 1028 |
| 5 Hearing and disposal of case | 1029 |

ORDER XXXVII

Summary Procedure on Negotiable Instruments

| | |
|---|------|
| 1 Application of Order | 1029 |
| 2 Institution of summary suits upon bills of exchange, etc | 1031 |
| 3 Defendant showing defence on merits to have leave to appear | 1033 |
| 4 Power to set aside decree | 1034 |
| 5 Power to order bill, etc. to be deposited with officer of Court | 1034 |
| 6 Recovery of cost of noting non-acceptance of dishonoured bill or note | 1034 |
| 7 Procedure in suits | 1034 |

ORDER XXXVIII

*Arrest and Attachment before Judgment**Arrest before Judgment*

| | |
|--|------|
| 1 Where defendant may be called upon to furnish security for appearance | 1034 |
| 2 Security | 1036 |
| 3 Procedure on application by surety to be discharged | 1036 |
| 4 Procedure where defendant fails to furnish security or find fresh security | 1037 |

Attachment before Judgment

| | |
|--|------|
| 5 Where defendant may be called upon to furnish security for production of property | 1037 |
| 6 Attachment where cause not shown or security not furnished | 1040 |
| 7 Mode of making attachment | 1040 |
| 8 Investigation of claim to property attached before judgment | 1041 |
| 9 Removal of attachment when security furnished or suit dismissed | 1041 |
| 10 Attachment before judgment not to affect rights of strangers nor bar decree holder from applying for sale | 1042 |
| 11 Property attached before judgment not to be re-attached in execution of decree | 1043 |
| 12 Agricultural produce not attachable before judgment | 1043 |
| 13 Small Cause Court not to attach immovable property | 1044 |

ORDER XXXIX

*Temporary Injunctions and Interlocutory Orders**Temporary Injunctions*

| | |
|---|------|
| 1 Cases in which temporary injunction may be granted | 1044 |
| 2 Injunction to restrain repetition or continuance of breach | 1049 |
| 3 Before granting injunction Court to direct notice to opposite party | 1053 |
| 4 Order for injunction may be discharged, varied or set aside | 1053 |
| 5 Injunction to corporation binding on its officers | 1053 |

Interlocutory Orders

| | |
|--|------|
| 6 Power to order interim sale | 1053 |
| 7 Detention preservation inspection, etc. of subject matter of suit | 1054 |
| 8 Application for such orders to be after notice | 1054 |
| 9 When party may be put in immediate possession of land the subject matter of suit | 1055 |
| 10 Deposit of money, etc. in Court | 1055 |

ORDER XL

| RULES | <i>Appointment of Receivers</i> | PAGE |
|-------|--|------|
| 1 | Appointment of receivers | 1055 |
| 2 | Remuneration | 1068 |
| 3 | Duties | 1068 |
| 4 | Enforcement of receiver's duties | 1069 |
| 5 | When Collector may be appointed receiver | 1070 |

ORDER XLI

Appeals from Original Decrees

| | | |
|---|---|------|
| 1 | Form of appeal What to accompany memorandum | 1070 |
| | Contents of memorandum | 1070 |
| 2 | Grounds which may be taken in appeal | 1073 |
| 3 | Rejection or amendment of memorandum | 1074 |
| 4 | One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all | 1075 |

Stay of proceedings and of execution

| | | |
|---|---|------|
| 5 | Stay by appellate Court | 1076 |
| | Stay by Court which passed the decree | 1077 |
| 6 | Security in case of order for execution of decree appealed from | 1081 |
| 7 | No security to be required from the Government or a public officer in certain cases | 1082 |
| 8 | Exercise of powers in appeal from order made in execution of decree | 1082 |

Procedure on admission of appeal

| | | |
|----|---|------|
| 9 | Registry of memorandum of appeal | 1082 |
| | Register of appeals | 1082 |
| 10 | Appellate Court may require appellant to furnish security for costs | 1083 |
| | Where an appellant resides out of British India | 1083 |
| 11 | Power to dismiss appeal without sending notice to lower Court | 1086 |
| 12 | Day for hearing appeal | 1087 |
| 13 | Appellate Court to give notice to Court whose decree appealed from | 1087 |
| | Transmission of papers to appellate Court | 1088 |
| | Copies of exhibits in Court whose decree appealed from | 1088 |
| 14 | Publication and service of notice of day for hearing of appeal | 1088 |
| | Appellate Court may itself cause notice to be served | 1088 |
| 15 | Contents of notice | 1088 |

Procedure on hearing

| | | |
|----|--|------|
| 15 | Right to begin | 1089 |
| 17 | Dismissal of appeal for appellant's default | 1089 |
| | Hearing appeal <i>ex parte</i> | 1089 |
| 18 | Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs | 1090 |
| 19 | Re-admission of appeal dismissed for default | 1090 |
| 20 | Power to adjourn hearing and direct persons appearing interested to be made respondents | 1091 |
| 21 | Decree on application of respondent against whom <i>ex parte</i> decree made | 1092 |

| RULES | PAGE |
|--|------|
| 22 Upon hearing respondent may object to decree as if he had preferred separate appeal | 1093 |
| Form of objection and provisions applicable thereto | 1093 |
| 23 Remand of case by appellate Court | 1097 |
| 24 Where evidence on record sufficient appellate Court may determine case finally | 1103 |
| 25 Where appellate Court may frame issues and refer them for trial to Court whose decree appealed from | 1104 |
| 26 Findings and evidence to be put on record Objections to finding | 1105 |
| Determination of Appeal | 1105 |
| 27 Production of additional evidence in appellate Court | 1106 |
| 28 Mode of taking additional evidence | 1110 |
| 29 Points to be defined and recorded | 1110 |

Judgment in Appeal

| | |
|--|------|
| 30 Judgment when and where pronounced | 1110 |
| 31 Contents date and signature of judgment | 1111 |
| 32 What judgment may direct | 1113 |
| 33 Power of Court of Appeal | 1113 |
| 34 Dissent to be recorded | 1117 |

Decree in Appeal

| | |
|--|------|
| 35 Date and contents of decree | 1117 |
| Judge dissenting from judgment need not sign decree | 1118 |
| 36 Copies of judgment and decree to be furnished to parties | 1118 |
| 37 Certified copy of decree to be sent to Court whose decree appealed from | 1118 |

ORDER \I II

Appeals from Appellate Decrees

| | |
|-------------|------|
| 1 Procedure | 1118 |
|-------------|------|

ORDER \LIII

Appeals from Orders

| | |
|----------------------|------|
| 1 Appeal from orders | 1119 |
| 2 Procedure | 1121 |

ORDER \LIV

Pauper Appeals

| | |
|--|------|
| 1 Who may appeal as pauper | 1122 |
| Procedure on application for admission of appeal | 1122 |
| 2 Inquiry into pauperism | 1124 |

ORDER \LV

Appeals to the King in Council

| | |
|---|------|
| 1 Decree defined | 1124 |
| 2 Application to Court whose decree complained of | 1124 |
| 3 Certificate as to value or fitness | 1125 |
| 4 Consolidation of suits | 1126 |
| 5 Remission of dispute to Court of first instance | 1127 |

| RULES | PAGE |
|---|------|
| 6 Effect of refusal of certificate | 1128 |
| 7 Security and deposit required on grant of certificate | 1128 |
| 8 Admission of appeal and procedure thereon | 1130 |
| 9 Revocation of acceptance of security | 1130 |
| 9A Power to dispense with notices in case of deceased parties | 1131 |
| 10 Power to order further security or payment | 1131 |
| 11 Effect of failure to comply with order | 1131 |
| 12 Refund of balance deposit | 1131 |
| 13 Powers of Court pending appeal | 1132 |
| 14 Increase of security found inadequate | 1134 |
| 15 Procedure to enforce orders of King in Council | 1134 |
| 16 Appeal from order relating to execution | 1137 |

ORDER XLVI

Reference

| | |
|--|------|
| 1 Reference of question to High Court | 1138 |
| 2 Court may pass decree contingent upon decision of High Court | 1139 |
| 3 Judgment of High Court to be transmitted and case disposed of accordingly | 1139 |
| 4 Costs of reference to High Court | 1140 |
| 5 Power to alter etc. decree of Court making reference | 1140 |
| 6 Power to refer to High Court questions as to jurisdiction in small causes | 1140 |
| 7 Power to District Court to submit for revision proceedings had under in stake as to jurisdiction in small causes | 1140 |

ORDER XLVII

Review

| | |
|--|------|
| 1 Application for review of judgment | 1142 |
| 2 To whom applications for review may be made | 1150 |
| 3 Form of applications for review | 1151 |
| 4 Application where rejected | 1151 |
| Application where granted | 1151 |
| 5 Application for review in Court consisting of two or more Judges | 1153 |
| 6 Application where rejected | 1153 |
| 7 Order of rejection not appealable Objections to order granting application | 1153 |
| 8 Registry of application granted and order for rehearing | 1156 |
| 9 Bar of certain applications | 1156 |

| FILES | ORDER XLVIII | PAGE |
|--|---|------|
| | <i>Miscellaneous</i> | |
| 1 | Process to be served at expenses of party issuing | 1150 |
| | Costs of service | 1156 |
| 2 | Orders and notices how served | 1156 |
| 3 | Use of forms in appendices | 1156 |
| | ORDER XLIX | |
| | <i>Chartered High Courts</i> | |
| 1 | Who may serve processes of High Court | 1157 |
| 2 | Saving in respect of Chartered High Courts | 1157 |
| 3 | Application of rules | 1157 |
| | ORDER L | |
| | <i>Provincial Small Cause Courts</i> | |
| 1 | Provincial Small Cause Courts | 1158 |
| | ORDER LI | |
| | <i>Presidency Small Cause Courts</i> | |
| 1 | Presidency Small Cause Courts | 1158 |
| | APPENDICES TO THE FIRST SCHEDULE | |
| | FORMS | |
| A —PLEADINGS | | 1159 |
| 1 | Title of suits | 1159 |
| 2 | Description of parties in particular cases | 1160 |
| 3 | Plaints | 1160 |
| 4 | Written statements | 1170 |
| B —PROCESS | | 1184 |
| C —DISCOVERY, INSPECTION AND ADMISSION | | 1193 |
| D —DECREES | | 1197 |
| E —EXECUTION | | 1224 |
| F —SUPPLEMENTAL PROCEEDINGS | | 1241 |
| G —APPEAL, REFERENCE AND REVIEW | | 1246 |
| H —MISCELLANEOUS | | 1251 |
| | THE SECOND SCHEDULE | |
| ARBITRATION | | 1258 |
| APPENDIX—FORMS | | 1259 |
| | THE THIRD SCHEDULE | |
| EXECUTION OF DECREES BY COLLECTORS | | 1260 |
| | THE FOURTH SCHEDULE | |
| ENACTMENTS AMENDED | | 12 |

MISCELLANEOUS

| | |
|---|------|
| APPENDIX I —High Courts Act 1861 | 1306 |
| Government of India Act, 1915 | 1311 |
| Despatch from the Secretary of State for India dated the 14th May 1862 | 1322 |
| APPENDIX II —Letters Patent—Calcutta Bombay and Madras | 1331 |
| —Allahabad | 1376 |
| —Patna | 1380 |
| —Lahore | 1391 |
| —Pangoon | 1399 |

RULES

| | |
|--|------|
| APPENDIX III —Rules made by the High Court of Calcutta under s 122 | 1410 |
| APPENDIX IV —Rules made by the High Court of Bombay under s 122 | 1424 |
| APPENDIX V —Rules made by the High Court of Allahabad under s 122 | 1432 |
| APPENDIX VI —Rules made by the High Court of Madras under s 122 | 1458 |
| APPENDIX VII —Rules made by the High Court of Lahore under s 122 | 1492 |
| APPENDIX VIII —Rules made by the High Court of Patna under s 122 | 1511 |

GENERAL INDEX

1521

TABLE OF CASES

A

A. C. Distoor v H. A. Kanhiwalla, 1022
 A. Haji Ismail & Co. v Rabiabai, 766
 A. T. K. P. L. M. Muthu v Lakshmi
 narayan, 1148, 1152
 A. T. K. P. L. M. Muthiah Chettiar v
 Tha Zan Hla, 868
 Aha v Dhondu Bai, 109
 Abasbhai v Bhimp, 486.
 Abbakke v Kinkamma, 560
 Abbas v Fasih ud din, 676, 678
 Abbas Khan v Nibaran Dasai, 151
 Abbas v Nanhi, 970
 Abbot v Andrews, 144
 Abba v Matheson & Co., 536.
 Abbubaker v Mohidin, 704
 Abda Begam v Muzaffar, 162
 Abdu v Mahomed, 598
 Abdul v Alliance Bank 1023
 Abdul v Chukhun, 716
 Abdul v Chunna 440
 Abdul v Doutre 18
 Abdul v Fggar, 947
 Abdul v Ganapathi, 1047
 Abdul v Mahomed 185
 Abdul v Matiyar, 812, 814
 Abdul v Mistry, 211
 Abdul v Muhammad, 776
 Abdul v Samsuddin, 886
 Abdul v Shahana, 594
 Abdul v Sundara, 173
 Abdul v Vaman 172
 Abdul Alim Abed v Abir Jan Bibi, 298.
 Abdul Ali v Miakhan, 66
 Abdul Aziz v Abdul Rahim, 173
 Abdul Aziz v Appayasami, 840, 841
 Abdul Aziz v Basdeo Singh, 863, 865
 Abdul Aziz v Chandu, 38, 1294
 Abdul Aziz v Fbrahim, 887
 Abdul Aziz v Punjab National Bank
 Ltd, 510 592
 Abdul Aziz v Tafazuddin 819
 Abdul Basit v Ashfaq, 40
 Abdul Gafar v Mahomed Mukaram, 427
 Abdul Gaffar v Official Assignee, 914
 Abdul Gafur v Albyn, 759
 Abdul Gafur v Ali Mah, 473

Abdul Gani v Dunne, 820
 Abdul Gani v Nabendra Kishore, 47
 Abdul Ghafor v Gulam, 811
 Abdul Ghani v Din Dayal, 1265
 Abdul Ghani v Muhammad, 1096, 1097
 Abdul Hakim v Hem Chandra, 1152
 Abdul Hakim v Karan Singh 489
 Abdul Hakim v Mahomed Burramudin,
 300, 302, 303, 373
 Abdul Hakim v. Mukarram 389
 A. Haji Ismail & Co. v Rabiabai, 766
 Abdul Hamid v Muhammad, 246 1273
 Abdul Hamid v Riaz ud din, 1260
 Abdul Haq v Sheo Pami, 391
 Abdul Hasan v Zohra, 578
 Abdul Hossein v Kasi Sahu, 7, 891
 Abdul Hossein v Turner, 531, 552
 Abdul Hussein v Mahomed Ally, 1341
 Abdul Hussein v D. J. Mistry & Co.,
 424
 Abdul Jubbar v Sita Ram 800
 Abdul Kadir v Ali Mia, 790
 Abdul Kadir v Dharma 20
 Abdul Kadir v Doolanbibi 78 79
 Abdul Kadir v Hurree, 426
 Abdul Kadir v Somasundaram 787
 Abdul Karim v Abdus Sobhan, 308
 Abdul Karim v Allah Bakhsh, 1127
 Abdul Karim v Badruddeen 1342
 Abdul Karim v Bullen, 733
 Abdul Karim v Hakam, 697, 702
 Abdul Karim v Islamun Nissa Bibi,
 170 171
 Abdul Karim v Lakshmanswami, 723
 Abdul Karim v Muhammad, 483
 Abdul Karim v Thakordas 229
 Abdul Khader v The Official Assignee
 of Madras, 1359
 Abdul Khadir v Ahammad, 195
 Abdul Khalif v Bama Charan, 598
 Abdul Lateef v Doutre, 218
 Abdul Latif v Bathula, 697
 Abdul Majid v Bedjadhar, 1142
 Abdul Majid v Jawahir, 7, 151, 996,
 1137
 Abdul Majid v Jew Narain, 39
 Abdul Majid v Wahid, 486
 Abdul Nasar v Lalta, 815

- Abdul Ohad v Amdali, 598
Abdul Rafikhan v Maula 703
Abdul Rahim v Abdul Rahman, 276,
277, 278
Abdul Rahim v Fateh Ullah 59
Abdul Ralun v Mohamed Baukat Ali,
298
Abdul Rahim v Ojamshee, 81
Abdul Rahiman v Mahomed, 12, 97
Abdul Rahman v Amin, 1041
Abdul Rahman v Amir Ali 476
Abdul Rahman v Cassim 352, 353
Abdul Rahman v Fateh Narain, 240
Abdul Rahman v Gaya Prasad, 1304
Abdul Rahman v Shahab ud Din, 857,
1268
Abdul Rahman v Shahana 3
Abdul Rashid *In re* 1336
Abdul Rashid v Gappo Lal, 233
Abdul Razak v Shreenath Ghosh 207,
208
Abdul Rehman v Cassum 297
Abdul Salam v Veerabhadra 257
Abdul Satar v Ch. Doe Rhu 173
Abdul Sattar v Hira Dei 789
Abdul Sattar v Special Deputy Collec-
tor, 380 1317
Abdul Shaker v Abdul Rahiman, 10
429
Abdul Shakur v Muhammad Matadin
1237
Abdul Sidiq v Abdul Aziz, 1145 1154
Abdul Wahid v Sheikh Ali 57
Abdul Wahid v Tribhawan Das 818
Abdullah v Mast Zamrab 852
Abdulla v Admr Genl of Pengal, 355
Abdulla v Ganesh 724, 875
Abdulla v Ganesh Das, 83
Abdulla v Muhammad, 867
Abdulla v Mangal Sain 168
Abdulla v Salaru, 1316, 1318
Abdullah Khan v Banke Lal, 1047
Abdullah Khan v Muhammad, 1038
Abdullahbhai v Isabhai 600
" " " "

- Abdur Rahman v Abdur Rahman, 1317
 Abdur Rahman v Shankar, 199
 Abdur Rashid v Qudrat un nissa, 486
 Abdur Pashid v The Sizing Materials
 Co, 117
 Abdurahman v Imbichuny, 1144
 Abdus Sattar v Mohun Mohan, 156.
 Abedunnissa v Amirunnissa, 715
 Abhaidat Singh v Ragho, 483
 Abhilakhi v Sada Nand, 1150
 Abinay Chandra v Pratul Chandra,
 250
 Abinash v Ananda, 733
 Abinash v Bhuban, 833
 Abinay Chandra v Dnsarath, 1115
 Abinashchandra v Narhari, 1094
 Ablakh v Bhagirathi, 12
 Abraham v Donald, 388, 517
 Abraham v Sookidas, 430
 Abraham & Co v Ibrahim, 578
 Abrahams & Co v Dunlop Pneumatic
 Tyre Co, 931
 Abraham v Abraham, 1102
 Abu Muhammad v Mukut Pertap, 429
 Acha v Sunkaran, 567
 Achaya v Ratnavelu, 1154
 Achhaibar v Hargobind, 65
 Achhaibar v Tapasi, 248
 Achul v Rajun, 559
 Achut v Nagappa, 431, 432, 565, 1123
 Achuta v Achutan, 890
 Achutan Nair v Manavikraman 858
 Achuthayya v Thummayya, 348, 1277
 Achyut v Ramchandra, 140
 Achyut v Tapibai, 1144, 1152
 Adakkala v Imperial Bank, 407
 Adam v Townsend, 937
 Adams v Great North of Scotland Ry
 Co, 1278
 Adamson v Arumugam, 461
 Adari v Nookalamma, 1013
 Adarji v Manekji, 969, 1148
 Ademma v Venkata, 704
 Adenna v Chinna, 815
 Adhar v Pulin, 427
 Adhar v Radha, 380, 1317
 Adhar Chandra v Lal Mohun, 769
 Admarayan v Narasimha, 6
 Adipuranam v Gopalasami, 999
 Adit Prasad v Ramharakh, 434, 567,
 1147
 Aditya Kumar v Abinash, 1118, 1149

- Aditya Prasad v Ram Narayan, 731
 Aditya Prasad v Hargovind Singh, 1008
 Adiveppa v Praggi, 605, 937
 Adaji Coal Co. v Panna Lal, 479
 Administrator General v. Aghore, 840
 Administrator General of Bengal v
 Lahit, 558
 Administrator General of Bengal v The
 Land Acquisition Collector, 350
 Administrator General v Chettivar, 378
 Administrator General v Premial, 2, 3,
 1057, 1065
 Administrator General v Sultanali, 726
 Advocate, *In re* [(1906) 4 Cal L J
 259], 1336
 Advocate, *In re* (44 Cal 741), 1337
 Advocate, *In the matter of* [(1923) 46
 Mad. 903] 1336
 Advocate, *In re* [(1931) 54 Mad 837]
 1337
 Advocate, *In the matter of* (8 Rang 40),
 352
 Advocate General v Adamji, 622
 Advocate General of Bengal v Sur-
 nomoyee Dossec, 1359
 Advocate General v Punjabai, 295
 Advocate General of Bombay v Gangji,
 1050
 Advocate General of Bombay v
 Yusuf Ali, 26, 301
 Advocates, *In the matter of certain first
 Grade* (1 Rang 142), 1401
 Adwaita v The Chittagong Co., 421, 726,
 727
 Adya Prasad v Lal Girjesh, 701
 Adya Saran v Jagannath, 1316
 Aetiesselskabet Dampskib Hercules v
 Grand Trunk Pacific Railway 927
 Aftab Begam v Haji Abdul, 1269
 Afzal v Akbari, 891
 Afzal Shah v Lachmi Narain, 498, 884
 Aga Gulam Husain v Sassoon, 520
 Aga Khan v Times Publishing Co., 532
 Aga Mahomed v Cohen, 20
 Aga Mahomed v Syed Mahomed, 147
 Agabeg v Sundari, 1066
 Agent, Bengal Nagpur Railway v
 Behari Lal, 477, 1099
 Agha Husain v Qasim Ali, 244, 834
 Agha Sultan v Mohabbathkhan, 782
 Aghore v Prem Chund, 659
 Aghore Nath v Kamini Debi, 58, 61
 Agulul v Dino Nath, 1094
 Ahad Shah v. Alphan, 132
 Ahil v. Mahendra Lal, 1152, 1155
 Ahilhar v Secretary of State, 355, 442
 Ah Kway v Administrator General,
 1356
 Ahmad v. Abdul Rehman, 105
 Ahmad v Basava, 380, 385
 Ahmad v Hardial, 600
 Ahmad v Muhammad, 980
 Ahmad v Nihal ud-din, 71
 Ahmad Ali v Wariis Husain, 1073, 1119
 Ahmad Bakhsh v. Lalta, 822
 Ahmad Din v Atlas Trading Co., 377,
 1293
 Ahmad Husain v Gobind Krishna, 349,
 353
 Ahmad Kasim v Khatun Bibi, 399
 Ahmad Noor Khan v Abdur Rahman,
 1284
 Ahmad Shah v Faujdar, 715, 1357
 Ahmad Yar v Bose, 231, 773
 Ahmadi v Ishaq, 815
 Ahmaduddin v Majlis Rai, 221
 Ahmad ud din v Sikandar, 503
 Ahmed v Ayeshabai 627, 1332
 Ahmed v A L A R Chettiar Firm, 904
 Ahmed v Fakir, 488
 Ahmed v Hashim 325
 Ahmed v Moidin 79
 Ahmed v Shaikh Essa 1084
 Ahmed Ali v Abdul Majid, 464
 Ahmed Ali v Secretary of State, 350
 Ahmed Asmal v Bai Bibi, 1061
 Ahmed Hussain v Hardial, 382
 Ahmed Suleman v Municipal Commis-
 sioner of Bombay, 379
 Ahmedabad Advance Co v Lakshmi
 shanker, 579
 Ahmedbhai v Petit 147
 Ahmedbhoy v Balkrishna, 462
 Ahmedbhoy v Vallcebhoy, 62, 628
 Ahsanulla v Hari Charan, 1072
 Ai Bai v Kahan, 789
 Ainsworth v Wilding, 84, 324
 Aisha Bee Bee v Noor Mohamed, 352
 Aishabai v Essaji, 1274
 Aishabai v Ismail 1356
 Aishan v Muhammad, 52, 56
 Aitamma v Naraina, 58, 59
 Aithala v Subbanna, 342
 Aiya v Gopanna, 886, 892
 Aiyasmier v Venkatachela, 192, 1005
 Aiyathurai v Muhamad Meera, 457, 496

- Aiyava v Vellaya, 494
 Ajai v Baldeo, 1031
 Ajoub Nath v Mathura, 683
 Ajitsing v Grunning, 936
 Ajnasi Kuar v Suraj Prasad, 739
 Ajo Koer v Gorak Nath, 177
 Ajodhya v Musammatt Phul Koer, 434.
 594 600 603
 Ajodhya Pershad v Sheo Pershad 602
 Ajodhya Roy v Hardwar Roy, 175
 Ajodhya v Mahadeo, 177
 Ajudhia v Inayat Ullah, 57
 Ajudhia Prasad v Badar ul Husain,
 1259 1260, 1281
 Ajudhia Prasad v Balmukund, 2
 Ajudhia Prasad v Gopi Nath, 795
 Ajudhia Prasad v Nand Lal, 819
 Akayi v Ayissa, 54
 Akbar Khan v Muhammad, 381, 1154
 Akbari v Vilayat Ali, 1105
 Akhoot v Ahmed 427
 Akhoy v Surendra, 720 881
 Akhoy Kumar v Krishna 437
 Akikunnissa v Rup Lal, 914
 Akshia v Govindarajulu, 438, 831
 Akula v Dhilli, 1064
 Ala Singh v Wasawa, 172
 Alagammal v Sadasiva, 980, 1099
 Alagappa v Annamalai, 115
 Alagappa v Chockalingam, 1095, 1097
 Alagappa v Muthukumara, 415
 Alagappa v Nachappan, 355, 360, 362,
 363
 Alagasundaram v Pichuvier 604
 Alagirisami v Lakshmanan 225
 Alagirisami v Ramanathan, 803
 Alagirisami v Sundareswara, 43
 Alagu v Mayilappa 902
 Alam Singh v Gokal Singh, 982
 Alameh v Rama, 1148
 Alcock Ashdown & Co v Chief Revenue
 Authority, 344, 1315
 Aldam v Brown, 374
 Alden v Beckley, 933
 Aldridge v Barrow, 448, 404
 Aldwell v Habi Baksh, 259
 Alexander Brault v Indra Krishna, 116
 Ali Afzal v Purna, 976, 977
 Ali Ahmad v Saud Man, 914
 Ali Ahmad Khan v Bansidhar, 781
 Ali Akbar v Khurshed Ali, 1154
 Ali Asrat v G I P Railway, 20, 276
 Ali Bahadur v Rafiqullah, 878
 Ali Baksh v Shaikh, 75.
 Ali Gauhar v Bansidar, 828
 Ali Husain v Mohammad, 744
 Ali Husein v Afzal Husain, 744
 Ali Jan v Marian Bibi, 1006
 Ali Kader v Gobind Dass, 610, 614.
 Ali Khan Bahadur v Indar Parshad, 900
 Ali Mordin v Kombi, 71
 Ali Muhammad v Hakim, 32.
 Ali Saheb v Shabji, 140
 Ali Seranz v Beadon, 449
 Ali Sher Khan v Ahmed, 1104
 Alice Mary Hill v Clarke, 538
 Alim v Jhalo, 941
 Aliman v Hasiba, 362
 Almunnessa v Fhama Charan, 58, 59
 Alkama Bibi v Syed Istak, 1060
 All Ditta v Shankar Das, 121
 Alla Bakhs v Madho Ram, 867
 Alla Ditta v Abdul Qadir, 110
 Allahabad Bank v Ganpat Rai 628
 Allahabad Bank v Motilal Barmen, 1015
 Allahabad Bank v Raja Ram, 131, 434,
 1065
 Allarakhia v Jehangir, 1293
 Allen Brothers v Arori, 349 564, 927
 Allen Brothers & Co v Bando & Co.,
 1317
 Allenborough v St Katharine's Docks,
 287
 Allhusen v Labouchere, 611, 613
 Alliance Bank v Mohan Lal, 579
 Allibhai v Dada, 246
 Allott v Smith, 615
 Allport v Securities Co, Ltd, 1053
 Allen v Kurjusha, 51
 Aloo v Gagubha, 13
 Altaf Ali v Lalji Mal, 676
 Altap Ali v Jamsur Ali 12, 1087
 Alwar v Eshamma, 12, 606
 Amajabala v Surat Kumari, 158
 Aman Singh v Naram 952
 Amanat Bibi v Imdad Husain, 55, 481,
 484
 Amar Chandra v Sebak Chand, 169, 206
 Amar Chandra v Shoshi Bhuchan, 362,
 1126
 Amar Chundra v Guru Prosunno, 164,
 715, 717, 721
 Amar Krishna v Jagat Bandhu, 700,
 701
 Amar Singh v Ram Dai, 700
 Amara v Annamala, 261, 1010

- Amarchand v Banwari Lal, 596
 Amarchand v Imperor, 1773
 Amarendra v S Banerjee & Co, 756
 Amarsingji v Deepsingji, 76 77
 Amarsingji v Desai, 875
 Amarsingji v Desai Umed, 1075, 1116
 Amba v Srinivasa, 1125
 Amba Lal v Ramgopal, 415
 Amba Prasad v Mushtaq, 712, 1101
 Ambaji v Hanmantrao, 962
 Ambalal v Narayan, 1022, 1023
 Ambalam v Bartle, 464
 Ambalavana v The Advocate General, 297
 Amba v Sridevi, 139
 Amba v Valla 1013
 Ambica v Nadyar, 1277
 Ambica v Ram Prasad, 846, 849
 Ambika v Devi Daval, 353
 Ambika v Mangraj Loan Office, 156, 791
 Ambika Datt v Ram Udit 500
 Ambika Prasad v Jhinak Singh, 856
 Ambika Prasad v Perdip Singh, 145, 1076.
 Ambu v Kelu, 172
 Ambu v Kethilamma 785
 Ambu Nair v Kelu Nair, 47
 Ambubai v Shankarsa 888
 Ambuja v Appadurai 1109
 Amdoo Miyan v Muhammad 410
 Ameer Ali, *In the matter of*, 1079
 Amer Ali v Inderjeet, 320
 Amer v Nathu 55
 American Trading Co v Bird & Co, 142
 Amichand v Collector of Sholapur 944
 Amina v Ram 1004
 Amina Bibi v K M Moideen, 383
 Aminabi v Sudu 995
 Aminuddin v Atarmani 433
 Amir v Mahadeo, 425
 Amir v Mohan, 432
 Amir v Prahlad, 133
 Amir Ali v Harish Chandra, 191
 Amir Baksha v Venkatachala, 800
 Amir Beg v Ghulam Nabi, 572
 Amir Begam v Badruddin, 1273, 1274, 1293
 Amir Begam v Bank of Upper India, 809
 Amir Chand v Bakshi, 169
 Amir Dulhin v Administrator General of Bengal, 1047
 Amir Hassan v Ahmad Ali, 1078, 1081, 1146
 Amir Hassan Khan v Sheo Baksh Singh, 382, 385, 386
 Amir Kazim v Durlari, 242
 Amrit Nath v Roy Dhunput, 586.
 Amritchand v Raoji, 330, 468
 Amritnan v Alwar, 967, 969
 Amiruddul Makkal Lal, 333
 Amrul Hossain v Khairunnessa, 147
 Amjad Ali v Ali Hussain, 375, 1316
 Amlook Chand v Sarat Chunder, 996, 1092
 Ammol v Hari, 568, 571
 Ammukutty v Manavikaraman, 1058
 Ammulva v Annada, 914, 917, 1051
 Amolak v Lachmi, 159
 Amolak Shah v Charan Das 1269
 Amrit Lal v Maho Das 1145
 Amrit Lal v Murlidhar, 157
 Amrit Ram v Dierat Ram 1202
 Amrita v Audithrao, 917
 Amrita Lal v Anukul, 239
 Amrita Lal v Rakhali 872
 Amrita Lal In the goods of, 947
 Amriteswari v Secretary of State 42
 Amrith Nath v Dhunpat 914
 Amritlal v Kantilal 200
 Amritram v Ramji 298 301
 Amritrav v Balkrishna 124 383
 Amritsar National Banking Co, Ltd v Fazal Ilahi, 54 581
 Amritsaria v Gamun, 942
 Amtul v Mahammad 906
 Amulakchand v Babu Lal 470 477, 929
 Amulya v Banku 732
 An Attorney *In the matter of* 1370
 Anand Iall v Empress, 733
 Anand Pao v Ramdas, 295, 312
 Ananda v Promotha, 714
 Ananda v Shariatulla, 316 1039
 Ananda Gopal v Nafar Chandra, 352
 Ananda Pal v Maha Bal 1112
 Ananda Rao v Appa Rao 70
 Anandi Kunwar v Pam Niranjana Das 789
 Anandi Kunwar v Ajudhia Nath, 818
 Anandibai v Rajaram, 225
 Anandrao v Budra, 622
 Anandrao v Shankar, 31
 Anangamanjari v Tripura Sundari, 337, 369

- Apurba v Shyama, 78
 Aran Sardar v Hara Sundar, 1317
 Arasayee v Sokkalinga, 182
 Aravamudu v Samiyappa 601
 Ardaseer v Perceboye, 1325
 Ardeshir v Aimal, 260
 Ardeshirji v Kalyan Das, 401
 Ardeair v Hirabai, 940
 Ariatindra v Dorasami, 206
 Arimuchu v Vapuri, 701
 Arjun v King Emperor, 779
 Arjun v Musammat Parbati, 412, 419
 Arjun v Shankar, 1108
 Arjun v Official Assignee, 1353
 Armitage v Parsons, 586
 Arnavaaz v Hormasji, 148
 Arnison v Smith, 452
 Arnabhella v Venkatasami, 457
 Arogya v Appachi, 22, 157
 Aromalla v Arimanda, 314
 Arsamma v Moidin, 787
 Arumagam v Kanappa 1065 1066, 1354
 Arumuga v Namasivaya 851
 Arumuga v Periananjappa, 437, 946.
 Arumugam v Arunachalam, 1263
 Arunachala v Katha 589
 Arunachala v Louis Dreyfus 142
 Arunachala v Subbaramiah 592
 Arunachalam v Govindaswami 906
 Arunachalam v Meyappa 904
 Arunachalam v Prasami 1041
 Arunachalam v Pratapasimha, 416, 686
 Arunachalam v Veerappa, 604
 Arunachalla v Mathial 106
 Arunachallam v Murugappa 954
 Arunachella v Orr 476
 Arunachelam v David 278
 Arunachellam v Arunachellam 499 502 826 829 1136 1137
 Arunachellam v Haji Sheek Meera, 269, 1043
 Arunachellam v Mahomed 97
 Arunachellam v Maung San Ngwe, 177
 Arunachellam v Ramandahan 701, 955
 Arunmoy v Mohendra Nath 87
 Arura v Bur Singh 82
 Asa v Ganesh, 90
 Asa Ram v Bakshi 117
 Asa Ram v Kishen Chand, 365
 Asad Ali v Haidar Ali, 220, 716, 1056, 1063
 Asadali v Mahomed, 411, 1076
 Asad ul lah v Karamchan 1, 837
 Asad ul lah v Muhammad 1263
 Asgar v Trilokya 723
 Asghar v Mahomed, 65
 Ashabai v Haji Tyeb, 503 504
 Ashanullah v Karoonamoyi, 1173
 Asharfi Lal v Deputy Commissioner of Bara Banki, 391
 Ashfaq Hussain v Gauri Sahai 602
 Ashghar Reza v Hyder Peza, 364
 Ashiq Ali v Imtiaz Begum, 384
 Ashna Bibi v Awaljadi Bibi, 786
 Ashraf v Ali Ahmad, 74
 Ashruffunnissa v Labrecaux, 596
 Ashutosh v Bihari Lal, 179, 1020, 1021
 Ashutosh v Kundalkamni 419
 Ashutosh v Sudhangshubhan, 815
 Ashworth v Lord, 991, 992
 Asir Khatun v Nurjahan, 771 1003
 Asimaddi v Sundari, 818
 Asiruddin v Pam Sakhi, 381
 Askaran v F I Ry Co 16
 Askaran v Ragunath, 180
 Askari Hussain v Jahangira Mal, 1000 1002
 Aslatt v Corporation of Southampton 1009
 Asmatibi v Ahmed Hussain 151 441
 Asman Singh v Tulsii Singh 207
 Asmatulla v Gamir 52
 Asmutunnissa Begum v Ashruff Ali, 819
 Asrafannessa v Hemchandra, 74
 Assan v Pathumma, 3 566
 Assan ul lah v Hafiz 1111
 Assardas v Mst Thakurbi 1006
 Assenoolia v Abdool 628
 Assistant Collector Salsette v Damodar das, 141 147
 Assur v Ratanbai 1051
 Asuram v Sub Collector 413
 Atchayya v Sri Seetharamachandra, 389
 Athamsa v Ganesan, 348
 Athappa v Ramkrishna, 821
 Atherton & Co v Habib, 764
 Atkins v Shephard 201
 Atma Ram v Balkishen, 1114
 Atma Ram v Banku Mal, 858
 Atmaram v Bhila, 955
 Atmaram v Collector of Nagpore, 369
 Atmaram v Narayan, 463
 Atmaram v Parashram 82

Attar Chand v Min Mahomed 867
 Attar Singh v Harm Chand, 1030
 Attorney *In the matter of* (25 Cal W N 99) 622
 Attorney *In the matter of* (41 Cal 113) 1336
 Attorney *In the matter of* [(1914) 41 Cal 734] 1370
 Attorney *In re* (26 Bom L R 887) 1336
 Attorney *In re* (52 Cal 795) 1336
 Attorney General v Acton Local Board 292
 Attorney General v Cambridge Gas Consumers Co 291 292
 Attorney General v Lockermouth Local Board 291
 Attorney General v Colney Lunatic Asylum 292
 Attorney General v Corporation of Manchester 292
 Attorney General v Emerson, 618 620
 Attorney General v Gaskill, 609 611 612
 Attorney General v Logan, 290 291, 313
 Attorney General v Mayor of Newcastle upon Tyne 618
 Attorney General v Newcastle upon Tyne Corporation 609 618
 Attorney General v Pontypriid Water works Co 471
 Attorney General v Proprietor of the Bradford Canal 290
 Attorney General v Sheffield Gas Consumers Co, 292
 Attorney General v Shrewsbury Bridge Co 292
 Attorney General v Simpson 1114
 Attorney General v Thompson 618
 Attorney General v Wright, 313
 Atul Chunder v Lakshman 593
 Atul Chandra v Raja Peary, 976 977
 Aubhoy v Bissesswari 970
 Aubhoy Churn v Shamont 1154
 Aubhoya Dass v Iudmo Lochun 820
 Aubhoveary v Gouri Shankar 1022
 Augustinus v Nerineck 532
 Aulad Ali v Abdul 818
 Aurnschellam v Polu 1070
 Aushootosh v Tara 324
 Australasian Automatic Weighing Machine, Co v Walter 430

Australian Steam Nav Co v Smith and Sons 411 545
 Austrian Lloyd Steamship Co v Gresham Life Assurance Society, 95
 Authimulam v Secretary of State, 639
 Ayala v Kuppup 78
 Ayasari v Nachammal, 77
 Awadh v Fahiman, 660
 Ayatunnessa v Kullu, 304
 Ayetunnessa Bili v Amjad Ali, 58
 Ayscough v Bullar, 470 471
 Ayja Mudali v Veerayee, 609
 Ayyagiri v Koorur, 901
 Ayanna v Nagabhooshanam, 10
 Ayyannamma v Ramaswami, 897
 Ayasami v Sivakhammal, 425
 Ayyasami v Official Receiver 1144
 Ayyasami Mudaliar v Appandai, 1269
 Ayyayayyar v Shastram 413
 Ayyayayyar v Virasami 221 224
 Azagappa v Ramanathar 90 518
 Aziz v Kiloboy, 379
 Aziz Ullah v Collector of Shahjahanpur, 436 439
 Aziz Ullah v Court of Wards 444
 Aziz Baksh v Kaniz, 237, 774
 Aziz Baksh v Sultan Singh 156
 Azizan v Matuk Lal 694
 Azizan v Matuklal 168 170
 Azizuddin v Ramanugra 184

B

B I. warayya v Swarnam 1117
 Baba v Purushothama 968
 Baba v Webb, 696
 Bababhat v Naraharbbhat 92 93
 Bahaji v Collector of Salt Revenue, 1076
 Bahaji v Vasudev 642
 Babajirao v Laxmandas, 71
 Babanna v Parava 585
 Baboo v Lekraj 804
 Baboo Gunesh Dutt v Mugneeram, 33
 Babu v Parvati, 5
 Babu v Thukra, 26
 Babu Lal v Hari Baksh, 60 87
 Babu Lal v Ishri Prasad, 84
 Babu Lal v Janak, 187
 Babu Lal v Raghunandan 382, 411 604

- Babu v Secretary of State, 972
 Babu Madhav v Venkatesh, 1111
 Balu Ram v Banke, 409
 Balu Ram v Imanullah, 799, 822, 828
 Balu Ram v Munna Lal, 393
 Balu Sakan Singh v Gopal, 353
 Babulhaji v Madhavji, 897, 1268
 Balui v Alakhlal, 409, 591
 Babui Padhika v Ramaswamy, 509
 Baburam v Dokhina, 249
 Bacha v Balgoland, 475
 Bachan v Paghunath, 442
 Bachchan Lal v Banarsi Das, 577
 Bachehu v Secretary of State, 274, 278, 279, 567
 Bachehu Singh v Jafar Beg, 277
 Bachoo v Nagindas, 1312
 Bachubai v Ibrahim, 388, 606
 Bada Kristam v Durvada, 716
 Badal Chandra v Shrikrishna, 124
 Badal Singh v Dabi Saran, 1006
 Badam v Imrat, 1102
 Badam v Nathu, 639, 1100
 Badami kuar v Dinu Rai, 381, 387, 388, 389
 Badar Bee v Habib Merican Noordin, 90
 Badaranesa v Ramchandra, 1075, 1039
 Badeley v Consolidated Bank, 751
 Badi v Sami, 1617
 Badiar v Sarada, 820
 Badri Chandra v Indrajit, 222
 Badri Das v Hoshiar, 1109
 Badri Das v Inayat Khan, 1005, 1006
 Badri Gope v King Emperor, 732
 Badri Misir v Shankar Misir, 669
 Badri Narain v Sheekoer, 1035
 Badri Narayan v East Indian Railway, 1032
 Badri Narayan v Jai Kishen, 11, 175, 183, 721
 Badri Nath v Ram Padarath, 1293
 Badri Prasad v Choke Lal, 752, 1038
 Badri Prasad v Gopal, 933
 Badri Prasad v Tej Singh, 652
 Badri Singh v Tulsai Ram, 811
 Badruddin v Sitaram, 82, 1357
 Badrun Nissa v Shankar, 1008
 Bagal Chunder v Rameshur, 798, 822
 Bagat v Easton, 529, 561
 Bagavathi v Sarangaraja, 320, 1129
 Bagga v Sahhon, 1129
 Bahadur Lal v Judges of the Allahabad High Court, 1129
 Bahadur Singh v Naga Puran Singh, 1278, 1293
 Bahadur Singh v Ram Phal, 838
 Baharmal v Bai Vishnubai, 668
 Bala v Aijamal, 700
 Bai Amthi v Madhav, 253
 Bai Atrani v Deeping, 374
 Bai Bhicaji v Puroshaw, 451
 Bai Chandan v Chhotalal, 377
 Bai Channan v Chhotalal, 968, 969, 970
 Bai Dabi v Hargovan, 667
 Bai Divali v Hiratal, 961
 Bai Divali v Shah Vishnu, 7, 320
 Bai Divali v Umedbhai, 56
 Bai Full v Adesang, 863, 864
 Bai Full v Dasi Manorbhai, 1123
 Bai Ganga v Rajaram, 1020
 Bai Jammalal, *In re*, 411, 1057
 Bai Kali v Alarkh, 647
 Bai Kanku v Bai Jadav, 69
 Bai Karimatibi v Alderehman, 12
 Bai Kashibai v Shidapa, 886, 892
 Bai Kishen v Jasoda kuar, 343, 1106
 Bai Krishna Das v Hira Lal, 457
 Bai Kunta v Mohanand, 157
 Bai Laxmi v Harjivan, 910
 Bai Mangu v Bharatchand Cotton Mills, 354, 1370
 Bai Mani v Ranchodlal, 181, 182, 381, 848
 Bai Meherbai v Maganchand, 68
 Bai Monghibai v Bai Rambhalaaxmi, 900
 Bai Nematbu v Bai Nematullabu, 1155
 Bai Noorjan v Hansraj, 1021
 Bai Parwati v Ghanchi, 741
 Bai Porebai v Devji, 910
 Bai Rami v Jaga, 376
 Bai Rukhibai v Vadlal, 766
 Bai Sada v Gangaram, 82
 Bai Shri Majraja v Maganlal, 551
 Bai Shri Vaktuba v Agarsangji, 12, 442
 Baigran Lal v Mahabir, 1001
 Baij Lal v Durga, 180
 Baij Nath v Chhowaro, 452, 494
 Baij Nath v Narain, 1268
 Baij Nath v Padmanand, 58
 Baij Nath v Panna Lal, 700
 Baij Nath v Ram Bharon, 196

- Baijnath v Babu 892
 Baijnath v Balmakund, 420, 421, 422
 Baijnath v Dulari, 401, 1337
 Baijnath v Moheep, 799
 Baijnath v Raghunath, 603, 610
 Baijnath v Pam Bharos, 193, 720, 881
 Baijnath v Parvateshwar, 171
 Baijnath v Vallabhdas, 92, 98
 Baijnath Das v Bisben, 249
 Baijulai v Butaklai 67, 451, 465
 Baikunta Nath v Sita Nath 372, 1281, 1282
 Baikunta Nath v Nawab Salimulla, 564, 1103
 Baikuntha Nath v Mohananda, 321
 Baikuntha Nath v Pro-sannamoyi, 412, 416
 Baikunti v Narinda, 839
 Baillic v Goodwin & Co, 930
 Badur v Lakshmana 786
 Bain v Central Vermont Ry Co 1072
 Bairagulu v Bappaanna 170, 694
 Baisnab v Bank of Bengal 933, 935
 Baiznath v Ramados 269
 Baji v Gangadhar 531
 Baji Lal v Nawal Singh 1093
 Bajrao v Saharam 898, 901
 Baji Lal v Maharajadhiraj 587, 594
 Byrang Bahadur v Beni Madho, 75
 Bakar v Udit Narain, 159, 705
 Bakhtan Mt v Ghulam Hassan, 1154
 Bakhtawar v Sheo Prasad 918
 Bal ram Kishore v Taffazzal 1098
 Bakshi v Azamuddin 45
 Bal Gangadhar Tilak v Shrinivas Pandit, 531
 Bal Mukunda v Bengal Nagpur Rly., 671
 Bala v Bhiva 155
 Bala v Seetharama 1288
 Bala Bksh v Amiruddin, 602
 Bala Krishnudu v Narayanaswamy, 558
 Bal Prasad v Balkrishna, 1146
 Bala Ram v Kanhai, 936
 Balabat v Ganesh, 879
 Balaji Is re, 132
 Balaji v Merwanji 379
 Balaji v Ramchandra 1066
 Balaji v. Sakaram, 19
 Balak v Kaul 1094
 Balak Vori v Durga, 851
 Balakeshwari v Joanananda, 912
 Balakhala Dasee v Jadunath, 680
 Balakishen v Khugnu, 685
 Balakrishna v Parvathammal, 429
 Balakrishna v Rangan, 787
 Balakrishna v Vasudeva, 379, 380, 384, 387
 Balakrishna Chettiar v Krishnamurthi Aiyar, 301
 Balsamani v Rama, 974
 Balamba v Krishnappa, 220
 Balambhat v Narayanbhat, 63
 Balamoney v Ramasami, 618, 623
 Bilaraju v Misilamoni, 1041
 Balaram v Mangta Das, 1073
 Balaram v Maruti, 188, 194
 Balaram v Naktu, 249
 Balaram v Ramchandra, 109, 1338, 1342
 Balaram v Shyama Chiran 335
 Balaramdas v Umesh, 419
 Balasubramania v Swarnammal, 409, 492
 Balbhaddar v Ram Lal, 55
 Baldeo v Bir Gur, 464
 Baldeo v Gopalji, 299
 Baldeo v Ramchandra, 755
 Baldeo Lal v Mst Matisra, 348
 Baldeo Prasad v Bhola Nath, 468, 982, 987
 Baldeo Sahai v Abdur Rahim, 1279
 Baljepalli v Baljepalli, 75
 Bahram v Seth Narsingdas 821
 Bahji v Mahipat, 72
 Balkaran v Gaya, 547
 Balkaran Rai v Gobud Nath, 431
 Balkrishen v. Bechan, 46
 Balkrishen v Kishan Lal, 34, 38, 44, 47, 83
 Balkrishen v Sohan Singh, 1279
 Balkrishen Sobu v Khugnu, 1077
 Balkissen v Luchmiput, 148
 Balkrishan v Raghunath, 591
 Balkrishna v Bapu, 3, 691
 Balkrishna v Collector, Bombay, 379, 380, 1317
 Balkrishna v Dattatraya, 31
 Balkrishna v Emperor, 1316, 1373

- Balkrishna v Govind 333
 Balkrishna v Jagananna 300 1002
 Balkrishna v Masuma, 842.
 Balkrishna v Parvathammal 420
 Balkrishna v Pamkrishna 547
 Balkrishnadass v Malakajappa 2 2.
 Baling v Devastian Fun! 1140
 Ballu v Hrudawari 370
 Ballu Ram v Laghubar, 220
 Balmakund v Basanta Kumari 420
 421
 Balmakund v Dixu 751, 641
 Balmakund v Sico Jatan 312.
 Balmakunda v Bengal Nagpur Railway
 Co Ltd, 777
 Balmer Lawrie & Co v Jadunath, 218,
 270
 Balmekand v Wazir, 1091
 Balmukund v Bissendival 399
 Balmukund v Pancham 682
 Balraj Kunwar v Jagatjal Singl, 3
 Balubhai v Nanalal 851
 Balupki Rout v Sri Kunja Behari Deb,
 338
 Baluram v Pannabai 590
 Baluswami Aiyar v Lakshmana Aiyar
 1092
 Balvant v Babaji 844
 Balvant v Bala 837
 Balvant v Baldev, 335
 Balvant v Hirachand 840 841
 Balvantrav v Sadrudin 413 414 420
 Balwant Sing v Daulat Singh 1035
 Balwant Singh v Rani Kishori 1314
 Balwant Singh v Sarabjit, 72 75
 Bama Charan v Gadadhar 348
 Ban Behari v Bhukan Lal 793
 Banarsi v Hari Kishun 416
 Banarsi Das v Maharani 711 719
 Banarsi Das v Ramzan 191
 Banarsi Pershad v Kashi Krishna 355
 356, 364, 1125
 Banarsi Prasad v Pam Narain 957
 Bande Ali v Gokul Misir, 485
 Bandey v Romesh 88
 Bandhan v Solhu 502
 Bandhu v Kayastha 190 195
 Bandhu v Lakhi, 132
 Bandhu v Shah Muhammad 875
 Bandi v Madalpalli 1103
 Bandiram v Purna Chandra, 335
 Bindoo v Narsingrao, 156
 Binerjee v Manzar Ali 542
 Binerjee v Sultawardi, 601
 Bangachandra v Jagat Kishora, 140
 Bangali Mal v Ganga Pam 118
 Bangaru v Vijayamachi 45
 Bangarusami v Balasulramaniam 97
 Banhi Bal v Manni Lal 1023
 Bank of Bengal v Currie & Co, 512
 Bank of Bengal v Lucas, 1107
 Bank of Bengal v Sarat Chandra, 123,
 161, 756
 Bank of Bihar v Sri Thakur 970
 Bank of Clettinad v Ho San Ok 222
 Bank of England v Agliano 2
 Bank of New South Wales v O Connor,
 991
 Bank of Upper India v Fitzholmes,
 179, 691
 Banka v Guru Das 837
 Banka Behari v Birendra Nath 373
 1098, 1121
 Banke Behari Lal v Pokhe Pam, 116
 122
 Banke Lal v Jagat Narain 241, 368.
 Bankey v Pam Bahadur, 375
 Bankey Behari v Abdul Rahman 436
 1152
 Bankey Behari v Rahman 1152
 Bankey Lal v Choteey 1260 1278
 Banli Behari v Dutta 1101
 Banku Behari v Harendra Nath 1058
 1067
 Banku Behary v Narain Das 160
 Banna Mal v Janna Das 211
 Banno Bibi v Mehdi Husain 346 1124
 1351
 Banshu v Majaharuddin 499
 Bans Dhar v Muhammad Suleman 948
 Bansidhar v Gulab Kuar 218 225 1351
 Bansidhar v Sita Ram 1074
 Bansilal v Dhapo 78
 Bansilal v Ghulam 120
 Banwari v Samman 1099
 Banwari Das v Mohumad 888
 Banwari Lal v Kishen 888 933
 Banwari Lal v Mahesh 568
 Banwari Lal v Nand Ram 985
 Banwari Lal v Shukrullah 438
 Bapuraj v Ramchandra, 312
 Bapu v Bapu 1367
 Bapu v Bhawan 63
 Bapu v Dhondi 105
 Bapu v Vajir 151, 441
 Bapuji v Govindlal 305, 308

- Baijnath v Babu 892
 Baijnath v Balmakund, 420, 421, 422
 Baijnath v Dulari, 401, 1357
 Baijnath v Moheep, 799
 Baijnath v Raghunath, 609, 610
 Baijnath v Ram Bharos, 193 720, 881
 Baijnath v Ravaneshwar, 171
 Baijnath v Vallabhdas, 92, 98
 Baijnath Das v Bishen, 249
 Baijula v Bulaklal 67, 451, 465
 Baikanta Nath v Sita Nath, 373, 1281, 1282
 Baikanta Nath v Nawab Salimulla, 564, 1163
 Baikuntha Nath v Mohananda, 321
 Baikuntha Nath v Prosannamoni, 412, 416
 Baikunti v Narinda, 839
 Bailhe v Goodwin & Co., 920
 Bailur v Lakshmina 786
 Bain v Central Vermont Ry Co 1072
 Bairagulu v Bappaanna 170 694
 Baisnab v Bank of Bengal 933 934
 Baiznath v Ramadoss, 269
 Baij v Gangadhar 531
 Baij Lal v Nawal Singh, 1093
 Bajirao v Sukhram, 898, 901
 Bajit Lal v Maharajahdiraj, 587, 594
 Bajrang Bahadur v Beni Madho, 75
 Bakar v Udit Naram, 159, 708
 Bakhtan Mt v Ghulam Hassan 1154
 Bakhtawar v Sheo Prasad, 918
 Bakram Kishore v Taffazzal, 1098
 Bakshi v Nizamuddin, 45
 Bal Gangadhar Tilak v Shrinivas Pandit, 531
 Bal Mukunda v Bengal Nagpur Rly., 671
 Bala v Bhira 115
 Bala v Sectharama 1288
 Balu Bikh v Amiruddin, 602
 Bala Krishnudu v Narayanaswamy, 558
 Balu Prasad v Balkrishna, 1146
 Bala Ram v Kanhai, 996
 Balabai v Ganesh, 870
 Balaji In re, 132
 Balaji v Merwanji, 379
 Balaji v Ramchandra, 1066
 Balaji v Sakham, 19
 Balak v Kausil, 1091
 Balak Puri v Durga, 851
 Balakrishna v Jnanananda, 912
 Balakhala Dasee v. Jadunath, 680
 Balakishen v. Khugnu, 685
 Balakrishna v. Parvathammal, 429
 Balakrishna v. Rangan, 787
 Balakrishna v Vasudeva, 379, 380, 384, 387
 Balakrishna Chettiar v. Krishnamurthi Aiyar, 301
 Balaram v Rama, 974
 Balamba v. Krishnappa, 220
 Balambhat v. Narayanbhat, 63
 Balamoney v Ramasami, 618, 623
 Balaram v. Missilamony, 1041
 Balaram v Mangta Dass, 1073
 Balaram v. Maruti, 188, 194
 Balaram v Naktu, 249
 Balaram v Ramchandra, 107, 1338, 1342
 Balaram v Shyama Charan, 335
 Balaramdas v Umesh, 419
 Balasubramania v Swarnammal, 409, 492
 Balbhaddar v Ram Lal, 55
 Baldeo v Bir Gir, 464
 Baldeo v Gopalji, 299
 Baldeo v Ramchandra, 755
 Baldeo Lal v Mast Mativra, 348
 Baldeo Prasad v Bhoja Nath, 468, 982, 987
 Baldeo Sahai v Aldur Rahim, 1279
 Baldeodas Lohia v Balmukund, 385
 Baldeodas v Subkarandas, 517
 Balgobind v Ram Sarup, 1096
 Balgobind v Sheo Kumar, 599
 Balheri v Sheva Sympat, 39
 Bahyepalli v Bahyepalli, 75
 Baliram v Seth Narsingdas, 821
 Baljit v Mahipat, 72
 Balkaran v. Gaya, 547
 Balkaran Rai v Gobind Nath, 431.
 Balkishen v. Bechan, 46
 Balkishen v Kishan Lal, 34, 38, 44, 47, 83
 Balkishen v Sohan Singh, 1279
 Balkishen Sahu v Khugnu, 1077
 Balkissen v Luchmiput, 148
 Balkrishan v Raghubar, 591
 Balkrishna v Bapu, 3, 691
 Balkrishna v Collector, Bombay, 379, 380, 1317
 Balkrishna v Dattatraya, 31
 Balkrishna v Emperor, 1316, 1373

- Balkrishna v. Gvind, 333
 Balkrishna v. Jagannada, 300, 1062
 Balkrishna v. Masuma, 842
 Balkrishna v. Parvathammal, 429
 Balkrishna v. Pamkrishna, 567
 Balkrishnadass v. Mahakajappa, 252
 Balling v. Devasthan Fund, 1149.
 Ballu v. Hardawari, 379
 Ballu Ram v. Raghubar, 229
 Balmakund v. Basanta Kumari, 420, 421
 Balmakund v. Dalu, 551, 641
 Balmakund v. Sheo Jatan, 392
 Balmakunda v. Bengal Nagpur Railway Co., Ltd., 737
 Balmer Lawrie & Co. v. Jadunath, 268, 270
 Balmokand v. Wazir, 1031
 Balmukund v. Bissendoyal, 399.
 Balmukund v. Paneham, 682
 Balraj Kunwar v. Jagatpal Singh, 3
 Balubhai v. Nanshal, 851
 Balunki Rout v. Sri Kunja Behari Deb, 338
 Baluram v. Pannabai, 520
 Baluswami Aiyar v. Lakshmana Aiyar, 1092
 Balvant v. Babaji, 844
 Balvant v. Balu, 837
 Balvant v. Baldev, 335
 Balvant v. Hirachand, 840, 841
 Balvantrav v. Sadrudin, 413, 414, 420
 Balwant Sing v. Daulat Singh, 1035
 Balwant Singh v. Rani Kishori, 1314
 Balwant Singh v. Sarabjit, 72, 75
 Bama Charan v. Gadadhar, 348
 Ban Behari v. Bhukan Lal, 793
 Binarsi v. Hari Kishun, 416
 Binarsi Das v. Maharani, 711, 719
 Binarsi Das v. Ramzan, 191
 Banarsi Pershad v. Kashi Krishna, 355, 356, 364, 1125
 Banarsi Prasad v. Ram Narain, 957
 Bande Ali v. Gokul Misir, 485
 Bandey v. Romesh, 88
 Bandhan v. Solhu, 502
 Bandhu v. Kayastha, 190, 195
 Bandhu v. Lakhu, 132
 Bandhu v. Shah Muhammad, 875
 Bandi v. Madalpathi, 1103
 Bandiram v. Purna Chandra, 335
 Bando v. Narsingrao, 150
 Banerjee v. Manzar Ali, 542
 Banerjee v. Subrawardy, 601.
 Bangachandra v. Jagat Kishori, 146
 Bangali Mal v. Ganga Ram, 118
 Bangaru v. Vijayamachi, 45
 Bangarucami v. Balasul ramanian, 97.
 Banh Bal v. Manni Lal, 1023
 Bank of Bengal v. Currie & Co., 512.
 Bank of Bengal v. Lucas, 1107
 Bank of Bengal v. Sarat Chandra, 123, 161, 756
 Bank of Bihar v. Sri Thakur, 970
 Bank of Chettinad v. Ko San Ok, 222
 Bank of England v. Vagliano, 2
 Bank of New South Wales v. O Connor, 991
 Bank of Upper India v. Fitzholmes, 179, 801.
 Banka v. Guru Das, 837
 Banka Behari v. Birendra Nath, 373, 1098, 1121
 Banke Behari Lal v. Pokhe Ram, 116, 122
 Banke Lal v. Jagat Narain, 241, 368.
 Bankey v. Ram Bahadur, 375
 Bankey Behari v. Abdul Rahman, 436, 1152
 Bankey Behari v. Rahman 1152
 Bankey Lal v. Choteey, 1260, 1278
 Banli Behari v. Dutta, 1102
 Banku Behari v. Harendra Nath, 1068, 1067
 Banku Behary v. Narain Das, 160
 Banna Mal v. Jamni Das, 211
 Banno Bibi v. Mehdi Husain, 346, 1124, 1351
 Banshi v. Majaharuddin, 429
 Bansi Dhar v. Muhammad Suleman, 948
 Bansidhar v. Gulab Kuar, 218, 225, 1351
 Bansidhar v. Sita Ram, 1074
 Bansilal v. Dhapo, 78
 Bansilal v. Ghulam, 120
 Banwari v. Samman, 1099
 Banwari Das v. Mohumad, 888
 Banwari Lal v. Kishen, 888, 993
 Banwari Lal v. Mahesh, 568
 Banwari Lal v. Nand Ram, 985
 Banwari Lal v. Shukrullah, 438
 Bapuraju v. Ramchandra, 312
 Bapu v. Bapu, 1367
 Bapu v. Bhawan, 63
 Bapu v. Dhondi, 105
 Bapu v. Vajr, 151, 441
 Bapuji v. Govindlal, 305, 308

Bapuji v Umedbhai, 339
 Bipurao v Sudhu, 596
 Bara Estate Ltd v Anup Chandra, 1105
 Barada Kanta Saha Roy v Sheikh
 Moujuddin, 23
 Baramdeo v Debdatt, 668
 Bardot v The Augusta, 1364
 Barendra v Emperor, 1371
 Barendra Nath v Martin & Co., 259 772
 Barham v Huntingfield, 615
 Barhamdeo v Tara Chand 264
 Barhma Din v Baiji Lal, 769, 771
 Barjorji v Shripatprasadji 82
 Barju v Kunja Behari 1138
 Barkat Ali v Karim Baksh 63
 Barkat un nissa v Abdul Aziz, 1063
 Barker, *Re* Hetherington v Longrigg, 634
 Barker v Purvis 440 441
 Barker v Snell 539
 Barnaby v Tassell, 1028
 Barnett Brothers v Fowle, 14 867
 Baroda v Chunder Kanta, 829 940
 Baroda Churn v Gobind Proshad 1155
 Barracho v Souza 1265
 Barrs v Jackson, 42
 Barsati v Chamru, 30
 Baru Mal v Sunder Lal, 74
 Basangowda v Churchigirigowda, 436
 Basingowda v Irgowdatti, 219
 Basant v Secretary of State, 668
 Basant Kuar v Chandulal, 1123
 Basant Kumar v Lala Ram, 676
 Basant Ram v Kolahal 120
 Basant Ram v Muhammad, 1071
 Basanta v Bukunta 794
 Basanta v Sylhet Loan & Co., 793
 Basanta Coomar v Kumudini 627
 Basanta Kumar v Abhoy, 1147, 1156
 Basanta Kumar v Khurode Chandra,
 831
 Basanta Kumar v Kusum Kumari, 1150
 Basanta Kumar v Radha Ram, 152, 995
 Basanti v Rajani, 382
 Basanti Lal v Chhedo Singh, 424
 Basico v Jagannath, 897
 Basappa v Bhumangowda, 174, 878
 Basaratulla v Reazuddin, 382, 409, 830
 831
 Basavana v Dudda Lingappa, 496
 Basawa v Kihapa, 335
 Basayya v Allayya, 658
 Basdeo v Dwarka, 979
 Basdeo v Smidt, 541

Basdeo Mal v Kanhaiya Lal, 1260.
 Baser v Fazle, 1090
 Basharatulla v. Uma Churn, 822.
 Basheshar Nath v. Ram Kishen Das,
 1149
 Bashu Ram v Chiniot Municipality, 1071
 Bashur ud din v Jhori Singh, 818
 Basir Ali v. Hafiz, 839, 1034
 Basiram v Kattiyani, 1043
 Basiram Saha Roy v. Ram Ratn Roy,
 333
 Basiruddi v Kailash, 1020
 Basist v Modnath, 857, 858
 Basivi Reddi v. Ramayya, 785
 Basivireddi v Kamaraju, 992
 Baslingappa v. Dharmappa, 31
 Basrat Ali v. Maung Aung, 1155
 Basroorvittal v Ramchandra, 715
 Basti Ram v Fattu, 177, 178
 Basudev v Bedeshu, 1089
 Basumati v Taritbasani, 1102
 Batcha v Abdul, 1279, 1281
 Bateman v Hunt, 991
 Batuk v Ambika, 441
 Batuk Nath v Munni Dei 151, 996,
 1137
 Batul Kunwar v Munni Lal, 481
 Bava Sahib v Abdul Ghani, 565, 964
 Bava Singh v Lachman Singh, 12
 Bava Levai v. Ammeenammal, 1036
 Bawan Das v Mul Chand, 223
 Bayaya v Pirvateva, 69
 Bayyan Naidu v Suryanarayana, 45, 49
 Bazful v Latis, 334
 Beard v Egerton, 224
 Beaumont v Senior, 145
 Bebee Tokat v Davod, 219
 Bechansang v Naran Moti, 1301
 Pecharam v Purna, 1367
 Beckett v Stiles, 143
 Bed Saran v Bhagat Deo, 74
 Beddow v Beddow, 1039
 Bedford v Ellis, 452, 462.
 Bedford Charity *In re*, 296
 Beeny, *Re*, 633
 Beer Chunder v Ishan Chunder, 283
 Beer Chunder v. Raj Koomar Nobodeep
 Chunder, 284, 285
 Beer Chunder v Tarnia, 612
 Beerchunder v. Maymana, 163.
 Beg Mohammed v. Kavasji, 118
 Begam Jan v. Jamat Bibi, 867
 Begam Sultan v. Sarvi Begam, 194

- Begz Dunlop & Co. v. Jagannath, 156
 160, 777
 Begz Dunlop & Co. v. Satish Chandra, 1045
 Behari v. Daul, 69
 Behari v. Majl, 38
 Behari Lal v. Halila Bili, 628
 Behari Lal v. Kolu Ram, 491
 Behari Lal v. Majl Ali, 88
 Behari Lal v. Mangolinath, 1151
 Behari Lal v. Sura Trading Co., 315
 Behari Lal v. Srimati Baran, 480, 889
 Behari Singh v. Mukat Singh, 829
 Bejoy v. Hukum, 258
 Bejoy Gopal, v. Umesh Chandra, 865
 Bejoy Singh v. Ashutosh, 793
 Bejoy Singh v. Hukum Chand, 819
 Beli Ram v. Ram Lal, 1046
 Bellary Press Co. v. Venkata, 132
 Benaim & Co. v. Ikbono, 117
 Benarsidas v. Sreemuttu Angira, 679
 Benbow v. Low, 608, 610
 Bengal and North Western Railway Co. v. Sadaram, 453
 Bengal Coal Co. v. Apcar Collieries, 904
 Bengal Coal Co. v. Elgin Cotton Co. 121
 Beni Madhab v. Abdul Razak, 38
 Beni Madhab v. Deb Narayan, 280
 Beni Madhab v. Rai Charan, 109
 Beni Madhab v. Sarbananda, 45
 Beni Madho v. Gaya, 578
 Beni Madho v. Indar Sahai, 38, 77
 Beni Madho v. Sanwardat, 814
 Beni Madhub v. Jotendra, 564
 Beni Pershad v. Chowbey, 45
 Beni Pershad v. Dudhnath, 17
 Beni Prasad v. Harnam Das, 1011
 Beni Prasad v. Lajja Ram, 947
 Beni Prasad v. Mukhtesar, 168, 242
 Beni Prasad v. Nand Lal, 1106, 1109
 Beni Prasad v. Sarju Prasad, 391
 Beni Rai v. Itam Lakhan, 365
 Beni Ram v. Nanhu Mal, 88
 Beni Ram v. Ram Chandra, 485
 Beni Ram Bhutt v. Ram Lal, 943
 Beni Singh v. Berhamdeo, 996
 Benjamin v. Benjamin, 1344
 Benjamin v. Storr, 290
 Pennets & Co. v. Mellwraith & Co., 460
 Bennett v. Moore, 634
 Benode v. Brajendra, 171
 Benode v. Harish, 1019
 Beroz Krishna v. Satish Chandra, 333,
 1060, 1061, 1066
 Bent v. Young, 107
 Bentley v. Black, 553
 Bejin v. Jogendra, 74
 Bejin Behari v. Annala, 1263
 Bejin Behari v. Brojo Nath, 62
 Bejin Bhari v. Premotho Nath, 143
 Bejin Bhari v. Makun Lal, 992
 Bejin Bhari v. Sori Bhusan, 103
 Berton v. Greenwood, 529, 543, 570
 Beresford v. Ramasulha, 910
 Bhamdeo Pershad v. Tara Chand, 990,
 991
 Berry v. Mullen, 16,
 Besant v. Advocate General of Madras,
 373
 Besant v. Narayanas, 1347, 1358
 Bet & Co., Ltd. v. Collector of Madura
 1315
 Besterman v. British Motor Car Co.,
 Ltd., 458
 Bethasami v. Nagammal, 563, 565
 Beti v. Collector of Etawah, 753
 Beti Joo v. Sham Bhari Lal, 599,
 Betti Mahalakshmi v. Badan Singh, 425
 Bexington v. Pils, 143,
 Bharam Charan v. Pratap Chandra, 161
 Bhabatram v. Durgesh, 248
 Bhabutaram v. Profulla, 952
 Bhada v. Shaikh Manowar, 1073, 1099
 Bhag Bhari v. Gujar Mal, 485
 Bhag Singh v. Labh Singh, 121, 128
 Bhagannulu v. Seethuramaswami, 1259
 Bhagat Darbari v. Bhula, 1281
 Bhagat Singh v. Jai Ram, 305, 309, 1010
 Bhagat Singh v. Nikka, 436
 Bhagbat v. Boloram, 964
 Bhagbat v. Ramdeb, 570
 Bhagchand v. Secretary of State, 271,
 275, 277, 278, 279
 Bhagelu v. Dharma, 945
 Bhagirath v. Ram Ghulam, 1276
 Bhagirathi v. Balishwar, 38
 Bhagirathi v. Chandra, 545
 Bhagoji v. Babu, 29
 Bhagoji v. Bapuji, 1091
 Bhagu v. Bawashch, 195
 Bhagvan v. Balu, 453, 456
 Bhagvan v. Hiraaji, 763, 764
 Bhagvan v. Kesur, 1105
 Bhagvandas v. Abdul Hussain, 756
 Bhagvandas v. Kashibai, 222,

TABLE OF CASES

Bhagwan v Dattatraya 430 594
Bhagwan v Hira, 606
Bhagwan v Hirajee, 705, 938
Bhagwan v Khettar Mohl 778
Bhagwan v Param 947
Bhagwan v Param Sukh Das 437 945
946
Bhagwan v Ratan 727 728
Bhagwan v Ummat ul Hasnain 413 414
Bhawan Dis v Allah Bakhsh 837
Bhagwan Das v Bhavani 1018
 " " " Almoed 428

Bhawari Das v Suraj Prasad 253 204
830
Bhigwan Dut v Ram Dut 1148
Bhagwan Prasad v Saheo Shai 200
Bhagwan Singh v Jamal 863
Bhagwan Singh v The Allahabad Bank,
 360 367
Bhagwana v Coru 682
Bhagwandis v Burjorji 611 614
Bhagwandas In re 267
Bhagwant v Haji Mahomed 196
Bhagnant Ram v Nizam Dyn, 177
Bhagnant Singh v Bho Singh 383
 441 443
Bhagwati v Zamir, 1136
Bhagwantappa v Vishwanath 704
Bhagwat v Debt, 647, 648
Bhagwat v Dwarka 723
Bhagwat v Sheo Golam 1078
Bhagwati v Badri, 134
Bhagwati v Banwari Lal 173, 180 182,
 817
Bhagwati v Jamna Prasad, 417
Bhagwati v Parmeshwar, 561
Bhagwati Dyal v Dhan Kunwar, 354
Bhagwati Prasad v Bindeshri 405
Bhaichand v Panchhodas 179 184
 1021, 1022
Bhandal v Bai Gulab 20 328, 1307
Bhaiji v Administrator General of
 Bombay, 767, 780
Bhairam v Ambika Charan, 1148
Bharab v Khalidhan 398
Bharab v Kahlil 1100 1109
Bharab v Nandiram 1063
Bhairab Chandra v Kali Kumar, 1102

Bhasubendra v Udai Narain, 474, 909
Bhatobur v Deokaran, 932
Bhaiton v Rama Autar, 1119
Bhairow Rai v Saran Rai, 743
Bhaishankar v Moraji, 84
Bhaishankar v Mulji, 910
Bhaishankar v Municipality Corporation,
 Bombay, 32
Bhaiya v Jogeshwar, 1273
Bhajahari v Bahary Lal, 1289, 1290
Bhajan Lal v Cheda Lal, 699, 700
Bhajari Lal v Secretary of State, 380
Bhaja v Mahomed, 567, 967, 968
Bham v Bhimagayda, 8, 9
Bhamboo v Ram Narain, 98, 118 123,
 120 126
Bhanaji v De Brito, 1139
Bhanu v Kashinath 471
Bhanudas v Krishnabai, 954
Bharam Chand v Kanah, 515
Bharasi v Sarat Chunder, 78
Bharat v Asghar, 409, 410 593
Bharat v Rameshwari, 575
Bharat v Srinath 901
Bharat Chandra v Gauranga, 231, 232
Bharat Chandra v Iasin, 593, 830
Bharat Chandra v Kiran Chandra, 684,
 919
Bhargava & Co v Jagannath 374
Bhimmal v Bai Visnubai, 439, 477
 " " " Sic
 " " " " " " " " "
 " " " " " " " " "
 " " " " " " " " "
Bhu v Hari, 491
Bhu v Nana, 18 278 279
Bhu Diji v Patlu 482
Bhusing v Chaganuram, 388
Bhawan Singh v Narottam Singh, 290
Bhawani v Harbars, 345
Bhawani Prasad v Hallu, 981
Bhawanshankar v Narainshnkar, 88,
 175
Bheeka v Bhuggoo, 55
Bhicma Charyulu v Kothakota, 30
Bhicooba v Hatiba, 467
Bhakabhai v Bai Bhuri 44
Bhikaji v Anant, 886
Bhikaji v Bapu Saiju, 1051
Bhikaji v Purshotam, 854 87
Bhikkhalal v Acharat Lal, 1281
Bhikhari v Surya Mohi, 798, 800

- Bhikha v. Pirj Bihari, 176, 846
 Bhikumbar v. Becharam, 33
 Bhim v. Sarwan, 809, 822, 841
 Bhim Naik v. Chakradhar, 847
 Bhim Sain v. Mohammad Ali, 852, 853.
 Bhimaji v. Hussain Sahib, 970
 Bhimanganda v. Hanmant, 208
 Bhimawana v. Venugopal, 1095
 Bhimji v. B. B. & C. 1 Rly., 385
 Bhimraj v. Laxman, 790
 Bhimraj Bania v. Emperor, 1361.
 Bhiram Ali v. Gopi Kanth, 169
 Bhuva v. Vithya, 32
 Bhivray v. Sitaram, 85, 675
 Bhuva v. Deschand, 953
 Bhobonath v. Radha Prasad, 1084
 Bhogaraju v. Addepalli, 69
 Bhogilal v. Chumanlal, 1273
 Bhogilal v. Darasha, 880
 Bhogilal v. Jethalal, 548
 Bhola Nath v. Kanti Chandra, 152, 995
 Bhola Nath v. Kishori, 222
 Bhola Nath v. Secretary of State, 275
 Bhola Pershad v. Ram Lal, 981
 Bhola Ram v. Arjan Das, 349
 Bholanath v. Hari, 846
 Bholanath v. Prafulla, 89
 Bholanath Pal, *In the goods*, 472
 Bholaram v. Administrator General, 19
 Bholu v. Ram Lal, 403, 593
 Bhomsetti v. Umabai, 514, 517
 Bhondu Mal v. Muhammad, 1029
 Bhoobun Mohun v. Nobin Chunder, 739
 Bhoynub v. Madhub Chunder, 221, 223, 224
 Bhuban Mohan v. Co operative Bank, 979, 1096
 Bhubaneshwari v. Nilcomul, 143
 Bhuben Mohun v. Nanda Lal, 185, 825
 Bhudaneswar v. Tilakdhari, 593, 847
 Bhugobati v. Mahomed, 143
 Bhugwan Das v. Nilkanta, 876
 Bhugwanbutti v. Forbes, 74, 77.
 Bhuja Roy v. Ram Kumar, 841
 Bhujbal v. Nanheju, 113, 123
 Bhukhandas v. Lallubhai, 79
 Bhulu Beg v. Jatindra Nath, 745
 Bhundal v. Pandol, 377
 Bhup Indar v. Bijai, 151, 152, 678
 Bhup Kunwar, *In the matter of the petition of*, 391
 Bhupal v. Kundan Lal, 236
 Bhupati v. Sourendra, 1032
 Bhupendra v. Purna, 157, 321
 Bhupendra v. Rajeswar, 473.
 Bhupendra Narain v. Rajeswar, 676
 Bhupendra Nath v. Jahindra, 820
 Bhupendra Nath v. Manohar, 1061.
 Bhupendra Nath v. Sassoon & Co., 581, 735
 Bhupsing v. Premsing, 1101
 Bhura Mal v. Har Kishan Das, 599, 601, 602, 603, 915
 Bhusan v. Norendra, 1073
 Bhusan v. Profulla, 383, 830
 Bhuta v. Lakadu, 328
 Bhutnath v. Barindra, 764
 Bhutnath v. Tarachand, 859, 868, 996
 Bhuttacharya v. Cawnpore Woollen Mills, 117
 Bhuvanagiri v. Maradugula, 901
 Bhyro v. Lekhranee, 550
 Biado Bibi v. Ram Chandra, 488
 Bibee Solomon v. Abdool Azeez, 16, 324 954
 Bibi Jamila v. Dayanand, 831
 Bibi Kasturi v. Balmukund, 564
 Bibi Khozasma v. Official Liquidator, 875
 Bibi Kulsumanissa v. Ram Prasad, 1102
 Bibi Ladli v. Bibi Raja, 127
 Bibi Mutto v. Ilahi Begam, 595, 1143
 Bibi Naba v. Raj Baijnath, 1130
 Bibi Sharofan v. Mahomed, 429
 Bibi Talsuman v. Harihar Mahto, 1144
 Bibi Uma v. Rasoolan, 269
 Bibi Ved v. Balkrishna, 80
 Bibujan v. Sach, 798 999
 Bickerton v. Walker, 991
 Bidder v. Bridges, 60
 Bidhoo v. Keshub, 265
 Bidhm v. Khandaprasad, 562
 Bidhyadhar v. Manindra Nath, 22, 157, 321
 Bidyaprasad v. Ashrafi, 1059
 Bihari v. Sheobalak, 74
 Bihari Lal v. Chunni Lal, 1275
 Bihari Lal v. Shankar Das, 1068
 Bihari Lal v. Shiva, 301, 313
 Bijai v. Raghnunath, 233, 775
 Bijai v. Rudra, 233, 775
 Bijanbala v. Mathuranath, 720
 Bikram v. Taffazzal, 536
 Bikram Kishore v. Ali, 1130
 Bikram Singh v. Dip Singh, 780
 Bikrama v. Bir, 4

Bhagwan v Dattatraya 435 594
 Bhagwan v Hira 676
 Bhagwan v Hirajee 705 938
 Bhagwan v Khetter Moni 778
 Bhagwan v Param 947
 Bhagwan v Param Sukh Das 437 945,
 946
 Bhagwan v Ratan 727 728
 Bhagwan v Ummat ul Haqnam 413 414
 Bhagwan Das v Allah Bakhsh 837
 Bhagwan Das v Bhavani 1018
 Bhagwan Das v Haji Abu Ahmed 429
 Bhagwan Das v Jugul Kishore 199
 Bhagwan Das v Keshwar Lal 134
 Bhagwan Das v Raj Nath 781
 Bhagwan Das v Shiv Dial 1271
 Bhagwan Das v Sukhdei 738
 Bhagwan Das v Suraj Prasad, 203, 254
 830
 Bhagwan Dut v Ram Dut 1148
 Bhagwan Prasad v Sabeo Shai 255
 Bhagwan Singh v Jamal 863
 Bhagwan Singh v The Allahabad Bank,
 360 367
 Bhagwana v Goru 682
 Bhagwandas v Burjorji 611 614
 Bhagwandas *In re* 267
 Bhagwant v Kaji Mahomed 196
 Bhagwant Ram v Nizam Din, 177
 Bhagwant Singh v Bhro Singh, 388
 441 443
 Bhagwanta v Zamir 1136
 Bhagwantappa v Vishwanath 704
 Bhagwat v Debi 647, 648
 Bhagwat v Dwarji 723
 Bhagwat v Sleo Golam 1078
 Bhagwati v Badri 174
 Bhagwati v Banwari Lal 173 180 182,
 817
 Bhagwati v Jamna Prasad, 417
 Bhagwati v Parmeshar, 761
 Bhagwati Dyal v Dhan Kunwar 304
 Bhagwati Prasad v Bindeeshri 490
 Bhagwat v Ranchhodas 179 184
 1021, 1022
 Bhagdas v Bai Gulab 20 328 1367
 Bhaji v Administrator General of
 Bombay 767, 780
 Bhairam v Ambika Charan, 1148
 Bhairab v Kaldahan 388
 Bhairab v Kalif 1100 1103
 Bhairab v Nandiram 1033
 Bhairab Chandra v Kahi Kumar, 1102

Bhairabendra v Uday Naram, 474, 909
 Bhairabux v Deokaran, 932
 Bhairon v Rama Autar, 1119
 Bhairav Rai v Saran Rai, 743
 Bhairankar v Moraji, 84
 Bhairankar v Mulji, 910
 Bhairankar v Municipality Corporation,
 Bombay, 32
 Bhairav v Jogeshwar, 1273
 Bhajapati v Behary Lal, 1289, 1290
 Bhajan Lal v Cheda Lal, 699, 700
 Bhajani Lal v Secretary of State, 380
 Bhajja v Mahomed, 567, 967, 968
 Bhama v Bhimgavda, 8, 9
 Bhamboo v Ram Naram, 98, 118 123,
 125 126
 Bhanaji v DeBrito, 1139
 Bhanu v Kashinath 471
 Bhanudas v Krishnabai, 954
 Bharam Chand v Kanak 515
 Bharasi v Sarat Chunder, 76
 Bharat v Asghar, 409, 410, 593
 Bharat v Rameshwar, 575
 Bharat v Srinath 901
 Bharat Chandra v Gauranga, 231, 232
 Bharat Chandra v Iasin, 593, 830
 Bharat Chandra v Kiran Chandra, 684,
 919
 Bhargava & Co v Jagannath 374
 Bharmal v Bai Vishnubai, 439 477
 Bhartoo v Raghunandan 816
 Bhatu Ram v Fogul Ram, 674 677
 Bhatwar Mall v Abdul Latiff, 277
 Bhat v Bapuji, 1102
 Bhat v Hari, 491
 Bhat v Nana, 18 278 279
 Bhat Diji v Patlu 482
 Bhausing v Chaganiram 388
 Bhawan Singh v Narotam Singh, 250
 Bhawani v Harbans, 345
 Bhawani Prasad v Kallu, 081
 Bhawanishankar v Narainshankar, 88,
 175
 Bheek v Bhuggoo, 55
 Bheema Charyulu v Kothalota, 30
 Bhicoobai v Hariba, 467
 Bhikabhai v Bai Bhuri, 44
 Bhikaji v Anant, 886
 Bhikaji v Bapu Saqu, 1001
 Bhikaji v Pureshotam, 854 857
 Bhikhalal v Acharat Lal, 1251
 Bhikhar v Surja Moni, 798, 822

- Bhakha v Puri Bihari, 170, 846
 Bhakumler v Beclaram, 33
 Blum v Sarwan, 802 822 831
 Bhim Naik v Chakrabhar, 847
 Bhim Sain v Mohammad Ali, 852 853
 Bhimaji v Hussain Sahib, 870
 Bhimangaula v Hanmant, 208
 Bhimasena v Venugopal, 1095
 Bhimji v B B & C I Rv, 785
 Bhimraj v Laxman, 790
 Bhimraj Bania v Emperor, 1363
 Bhiram Ali v Gaji Kanth, 169
 Bhava v Aithya, 32
 Bhavray v Sitaram, 85 675
 Bhuva v Darchand, 953
 Bhobonath v Radha Prosad, 1081
 Bhogaraju v Adilepalli, 69
 Bhogilal v Chimanlal, 1273
 Bhogilal v Darasha, 880
 Bhogilal v Jethalal, 548
 Bhola Nath v Kanti Chandra, 152 995
 Bhola Nath v Kishori, 222
 Bhola Nath v Secretary of State, 275
 Bhola Pershad v Ram Lal, 981
 Bhola Pam v Arjan Das, 349
 Bholanath v Hari, 846
 Bholanath v Prafulla, 89
 Bholanath Pal *In the goods*, 472
 Bholaram v Administrator General, 19
 Bholu v Ram Lal, 403 593
 Bhomsetti v Umabai, 514 517
 Bhondu Mal v Muhammad, 1029
 Bhoobun Mohun v Nobin Chunder, 739
 Bhoynub v Madhub Chunder, 221, 223, 224
 Bhuban Mohan v Co operative Bank, 979 1096
 Bhulaneshwari v Nilcomul, 143
 Bhubon Mohun v Nanda Lal, 185, 825
 Bhudaneswar v Tilakdhari, 593, 847
 Bhugobati v Mahomed, 143
 Bhugwan Das v Nilkanta, 876
 Bhugwanbutti v Forbes, 74, 77
 Bhuja Roy v Ram Kumar, 841
 Bhujbal v Nanheju, 113, 123
 Bhukbandas v Lallubhai, 79
 Bhulu Beg v Jatindra Nath, 745
 Bhundal v Pandol, 377
 Bhup Indar v Bijai, 151, 152, 678
 Bhup Kunwar, *In the matter of the petition of*, 391
 Bhupal v Kundan Lal, 236
 Bhupati v Sourendra, 1032
 Bhupen Ira v Purna, 157, 321
 Bhupendra v Rajeswar, 473
 Bhupen Ira Narsin v Rajeswar, 676
 Bhupendra Nath v Bahndra, 520
 Bhupendra Nath v Manohar, 1001
 Bhupendra Nath v Sassoon & Co., 581, 735
 Bhuping v Premsing, 1101
 Bhura Mal v Har Krishan Das, 599 601, 602, 603 915
 Bhuran v Norendra, 1073
 Bhuran v Profulla, 383 830
 Bhuta v Lakadu, 328
 Bhutnath v Barindra, 761
 Bhutnath v Tarachand, 859, 868, 996
 Bhuttacharya v Cawnpore Woollen Mills, 117
 Bhuvanagiri v Maradugula, 901
 Phyro v Lekhrance, 550
 Biado Bibi v Ram Chandra, 488
 Bibee Solomon v Abdool Azeez, 16 324, 954
 Bibi Jamila v Dayanand, 831
 Bibi Kasturi v Balmukund, 564
 Bibi Khozima v Official Liquidator, 875
 Bibi Kulsumanissa v Ram Prasad, 1102
 Bibi Ladli v Bibi Raje, 127
 Bibi Mutto v Ilahi Begam, 595 1143
 Bibi Nabi v Raj Baijnath, 1130
 Bibi Sharofan v Mahomed, 429
 Bibi Talsiman v Harihar Mahto, 1144
 Bibi Uma v Rasoolan, 260
 Bibi Ved v Balkrishna, 80
 Bibujan v Sachu, 798 999
 Bickerton v Walker, 991
 Bidder v Bridges, 609
 Bidhoo v Keshub, 265
 Bidhu v Kuladaprasad, 562
 Bidhyadhar v Manindra Nath, 22, 157, 321
 Bidyaprasad v Ashrafi, 1059
 Bihari v Sheobalak, 74
 Bihari Lal v Chunni Lal, 1275
 Bihari Lal v Shankar Das, 1068
 Bihari Lal v Shiva, 301, 313
 Bijai v Raghnath, 233, 775
 Bijai v Rudra, 233 775
 Bijanbali v Mathuranath, 720
 Bikram v Taffazzal, 536
 Bikram Kishore v Ali, 1130
 Bikram Singh v Dip Singh, 760
 Bikrama v Bir, 4

Bika Raj v Durga Dayal, 1017
 Bilas Kunwar v Desraj, 622
 Bilasrai v Cursondas, 592
 Bilasroy, *Re*, 402
 Bill *In re*, 964
 Binatinandhan v United Refineries,
 730
 Binayakdas v Sasi Bhusan, 1261
 Binda Prasad v Raghunir, 1146
 Bindeshari v Banshi Lal, 221
 Bindeshri Prasad v Badal Singh, 183
 417 420 538
 Bindeshwari v Raja Kartyanand, 260
 Bindesri Nath v Ganga Saran Sahu,
 1017
 Bindeswari v Kartyanand, 802
 Bindrabai v G I P Ry Co, 336
 Bindubashini v Secretary of State, 655
 1147
 Binodini v Kalachand, 912
 Binoo Gorain v Jaimurat, 699
 Bipin Behare v Abdul Barik, 594
 Bipin Behari v Rai Promotho Nath, 145
 147
 Bipin Behari Mitra v Jatindranath, 822
 Bipro Doss v Secretary of State for India,
 619
 Biputibhary v Nikilchandra, 86
 Bir Kishor v King Emperor, 1370
 Biraj Mohini v Chintamani, 45
 Birchall v Birch Crisp & Co, 611 622
 Birdichand v Badesahib, 203, 709
 Birendranath v Sultan, 903 1034
 Bireswar v Ambika Charan, 699
 Bireswar v Panesh Kouri, 829
 Bir Singh v Naval, 471 475 980
 Birinchi Singh v Sarado Prasad, 983
 Birj Mohan v Rai Uma Nath, 381, 392,
 385 820 832
 Birmingham and Midland Motor Omni-
 bus Co., Ltd v London & North
 Western Railway Company, 619
 Biru Mahata v Shyama Churn, 170, 184
 Bishambar v Imdad Ali, 223
 Bishambar v Mast Phulgari, 309
 Bishambar v Sri Thakurji, 431 897
 Bishambar v Sukhdevi, 1034, 1039
 Bishambar v Gangs, 930
 Bishamberdas v Bajal, 477
 Bishambar v Muhammad, 307
 Bishambar Nath v Achal Singh, 379
 Bishan Dial v Ghazi ul din, 247, 248,
 249

Bishen v Bishen, 36
 Bishen Chand v Nadir Hoosein, 218,
 219
 Bishen Dayal v Bank of Upper India,
 145
 Bishenmun v Land Mortgage Bank,
 803
 Bisheswar v Drijra, 892
 Bisheswar v Hanuman, 743
 Bisheswar v Hari Singh, 378
 Bisheswar v Raghunir, 563
 Bisheswar Das v Ambika, 1042
 Bisheswar Das v Ram Prasad, 79, 591
 Bisheswar Nath, *In the matter of*, 541
 Bisheswar Prasad v Raghunir, 389
 Bisheswar v Chandreshwar, 416
 Bishoka v Anunto, 1259
 Bishonath v Huro, 75
 Bishun Churn v Jogendra, 1036
 Bishun Priva v Bhaba Sundari, 58
 Bismillah v Shakir Ali, 391
 Bissa Mal v Kesar Singh, 431, 1091
 Bissessur v Gunput, 34
 Bisseswar v Jasoda, 3 188, 194
 Bissucks v Bath Colliery Co., 265
 Biswanath v Baidyanath, 1112
 Biswa Nath v Bani Kanta, 325
 Biswanath v Lingaraj, 783, 787
 Bithal Das v Nand Kishore, 257
 Blackie v Osmaston, 532
 Bodh Singh v Gunesh Chunder, 245, 248
 Bodhnarain v Omrao, 663
 Bodku v Mohan Singh, 77
 Bogra v Emperor, 661
 Bohra Akhey Ram v Basant Lal, 775,
 1043
 Boidya Nath v Mahan Lal, 101 1065
 Borsgomoff v Mangrathanath, 471
 Borsgomoff v Nahapet Jute Co., 915
 Bolckow Vaughan & Co v Fisher, 615
 Boloram Dey v Ram Chundra Dey, 325
 Bolye Chund, *In the matter of*, 213
 Bomanjee Cowasjee, *In re*, 1336
 Bomanji v Nusservanji, 909, 910
 Bombay and Baroda Railway Co v
 Sassoon, 287
 Bombay and Persia Steam Nav Co v
 Zuari, 1154
 Bombay Burmah Trading Corporation v
 Dorabji, 356, 364, 410
 Bombay Burmah Trading Corporation
 v Smith, 1072
 Bombay Co v Krishan Singh, 763

- Bomblay Cotton Manufacturing Co. v
 Motilal Shivalal, 1072
 Bomblay Persia Steam & Co. v. Shop
 hard, 4 476
 Bomblay Sizing Co. v. Kusumgar 1103
 Bomblay Steam Navigation Co., Ltd.
 v. Vavoder, 373
 Bommanapati v. Chintakunta, 721
 Bommaraju v. Rangasamy, 661
 Bon Behari v. Satish Kantha, 826
 Bon Jwi v. S. K. R. S. K. R. Firm 363
 Bonner v. Great Western Ry. Co., 1033
 Bonommal v. Prasunno, 781
 Bonsey v. Wordsworth, 482
 Bool Chand v. Bhoop Singh, 473
 Borradaile v. Hunter, 528
 Boreck v. Mandleston, 121
 Bostock v. Ramsey Urban District Coun-
 cil, 143
 Bowden's Patents Syndicate, Ltd. v.
 Herbert Smith & Co., 551
 Bowles v. Bowles, 13
 Boynton v. Boynton, 872
 Bozon v. Bolland, 579
 Brahmayya v. Appayya, 830 834
 Brahmayya v. Venkatasuryanaravana
 murthy, 300, 302.
 Brahmomoni Dasi v. Andi Si, 563
 Braja v. Jagannath, 1148
 Braja Bhushan v. Sris Chandra, 388 438
 1058 1316
 Brajabala v. Gurdas, 847
 Brajabashi v. Manik, 698 717
 Brajeshware v. Budhanuddin, 990
 Brajgopal Ray v. Amar Shandra, 1350
 Brajlal v. Atkinson, 69 718
 Branson v. Appasami, 943
 Brendon v. Sundarabai, 87
 Brudges & Co. v. Shamas Din & Co., 931,
 936
 Bright v. Marner, 543
 Brij Bhukhan v. Durga Dat, 1357
 Brij Coomaree v. Ramrick Dass, 1080
 1349
 Brij Indar v. Jai Indar, 1068, 1069
 Brij Indar Singh v. Kanshi Ram, 867
 874, 1100
 Brij Kishore v. Beni Pershad, 553
 Brij Kishore v. Madho Singh, 983
 Brij Kishore v. Pratab, 820
 Brij Narain v. Tejbal, 151, 441
 Brij Raj v. Ram Sarup, 70, 947
 Brij Soondur v. Kimoonnissa, 671
 Brijbasi Lal v. Salig Ram 1149
 Brijbhukhan v. T. ta Ram 431, 432
 Brijmohan v. Deshbanjan 1101
 Brijnath v. Jaggernath 581
 Prijatan v. Jaynarain 479
 Brindaban v. Damodar 1141 1147
 Brinsmead v. Harrison 456
 Bristol Corporation v. John Aird & Co.
 1287
 British Association of Glass Bottle
 Manufacturers v. Nettleford 620
 British India Steam Navigation Co. v.
 Secretary of State, 350
 British India Steam Navigation Co. v.
 Sharafally, 385
 British Land Association v. Foster, 543
 British South Africa Co. v. Companhia
 de Mocambique, 107, 1311
 Brito v. Brito, 354
 Briton Medical Life Association v. Bri-
 tannia Fire Association, 523
 Brogden v. Metropolitan Railway Co.
 540
 Brohmo Dutt v. Dharmodas, 942
 Brojendra v. Budge Budge Jute Mill Co.,
 578
 Brojendra v. Mohim Chandra, 344
 Brojendra v. Promatba, 639
 Brojendra v. Prosanna, 1097
 Brojendra v. Rup Lal, 1047
 Brojo Behari Mitter v. Kedar Nath 64,
 66
 Brojo Gopal v. Lakshimoni, 1347
 Brojo Kanta v. Tufaan Das 5
 Brojodurlabh v. Ramanath, 893
 Brojolal v. Budh Nath, 930
 Brojonath v. Kelat Chunder, 980, 983
 Broken Hill Proprietary Co. v. Broken
 Hill Municipal Council, 61
 Brook v. Brook, 526.
 Brooking v. Maudslay, 542 543, 544,
 Broome, *Ex parte*, 1062
 Brown v. Dean, 1144
 Brown v. Hanson 177, 373
 Brown v. Pearson, 634
 Brown Janson & Co. v. Hutchinson &
 Co., 761
 Browne v. Pearce, 224, 226
 Bu Ali Khan v. Sujan, 367
 Buchha v. Hanraat, 336
 Budden v. Wilkinson, 618
 Buddhu Lal v. Mewa Ram, 376, 379
 Buddhu Mair v. Bhagirathi, 180

Budh Singh v Niradbaran 299, 307
 Budha Ram v Kahu Ram, 508
 Budhilal v Morari, 949
 Budhu v Barlat Ram 237
 Budhu Lal v Chattu 391 1350
 Budhu Lal v Mewa Ram 374
 Budhu Lal v Pekkhab 673
 Budhu Ram v Ramzan 348
 Budree Das v Choomi Lal 295 298 301,
 303 304 305 307, 308 310
 Budruddin Sahib v Abdul Fakim 177
 Budrudeen v Gulim 698 699
 Budh Sen v Nanak 1266
 Buhuns v Lalla Buhooree 346
 Buiju Lal v Balak Lal 464
 Bujha Pot v Ram Kumar 183
 Bukkan Singh v The District Board
 172
 Bulagi Shah v Collector of Lahore 1469
 Bulaki v Pesricha 139
 Bulaki Das v Kestri 181 834
 Bulaki Das v Secretary of State 1006
 Bull v Chapman 579
 Bulli Mal v Jhabba 451
 Bulliraju v Satyanarayanamurthy, 1357
 Bullivant v Attorney General 618 619
 Bullock *in re* 649
 Bullock v London General Omnibus Co
 446 454 458
 Bulor Bhattacharya v Baburam 342
 Bunko Behary v Nil Madhab 409 410
 Bunwari Lal v Drup Nath 147 148
 Bura v Teja 677
 Burchard v Macfarlane 612
 Burjor v Ellerman City Lines Ltd
 9,
 Burjore v Bhagana 1129
 Burjorji v Dhunbai 464
 Burjorji v Hormusji 543
 Barla v Kalapath 1288
 Burnell v Burnell 634
 Burney v Lyre 914
 Burrell v Nicholson 618
 Bustros v White 621
 Buta v Municipal Committee of Lahore
 1264 1269 1274 1293
 Butchik v Tavar 171, 698
 Butwor Lohem v Dhumsomnissa 481
 Byash Chandra v Ajolhyanath 547
 Byjnath v Graham 1126
 Bykant Nath v Rajendro Narain, 228
 229 226
 Byomkes v Bin Nath 1357

C

C Jorden v Maung Ba Chit, 1353
 Calcutta Trades Association v Ryland,
 228
 Calgary and Medicine Hat Land Com
 pany Limited, *Re*, 466
 Calico Printing Association v Karim, 927
 Calico Printers' Association v Karim &
 Bros., 541 927
 Campbell & Co v Jeshraj 345, 1356
 C E Dooply v M E Moolla 312, 313
 C R M A Chettyar v K R S V
 Chettyar 268
 C S Arumugan v Sitaram, 771
 C T K M S R M Chettyar Firm v
 O A O K C J Chettyar Firm, 1032
 C T K N S R M Chettyar Firm v
 A O K C J Chettyar Firm 672
 Champion v Palmer 754
 Cardigan v Curzon Home, 940
 Cargil v Bower, 560
 Carlisle *in re*, Clegg v Clegg, 1287
 Carriage Supply Association, *In re*, 579
 Carrison v Rodriguez 15 16
 Carter v Rugby, 450
 Cartwright v Pettus 107
 Carvalho v Nurbibi 139 143 672
 Cashin v Cradock, 543, 544
 Casperz v Kishori Lal 1034
 Cassomally v Carrimbhoy, 38
 Caton v Lewis 622
 Cave v Torre 535
 Cawley v Poole, 561
 Cecil Gray v The Cantonment Com
 mittee of Poona, 19 277, 278 279
 Central India Spg Co v G I P Ry Co
 619
 Chail Behari v Kidar Nath, 849
 Chairman, Girdit Municipality v Srish
 Chandra, 32
 Chairman, Municipality Chapra v
 Basdee, 32
 Chairman of the Purnea Municipality v
 Siva Sankar Ram, 1276 1279
 Chaitanya v Mohamed 365
 Chajju v Umrao, 63 1076
 Chajmal Das v Bri Bhukan Lal, 1017
 Chajmal Lal v Dharam 726
 Chakrapani v Dhanji 819
 Chakrapani v Government of India, 974
 Chaladom v Kakkath, 486
 Chamanlal v Bapubhai, 58 60
 Chamatkar v Mohesh Chunder, 912

- Chamlasappa v Holihassappa, 771
 Chamlota v Maw n, 17
 Champaklal v Nectar Tea Co, 117
 Champaklal v Raschand, 203
 Champion, *In the matter of the ship*
 1356
 Champsey v Junna Flour Mills, 1053
 Champsey Bihara & Co v Jewraj Balloo
 1271
 Chamria v. Chamria 1260
 Chanhasappa v Mainaba, 516
 Chanda Prasad v. Musat Jumna 729
 Chand Mull v Ban Telari, 1006
 Chand Kour v Partab Singh 79 116
 485 590
 Chandala v Kuvet, 975
 Chandar v Durga 411, 695
 Chandar Sahai v Durga Prasad, 605
 Chandaram v Samasgany, 658
 Chandarsang v Khimabhai, 855, 863
 864, 865, 866
 Chander Pershad v Sham Koer, 206
 Chandbhai v Hasanbhai, 339
 Chandi v Balaji, 945
 Chandi Charan v Panchanan, 699
 Chandi Prasad v Jamna, 796
 Chandi Prasad v Mahendra 44, 47, 51
 Chandi Raj v Kirpal Ray, 1316
 Chandidat v Padmanand, 1060 1061
 Chandika v Bitai 420, 421
 Chandikamba v Viswanathamayya, 340
 Chandlen v Parkes, 930
 Chandmull v Dhanraj, 568, 624
 Chandmull v Rancee, 474, 878
 Chando Bibi, *In the matter of the peti-
 tion of*, 1045
 Chandra v Amir, 583 1003
 Chandra Bali v Drigpal, 75
 Chandra Chur v Mst. Shyam, 868
 Chandra Kishore v Prasanna Kumari
 558.
 Chandra Krishna v Manni Lal, 252
 Chandra Kumar v Kusum Kumari,
 153
 Chandra Kumar v Sandhyamani 875
 Chandra Kumar v Sudhansu, 439, 440
 Chandra Kunwar v Narpal Singh,
 641
 Chandra Nath v Kalprasanna, 1090
 Chandrabala v Prabodh, 186
 Chandradhari v Tippian, 437
 Chandramani v Basdeo, 567
 Chandramani v Bipin, 852
 Chandramathi v Narayanaswami 658
 Chandramma v Gunna Seethan, 547
 Chandranath v Nala Ipechan Ira 730
 Chandraprasad v Jinalharthi 300 302
 Chandraseka v Secretary of State, 974
 Chandrawati v Jagannath 411 1057
 Chandreshwar Prasad v Bisheshwar,
 1057 1065
 Chandri v Firm Dina Nath, 1010
 Chandrika Lal v Saminath 886
 Chandrika Prasad v Hiralal, 1038
 Chandu v Komli, 101
 Chandu Lal v Koka Mal, 389
 Chandulal v Awad bin Umar, 284
 Chandulal v Digdu, 494
 Chandulal v Jeshangbhai, 1039
 Chandulal v Lakmi Chand, 1104
 Chandulal v Maneklal, 1067
 Chandulal v Nagindas, 954
 Chandumal v Motilal, 326
 Changi Mal v Chauley, 882
 Chanmalswami v Gangadharappa, 8 9
 Channappa v Yellappa, 211, 212, 420
 Chant v Brown, 619
 Chapman v Leach, 610
 Chappan v Moidin, 346 392, 1083
 Charan Das v Amir Khan, 547, 548,
 1126
 Charandas v Chhaganlal, 1350, 1352
 Charles v Jones, 991
 Charry v Pohoomul, 937
 Charta Ram v Sajan Mal, 1265
 Chartered Bank of India v Imperial
 Bank of India, 554 645
 Charu Bala v Nihar Kumari, 1114
 Charu Chandra v Chandi, 593
 Charu Chandra v Kamakhya Naram,
 58
 Charu v Sambhu, 901
 Chatarbhu v Harnandan, 961
 Chatarbhu v Raghubar, 1261
 Chathakelan v Govinda, 198
 Chathappan v Pydel, 440
 Chathoth v Saidindavide, 718
 Chatrabhu v Ambarsingh, 139
 Chatrapat v Kharag Singh, 351,
 Chatrapat Singh v Dwarkanath, 1131
 Chattar Singh v Amir Singh, 700
 Chattar Singh v Kamal Singh, 190
 Chattar Singh v Lekhras, 374
 Chattarmal v Thakure, 1007
 Chattarpal v Raja Ram, 967
 Chatter Singh v. Tej Singh, 990

- Chatterbhujdas v Natvarlal 1003
 Chatterjee v Tribedi 1317
 Chatterput v Maharaj Bahadur 461
 Chatterton v Watney 704
 Chattu Lal v Marwari 1304
 Chattu Singh v Rai Radha 78
 Chattrar Firm v S Mehr 411
 Chaturbhaj v Harbhamji 1016
 Chaturbhuj v Baodeo Das 1078
 Chaturbhuj v Chundal 757
 Chaturbhuj v Ganesh 1268
 Chaturbhuj v Harandin 436
 Chaturi Singh v Musammatt Ramu 134
 Chaudhary v Mithu Rai 1098 1102
 Chaudhri P. al Singh v Balwant Singh 68 69
 Chaudhri Satgur v Keshori Lal 334 367
 Chaudhry Har Prasad v Brij Kishor Das 430 1127
 Chaudhry Rameshwar v Chaudhry Sureshwar 817
 Chaurasi v Bhagan 722 1000
 Cheda Lal v Badulla 1094
 Chedi Lal v Kuari 1038
 Chedi Lal v Saadat un Nissa 102
 Chekkanna v Dhanakoti 960
 Chelms v Subbammal 8
 Chena v Ghelabhai 728
 Chenbaisapa v Lakshman 388
 Chenbaisappa v Baslingappa 897
 Chencharam v Mahomed 890
 Chenchu v Bipayya 40
 Chengal v Venkatta 905
 Chengalavala v Venkateshwar 63
 Chennai v Veeraswami 9 6
 Chennai I eddi v Peddadi Reddi 1149
 Chennanagoud In re 311
 Chennappa v Iaghunatha 178
 Chennai v Krishnan 461
 Chennurappa v Puttappa 245
 Cherry v Lohoomal 1033
 Chessum & Sons v Gordon 440
 Chetan v Ballhadra 108 870
 Chetan Singh v Sartaj Singh 980
 Chettiar Firm v Teo Fe San 173 170
 Chettivattil v Kunhi Koru 152
 Chettiar Firm v Ho Yin Gie 437 441
 Chettiar Firm v B. K. Bannerji 370 303
 Chettiar J. M. Firm v Commissioner of Income Tax 130
 Chettiar v Ma Shwa Pon 503
 Chettiar v Ma Shwa Pon 790
 Chetty Firm v Maung Tha Din, 695
 Cheyt Ram v Chowdree Mowbut Ram 369
 Chhabil Das v Mass 487
 Chhabile Ram v Durga, 312
 Chhabraji v Ganga, 336
 Chhigan v Lakshman 1023
 Chhaganlal v B B & C. I Ry, 1026
 Chhaganlal v Bai Harkha, 62
 Chhaganlal v Jayaram, 330 997
 Chhaganlal v The Collector of Kara 277 278
 Chharmull v Amanatulla, 676
 Chhaju v Qutub Din, 1097
 Chhaju Ram v Neki 588, 1146 1147 1148
 Chhajua v Khyali Ram, 891
 Chhakkan Lal v Kanhaiya Lal 374, 432
 Chhanga v Jirhi 800
 Chhannubhai v Dabyabhai 891
 Chhaterbhai v Damodar 828
 Chhatrapat Singh v Kharag Singh, 438
 Chhattoo Lal v Naram Das, 2 20 938
 Chhotalal v Ambalal 592
 Chhotalal v Nabibhai 267
 Chhotal Lal v Puran Moll 164
 Chhote Lal v Chandrabhan 74
 Chhote Lal v Raja Mahomed 1016
 Chotte Lal v Raja Mohammad 140
 Chhoter Lal v Lakshmi Chand 134
 Chhoti v Rameshwar 158
 Chhotu v Jawahir 1141
 Chhubu Man v Harcharan Das 345 383 1102
 Chhutkeo v Iala 185
 Chhuttan Lal v Mahomed Ikram 798, 829
 Chidambara v Krishnaswami 577
 Chidambara v Ramasami (5 Mad 161) 500
 Chidambara v Ramasamy (27 Mad 67) 777
 Chidambara v Subarayar 719
 Chidambara v Thiruman 33
 Chidambara v Veerama 343
 Chidambaram v Kadar Mohideen 96
 Chidambaram v Kother, 872 968.
 Chidambaram v Krishna, 171, 183
 Chidambaram v Subramaniam 475
 Chidambaram v Thaipanai 10, 794, 796
 Chidambaramatha v Nallasiva, 462
 Child v Stenning, 458 543
 Chilton v Corporation of London, 633

- Chinnabawami v Palayy 267
 Chinnabhai v Kestaval 1277
 Chinnaya v Iraya 100 102, 103
 Chinnan Lal v Thulbandi 1286
 Chinnna v Sada 1085
 Chinnaji v Dinkur 663
 China v Lakshminarasamma 812
 China Venkatajamma v Punisava 1145
 Chintha v Chaganlal 235
 Chinna v Krishnavasamma 208
 Chinna v. Venkatasami, 897, 1284
 Chinnammal v Tulukannatammal 115
 Chinnammal v Venkayamma 1160
 Chinnasami v Karuppa, 563, 1102
 Chintamallaya v Thadi Gangireddy 1292
 Chintaman v Balchastri, 189
 Chintaman v Chintaman, 172
 Chintaman v Chinnasahu, 244, 419, 420
 Chintaman v Dhondo, 296, 299
 Chintaman v Gangalal, 855 861
 Chintaman v Madhavray, 105
 Chintaman v Ramchandra, 87
 Chintamani v Pyari, 1145
 Chintamanray v Vithabai, 241, 801
 Chintamony v Raghoonath, 318
 Chintamony Dutt v Mohesh Chandra, 198
 Chiragh Din v Bhagwan Das, 409
 Chiranj v Jawahir, 229
 Chiranj v Kundan, 590
 Chiranj Lal v Dharam Singh, 152, 995
 Chiranj Lal v Syed Ilias Ali, 949
 Chiranjilal v Tularam, 1144, 1152, 1155
 Chisholm v Gopal Chunder, 576
 Chitambar v Krishnappa, 829
 Chitpal Singh v Bhairon, 366, 367
 Chockalinga v Duraiswami, 96
 Chockalinga v Palaiappa, 133
 Choganlal v Truman, 704
 Chokkalingam v Lakshmanan, 1143
 Chokalingam v Seethai, 476, 1032, 1114
 Chokalingam v Singaram, 1114
 Chokkalinga v Velayudha, 127, 128
 Chokkalingam v Maung Tha O, 83
 Chokkalingam Chetty v Lakshmanan 1143
 Chokalingan v Seethai, 1032
 Cholappa v Ramchandra, 427
 Chooney Money v Ram Kinkur, 1262
 Chotalal v Manohar, 302
 Chotey Lal v Chandra Bhan, 56
 Chotha Ram v Karmon Bai, 180
 Ch 41 Narsin v Mast Kameshwar, 171
 Ch 41 Hary v Chou Hary, 870 101
 Ch 41 Hary Wahed v Mi Jumace, 168
 Ch 41 v 100 573
 Chowdhry Hestri v Giani Poy 817
 Chowdhry Slamanund v Pajnarain, 857
 Chowdhury v Srimati 722
 Chowdhury v Mahesh 881 892 904
 Chowdhury Jamini Nath v Milnapur Zemindars Co 74 75
 Chowood Ltd v Iyall 610 618 620
 Chowthmull v Calcutta Wheat & Seed Association 1080
 Christian v Prasad 841
 Christie v Christie, 543 544
 Christian v Dlanney, 94
 Chudasama v Ishwarar, 905
 Chudasama v Partaj sang, 461
 Chuha Mal v Hari Ram, 1275 1280
 Chullide v Othenam, 735
 Chunder v Gocel 471
 Chunder v Shiba, 81
 Chundi Charam v Banke Ichary Lal, 815
 Chundi Dutt v Padmanund 753 1066, 1371
 Chundra Nath v Burroda, 1020
 Chundy Churn v Abbas Ali 945
 Chuni Lal v Abdul Ali Khan, 878 879
 Chuni Lal v Amin Chand, 354 361, 867, 875
 Chuni Lal v Anantram 1080
 Chuni Lal v Hira Lal, 16
 Chuni Lal v Jugal Kishore, 257
 Chuni Lal v Osmond 198
 Chuni Lal v Ram Kishen, 273, 461
 Chuni Ram v Bhagwan Dha, 672
 Chunalal v Bai Mani, 11, 201, 205
 Chunalal v Kala, 874
 Chunalal v Karamchand, 215
 Chunalal v Pira Miyaji, 777, 788
 Chunalal v Ram Kishan, 33
 Chunalal v Sonilal, 1166
 Chunalal Panalal v Ram anj
 Chunn v Lala Ram, 1000
 Chunnal v Maliprasad, 418
 Chunn Dat v, Palu 21
 Churamoni v Baidya 10
 Churya v Banerjee 20
 Chutterpat Singl v 10
 Chutterpat Singl v 10

- Davey v Bentinck, 532, 535
 Davis v Freethy, 754
 Davis v Hyman & Co., 762
 Davis v James, 526
 Davis & Son v Morris, 970
 David v Paramasami, 955
 Day v Garret, 528, 529, 542, 544
 Day v U Bah, 425
 Day Mun Baw v A V P L N Chettyar, 373
 Daw Ohn Bwin v U Ba, 89
 Daw Toke v Maung Ba Han, 203
 Dawan Singh v Mahip Singh, 33
 Dawoodjee v Municipality of Rangoon, 1129
 Dawudbhai *In re* 964
 Day v Brownrigg, 125 1059
 Daya Narain v Secretary of State, 114 115
 Daya Ram v Jatti, 668
 Daya Singh v Buta Singh, 862 874
 Dayabhai v Bipalal, 200
 Dayachand v Hemchand, 777
 Dayaram v Gordhandas, 101, 102
 Dayaram v Govardhandas, 778
 D Cruz v D Silva, 295
 D Epineul, *Re*, 680
 Deb v Chowdhary, 161, 164
 Deb Narain v Chairman, Binaipur, 32
 Deb Narain v Raja Jagadish, 486
 Deb Nath v Sashi Bhushan, 71
 De Beers Consolidated Mines, Ltd v Hone, 122 123
 De Bernales v New York Herald, 934
 De Hart v Stevenson, 466
 De Houghton v Money, 495
 De Silva v De Silva, 363
 De Silva v Govind, 19 279
 De Souza v Coles, 112 1343 1345 1350 1351
 De Souza v Preston, 330
 Debendra v Narendra, 1113.
 Debendra v Pramada, 76
 Debendra v Satya Charan, 29
 Debendra Kumar v Rup Lal, 755
 Debendra Narain v Narendra, 479
 Debendra Narain v Pamtaran, 983
 Debendra Nath v Bhudhendra, 319 366 370 372
 Debendra Nath v Nagendra Nath, 61
 Debendra Nath v Prasanna Kumar, 184, 185
 Delendranath v Ladhakissen, 703
 Debi Baksh v. Habib Shah, 436, 587
 Debi Chand v Parbhu Lal, 883
 Debi Charan v Sheikh Mehdi, 1357
 Debi Churn v. Bipra, 891, 1263
 Debi Das v Ejaz Hussain, 377, 378
 Debi Das v Maharaj Rupchand, 777, 782
 Debi Dayal v. Bhan Pertap, 561
 Debi Prasad v Gandham, 328, 1367
 Debi Prasad v Jai Karan, 994
 Debi Prasad v Lewis, 224
 Debi Prasad v Maharaj Rupchand, 787.
 Debi Prasad v Dharamjit, 985
 Debi Rai v Gokal Prasad, 158, 194
 Debi Rai v Prahlad Das, 1129
 Debi Sahai v. Basheshar Lal, 1145
 Debi Singh v Sheo Lal Singh, 207
 Debo Das v Ram Charan, 967, 968
 Dedhray v Mahabir, 211, 424
 Deekappa v Chanbasappa, 230
 Deefholts v Peters, 777
 Deep Narain v Dietert, 13
 Degambar v Kally Nath, 739
 Degumbati v Aushootosh, 910
 Dekari Tea Co., Ltd v The India General Steam Navigation Co., Ltd, 896
 Delhi Cloth and General Mills Co v Income Tax Commissioner, Delhi, 320, 356 1369
 Delhi and London Bank v Bhikari Das, 984
 Delhi and London Bank v. Oldham, 927.
 Delhi and London Bank v. Orchard, 88
 Delhi and London Bank v Partab Bhaskar, 247
 Delhi and London Bank v. Partab Singh, 770
 Delhi and London Bank v. Ram Narain, 1046
 Delhi and London Bank v Uncovenanted Service Bank, 267
 Delhi and London Bank v Wordie, 1338, 1341
 Deno Bundhu v Hari, 694
 Denobundhoo v Kristomonee Dossee, 53
 Deo Narain v Webb, 1073
 Deo Saran v Deoki, 299
 Deodhari v. Lala Seesaran, 79
 Deodip Singh v Gopal Singh, 589
 Deoki v Bansu Singh, 186
 Deoki v Tapeari, 800
 Deokinandan v. Bansu Singh, 795
 Deokinandan v Narsing, 1127

- Deokinandan v Pajah Dhakeswar Prasad 796
 Deokinandan v Sri Pam 681
 Deokishen v Bansi, 713 1102
 Deonandan v Janki, 199 400 808
 Deonandan v Prithi Narayan 778
 Deonandan v Pamidhari 683
 Deoraj v Allairaji 905
 Deoraj v King Behari 505
 Deorajo Kuer v Jadunandan 237
 Deputy Commissioner of Khari v Khan Jan Singh, 72
 Desai Lalulhai v Munias 1004
 Desai Ranel hod las v Pawal 337
 Desaiappa v Dundappa 89
 Desaji v Bhavanidas 148
 Desikachari *Re* 1718
 Desram v Basawa 15
 Deutsche Springstoff Achen Gesellschaft v Briscoe, 1287
 Deutsch Asiatische Bank v Hira Lall 281
 Dev Gopal v Vasudev 208
 Devchand v Hirachand 328 330
 Devandra Nath v Kailash Chandra 795
 Devarakonda v Devarakonda, 78
 Devare v Vaikunt, 222
 Devendra Nath v I am Rachpal 436
 Devereux v Clarke & Co, 539
 Deviguru *Ex parte* 505
 Devi Das v Muhammad 863
 Devi Dial v Moharaj 700
 Devi Dittamal v Official Liquidator, 1072
 Devi Prasad v Lewis 221
 Devi Prasad v Secretary of State 225
 Devichand v Pritam Das 606
 Devidas v Pirjada Begam 569
 Devidatt v Shriram 118 1345
 Deviditta v Nathu 84
 Devkabi v Jafferson 550 942
 Devkaran v Sangidas 628
 Dewa Singh v Fazal Dad 32 33
 Dewan Amir v Nanakchand 428
 Dewan Singh v Golul 63
 Dhadphale v Gurav, 29
 Dharyasingh v Kissandas 903
 Dhakjee v The East India Co, 273
 Dhan Dei v Kashmiri Bank 196
 Dhan Kunwar v Mahtab Singh 170
 Dhan Singh v Basant Singh 388
 Dhanammal v Veeraraghava 815
 Dhanapalu v Anantha 56
 Dhanaraju v Balkissendas 328 1367
 Dhandei v Chotu Lal 374
 Dhan Pam v Chaturbhuj 177, 179
 Dhan Pam v Luchmeswar, 178, 172
 Dhan Singh v Sri Chandra 79
 Dhaninder Das v Bikheli 1146
 Dhanilhai v Mathurlal 1202
 Dhanilhoi v Luso 1078
 Dhanjshaw v Ffode, 116
 Dhannamal v Moti 336, 309 364
 Dhanpat Rai v Kahan Devi 1293
 Dhanram v Ganpat, 696
 Dhanu Das v Shankar 1111
 Dhanu Pam v Murli 916
 Dhanukdhar Singh v Mahabir Pershad Singh 793
 Dhanwanti v Shoo Shankar, 814 818
 Dhapi v Ram Pershad, 370 626
 Dhapo v Bakridi 421
 Dharam Chand v Queen Impress 733
 Dharam Singh v Kishen Singh 1078
 Dharamsey v Balkrishna 931
 Dharanhar v P D Sethi 707
 Dharani v Gaber 74
 Dharanjit v Chandeswar 863 864 860
 Dhirendra v Surendra 1003
 Dharmaji v Gurrav 903
 Dharmaraja v Pethu Paja 884
 Dharmaraja v Srinivasa 420 1011
 Dharmdas v Kachadas 509
 Dharni v Kasturji 700
 Dharnikota v Budharaza 1021
 Dhera Mal v Haidar Shah 1078
 Dhurajlal v Hormusji 582 586
 Dhurendra Nath v Kamini 820
 Dhoni v Taraknath 598
 Dhondi v Collector of Salt Revenue 1095
 Dhondiba v Pamechandra 502
 Dhondiram v Taba Savadan 566
 Dhondo v Balkrishna 991
 Dhondo v Bhikaji 57
 Dhondshet v Ravji 140
 Dhondu v Rampi 840
 Dhondu v Vaman 348
 Dhonkal v Phakkar 188 189 410
 Dhoroney v Radha 1004
 Dhundraj v Ganesh 576
 Dhunjsha v Fforde 117 119
 Dhunput v Paresb 464
 Dhuttaloor v Paidigantham, 1076
 Dick v Dhunji 459 646
 Digambar v Lahyadeo 340
 Digamber v Hari 222, 791

- Davey v. Bentinck, 532, 535
 Davis v. Freethy, 754.
 Davis v. Hyman & Co., 762.
 Davis v. James, 526
 Davis & Son v. Morris, 920
 Davud v. Paramasami, 955
 Davy v. Garret, 528, 529, 542, 544.
 Daw v. U Bah, 425
 Daw Min Baw v. A V P. L. N. Chettyar, 373
 Daw Ohn Baw v. U Ba, 89
 Daw Toke v. Maung Ba Han, 203
 Dawan Singh v. Mahip Singh, 33.
 Dawoodjee v. Municipality of Rangoon, 1139
 Dawuddhau, *In re*, 964.
 Day v. Brownrigg, 125, 1039
 Daya Naram v. Secretary of State, 114, 115
 Daya Ram v. Jattu, 668.
 Daya Singh v. Buta Singh, 862, 871
 Dayabhai v. Bapalal, 200
 Dayachand v. Hemchand, 777
 Dayaram v. Gordhandas, 101, 102
 Daysaram v. Govardhandas, 776
 D Cruz v. D'Silva, 295
 D'Egmont, *Re*, 620
 Deb v. Chondhary, 161, 164
 Deb Naram v. Chairman, Bansaipur, 32
 Deb Naram v. Raja Jagadish, 486.
 Deb Nath v. Sashi Bhusan, 71.
 De Beers Consolidated Mines, Ltd. v. *Hone*, 122, 123.
 De Bernales v. New York Herald, 939.
 De Hart v. Stevenson, 466.
 De Houghton v. Money, 495.
 De Silva v. De Silva, 363.
 De Silva v. Govind, 19, 279.
 De Souza v. Coles, 112, 1343, 1345, 1350, 1351.
 De Souza v. Pestonji, 370.
 Debendra v. Narendra, 1113.
 Debendra v. Pramada, 76.
 Debendra v. Satya Charan, 28
 Debendra Kumar v. Rup Lal, 755
 Debendra Naram v. Narendra, 473.
 Debendra Naram v. Ramtaran, 983
 Debendra Nath v. Bibudhendra, 319, 366, 360, 392.
 Debendra Nath v. Nagendra Nath, 51.
 Debendra Nath v. Prasanna Kumar, 184, 185
 Delendranath v. Radhakissen, 793.
 Debi Baksh v. Habib Shah, 436, 597.
 Debi Chand v. Parbhu Lal, 883.
 Debi Charan v. Sheikh Mehdi, 1357.
 Debi Churn v. Bipra, 891, 1263
 Debi Das v. Ejaz Hussain, 377, 378.
 Debi Das v. Maharaj Rupchand, 777, 782.
 Debi Dayal v. Bhan Pertap, 561.
 Debi Prasad v. Gandham, 328, 1367.
 Debi Prasad v. Jai Karan, 994.
 Debi Prasad v. Lewis, 224.
 Debi Prasad v. Maharaj Rupchand, 787.
 Debi Prasad v. Dharamjit, 985.
 Debi Rai v. Gokal Prasad, 158, 194.
 Debi Rai v. Prabhad Das, 1129.
 Debi Sahai v. Basheshar Lal, 1145.
 Debi Singh v. Sheo Lal Singh, 207.
 Debo Das v. Ram Charan, 967, 968
 Dedhraj v. Mahabir, 211, 424
 Deekappa v. Chanbasappa, 230
 Deesholts v. Peters, 777
 Deep Naram v. Dietert, 13.
 Degambar v. Kally Nath, 739.
 Degumbhari v. Aushootosh, 910.
 Dekari Tea Co., Ltd. v. The India General Steam Navigation Co., Ltd, 896.
 Delhi Cloth and General Mills Co. v. Income Tax Commissioner, Delhi, 320, 356, 1369.
 Delhi and London Bank v. Bhikari Das, 984.
 Delhi and London Bank v. Oldham, 927.
 Delhi and London Bank v. Orchard, 88
 Delhi and London Bank v. Partab Bhaskar, 247.
 Delhi and London Bank v. Partab Singh, 770
 Delhi and London Bank v. Ram Narain, 1046.
 Delhi and London Bank v. Unassuramantari Service Bank, 267.
 Delhi and London Bank v. Wordie, 1338, 1341.
 Deno Bundhu v. Hari, 694
 Denobundboo v. Kristomonee Dossee, 53
 Deo Naram v. Webb, 1073.
 Deo Saran v. Deoki, 299.
 Deodhari v. Lala Seosaran, 79.
 Deodip Singh v. Gopal Singh, 589.
 Deoki v. Bansil Singh, 186.
 Deoki v. Tapeari, 800
 Deokinandan v. Bansi Singh, 795.
 Deokinandan v. Narsing, 1127.

- Deokinandan v Rajah Dhakeswar Prasad 796
 Deokinandan v Sri Ram 683
 Deokishen v Bans 343 1102
 Deonandan v Janki 199 490 868
 Deonandan v Iritlu Narayan 778
 Deonandan v Ramdhari 683
 Deoraj v Ahiraj 915
 Deoraj v King Behari 565
 Deorajo Kuer v Jadunandan 207
 Deputy Commissioner of Khari v Khan Jan Singh 52
 Desai Lallubhai v Munda 1004
 Desai Ranchhoddas v Rawal 337
 Desaiappa v Dundappa 89
 Desai v Bhavandas 148
 Desikachari Re 1308
 Desram v Basawa 15
 Deutsche Springstoff Aktien Gesellschaft v Briscoe 1287
 Deutsch Asiatische Bank v Hira Lal 281
 Der Gopal v Vasudev 208
 Devachand v Hirachand 328 330
 Devandra Nath v Kailash Chandra 790
 Devarakonda v Devarakonda 78
 Devare v Vaikunt 222
 Devendra Nath v Pam Rachpal 436
 Devereux v Clarke & Co 532
 Devgurguru Ex parte 500
 Devi Das v Mulammad 863
 Devi Dial v Moharaj 700
 Devi Dittamal v Official Liquidator 1072
 Devi Prasad v Lewis 221
 Devi Prasad v Secretary of State 220
 Devchand v Pritam Das 606
 Devidas v Purjada Begam 569
 Devidatt v Shriram 118 1345
 Deviditta v Nathu 84
 Desaihar v Jafferson 560 942
 Devkarani v Sangidas 628
 Dewa Singh v Fazal Dad 32 33
 Dewan Amir v Nanakchand 428
 Dewan Singh v Gokul 63
 Dhadphale v Gurav, 29
 Dhairvasingh v Nissandas 903
 Dhakjee v The East India Co, 273
 Dhan Dei v Kashmiri Bank 196
 Dhan Kunwar v Mahtab Singh 170
 Dhan Singh v Basant Singh 388
 Dhanammal v Veeraraghava 815
 Dhanapala v Anantha 56
 Dhanaraju v Balkissen 328 1367
 Dhandev v Chotu Lal 374
 Dhanu Ram v Chaturbhuj 177 179
 Dhanu Ram v Luchmeswar 158 172
 Dhanu Singh v Sri Chandra 39
 Dhaninder Das v Bikkshi 1146
 Dhanjibhai v Mathurblai 1992
 Dhanjibhoy v Lisbo 1078
 Dhanjishaw v Fforde 116
 Dhannamal v Moti 336 309 364
 Dhanpat Rai v Kahan Devi 1293
 Dhanram v Ganpat, 696
 Dhanu Das v Shankar 1111
 Dhanu Ram v Murlu 916
 Dhanukdhari Singh v Mahabir Pershad Singh 793
 Dhanwanti v Sheo Shankar 814 818
 Dhapu v Ram Pershad 375 626
 Dhapo v Bakridi 421
 Dharam Chand v Quten Empress 737
 Dharam Singh v Kishen Singh 1078
 Dharamsey v Balkrishna 931
 Dharandhar v P D Sethi 707
 Dharani v Gaber 74
 Dharanjit v Chandeswar 863 864 865
 Dharendra v Surendra 1033
 Dharmaji v Gurav, 903
 Dharmaraja v Pethu Raja 884
 Dharmaraja v Srinivasa 420 1011
 Dharmdas v Kachadas 509
 Dharni v Kshitipati 750
 Dharnikota v Budharaza 1021
 Dhera Val v Haidar Si al 1078
 Dhurajlal v Kornusji 587 686
 Dhurendra Nath v Kamini 80
 Dhoni v Taraknath 598
 Dhondi v Collector of Salt Revenue 1093
 Dhondiba v Ramchandra 702
 Dhondiram v Talahavalan 606
 Dhondo v Balkrishna 909
 Dhondo v Bhikaji 57
 Dhondshet v Ravji 149
 Dhondv v Ramji 849
 Dhondv v Vaman 448
 Dhonkal v Bhakkar 100 101 102
 Dhoroney v Raha 1004
 Dhundiraj v Gopal 60
 Dhunjsha v Irfan 11 11
 Dhunput v Irfan 44
 Dhuttaloor v Lal, 1
 Dick v Dhurji 4
 Digambar v Irfan 100
 Digambar v Irfan

Dyendra v Manorama 808
 Dildar Ali Khan v Bhawan Sahai Singh 140 147
 Dildar Husain v Sheo Narain 775
 D Isukh Pr v Lachhman Das 171
 Dalsul hru v Dwarkadas 374
 Din Dayal v Patrakhan 342
 Din Nath v Upendra 517
 Dinabandhu v Chintamani 1293
 Dinamani v Elahadut Khan 14 203
 Dinanath v Divachand 138
 Dinanath v Sadashiv 29
 Dinanath v Musst Mayawati 22 157
 Dinendra v Wilson 941
 Dinendronath v Ramkumar 233
 Dinendronath v Tarachand 237
 Dinkar v Anant 80
 Dinkar v Yeshwantrao 288 897 1284
 Dino Bunkhu v Hari 170
 Dino Nath v Jogendra 421
 Dino Nath v Pratap Chandra 28 30
 Dinobundhu v Jogmaya 231 235
 Dinsha Petit v Jamsetji 290 298 304
 Dinshaw v Amrit Lal 1058
 Dinshaw v Galestan 34
 Dip Narain v Lachman 867
 Dip Narain v Hira Singh 984
 Dip Prakash v Bohra Dwarka Prasad 81
 Dipchand v Sheo Prasad 388 817 820, 834
 Dirgopal v Kesho Prasad 127
 Dirgopal v Pahladilal 306
 Dinev v Longbourne 611
 Diwali v Apaji 218
 Diwashtai v Sadashivdas 1140
 Diwan v Jagta 336
 Diwan Chand v Bedha 774
 Diwan Chand v Hari Chandel 52
 Diwan Chand v Jharia Coal Co 1003
 Diwan Chand v Parbati 516
 Diwan Chand v Ralla Ram 483
 Diwan Sub Nath v Alliance Bank of India Ltd 408 1092
 Doaba Bank v Hiralal 470
 Dobson v Bengal Spinning and Weaving Co, 116 117 576
 Dole v The Krishna Mills, Ltd, 1347
 Dollychand v Radhanappa 644
 Dole v Tule 630

Dodhu v Madhavrao 339
 Doherty v Allman, 1045
 Dola v Balya 52 56
 Doleman & Sons v Ossett Corporation, 1286
 Domlal v Bijoy Prasad 769
 Dongatchand v Madho Singh 223
 Dookhee Kahn v Rajessure Rancee 601
 Dooki v Banu, 11
 Doolubdass v Ramlall, 138
 Dooly Chand v Mamuji Musaji, 1259, 1260
 Dooly Chand v Mohan Lal, 902
 Dooply v Moola 312 313
 Doorga v Doorga, 75
 Doorga Churn v Nittokally 964
 Doorga Doss v Rama Nauth 308
 Doorga Mohan Dass v Tahir Ali, 960
 Doorga Persad v Doorga Konwari 49 54
 Doras v Govindaswami 60 88
 Dorab Ali v Abdul Aziz 791 837
 Dorab v Executors of Ahazjah Moheooddeen, 839
 Doraisami v Chidambaran 807
 Doraiswami v Balasundaram, 519
 Doraiswami v Subramania 85
 Dorasami v Annansami, 413
 Dorasami v Thungasami 906 908
 Dorasamy v Muthusamy, 456
 Doraswami v Chidambaram 199 729
 Dost Muhammad v Mani Ram 973
 Dost Muhammad v Said Begam 50
 Doucet v Wise 888
 Douglas v Collector of Benares 582
 Douglas v Forrest 96
 Doulat v Bhukhandas 151
 Doulat v Bissessur, 1104
 Dowdeswell v Dowdeswell 554
 Doya Narain v Secretary of State 116, 273 274 1346
 Doyal v Amrita 840
 Drayfus & Co v Gurditta Mal 411 1284
 Drighbijay v Bhagwan 89 708 723
 Dringbier v Wood 450
 Dryden v Frost 991
 Dubois v Hurish Chunder 649
 Duchess of Kingston's case, 37, 70 71, 72 78
 Duckett v Gover 470

Duckworth v Duckworth, 226
 Duckworth v M Cleland, 538
 Duke v Wieden, 530
 Duke of Buccleuch, The, 472
 Dukhda v Srimonto, 250
 Dukhumalah v Halway, 3
 Dukhno v Munshi Sahu, 430
 Dukshina, *Re*, 660
 Dulal v Ram Narain, 134
 Dulare Lal v Hazari Lal, 74, 134
 Dulari v Vallabdas, 967
 Duli Chand v Kalyan Singh, 279
 Dulichand v Ramkrishen, 788
 Duljeet v Rewal, 170
 Dulla v Shib Lal, 177
 Dullabh v Narain, 79
 Dulta v Khedu S:1
 Dumi Chand v Arja, 870
 Duncan, *Re*, 139
 Duncan v Jeetmull, 468
 Dungar v Jai Ram, 676
 Duni v Pitam Das, 434
 Duni Chand v Muhammad, 32
 Dunichand v Pritamdas, 594
 Dunne v Kumar Chandra, 1037, 1039,
 1067
 Dunnichand v Aziz Khan, 1095
 Duraichami v Adimuthu, 66
 Durbari Mal v Moola Singh, 1006
 Durga v Balwant, 179, 801, 825
 Durga v Bhagwandas, 245
 Durga v Narain, 1086, 1111
 Durga v Sashibala, 45
 Durga v Umatar, 157
 Durga Bai v Ramanatha, 544
 Durga Bibi v Chanchal, 218
 Durga Charan v Ganga Dhar, 1280
 Durga Charan v Kali Prosonna, 178
 227 825
 Durga Charan v Lakhi Narain, 1092
 Durga Charan v Rajbala, 30
 Durga Chowdhrahi v Jawahir Singh 2,
 332, 333
 Durga Churn v Hatcen, 75
 Durga Churn v Monmohuni, 235
 Durga Das v Dewraj, 710 739
 Durga Das v Jai Narain, 105, 121.
 Durga Devi v Hans Raj, 184
 Durga Dihal Das v Anoraji, 433
 1119
 Durgadutt v Bholaram, 767.
 Durga Prasad, *in the matter of*, 878.
 Durga Prasad v Jai Narain, 338, 1110

Durga Prasad v Mallikarjuna, 643,
 1080
 Durga Prasad v Mansa Ram, 782
 Durga Prasad v Narain, 84
 Durga Prasad v Raja Rajgan, 486
 Durga Prasad v Shambhu, 222
 Durga Prasad v Sheo Charan, 392
 Durga Singh v Bishesbar Dyal, 566
 Durga Sundari v Govinda, 832
 Durpati v Bibi Ramrach Pal, 229
 Dutt v Shamal, 1065
 Dutt v Shamsuddin, 389 600
 Dutta v Khedu, 1260, 1261
 Dutto Singh v Dosad Bahadur, 1290
 Dwar Bux v Fatik, 17, 175, 712, 715,
 720
 Dwarkanath v Krishna, 834
 Dwarka v Lachhoman, 598
 Dwarka v Ram Jatan, 529 543, 561
 Dwarka Das v Akhay Singh, 44, 47
 Dwarka Das v Krishan, 14 204
 Dwarka Das v Muhammad, 718
 Dwarka Das v Pyare Lal, 127, 411
 Dwarka Das v Gurish Chunder, 908
 Dwarka Dish *Re application*, 1148
 Dwarka Nath v Imperial Bank of India
 160, 161, 164
 Dwarka Nath v Kisorilal, 478
 Dwarka Prasad v Brij Mohan Lal, 521
 Dwarkadas v Isabhai, 211
 Dwarkadas v Jadab, 270
 Dwarkanath v Debendra, 138 678
 Dwarkanath v Madhavray, 963
 Dwarkanath v Ramchand, 43 62
 Dwarkanath v Tarini Sankar, 227, 243
 Dwijapada Das v Kalipada Das, 87
 Dwijendra v Jogeschandra, 46
 Dwijendra v Jogesh, 1057
 Dwipalchandra v Jeeban, 845
 Dwipalchandra v Jeevan, 181

E

E v E, 440
 Eade v Jacobs, 609
 East India Railway Co v Piyari Lal,
 924
 East Indian Railway v Badri Narain,
 339
 East Indian Railway Co v Bengal Coal
 Co., 1338, 1341.

East Indian Railway Co v Changan
333, 110
East Indian Railway Co v Jit Mal 437
60
East Indian Railway Co v Kanai Lal
383
East Indian Railway Co v Ram Lakhan
477
Eastern Mortgage and Agency Co v
Fakuruddin 1062
Ebb Lmersey v W & A Graham &
Co 26
Ebrahim v Fulkrunnissa 12 643 1300,
1302
Ebrahim v King Emperor 650
Ebrahim v Provas Chunder 1339
Ebrahim Ahmed In re 581
Ebrahim Haji v Noor Mahomed 1042
Ebrahimhai v Fulhai 462
Edin v Little 554
Elevain v Cohen 546
Educational Book Depot v Bahindra
nath 541
Edulji v Manekji 97
Edulji v Vullebhoy 473
Edun v Bechun 73
Edward v Padmini 575 577
Edwards v Bhaga 226
Edwards v Edwards 1063
Egremont Rural Board v Egremont
Iron Ore Co 618
Ejiz Ahmed v Saghir 64
Eknath v Janaji 891
Ekram v Holodhir 49
Ekram Hussain v Mast Umatul Isl
163
Elahi Baksh v Emperor 661
Elkazaray v Pannagaram 82
Ellem v Vasheer 114
Elle Colberg v Sarojini 1036
Ellis v Allen 633
Ellis v DeSilva 144
Ellis v Manchester Carriage Co 349
Ellis v Wadson 703 903 936
Ellis v Hedger 144
Elke hee v Kunjhar 869 879
Elumalai v Kuppamal 349 900
Emmanuel v Symon 96
Em lens v Birns 575
Emper v Ashraf Lal 204
Emper v Bhajan 24
Emper v, Bihari 404

Emperor v Bihari Lal 377
Emperor v C Dunn 663
Emperor v Chimanlal 903
Emperor v Chote Lal 391
Emperor v Chunilal, 4
Emperor v Fateh Chand 1362
Emperor v Ghure 1376
Emperor v Har Prasad 391
Emperor v Jogendra Nath 661
Emperor v Kashi 391
Emperor v Nabab Ali 661
Emperor v Panchu Das 1360
Emperor v Probhat 329
Emperor v Rajani 509
Emperor v Rodrigues 619
Empress v Amar Nath 733
Empress v Burah 1373
Empress v Majadeb 661 662
Empress v Motab Chandra 20
Emritoll v Kidd 113
Enamul v Ekramul 625
Enat Mondul v Baloram 383 387
Enatulla v Jivan 606 657
Endoori v Venkatachinnulu 715 716
Engineering Supplies v Dhandhamia
117
Ephrayim v Turner Morrison & Co 506
541
Equitable Trust Co v Hafiz Mahomed
374 478
Erat Madhavan v Venganath Swarapa
417
Erawa v Sidramappa 730
Errikulappa v The Official Assignee
1033
Eshen Chunder v Shama Churn 550
573 642
Eslami Das v Gopal 920
Esmail v Abdulla 145
Esmail v Haji Jan Mahomed 590
Essoof Hasshim v Fatima 4
Estwick v Conningsby 1062
Eswara Doss v Venkatarayer, 483
Etakkott v Etakkott 898
Fthirajulu v Official Receiver 184
Fusuffzeman v Sanchia Lal 760
Evalappa Mudahar v Balakrishnammal
307
Fyre v Rodgers, 610
Ezra v Gublay 743, 845 846
Ezra v Secretary of State 279

F

Fadhu Jhala v Gour Mohun, 3
 Faiyuz v Prag Narain, 82
 Faiz Ahmad v Badar Din, 1101
 Faizullah Khan v Mauladad Khan, 431
 Fajor Banu v Rohim Bux, 837
 Fakhr ud din v Ghafur ud din 520 599
 Fakhrul v Rani, 730
 Fakir v Amin Chand 251
 Fakir v Emambuksh, 683
 Fakir Khan v Ismail Khan, 986
 Fakirapa v Rudrapa, 448 452 479
 Fakirchand v Naginchand 63
 Fakirgowda v Vishnudas, 600
 Fakirgowda v Dyamava, 64
 Fakir ullah v Thakur Prasad, 403 409
 Fakrunnessa v District Judge, 301
 Fakuruddeen v Official Trustees of
 Bengal 96 674 675
 Fala Krista v Jagannath, 1007
 Falkner v Mirza 390 567
 Fane v Fane, 143
 Fani Bhusan v Surendra Nath, 729 948
 Fanindra Nath v Dwarka Nath, 1260
 Faqir Chand v Kundan Singh 191, 195
 Faqira v Hardewa, 863
 Farhat un Nissa v Sundari, 252
 Farid Ahmed v Dulari 374
 Farzand v Abdullah 711
 Farzand Ali v Bismillah Begam, 1114
 Fateh Chand v Kishan Kunwar, 334
 Fateh Chand v Manab Rai, 541
 Fateh Din v Qutab Din, 775, 785
 Fateh Muhammad v Imam ud Din,
 641
 Fateh Singh v Jagannath Baksh Singh
 49 50 52 53 85 884 888
 Fatima v Imdad Ali 132 388
 Fatima Bibi v Ahmed Baksh 366 367
 Fatimunnissa v Ashgar Husain 699
 Fatimunnissa v Deoki, 1091
 Fatima ul Hasna v Baldeo Sohai, 814
 Fatmabai v Aishabai, 85 659
 Fatmabai v Dossabhoj, 963
 Fatmabai v Pirbhai, 476
 Fatmabai v Sonbai, 324
 Fattch Singh v Lachmi 79
 Fattu v Emperor, 747
 Faujdar Rai v King Emperor, 1317
 Favrell v Eastern Counties P & Co 17
 Fazal v Hashmati 12 348 592 605
 Fazal v Manzur 816 835

Fazal v Umar, 1155
 Fazal Hussain v Jiwan Shah 72
 Fazal Iahi v Prag Narain, 1284, 1288
 Fazal Iman v Rasul, 32
 Fazal Karim v Maula Baksh, 333
 Fazil v Krishna, 266
 Fazla v Zainulab, 300
 Fazlul v Sardar, 246
 Fazloor v Altaf, 22
 Fazul Rahim v Dwarka Nath, 112
 Fazulbhoj v Bombay and Persia S N
 Co, 1284
 Fazul Un Nissa v Mulo 1129
 Fenner and Lord Re, 625
 Fennessy v Clark, 614
 Fennessy v Day and Martin, 143
 Fernandez v Rodrigues, 464 1150
 Fernandez v Wray, 113
 Feroz Din v Nawab Khan 637
 Feroze v Nawab Khan, 368
 Feroze Shah v Commissioner of Income
 Tax [(1931) 12 Lah. 166], 1369
 Feroze Shah v Commissioner of Income
 Tax [(1933) 63 Mad L.J. 335], 1369
 Feuerherd v London General Omnibus
 Co, 619
 Fillingham v Dunn 1139
 Fink v Bahadoor Singh 260
 Fink v Baldeo Das 556 1343
 Fink v Corporation of Calcutta 1007
 Fink v Maharaj Bahadur Singh 1064
 Firm Chaitanya v Jagat Chandra, 1043
 Firm K K S A R v Maung Hya, 1147
 Firm Hanwar Bhan v Firm Ganpat Rai,
 536
 Firm M S M M v Maing Sein 407
 Firm M. S. M. M. v Maung Sein, 1039,
 1041
 Firozi Begam v Abdul Latiff, 1035
 Fischer v Kamala Naicker, 145, 1118
 Fisher v Nagappa, 887
 Fisher v Owen, 543 613, 615
 Fitzhollmes v Bank of Upper India Ltd
 996
 Fletcher v Bealey, 292
 Filtcroft a case, 579
 Foakes v Webb, 619
 Foolibai v Rampartab, 1343
 Forbes v Ammeerunnissa Begum, 347
 Forbes v Secretary of State 31
 Forester v Secretary of State, 147, 153,
 413 1137
 Forman v Basanta, 1152.

- Digendra v Manorama, 808
 Dildar Ali Khan v Bhawani Sabai Singh 145 147
 Dildar Husain v Sheo Narain, 775
 Dilsukh Rai v Lachman Das 171
 Dilsukhrai v Dwarkadas 374
 Din Dyal v Patrakhan 342
 Dina Nath v Upendra, 517
 Dinabandhu v Chintamani 1293
 Dinabandhu v Darya Prasad 1286
 Dinabandhu v Durgaprasad, 1287
 Dinabandhu v Mashuda 950
 Dinamani v Elahadut Khan, 14, 203
 Dinanath v Divachand 138
 Dinanath v Sadashiv, 29
 Dinanath v Musst Mayawati, 22, 157
 Dinendra v Wilson 941
 Dinendronath v Ramkumar, 233
 Dinendronath v Tarakchandra, 237
 Dinkar v Anant, 80
 Dinkarrai v Yeshwantrao 288, 897 1284
 Dino Bundhu v Hari, 170
 Dino Nath v Jogendra, 421
 Dino Nath v Pratap Chandra 28 30
 Dinobundhu v Jogmaya, 231, 235
 Dinsha Petit v Jamsetji 295, 298, 304
 Dinshaw v Amrit Lal, 1058
 Dinshaw v Galstaun, 34
 Dip Narain v Lachman 867
 Dip Narain v Hira Singh, 984
 Dip Prakash v Bohra Dwarka Prasad 81
 Dje Chand v Sheo Prasad, 388, 817 829, 834
 Dirgopal v Kesho Prasad 127
 Dirgopal v Pahladulal 336
 Disney v Longbourne, 611
 Divali v Apur, 218
 Dushbar v Sadashivdas, 1149
 Diwan v Jagta, 336
 Diwan Chand v Bedha, 774
 Diwan Chand v Hari Chand, 52
 Diwan Chand v Jharai Coal Co., 1053
 Diwan Chand v Parlati, 516
 Diwan Chand v Ralla Ram, 483
 Diwan Shib Nath v Alliance Bank of India Ltd., 468, 1092
 Divala Bank v Hiralal, 470
 Divala Bank v Bengal Spinning and Weaving Co., 116 117, 578
 Divala Bank v The Krishna Mills, Ltd., 1347
 Divala Bank v Pradhanappa, 644
 Divala Bank v Tuke, 630
 Dodhu v Madhav Rao, 339
 Doherty v. Allman, 1045
 Dola v Balya, 52, 56
 Doleman & Sons v Ossett Corporation, 1286
 Domilal v Bijoy Prasad, 769
 Dongurichand v Madho Singh, 223
 Dookhee Kahn v Rajessure Rancee, 601
 Dooki v Bansu, 11.
 Doolubdas v Ramlall, 138
 Dooley Chand v Mamuji Musaji, 1259, 1260
 Dooley Chand v Mohan Lal, 902
 Dooply v Moola, 312, 313
 Doorga v Doorga, 75
 Doorga Churn v Nittokally, 964
 Doorga Doss v Rama Nauth, 358
 Doorga Mohan Dass v Tahir Ali, 960
 Doorga Persad v Doorga Konwari, 49, 54
 Doornas v Govindaswami, 60 88
 Dorab Ally v Abdul Aziz, 791, 837
 Dorab v Executors of Khazjah Moheecooddeen, 839
 Doraisami v Chidambaram, 857
 Doraiswami v Balasundaram, 519
 Doraiswami v Subramania, 85
 Dorasami v Annansami, 413
 Dorasami v Thungasami, 956, 958
 Dorasamy v Muthusamy, 456
 Doraswami v Chidambaram 199, 729
 Dost Muhammad v Mani Ram 973
 Dost Muhammad v Said Begam, 55
 Doucett v Wise, 888
 Douglas v Collector of Benares, 582
 Douglas v Forrest, 96
 Doulat v Bhukhanda, 151
 Doulat v Bissessur, 1104
 Dowdeswell v Dowdeswell, 554
 Doya Narain v Secretary of State, 116, 273 274 1346
 Doyal v Amrita, 840
 Doyal Sarkar v Tara Deshi, 416
 Doyamoyi Das v Sarat Chunder, 244
 Dreyfus v Arunachala, 146
 Dreyfus & Co v Gurditta Mal, 411, 1284
 Dringbaj v Bhagwan, 89, 708, 723
 Drinquier v Wood, 450
 Dryden v Frost, 991
 Dubois v Hurish Chunder, 649
 Duches of Kingstone's case, 37, 70, 71, 72, 78
 Duckett v Gover, 470

Duckworth v Duckworth, 226
 Duckworth v M Cleland, 538
 Duke v Widen, 530
 Duke of Buccleuch, The, 472
 Dukhda v Srimonto, 250
 Dukhumalah v Halway, 3.
 Dukhno v Munchi Sahu, 430
 Dukshina, *Re*, 660
 Dulal v Ram Narain, 134
 Dulare Lal v Hazari Lal, 74, 134
 Dulari v Vallabdas, 967
 Duli Chand v Kalyan Singh, 279
 Dulchand v Ramkrishen, 788
 Duljeet v Rewal, 170
 Dulla v Shib Lal, 177
 Dullabh v Narain, 79.
 Dulta v Khedu 831
 Dumi Chand v Arja, 870
 Duncan, *Re*, 139
 Duncan v Jeetmull, 488
 Dungar v Jai Ram, 676
 Duni v Pritam Das, 434
 Duni Chand v Muhammad, 32
 Dunchand v Pritamdas, 594
 Dunne v Kumar Chandra, 1037 1039
 1067
 Dunnichand v Aziz Khan, 1095
 Duraichami v Adimuthu, 66
 Durbari Mal v Moola Singh, 1006
 Durga v Balwant, 179, 801 825
 Durga v Bhagwandas, 245
 Durga v Narain 1086, 1111
 Durga v Sashibala, 45
 Durga v Umatara, 157
 Durga Bai v Ramanatha, 544
 Durga Bibi v Chanchal, 218
 Durga Charan v Ganga Dhar, 1280
 Durga Charan v Kali Prosanna, 178
 227 825
 Durga Charan v Lakhi Narain, 1092
 Durga Charan v Rajbala, 30
 Durga Chowdhuran v Jawahir Singh, 2
 332, 333
 Durga Churn v Hateen, 75
 Durga Churn v Monmohini, 235
 Durga Das v Dewraj, 710 739
 Durga Das v Jai Narain, 105 121
 Durga Devi v Hans Raj 184
 Durga Dihal Das v Anoraji, 433
 1119
 Durgadutt v Bholaram, 767.
 Durga Prasad, *in the matter of*, 878
 Durga Prasad v Jai Narain, 338, 1110

Durga Prasad v. Mallikarjuna 643,
 1080
 Durga Prasad v Mansa Ram, 782
 Durga Prasad v Narain, 84
 Durga Prasad v Raja Rajgan, 486
 Durga Prasad v Shambhu, 222
 Durga Prasad v Sheo Charan, 392
 Durga Singh v Bisheshar Dayal, 566
 Durga Sundari v Govinda, 832
 Durpati v Bibi Ramrach Pal, 229
 Dutt v Shamal, 1065
 Dutt v Shamsuddin 389 600
 Dutta v Khedu, 1260 1261
 Dutto Singh v Dosad Bahadar, 1290
 Dwar But v Fatik, 17, 175 712 715,
 720
 Dwarkanath v Krishna, 834
 Dwarka v Lachhoman 598
 Dwarka v Ram Jatan 529, 543, 561
 Dwarka Das v Akhay Singh 44 47
 Dwarka Das v Krishan, 14 204
 Dwarka Das v Muhammad, 718
 Dwarka Das v Pyare Lal 127 411
 Dwarka Dass v Girish Chunder, 900
 Dwarka Dish *Re application*, 1148
 Dwarka Nath v Imperial Bank of India
 160, 161 164
 Dwarka Nath v Kisorilal 478
 Dwarka Prasad v Brij Mohan Lal, 521
 Dwarkadas v Isabhai, 211
 Dwarkadas v Jadab, 270
 Dwarkanath v Debendra 138, 678
 Dwarkanath v Madhavray, 963
 Dwarkanath v Ramchand 43, 62
 Dwarkanath v Tarini Sanlar, 227, 213
 Dwijpada Das v Kalipada Das, 87
 Dwijendra v Jogeschandra, 46
 Dwijendra v Jogesh, 187
 Dwipalchandra v Jeehan 815
 Dwipalchandra v Jeevan, 181

E

F v E, 440
 Fade v Jacobs, 603
 East India Railway Co v Piyari Lal
 924
 East Indian Railway v. Paderi N, 1
 359
 East Indian Railway Co v Pen
 Co., 1339, 1341

Deyendra v Manorama 808
 Dildar Ali Khan v Bhawan Sahai Singh 145 147
 Dildar Husain v Sheo Naram 775
 Dilsukh Puri v Lachhman Das 171
 Dilsulhrai v Dwarakadas 374
 Din Dayal v Patrakhan 342
 Dina Nath v Upendra 517
 Dinabandhu v Chintamani 1293
 Dinabandhu v Darya Prasad 1286
 Dinabandhu v Durgaprasad 1287
 Dinabandhu v Mashuda 950
 Dinamani v Flahadut Khan 14 203
 Dinanath v Divachand 138
 Dinanath v Sadashiv 29
 Dinanath v Musst Mayawati 22 157
 Dinendra v Wilson 941
 Dinendronath v Ramkumar 233
 Dinendronath v Tarakchandra 237
 Dinkar v Anant 80
 Dinkarrao v Yeshwantrao 288 897 1284
 D no Bundhi v Hari 170
 Dino Nath v Jogendra 421
 Dino Nath v Pratap Chandra 28 50
 D no bundhu v Jogmaya 231 235
 Dinsha Petit v Jamsetji 295 298 304
 Dinshaw v Amrit Lal 1058
 Dinshaw v Galstain 34
 Dip Naram v Lachman 867
 Dip Naram v Hira Singh 984
 Dip Prakash v Bohra Dwarka Prasad 81
 Dipchand v Sh o Prasad 388 817 899 834
 Dirgopal v Kesho Prasad 127
 Dirgopal v Pahladilal 356
 Disney v Longbourne 611
 Diwali v Apaji 218
 Diwalibai v Sadashivdas 1140
 Diwan v Jagta 336
 Diwan Chand v Bedha 774
 Diwan Chand v Hari Chand 52
 Diwan Chand v Jharia Coal Co, 1053
 Diwan Chand v Parbati 516
 Diwan Chand v Ralla Ram 483
 Diwan Shub Nath v Alliance Bank of India Ltd 468 1092
 Diwa Bank v Hiralal 470
 Diwan v Bengal Spinning and Weaving 116 117 576
 Diwan v The Krishna Mills Ltd, 1347
 Diwan v Krishnanappa, 644
 Diwan Tuke 630
 Diwan

Dodhu v Madhavrao 339
 Doherty v Allman, 1045
 Dola v Balya 52, 56
 Doleman & Sons v Ossett Corporation, 1286
 Domilal v Bijoy Prasad, 769
 Dongarchand v Madho Singh, 223
 Dookhee Kahn v Rajessure Rancee, 601
 Dooki v Bansi, 11
 Doolubdas v Ramallal, 138
 Dooly Chand v Mamuji Musaji 1259, 1260
 Dooly Chand v Mohan Lal, 902
 Dooply v Moola 312 313
 Doorga v Doorga 75
 Dooria Churn v Nittokally, 964
 Doorga Doss v Rama Nauth, 358
 Doorga Mohan Das v Tahir Ally 960
 Doorga Persad v Doorga Konwari, 49 64
 Doorvas v Govindaswami 60 88
 Dorab Ally v Abdul Aziz 791 837
 Dorab v Executors of Khazjah Moheecooddeen 839
 Doraisami v Chidambaran, 857
 Doraiswami v Balasundaram, 519
 Doraiswami v Subramani 85
 Dorasami v Annansami 413
 Dorasami v Thunarasami 956 958
 Dorasamy v Muthusamy 456
 Doraswami v Chudambaram 199 729
 Dost Muhammad v Mani Ram 973
 Dost Muhammad v Said Begam 55
 Doucet v Wise 888
 Douglas v Collector of Benares 582
 Douglas v Forrest 96
 Doulat v Bhukhandas 151
 Doulat v Bissesur, 1104
 Dowdeswell v Dowdeswell 554
 Doya Naram v Secretary of State 116, 273 274 1346
 Doyal v Amrita 840
 Doyal Sarkar v Tara Deshi 416
 Doyamoyi Das v Sarat Chunder 244
 Dreyfus v Arunachala 146
 Dreyfus & Co v Gurditta Mal 411 1284
 Drighbijay v Bhagwan 89 708 723
 Drinoqbier v Wood, 450
 Dryden v Frost 991
 Dubois v Hurish Chunder, 649
 Duchess of Kingston's case, 37 70 71, 72 78
 Duckett v Gover 470

Ganesh Row v. Tuljaram Row, 632, 657.
 Ganesh Singh v. Bhikam Singh, 1281.
 Ganesh Singh v. Debi Singh, 1022.
 Ganesh v. Mundi Forest Co., 463, 547.
 Ganesh v. Khairati, 457, 884.
 Ganesh Lal v. Khairati, 497.
 Ganesh Lal v. Imtiyaz, 193.
 Ganga v. Gaura, 974.
 Ganga v. Mussamat Kishni, 893.
 Ganga v. Ram Prasad, 823.
 Ganga Bishan v. Jagmohan, 222.
 Ganga Bishan v. Murree Brewery Co., 143.
 Ganga Charan v. Ramchandra, 306.
 Ganga Charan v. Shoshi Bhushan, 383.
 Ganga Das v. Yakub Ali, 11, 175, 183, 715, 721.
 Ganga Dass v. Ramjoy, 11.
 Ganga Deo v. Joti Lal, 426, 1021.
 Ganga Devi v. Ram Prasad, 170.
 Ganga Din v. Khushali, 231.
 Ganga Mulik v. Bajaj, 900.
 Ganga Prasad v. Chuni Lal, 981.
 Ganga Prasad v. Ganesh Lal, 93, 95, 98.
 Ganga Prasad v. Kura, 1277, 1281.
 Ganga Puri v. Mohan Lal, 306.
 Ganga Ram v. Akbari, 891.
 Ganga Ram v. Dina Nath, 724.
 Ganga Ram v. Mukhtiram, 260.
 Ganga Ram v. Rulia, 335.
 Ganga Sahai v. Baldeo Singh, 1274.
 Ganga Sahai v. Keshri, 248.
 Ganga Sahai v. Lekhraj, 1273.
 Ganga Singh v. Kaushal Ram, 1139.
 Gangabai v. Khashabai, 850.
 Gangadas v. Bai Suraj, 799, 800.
 Gangadhar v. Jagmohan, 89.
 Gangadhar v. Jagmohandas, 778.
 Gangadhar v. Banabasi, 1115.
 Gangadhar v. Khaja, 559.
 Gangadhar v. Krishanji, 569.
 Gangadhar v. Lakshman, 842.
 Gangadhar v. Sekali, 40.
 Gangadhar v. Hubli Municipality, 379.
 Gangasand v. Rameshwar, 898.
 Gangapathy v. Chenga, 698.
 Gangappa v. Gangappa, 353.
 Gangaprasad v. Kuldananda, 64.
 Gangaraju v. Somanna, 204.
 Gangaram v. Dinkar, 32.
 Gangaram v. Gujar Mal, 132.
 Gangaram v. Naranda, 31.

Gangaram v. Vasudeo, 63.
 Gangayya v. Venkataramayya, 231, 385.
 Gann v. Jangi Lal, 232.
 Ganoda v. Nalini, 276.
 Ganoda v. Shib Naram, 599.
 Ganoda Sundari v. Nalini, 1312.
 Ganoji v. Dhondu, 208.
 Ganoo v. Shri Dev Sidheswar, 641.
 Ganpat v. Collector of Kanara, 972, 973.
 Ganpat v. Jivan, 1151.
 Ganpat v. Kashmiri Bank, 223.
 Ganpat v. Rajkumar, 1098.
 Ganpat Lal v. Bind Basini Prasad, 996.
 Ganpat Naram, *In the matter of*, 1071.
 Ganpati v. Jivanbai, 330, 506.
 Ganpatibhatta v. Devappa, 775.
 Ganpatram v. Isaac, 253.
 Ganpatrao v. Anandrao, 170.
 Ganpaya v. Krishnappa, 701.
 Gannu Singh v. Jangi Lal, 1039, 1039.
 Garabini v. Suraja Naram, 1116.
 Garden Reach Spinning and Weaving Co. v. Secretary of State, 1107, 1100.
 Gardner v. Irvin, 621.
 Garibani v. Suraja, 1147.
 Garudhuj Prasad v. Baiju Mal, 417, 1137.
 Gates v. W. A. & R. J. Jacobs, 576.
 Gatti Lal v. Bir Bahdur, 267.
 Gaunt v. Tynney, 292.
 Gauri Dutt v. Dohan, 901.
 Gauri Shankar v. Jawala Prasad, 612.
 Gaura Bibi v. Ghasita, 658, 659.
 Gauran v. Brij Raj, 1091.
 Gauri Shankar v. Kunwar Jang, 633, 711.
 Gauri Shankar v. Keshab Deo, 329.
 Gauri Shankar v. Maida Koer, 1204, 801.
 Gauri Shankar v. Mt. Manki Kunwar, 533.
 Gauri Shankar v. R. J. DeCruz, 225.
 Gauri Singh v. Gajadhar Das, 171.
 Gaurishankar v. Chinumaya, 1304.
 Gauskha v. Abdul, 156.
 Gautret v. Egerton, 525, 531.
 Gayadappa v. Gurimallappa, 340.
 Gavaranga v. Boto Krishna, 566.
 Gavrishnakar v. Atmaram, 551.
 Gaya v. Awadh, 566.
 Gaya v. Name, 1103.
 Gaya Baksh v. Kuar Rajendra, 150.
 Gava Prasad v. Randhir Singh, 178, 825.
 Gavanoda v. Butto Kisto, 973.

Gedge v Royal Exchange Assurance Corporation, 538
Geereeballa v Chunder Kunt, 462, 942
Geffert v Ruckchand 121, 129,
Genaram v Hanmantram, 716,
Genda Mal v Pirbhu Lal, 7, 891
Gendo v Nihal Kunwar, 695
Genga Prasad v Genga Baksh, 1304
Genna v Khuda Baksh, 9
Genu v Sakharam, 179, 801
George v Vastian Soury, 1271, 1272
Gershon & Levy, *In re*, 766
Ghamanda v Amir Begam 857
Ghanasham v Kashuram 693, 696
Ghanasham v Lal Singh, 1146
Ghanaya Lal v Madho Prasad, 712
Ghanaya Lal v Punjab National Bank, 708
Ghansham v Moroba, 143 144
Ghansham Singh v Bhola Singh 39
Ghanshamlal v Bhansali 220 757
Ghanashyam v Gobunda, 1061
Ghanashyam Lal v Ram Narain 152
Ghantayya v Papayya, 1017
Gharry v Gowrya, 696
Ghasi Ram v Mangal Chand, 783, 784
Ghasi Ram v Nauraj 1351
Ghazaffar v Yawar Husain, 306 307
Ghaziti Bibi v Abdul Samad 818
Ghazi ud din v Bishan Dial 246
Ghaznavi v Allahabad Bank 1106
Gholam Mowlah v Ali Hafiz, 307
Ghulam v Dwarka Prasad, 377
Ghulam v Ghulam 392
Ghulam Husain v Dina Nath 980
Ghulam Kadir Khan v Mustakim Khan, 981, 1072
Ghulam Khan v Muhammad Hassan, 1073 1259 1271 1276, 1278 1279, 1281, 1283 1285 1289
Ghulam Muhammad v Nur Khan 489
Ghulappa v Raghavendra 77
Ghulsum v Ahmadas 674 686
Ghuznavi v The Allahabad Bank Ltd., 431 1100 1102 1106
Gilbert v Smith, 633 634
Gilkenson v Subramania, 12
Girdhar v Dayabhai, 42, 54
Girdhar v Ganpat, 330
Girdhar v Kalya, 30
Girdhar v Kassigar, 123.
Girdhar Das v Har Shankar, 255
Girdhar Das v Sidheshwari, 836, 837
Girdharee Lal v. Kantoo Lal 243
Girdharee Singh v Koolahull Singh, 2
Girdhari v Sital, 838
Girdhari Lal v Crawford, 343
Girdhari Lal v Deputy Commissioner, 598
Girdhari Lal v Ram Charan, 190
Girdhari Lal v Ram Lal, 299
Girdhari Lal v Umdajan, 51.
Girdhari Singh v Bhupal Singh, 683
Girdhari Singh v Hardeo Narain, 822, 829
Girdharilal v Sundar Bibi 147
Girdharilal v Zorawar Singh, 1151
Girdharilal v Kapadvanj Municipality, 1146
Giriappa v Ningapa, 340
Giribala v Biswambhar 702
Giriya v Kanai 1259
Girjananda v The Emperor, 639
Girindra v Kedar Nath 258 259
Giris v Sri Krishna 229
Girish Chunder v Kedar Nath 984
Girish Chunder v Sasi Sekhaheswar, 677, 1092
Girish Chundra v Apurba 3
Giriya v Sabapathy, 73 76
Girja Shankar v Gopalji, 668
Girjabai v Raghunath 342
Giyana v Kandusami 301 501
Gladstone Wyllie & Co. v Joosub, 720 735 765
Gledhill v Hunter, 500 501
Gnanada v Nalin, 44
Gnanamanikkam v S. R. Samson, 363
Gnanambal v Parvathi, 88
Gnanasambanda Pandara Sannadhi v Velu Pandaram, 218
Gnanendra v Prasfullananda, 435
Gnanoda v Chandu, 421
Goba v Sakharam, 181
Gobardhan v Bishan, 169 176

- Gobardhan v Bishunath 193
 Gobardhan v Din Dyal, 190, 194
 Gobardhan v Munna Lal 979
 Gobardhan v Saratchandra, 822
 Gobardhan v Shamakantlal, 465
 Gobardhan Das v Jai Devi, 626, 629
 Gobardhandas v Makundi Lal, 757
 Gobind v Afzul, 591
 Gobind v Anar Kunwar, 856
 Gobind v Taruck 43, 62
 Gobind Das v Bishambar Das 26
 Gobind Lal v Baldeo Singh 49
 Gobind Lal v Ramjanam, 983
 Gobind Ram v Ganesh Ram 1066
 Gobind Ram v Kunj Behari Lal, 575
 Gobind Ram v Muhammad, 583 947
 Gobind Singh v Bhargu Nath, 1281
 Gobinda v Kadas, 1022
 Gobinda v Kunja 375
 Gobinda v Radha 1097
 Gobinda Chandra v Dwarka Nath, 900, 901
 Gobinda Lal v Shiba Das, 1355
 Gobinda Mal v Santa, 559
 Gobinda Ram v Bholanath, 1155
 Gobindachandrar Sub Divisional Officer, Chandpur, 278
 Gobindjee v C J Smith 520
 Gobindu v Nitya 567
 Gocool Chunder v Administrator General, 878
 Goculdas v Chaganal, 1330
 Goculdas v Ganeshlal 514
 Goculdas v James Scott 323 903
 Goculdas v Odhavj 78
 Goculdas v Sadasiwer 133 1347
 Goculdas Manufacturing Co v Scott 895
 Goda v Soondarammall 870
 Godard v Gray, 97
 Godavari v Gajapati 348
 Godavaribai v Dechappa, 259
 Godavarthi v Godavarthi, 142
 Godden v Corsten, 532
 Godhni v Shyam, 1013
 Godman v Times Publishing Co, 532
 Godu v Suraj Mal, 629
 Gokal Chand v Sanwal Das, 367, 368 1352 1353
 Gokal hand v Sanwal Das, 1660
 Gokul v Aukhil 177
 Gokul v Mohri Bili 787
 Gokul v Shrimal 83
 Gokul Das v Nathu, 119
 Gokul Mandar v Pudmanund, 3 72 73
 Gokul Pande v Baldeo, 1108
 Gokul Prasad v Ram Devi, 413
 Gokul Prasad v Ram Kumar, 1101, 1102
 Gokulchand v Bhika, 700
 Gokulechandra v Nistarini Ghosh, 1318
 Gokulsing v Karsensing, 177 179, 181
 Golak Nath v Mathura Nath, 218
 Golam v Goljan 708
 Golam Ahad v Judhister, 825 830
 Golam Mahammad v Saroda, 378
 Golaupmonee v Prosomomoye, 964
 Goldring v La Banquet's Hochelaga, 1371
 Golenur Bibi v Abdus Samad, 1262, 1276, 1279, 1280
 Goma v Gokaldas 701
 Gomatham v Komandur, 127, 158 172
 Goodhart v Hyett, 143
 Googlee v Premlal, 349
 Goor Bux v Brij Lal, 563
 Goorodoss Roy v Gohlam Mowlah, 358
 Goorooopersad v Juggutchunder, 357 358 361
 Gopal v Baikuntha, 1006
 Gopal v Benarasi 57
 Gopal v Bigoo 967 968
 Gopal v Hanumant 339
 Gopal v Jhakri, 1109
 Gopal v Joharimal 769 771
 Gopal v Kashi, 237
 Gopal v Narasinga, 491
 Gopal v Ramechandra, 852
 Gopal v Solomon 1146
 Gopal v Vishnu, 568
 Gopal Chandra v Abdur Rahim, 326
 Gopal Chandra v Purna Chandra, 890
 Gopal Chandra v Rajani Kanta, 1130
 Gopal Chunder v Gunamoni Das, 729, 730
 Gopal Dai v Chunni, 260 261
 Gopal Das v Alaf Khan, 377, 1155
 Gopal Das v Baij Nath, 1281
 Gopal Das v Mulchand, 858
 Gopal Dei v Kanoo Dei, 297
 Gopal Dinker v Ganesh Narayan, 1269
 Gopal Lal v Balkissen, 366
 Gopal Lal v Purna Chandra, 502
 Gopal Lal v Taj Muhammad, 500
 Gopal Parvi v Swarna Bewa, 413
 Gopal Ram v Maini Ram, 430

Gurdas Mal v Kashi Ram 863
 Gurdeo Singh v Chandrikah Singh 63
 120
 Gurdial v Diwan Chand 483
 Gurdial v Emperor 733
 Gurdial v Gurbaksh 716
 Gurdit Singh v Mst Ishar Kaur 336
 Gurditta Mal v Muhammad 808
 Gurdyal Singh v Pajah of Faridkot
 13 93 94
 Gurlingappa v Sihu Ramappa 548
 Gurmallaappa v Mallappa 903 900
 Gurnak Poy v Tularam 692
 Gursaran Das v The District Board
 432
 Gursudawa v Gaugaya 836 837
 Guru Charan v Uma Charan 7 38 1284
 1294
 Guru Day v Hemendra 60 676
 Gurudas v Bhowanipore Zemindary
 Co Ltd 729 730
 Gurujambah v Venkatta 38
 Gurumoorthi Naidu v Varadappa
 Chetty 3
 Gurumurthi v Ramaswami 1070
 Gurupada v Upendra 1146
 Gurupathappa v Narasingappa 1264
 Gururao v Ramechandra 1130
 Gurusami v Chhina 1360
 Gurusami v Sivannmalai 701 712
 Gurushantappa v Gurava 426
 Guruswami v Govindappa 1011
 Guruswami v Mahommadhu 432
 Guruswami v Maheshhad Khan 96
 Guruswami Pillai v Veerabhadra 1367
 Gururayya v Anant 474 470 476
 Gururayya v Vudayappa 11 702
 Gwamonee v Redha 715
 Gyanaji v Vingappa 1145
 Gyanamal v Abdul Hussain 610 599
 1093
 Gyan Singh v Ata Husain 996 1117
 Gyanendra v Paresah Nath 517

H

Habib Baksh v Baldeo Prasad 1100
 1104
 Habib Bax v Samuel Fitz & Co, 938
 Habibar v Saidannessa 411
 Habibuddin v Hatim 837
 Habibullahman v Jam Salal 213

Habibullah v Lalita Prasad 1099
 Habib un Nissa v Munawar un Nissa
 353
 Habibur Rahman v Altaf Ali 367
 Had v Kasim 47
 Hadida v Fordham 324
 Hadjee Ismail v Hadjee Mahomed 121,
 1344 1345 1349 1300
 Hadu v Lala 862 860
 Hafez v Damodar 259
 Hafez Uzir v Nasimannesa 179
 Hafiz v Abdullah 237
 Hafiz v Fateh Nasib 964
 Hafizabai v Kazi Abdul Karim 940
 1000
 Hafizaboo v Mahomed 503 504
 Haidar Husain v Abdul Ahad 857
 Haigh v Haigl 698
 Haimraj v Ram Bux 119
 Hajee Haroon v Abdul Karim 619
 Haji Abadi v A Besse 764
 Haji Abdul v Haji Abdul 1001
 Haji Abdul v Munjibhai 318
 Haji Abdul Gani v Raja Ram 160
 Haji Abdul Rahman v Khoja Khak
 Arath 603
 Haji Abdul Rahman v Haji Noor Maho
 med 903 906
 Haji Abdulla v Stamp 90
 Haji Ahmed v Maruti 496
 Haji Ali v Abdul Jalil 281
 Haji Bibi v Sultan Mahomed Khan
 660
 Haji Cassim v Dutt 1064
 Haji Hasam v Mancharam 54
 Haji Jakarya v Casim 693
 Haji Khan v Baldeo Das 509
 Haji Mohammuddin & Co v The East
 ern Trading Co 1040 1301
 Haji Ramjan v Hafiz 600
 Haji Saboo Sidick v Ally Mahomed
 203
 Haji Sajjan v N C Macleod, 878
 Haji Umar v G stadaj, 132 649
 Hajumusa v Purmanand 93 16 701
 Hajon v Bur Singh 282
 Hajrat Akramnissa v Val ulnissa 3
 410 593
 Hakim Basir v Saaved Sal q 390
 Hakim Lal v Mooshahar Salu 464
 Hakim Rai v Firm Ishar 503

Hakim Syed Mahomed v Fatch Bahadur, 881
 Hale v Hale, 1062
 Halumbhai v. Shanker, 1261, 1263
 Hall v Eve, 527
 Hall v Laardet, 609
 Hall v Truman, 620
 Haller v. Worman, 17
 Hameed & Co v Universal Fire Insurance Co, 529
 Hamid v Balteser, 779
 Hamid v Gayadin, 339
 Hamid Ali v Madhu, 1112
 Hamida v Jamila, 1063
 Hamida Bibi v Ali Husen, 834, 860
 Hamidali v Ahmedali, 420, 421
 Hamiduddin, v Kedar Nath, 491, 1007
 Hamidunnissa v Gopal, 101
 Hamilton v The Land Mortgage Bank of India, 550, 551
 Hancock v Leblache, 610
 Hanif v Kulsam, 908
 Hanifa Bai v Haji Siddick, 1122
 Hanmant v Annaji, 1037
 Hanmant v Ganesh, 206
 Hanmant v Raghavendarao, 1005
 Hanmant v Shrinivas, 352, 370
 Hanmant v Subbabbat, 690
 Hanmanta v Shida, 82
 Hanmantappa v Jivubai, 591
 Hanmantram v Shivnarayan, 950
 Hannay & Co v Smurthwaite, 451, 456
 Hanoomanprasad Panday v Mest Koonwaree, 2
 Hansa v Bhawa, 698
 Hansman v Bahuji, 1128
 Hansraj v Anant, 312
 Hansraj v Lalji, 486
 Hansraj v Official Liquidator, 135, 1356
 Hansraj v Shyam Sunder, 1103
 Hansraj v Sundar Lal, 1278
 Hansraj Pal v Nukhrayi Kunwar, 716
 Hanumagamma v Ankamma 799, 809
 Hanuman v Hanuman, 484
 Hanuman v Muhammad, 945
 Hanuman v National Bank of India, 413, 419
 Hanuman Pershad v Jadu Nandan, 248
 Hanuman Prasad v Bhagwati, 363, 1127
 Hanuman Prasad v Mathura Prasad, 743
 Hanumappa v Venkatasubbaraya, 1061
 Hanwant Singh v Pam Gopal, 869

Har Kumar v Jagat Bandhu, 316
 Har Lal v Sri Ram, 431
 Har Naram v Bhagwant Kurr, 1266, 1267, 1275
 Har Naram v Kharag, 475, 870
 Har Naram v Sadhu Govind, 1082
 Har Prasad v Fazal Ahmed, 327
 Har Prasad v Jagan Lal, 229
 Har Prasad v Judges of The Allahabad High Court, 1336, 1337
 Har Prasad v Ram Sarup, 676
 Hara v Murari, 411
 Hara Chandra v Bepin, 45
 Hara Chandra v Bhagabat, 54
 Hara Kumar v Murari, 593
 Hara Lal v Nitambini 1338, 1341, 1342
 Haradhan v Iswar Das, 1098
 Harai Saha v Faizlur Rahman, 262, 263, 816
 Harakbai v Jamnabai, 896
 Harak Chand v Sahanatulla, 676
 Harakh Chand v Mest Sajda, 672
 Harakh Naram v Babban, 327
 Harakh Ram v Lakshmi Ram, 1294
 Harakhpan v Jagdeo, 677
 Haramoni v Hari Churn, 448, 452
 Haran v Ramesh, 469
 Haranchandra v Joy Chand, 781
 Haran Chandra v Ram Kumar, 250
 Haranund v Prosunno Chunder, 2, 498
 Harbans v Tota Sahu, 495, 498
 Harbans Lal v Kundan Lal, 826, 830
 Harbhagwan v Ahmad, 669
 Harbord v Monk, 535, 611
 Harchand v Gulabchand, 95
 Harchandar v Lal Bahadur, 107, 109
 Hardat v Izat un Nissa, 413
 Hardatrai v Victoria Finance and Bullion Association, 531
 Hardeo v Gauri Shankar, 955
 Hardi v Ruder Perlash, 941
 Hardial v Secretary of State, 1358.
 Hardiani Lal v Ram Nath, 829
 Hardit Singh v Gurmukh Singh, 1120
 Hariditta v Nigahia 11 717, 721
 Hardwari Lal v Salamat ul lah Khan, 820
 Harekrishna v Gourhari, 43.
 Harendra v Dwijendra, 1116
 Harendra v Emperor, 390, 391
 Harendra v Haridas, 1129
 Harendra Chandra v Kailaschandra, 1357

Gurdas Mal v Kashi Pam 863
 Gurdeo Singh v Chandrikah Singh 63
 120
 Gurdial v Diwan Chand 483
 Gurdial v Emperor 733
 Gurdial v Gurbaksh 716
 Gurdit Singh v Mst Ishar Kaur 336
 Gurditta Mal v Muhammad 808
 Gurdyal Singh v Pajah of Faridkot
 13 93 94
 Gurlingappa v Sahu Ramappa 548
 Gurmallaappa v Mallappa 953 900
 Gurmuk Roy v Tularam 622
 Gursaran Das v The District Board
 432
 Gurshidawa v Gangaya 836 837
 Guru Charan v Uma Charan 7 38 1284,
 1294
 Guru Das v Hemendra, 675 676
 Gurudas v Bhowanipore Zemindary
 Co Ltd 729 730
 Gurujammah v Venlatta 38
 Gurumoorthis Naidu v Varadappa
 Chetty, 3
 Gurumurthi v Ramaswami 1070
 Gurupada v Upendra 1146
 Gurupathappa v Narasingappa 1264
 Gururao v Ramchandra 1130
 Gurusami v Chinna 1360
 Gurusami v Sivanmalai 701, 712
 Gurnshantappa v Gurava, 426
 Guruswami v Govindappa, 1011
 Guruswami v Mahommadhu 432
 Guruswami v Muhahhad Khan 96
 Guruswami Pillai v Veerabbadra 1367
 Gururayya v Anant, 474 475 476
 Gururayya v Vudayappa, 11 702
 Gyanonee v Radha 715
 Gyanaji v Vingappa 1145
 Gyanammal v Abdul Hussain 519 590,
 1093
 Gyan Singh v Ata Husain 996 1117
 Gyanendra v Fareesh Nath, 547

H

Habib Baksh v Baldeo Prasad 1100
 1104
 Habib Bax v Samuel Fitz & Co, 938
 Habibar v Saidannessa, 411
 Habib ulla v Hatim, 837
 Habib ulla man v I am Sahal, 213

Habib ullah v Lalta Prasad 1099
 Habib un Nissa v Munwar un Nissa
 353
 Habibur Rahman v Altaf Ali, 367
 Hadi v Kasim, 47
 Hadida v Fordham 324
 Hadjee Ismail v Hadjee Mahomed 121,
 1344 1345 1349 13 0
 Hadu v Lala, 862 865
 Hafez v Damodar, 250
 Hafez Uzir v Nasimannessa, 179
 Hafiz v Abdullah, 237
 Hafiz v Fateh Nasib, 964
 Hafizabai v Hazi Abdul Karim, 910
 1060
 Hafizaboo v Mahomed, 503 504
 Haidar Husain v Abdul Ahad 857
 Haigh v Haigh 628
 Haimraj v Ram Bux 119
 Hajee Haroon v Abdul Karim, 619
 Haji Abadi v A Besse 764
 Haji Abdul v Haji Abdul, 1051
 Haji Abdul v Munjibhai, 318
 Haji Abdul Gani v Raja Ram, 180
 Haji Abdul Rahuman v Khoja Khak
 Arath, 693
 Haji Abdul Rahman v Haji Noor Maho
 med 905 906
 Haji Abdulla v Stamp 90
 Haji Ahmed v Maruti 426
 Haji Ali v Abdul Jahl, 281
 Haji Bibi v Sultan Mahomed Khan
 660
 Haji Cassim v Dutt 1064
 Haji Hasam v Mancharam 54
 Haji Jakaria v Casim 623
 Haji Khan v Baldeo Das 559
 Haji Mohammuddin & Co v The East
 ern Japan Trading Co, 1040 1304
 Haji Ramjan v Hafiz, 600
 Haji Saboo Sidick v Ally Mahomed
 203
 Haji Sajan v N C Macleod 878
 Haji Umar v Gustadi 132 642
 Hajumusa v Purmanand, 93, 165 704
 Hajon v Dur Singh 282
 Hajrat Akramnussa v Valunissa, 3
 410, 593
 Hakim Bishir v Sayed Saluq 320
 Hakim Lal v Mooshahar Sahu, 464
 Hakim Rai v Firm Ishar, 553

Hakim Syed Mahomed v Fateh Bahadur, 881
 Hale v Hale, 1062
 Halimbhai v. Shanker, 1261, 1263
 Hall v Eve, 527
 Hall v Lardet, 609
 Hall v. Truman, 620
 Haller v Worman, 17
 Hameed & Co v Universal Fire Insurance Co., 529
 Hamid v Buktear, 779
 Hamid v Gayadin, 339
 Hamid Ali v Madhu, 1112
 Hamida v Jamila, 1063
 Hamida Bibi v Ali Husen, 854, 860
 Hamidalli v Ahmedalli, 420, 421
 Hamiduddin, v Kedar Nath, 491, 1007
 Hamidunnissa v Gopal, 101
 Hamilton v The Land Mortgage Bank of India, 550, 551
 Hancocks v Leblache, 610
 Hanif v Kulsam, 908
 Hanifa Bai v Haji Siddick, 1122
 Hanmant v Annaji, 1087
 Hanmant v. Ganesh, 206
 Hanmant v Raghavendarao, 1005
 Hanmant v Shrinivas, 332, 370
 Hanmant v Subbabbhat, 690
 Hanmanta v Shidu, 82
 Hanmantappa v Jivubai, 591
 Hanmantram v Shivnarayan, 906
 Hannay & Co v Smurthwaite, 451, 456
 Hanoomanprasad Panday v Msst Koonwaree, 2
 Hansa v Bhawa, 698
 Hansman v Bahuji, 1128
 Hansraj v Anant, 312
 Hansraj v Lalji, 486
 Hansraj v Official Liquidator, 130, 1306
 Hansraj v Suresh Sunder, 1169
 Hansraj v Sundar Lal, 1278
 Hansraj Pal v Nukhrayi Kunwar, 716
 Hanumagamma v Ankamma, 799, 809
 Hanuman v Hanuman, 484
 Hanuman v Muhammad, 945
 Hanuman v National Bank of India, 413, 419
 Hanuman Pershad v Jadu Nandan, 248
 Hanuman Prasad v Bhagwati, 363, 1127
 Hanuman Prasad v Mathura Prasad, 743
 Hanumayya v Venkatasubbayya 1061
 Hanwant Singh v Ram Gopal, 669

Har Kumar v Jagat Bandhu, 316
 Har Lal v Sri Ram 431
 Har Naram v Bhagwant Kuar, 1266, 1267, 1275
 Har Naram v Kharag, 475, 870
 Har Naram v Sadhu Govind, 1082
 Har Prasad v Fazal Ahmed, 327
 Har Prasad v Jagan Lal, 229
 Har Prasad v Judges of The Allahabad High Court, 1336, 1337
 Har Prasad v Ram Sarup, 575
 Hara v Murari, 411
 Hara Chandra v Bepin, 45
 Hara Chandra v Bhagabat, 54
 Hara Kumar v Murari, 593
 Hara Lall v Nitamburi, 1338 1341, 1342
 Haradhan v Iswar Das, 1098
 Harsi Saha v Faizlur Rahman, 262, 263, 816
 Harakbai v Jamnabai, 896
 Harak Chand v Sahanatulla, 676
 Harakh Chand v Msst Sajda, 672
 Harakh Naram v Babban, 327
 Harakh Ram v Lakshmi Ram, 1294
 Harakhpan v Jagdeo, 677
 Haramoni v Hart Chorn, 448, 452
 Haran v Ramesh 469,
 Haranchandra v Joy Chand, 781
 Haran Chandra v Ram Kumar, 250
 Haranund v Prosunno Chunder, 2, 498
 Harbans v Tota Sahu, 495, 498
 Harbans Lal v Kundan Lal, 826, 830
 Harbhagwan v Ahmad, 669
 Harbord v Monk, 535, 611
 Harchand v Gulabchand, 95
 Harchandar v Lal Bahadur 107, 109
 Hardat v Izat un Nissa, 413
 Hardatrai v Victoria Finance and Bul
low Association, 584
 Hardeo v Gauri Shankar, 955
 Harda v Ruder Perakash 941
 Hardal v Secretary of State, 1358
 Hardam Lal v Ram Nath, 829
 Hardit Singh v Gurmukh Singh, 1120
 Hariditta v Nigahia 11, 717, 721
 Hardwar Lal v Salamat ul lah Khan, 820
 Harekrishna v Gourhari, 43
 Harendra v Dwijendra, 1116
 Harendra v Emperor, 390, 391.
 Harendra v Haridas, 1129
 Harendra Chandra v Kallatappa, 1357

- Harendra Lal v. Haridas, 367, 1343
 Harendra Lal v. Sham Lal, 88
 Harendra Lal v. Sarvamangala, 1346
 Harendra Nath v. Purna Chandra, 446,
 449, 452, 453, 458
 Hargobind v. Hakim, 723, 736
 Hargobind v. Hakim Singh, 201
 Hargopal v. Harish Chander, 658
 Hargovan v. Mulji, 54, 71
 Hargovind v. Bhudar, 180
 Hargovindas v. Jadavaboo, 1095
 Hari v. Bhubaneswari, 946
 Hari v. Birendra, 264, 270
 Hari v. Ganpatrav, 55
 Hari v. Narsingrao, 163, 704
 Hari v. Musammat Tapa, 1023
 Hari v. Ramechandra, 245, 250
 Hari v. Sakharam, 171
 Hari v. Shapurji, 172
 Hari v. Sheikh, 836
 Hari v. Shrinivas, 775, 1013
 Hari v. Yamunabai, 88, 732
 Hari Annaji v. Vasudev, 63
 Hari Bhagat v. Anundaram, 258
 Hari Bhajan v. Ganpothi Das, 545
 Hari Charan v. Baram Khan, 1152
 Hari Charan v. Kalpada, 856, 864
 Hari Charan v. Manmatha, 409, 594, 604,
 848
 Hari Charan v. Mon Mohan, 179
 Hari Das v. National Insurance, Co. 161
 Hari Das v. Gadadar, 1037
 Hari Gana v. Hari Gana, 1149, 1150
 Hari Karmakar v. Robin, 287
 Hari Kishen v. Raghubar, 71
 Hari Kunwar v. Lakshmi Ram, 1271
 Hari Lal Mullick, *In the matter of*, 140
 Hari Mohan v. Baburahi, 745
 Hari Mohun v. Parmeshwar, 421
 Hari Mohun v. Surendra Narain, 360
 Hari Narayan v. Ganpatrao, 103
 Hari Nath v. Mothur Mohun, 68
 Hari Parshad v. Soogni, 897
 Hari Ram v. Buta, 1093
 Hari Ram v. Fori Ram, 635, 636
 Hari Ram v. Indraj, 82
 Hari Sadhan v. Shih Gopal, 798, 822
 Hari Sanikar v. M. Tapa, 1022
 Hari Shankar v. Ram Pyari, 1273
 Hari Singh v. Muhammad, 85, 97, 98, 1157
 Hari Singh v. Bulagi, 434, 593
 Hari Singh v. Firm Karam Chand,
 637, 929, 934
 Haribandhu v. Harimohan, 939
 Haribans v. National Sugar Mills, 1055
 Haribans Rai v. Sri Niwas, 1021
 Haribhusan v. Manmatha Nath, 852
 Haricharan v. Kedernath, 767
 Haridas v. Baroda Kishore, 220, 221, 225
 Haridas v. Charn Chandra, 223
 Haridas v. Iswar, 324
 Haridas v. Charan Chandra, 1040
 Haridas v. Iswar, 1121
 Haridas v. Ramdas, 851
 Haridas v. Ratansey, 386
 Harihar v. Bijoy Krishna, 600
 Harihar v. Chandra Kumar, 80
 Harihar v. Jaharuddin, 1067
 Harihar v. Maheshwari, 439, 668
 Harihar Kanta v. Rama Panda, 178, 816,
 817
 Harihar Pershad v. Mathura Lal, 952
 Harilal v. Abhesang, 778
 Harinath v. Haradas, 757
 Harinath v. Krishna, 143
 Harinath v. Ram Kumar, 909
 Hariram v. Lalbai, 79, 911
 Harish v. Nripandra, 249
 Harish Chandra v. Chandpore Co., 198,
 877
 Harish Chandra v. Pran Nath, 462
 Harishankar v. Naran, 776
 Harjas Rai v. Narain Singh, 659
 Harjas Rai v. Ramesbar, 999
 Harji v. Devi Ditta, 660
 Harjivan v. Shivram, 744
 Harjivandas v. Bhagwandas, 930, 932
 Harkisandas v. Chhaganlal, 463
 Harkisandas v. Bai Ichha, 242
 Harlock v. Ashberry, 1084
 Harmange Singh v. Ram Gopal, 439
 Harnam v. Ganpat, 835
 Harnam v. Muhammad, 170
 Harnam Singh v. Atri, 437
 Harnam Singh v. Mulki Ram, 746
 Harnam Singh v. Selig Ram, 219
 Harmand Lal v. Chaturbhuj, 434, 961
 Harmand Rai v. Rup Chand, 705
 Harmandroy v. Gootiram, 680
 Harmathrai v. Churamoni, 1343
 Haroon v. Haji, 30
 Harris v. Beauchamp Bros., 929, 1060
 Harris v. Gamble, 572, 633
 Harris v. Petherick, 143

- Harris v. Taylor, 95.
 Harris v. Warre, 539.
 Harrison v. Rumsey, 84.
 Harsaran v. Muhammad, 374, 377.
 Harshankar v. Baijnath, 221.
 Hart v. Lakhmi, 1293.
 Hart v. Tara Prasanna Mukherji, 266, 268, 269.
 Hasan v. Sheo Prasad, 440, 442.
 Hasan Ali v. Gauzi Ali, 171.
 Hasan Ali v. Lachman, 390.
 Hasan Shah v. Mohammad, 785.
 Hashim v. Martin, 151.
 Hashim Ali v. Abdul Rahman, 337.
 Hasoon Arra v. Jawadoonnissa, 257.
 Hassanbhai v. Umaji, 642, 983.
 Hassonbhoj v. Cowasji, 629.
 Haswa v. Mahbub, 1259.
 Hatimbhai v. Framroz, 1340, 1342.
 Hatton v. Harris, 439, 441.
 Haur Kaur v. Munni Lal, 967.
 Haveli Shah v. Panda Khan, 111.
 Hawley v. Reade, 611.
 Hawthorn; *In re*, 107.
 Hay v. Ram Chandar, 226.
 Hays v. Padmanand, 85.
 Hazari Lal v. Ambica, 410.
 Hazari Mal v. Bhawan Ram, 476.
 Hazarimal v. Namdev, 802.
 Hazariram v. Kedar Nath, 721.
 Hazrat Akramnissa v. Valuinissa, 691.
 Heap v. Marrs, 542, 543.
 Heera v. Pestonji, 696.
 Heeralal v. Ram Surun, 622.
 Heinger v. Droz, 471.
 Hem Kunwar v. Amba Prasad, 349.
 Hemanginee v. Kumode Chander, 201, 1063.
 Hemangini v. Bhagwati, 953, 958.
 Hemanta v. Banku Behari, 916.
 Hemanta v. Baranagore, 1045, 1047.
 Hemanta v. Brojendro, 337.
 Hemanta Kumari Debi v. Midnapur Zamindari Company, 323, 900, 903.
 Hemayetuddin V. Emperor, 1369.
 Hemchand v. Azam Sakarlal, 4, 909.
 Hemchandra v. Annapurna, 880.
 Hem Chandra v. Narendra, 740.
 Hemendra v. Dharani, 997.
 Hemendra v. Fakir, 859, 1000.
 Hemendra Nath v. Prokash Chandra, 201.
 Hemendro v. Rajendrolall, 459.
 Hennessey v. Wright, 609, 614.
 Heramba Chandra v. Jyotish Chandra, 12.
 Hervey v. Smith, 1053.
 Het Narain v. Ramdeni, 140.
 Het Ram v. Raja Dutt, 1015.
 Het Ram v. Shadi Lal, 983, 984.
 Het Singh v. Tika Ram, 430.
 Hewetson v. Deas, 1084.
 Hickman v. Berens, 16.
 Hiern v. Mill, 560.
 Higgins v. Weekes, 535.
 Hukmatulla v. Imam Ali, 486.
 Hildreth v. Sayaji, 656.
 Hill v. Hart Davis, 621.
 Hill v. Peel, 148.
 Him Kunwar v. Amba Prasad, 863.
 Himanchal v. Jatwar, 897.
 Himatram v. Khushal, 777.
 Himmat Lall v. Shivajirav, 93.
 Hinchliffe, *Re*, 625.
 Hinde v. Poonnath, 94, 97.
 Hindley v. Joynarain, 225, 388.
 Hindustan Assurance, Ltd., v. Rai Mulraj, 129, 130, 131, 438.
 Hindustan Bank v. Mehraj, 411.
 Hinga v. Munna, 588.
 Hingan Lal v. Mansa Ram, 17.
 Hingo v. Jhuri, 79.
 Hingu v. Heramba, 559.
 Hingu Lal v. Baldeo Ram, 473, 501.
 Hingu Singh v. Jhuri Singh, 583.
 Hipgrave v. Case, 549.
 Hira v. Bachu, 29.
 Hira v. Gaya, 141, 1263, 1270.
 Hira Lal v. Akshoy, 821.
 Hira Lal v. Chandra, 830.
 Hira Lal v. Hoti Lal, 493.
 Hira Lal v. Karim-un-Nissa, 836.
 Hira Lal v. Parmeshar, 172, 20.
 Hira Lal v. Udoy Chandra, 892.
 Hirabhai v. Maneklal, 413.
 Hirachand v. Aba, 196.
 Hirachand v. G. I. P. Rly., 20, 275, 276.
 Hirachand v. Kasturehand, 200.
 Hirachand v. Venidas, 350.
 Hiralal v. Bai Asu, 392.
 Hiralal v. Bharon, 461, 464.
 Hiralal v. Jagatpatti, 772.
 Hiralal v. Kushan Lal, 980, 983.
 Hiralal v. Manilal, 426.
 Hiralal v. Narsial, 140.
 Hiralal v. Ramchandra, 180, 378, 693, 845.

Harendra Lal v Haridas, 367 1343
 Harendra Lal v Sham Lal 88
 Harendra Lal v Sarvamangala 1346
 Harendra Nath v Purna Chandra 446
 449 452 453 458.
 Hargobind v Halim 728 736
 Hargobind v Hakim Singh 201
 Hargopal v Harish Chander 603
 Hargovan v Mulj 54 71
 Hargovind v Bhudar 180
 Hargovindas v Jadavaboo 1090
 Hari v Bhubaneswari 946
 Hari v Birendra 264 270
 Hari v Ganpatrav 50
 Hari v Narasingrao 163 704
 Hari v Musammatt Tapa 1093
 Hari v Panchandra 245 200
 Hari v Sakharam 171
 Hari v Shapurji, 172
 Hari v Sheikh 836
 Hari v Shrinivas 7 5 1043
 Hari v Yamunabai 88 732
 Hari Annaji v Vasudev 63
 Hari Bhagat v Anundaram 258
 Hari Bhajan v Ganpathi Das 540
 Hari Charan v Baram Khan 1150
 Hari Charan v Kalpada 806 864
 Hari Charan v Manmatha 409 594 604
 848
 Hari Charan v Mon Mohan 179
 Hari Das v National Insurance Co 161
 Hari Das v Gadadar 1087
 Hari Gann v Hari Gann 1149 1100
 Hari Harmahar v Robin 287
 Hari Kishen v Raghubar 71
 Hari Kunwar v Lakshmi Ram 1071
 Hari Lal Mullick, *In the matter of* 140
 Hari Mohan v Babural 745
 Hari Mohun v Parneshwar 491
 Hari Mohun v Surendra Narain 300
 Hari Narayan v Ganpatrao 109
 Hari Nath v Mothur Mohun 68
 Hari Parshad v Soogni 897
 Hari Pam v Buta 1098
 Hari Ram v Fori Pam 635 636
 Hari Ram v Indraj 80
 Hari Sadhan v Shib Gopal 708 822
 Hari Sankar v M. Tappa 1020
 Hari Shalakar v Lami Pyar 1279
 Hari Singh v Mitta, nad 90 97 98 1150
 Hari Singh v Bulag 438 497

Hari Singh v Firm Karam Chand,
 637 929 931
 Haribandhu v Harimohan 939
 Haribans v National Sugar Mills 1005
 Haribans Pai v Sri Niwas 1021
 Haribhusan v Manmatha Nath 852
 Haricharan v Kedernath 767
 Haridas v Baroda Kishore 220 221 225
 Haridas v Charn Chandra 223
 Haridas v Iswar 394
 Haridas v Charan Chandra 1040
 Haridas v Iswar 1121
 Haridas v Ramdas 801
 Haridas v Ratanscy 386
 Harihar v Bijoy Krishna 600
 Harihar v Chandra Kumar 80
 Harihar v Jaharuddin 1067
 Harihar v Maheshwari 439 668
 Harihar Kanta v Rama Pandu 178 816
 817
 Harihar Pershad v Mathura Lal 95
 Harilal v Abhesang 778
 Harinath v Haradas 757
 Harinath v Krishna 143
 Harinath v Ram Kumar 909
 Hariram v Lalbai 79 911
 Harish v Nripandra 249
 Harish Chandra v Chandpore Co 198
 877
 Harish Chandra v Pran Nath 462
 Harishankar v Naran 776
 Harjas Rai v Narain Singh 659
 Harjas Rai v Rameshar 999
 Harji v Devi Ditta 660
 Harjivan v Shivram 744
 Harjivandas v Bhagwandas 930 932
 Harkisandas v Chhaganlal 463
 Harkisandas v Bai Ichha 242
 Harlock v Ashberry 1084
 Harmange Singh v Ram Gopal 439
 Harnam v Ganpat 835
 Harnam v Muhammad 170
 Harnam Singh v Atri 437
 Harnam Singh v M. Lkhi Ram 746
 Harnam Singh v Sahaj Ram 219
 Harmand Lal v Chaturbhuj 434 961
 Harmand Rai v Rup Chand 705
 Harmandroy v Gootiram 580
 Harnathrai v Churamoni 1343
 Haroon v Haji 30
 Harris v Beauchamp Bros 999 1060
 Harris v Gamble 572 633
 Harris v Petterich 143

Huxley v West London Extension Ry Co 143 145
 Hram v Bengal Stone Co 143
 Hyat Mahomed v Shaikh Mannu 130
 Hvattunnessa v Ashua Khatun 190 191

I

I E Abowath v A E Abowath 1356
 Ibn Husain v Ramdal 463
 Ibrahim v Jusuf 593
 Ibrahim v Konammal 46
 Ibrahim v Mohsin 1275 1281
 Ibrahim v Muni Mir 683
 Ibrahim v Nihalchand 1021
 Ibrahim v Ramjadu 847
 Ibrahim v Sangaram 317
 Ibrahimbhai v Fletcher 553
 Ibrahimbhai v Yousuf 1353
 Ibrahimji v Bejanji 320
 Ide *In re* 933
 Ideal Films Limited v Richards 464
 Idumba Parayan v Pethi Reddy 1011
 Ijjatulla Bhuyan v Chandra Mohan 300 677
 Ilramul Huq v Wilkie 353
 Ilahi v Javinda 1116
 Ilahi Khan v Sber Ali 1071
 Imam D n v Puranchand 947
 Imam Khan v Ayub Khan 51 54
 Imambandi v Mutsaddi 635 630
 Imam ud din v Liladhar 476
 Imam ud d n v Sadarath Rai 856 863
 Imamuddin v Bindubasann 699
 Imma udd n v Sri Ram 637
 Imam un n ssa v Laakat Hussain 178 730
 Imbuchunni v Lalji 211
 Imdad Ali v Jagan Lal 159 168
 Imperial Pressing Co v British Crown Assurance Corporation 930
 Imperial Tobacco Co v Bonnan 317
 Iltiaz un N ssa v Chuttan Lal 183 803
 Inayat v Faiz Muhammad 306
 Inayat Ali v Murad Ali 4
 Inayat ullah v Nasir 131 137
 Isaji v Cooverji 204
 Indar v Thakur 90
 Indar Kwar v Japal 146
 Indar Pal v Imperial Bank, 204
 Indarjit v Ichha 78

Indarpal v Mewa Lal, 491
 Inder Kumari v Japal Kumar 1133
 India General S & P Co Ltd v Lal Mohan 477, 927
 India Provident Co Ltd, v Govinda 122
 India Spinning and Weaving Co v Chitmax Syndicate 1340 1341
 Indian Iron and Steel Co v Banaw, 1317
 Indomati v Jogashar 177
 Indra Chand v Forbes 413 417
 Indra Chandra v Srish Chandra 311
 Indra Chandra Sngl *In the goods of* 1355
 Indrabhusan v Janardhan 1109
 Indrajit v Amarsingh 1107 1109
 Indramani Dasi v Sarentra 1027
 Indubhusan v Haricharan, 817
 Indur v Kandadai 1280
 Indur Chunder v Rallakshi *re* 1071
 Indur Kuar v Gur Ram 1 498
 Indur Subbarani v Kallakshi 1271
 Indurjeet Singh v Kallakshi 676
 Injad Ali v Mohd 1094
 International Cotton Co v Compagnie v Mella & Co 927 971, 936 937 938
 Intizan v Narah 809
 Intu Meah v Darikhal 522
 Irangowda v Irlanjan 420, 1010
 Irangowda v Seshaji 1071
 Irappa v Bhalaji 471
 Irappa v Sdava 678
 Ira va v Satyaji 70
 Irbaappa v Hanappa 170
 Irrani v Nalunil 320
 Irshad v Salim Khan 82
 Isa Adan v Bal Marla 777
 Isaacs v Hottelhouse 1108
 Ishan Chandra v Nilratan 93 154 1000
 Ishan Chunder v Aala 141 1078
 Ishan Chunder v Bala Mahil 171 170 181
 Ishan Chunder v Bhal 335 336
 Ishan Chunder v Rameshwar 408
 Ishaq Ali Khan v Chunnal 981
 Ishar Das v Asaf Ali 813
 Ishar Das v Lal Singh, 886 892
 Ishar Das v Parmanand, 175 177
 Ishardas v Keshab Deo 1259
 Ishri v Gopal 708
 Ishri Prasad v Shri Ram, 94 97, 98

Ishvar v Devar, 464
 Ishwar v Gopji, 992
 Ishwari v Sheotahal 1351
 Ishwarappa v Dhanji, 21, 101.
 Ishwargar v Chudasama, 153
 Ismail v Sultan Bibi, 70
 Ismail Hassan v Haji Moos & Co, 777
 Ismailji v Ismail, 113, 123
 Ismailji v Macleod, 391, 1316
 Israil v Shamser, 1045, 1047, 1053
 Isup Ali v Gour Chandra, 38, 39
 Iswar Chandra v Haris Chandra, 693 695
 Iswari Prasad v Farkat Hussain, 154
 Ittiachan v Velappan, 377
 Ives v Williams, 1282, 1286
 Iyappa v Rama Lakshamma, 561
 Izhuva v Izhuva, 179, 1021
 Izzat un Nisa Begam v Partab Singh,
 783

J

Jachin v Cheninessa, 901
 Jackson v Barry Railway & Co, 1282
 Jackson v Litchfield, 936 937
 Jadab v Anath, 1100
 Jadab v Rameshwar, 180
 Jadab Chandra v Dhananath, 164
 Jadav v Akarur, 179
 Jadav v Bailash, 63
 Jadov v Chhagan, 948
 Jada v Bhabotoran, 636
 Jadu Nath v Amulya, 79
 Jadub v Kanai, 622
 Jadubansi v Mahpal Singh, 14, 851, 856
 Jadunandan v Deo Narain, 1096
 Jadunandan v Sheonandan, 11, 702
 Jadunandan v Wajid Ali, 830
 Jadunath v Murari, 879 1121
 Jadunath v Ruplal, 215
 Jadun v Sheonandan, 1142
 Jafar v Ranjit Singh, 1095
 Jafar Khan v Daud Shah, 298, 299
 Jaffurji v Miyadin, 846
 Jafri Begam v Saira Bibi, 200
 Jafri Begam v Syed Ali Raja, 1276
 Jag Shah v Ramchandra, 985
 Jagalandhu v Haris, 473
 Jagalanand v Rajendra, 1125
 Jagadu v Haribar, 343, 950
 Jagadish v Rama Sundari, 109

Jagadish v. Debendra, 1058
 Jagadish v. Kripa Nath 270
 Jagadishchandra v Debendraprasad,
 274, 275.
 Jagan v. Gaunda Mal, 121
 Jagan Nath v. Balkishan, 55
 Jagan Nath v. Bishwa, 429, 668
 Jagan Nath v. Daud, 823, 825, 835
 Jagan Nath v. Fatteh Chand, 415
 Jagan Nath v. Ganesh, 781
 Jagan Nath v. Lalman, 1074
 Jagan Nath v. Makund, 827
 Jagan Nath v. Mannu Lal, 1292
 Jaganandan v. Kishna Chand, 121
 Jaganathdas v. Ramdas, 16
 Jagannada v. Basawayya, 832
 Jagannadham v. Venkatasubba Rao, 71
 Jagannadhan v. P. dayya, 777
 Jagannat v. Tore, 493
 Jagannath v. Aksh 25
 Jagannath v. Chhedi, 1266
 Jagannath v. Debi Prasad, 736
 Jagannath v. Kalachand, 980
 Jagannath v. Mohra Kuar, 57
 Jagannath v. Motilal, 204, 205
 Jagannath v. Sassoon, 388, 520
 Jagannath v. Sheo Shankar, 56
 Jagannath v. Sheonandan, 155
 Jagannath v. Sita Ram, 206
 Jagannath v. Surajmal, 140
 Jagannath v. Tara, 225
 Jagannath Prasad v. Surajmal, 1016,
 1017
 Jagannatha v. Kathaperumal, 830
 Jagannatha v. Sarathambal, 814
 Jagapati v. Ekambara, 16
 Jagar Nath v. Ram Karan, 868
 Jagarnath v. Hanuman, 1107
 Jagarnath v. Kamta Prasad, 429
 Jagarnath v. Kishen, 220
 Jagarnath v. Ram Phal, 743
 Jagat v. Dhundhey, 268
 Jagat Chandra v. Gunny, 762 763, 764
 Jagat Chunder v. Iswar Chunder, 217,
 760
 Jagat Pande v. Sarwan Pande, 1291
 Jagat Tarini Dasi v. Naba Gopal, 1057,
 1064
 Jagatjit v. Sarabjit, 47, 159.
 Jagdamba v. Badri Prasad, 60
 Jagdip v. Harku, 1316
 Jagdip v. Holloway, 416, 420
 Jagdish v. Harbans, 593

- Jagernath v Dip Rani, 156
 Jagernath v Mohra Kuvar, 1018
 Jaggan Nath v Daud 823, 825, 831
 Jaggan Nath v Jokhu, 682, 683
 Jaggeswar Dutt v. Bhuban, 978
 Jagmohan v Venkatesh 379
 Jagneswor v Kailash, 835
 Jagrani v Kuar Durga, 1108
 Jahar v Kamini Debi, 155, 157
 Jahar Ali v Mst Musharatan 224
 Jahar Lal v Lalita Sundari 268
 Jahnabai v Brojo, 940
 Jai Berham v Kedar Nath Marwari, 415, 417
 Jai Gobind v Patesri Pratap, 158
 Jai Gopal v Muna Lal, 1095
 Jai Indra v Baldeo Singh, 1066
 Jai Kishan v Bhola Nath, 682
 Jai Naram v Ram Deo, 870
 Jai Naram Babu Lal v Naram, 1286
 Jaibahadar v Matukdhari, 791, 809
 Jaijit Rai v Gobind, 992
 Jaikaran v Raghunath, 694
 Jaikisondas v Zenabai, 1061
 Jaimal v Ganeshi Mal, 485
 Jaimala v Collector of Saharanpur, 893
 Jaimangal Deo v Bed Saran, 66, 67
 Jamarayan v Hira 808
 Jaimti Prasad v Bachu Singh 566
 Jainulabdin v Krishna, 182, 183
 Jairaj Mal v Radha Kishan, 782
 Jairam v Atmaram, 1341, 1342, 1343
 Jairam v Nowroji, 846
 Jairamdas v Zamonlal, 1048
 Jalal Din v Quim Din, 548
 Jalsutram v Bommadevara 42
 Jalbai v Jerbai 1358
 Jalbhai v Jerbai 438
 Jalim Chand v Yusufali, 701
 Jalmoja v Askaur, 484
 Jamadar Singh v Serazuddin 49, 58
 Jamahr v Askanar, 769
 Jamaitunnissa v Lutfunnissa, 78
 Jamal Brothers & Co., Ltd. v Chip Moh & Co., 778
 Jamal ud-din v Muftaba Hussain, 303, 309
 Jambu Chetty v Palaniappa, 984
 Jambularya v Rajamma 1100
 James v Radnor County Council, 532
 James Bevis v Turner, 146
 James Currie *In the matter of* 173
 Jamil v Maharaja of Sikkim, 164
 Jamini v Kali Prasad 173
 Jamini Nath v. Dharma Das, 169, 417
 Jammalamadaka Subba v Jammala Venkatarayadu, 349
 Jamna v. Mathura, 11, 702
 Jamna v Nasib, 1263, 1264, 1266, 1267
 Jamna v Sarjit, 862, 865, 874
 Jamna Bai v Ramnathan, 1347
 Jamna Bai v Vasant Rao, 957
 Jamna Bibi v Shaikh Jan, 880
 Jamna Das v Ramautar, 1007
 Jamna Das v Udey Ram, 322
 Jamna Doss v Sabapathy Chetty, 390
 Jamna Prasad v Raghunath, 222
 Jamnadas v Bai Soonabai, 260
 Jamnadas v Damodardas, 471
 Jamnadas v Sorabji, 866
 Jamoona v Bhamasoondaree, 109
 Jamsedji v Husseinbhai, 1058
 Jamsotji v Bawabhai, 423
 Jamsotji v Dadabhoj, 348
 Jamsotji v Hari Dayal, 176, 200
 Jamsheedji v Hirjibhai, 558
 Jamuna Parshad v Ganga Parshad, 982
 Jamuna Prasad v Jagarnath, 360
 Jamundas v Krishan, 425
 Janwanti v Chetan Das, 440
 Jan Ali v Ram Nath, 305, 311
 Jan Mahomed v Mahar Bibi, 102
 Jan Mahomed v Syed Nurudin, 313
 Jan Muhammad v Iahi Baksh, 246
 Janak Kishore, *In the matter of*, 411
 Janakbati v Gajanand, 899
 Janakdhary v Janki, 970
 Janakdular v Ambika Prasad, 79
 Janaki v Narayanasami 560
 Janaki Nath v Prabhasini, 1148, 1152
 Janakinath v Nirodbaran 674, 882
 Janardan v Jankibai 501
 Janardan v Nilkanth, 1081
 Janardan v Ramdhone, 2
 Janardan v Shub Pershad 1072
 Janardhan v Krishnaji, 1005
 Janardhan v Martand, 11, 164
 Janardhan v Ramchandra, 159, 163, 800, 1111
 Janardhanan v Verghese 375, 376
 Janda Singh v Lachmi 934
 Jandera v Sures Chandra, 1271
 Jang Bahadur v Bank of Upper India Ltd., 164, 200, 330
 Jang Bahadur v Hanwant, 744, 745
 Jang Bahadur v Shankar, 15, 16
 Jang Bir v Mst Jamna 1076

- Jangal v Lalit, 599
 Jangt Singh v Chandar Mol, 1007
 Jangli Lal v Laddu Ram, 168, 871
 Janki v Collector of Allahabad, 972
 Janki v Gauri, 920
 Janki v Naunihal 954
 Janki v Sarup, 423, 425
 Janki v Sukhrani, 593
 Janki Das v East India Ry 219
 Janki Das v Gulzar 789
 Janki Das v Sheo Prasad 438
 Janki Kuer v Lachmi, 78
 Janki Pershad v Lekraj 81
 Janki Pray v Raja Kalanand, 590
 Jankubai v Chimpa 1004
 Jankubai v Shrinivas 504
 Janmat v Ghulam 131
 Janokunath v Ramrunjun, 446 468
 Janoo v Batchu, 123
 Janoo v Mahamad, 96 97
 Janoo Hassan v Batchu, 1344
 Janson v Driefontein Consolidated
 Mines, Ltd 281
 Jaso v Bhagwan 474
 Jaso Kumari v Gopi Chand 1132
 Jarp v Jogendra Nath 340
 Jarutoll Butool v Hoseinee Begum,
 1133, 1134
 Jasumuddin v Bhuban 323, 903
 Jasoda v Kirtivash, 705
 Jasraj v Akubai 1340
 Jasvatsingji v Secretary of State 788
 Jatendrakumar v Mahendra Chandra,
 164
 Jathari v Medini 1102.
 Jathavedan v Kunchu, 84
 Jatindra v Gagan 700 701
 Jatindra v Manindra. 1276
 Jatindra v Nishendra 700
 Jatindra v Srinath 947
 Jatindra Nath v Peyer Deye Bibi, 714
 Jatindramohan v Rebatimohan, 278,
 280 467
 Jatra Mohan v Ankhil Chandra 1145
 Jauhari Lal v Peman 746
 Jayberbai v Haribhai 799
 Jawahar v Akbar Husain, 296, 303,
 464
 Jawahar v Husain 305
 Jawahar v Mul Paj 1278
 Jawahar Bano v Shujaat Husain, 1115.
 Jawahar Singh v Sawa Singh, 950
 Jawahar v Nekiram 122
 Janabur Singh v L D Sasoon &
 122
 Jayanti Venkatta v Demiseti, 996
 Jayantilal v Nagnath, 582.
 Jayantilal v Waman, 1070
 Jayappa v Shevangoorda 426
 Jayarama v Vridhagiri 822
 Jaychandra v Satishchandra, 203
 Jechand v Aba, 225
 Jeewanbai v Manordas 141
 Jeewandas v Ranchoddas 190
 Jehangir v Sararkar, 366
 Jehangir v Secretary of State, 32, 273,
 275 327, 610, 1352.
 Jehrabai v Bismillahi 867
 Jekkam v Sir S Subramania 297
 Jenkins v Robertson, 78
 Jeranchood v Dakore Temple Committee,
 125 302 303.
 Jeshankar v Bai Divali 1100, 1119
 Jeswant v Jet Singjee 661
 Jetha v Durgadutt 756
 Jetha v Gulraj 141 975
 Jetha Bhima & Co v Lady Janbai, 235,
 236
 Jethabhai v Amarchand 437
 Jethabhai v Chapsey 30
 Jethalal v Varajlal, 595, 597, 1101, 1110
 Jeuna Bahu v Parmeshwar, 1005
 Jewan Lal v Oudh Commercial Bank,
 120
 Jeyappa v Shevanjouda, 1079
 Jhamman Lal v Kewal Ram, 184
 Jhanda v Mohan Lal 196.
 Jhanda Singh v Met Lachbmi 598
 954
 Jhanda Singh v Sadiq, 658
 Jhanday Lal v. Sarman Lal, 1102.
 Jhari Singh v Parthi Nath 551
 Jharala Das v Jalandhar, 68
 Jhotu Lal v Ganouri, 383
 Jhumman v Dinooonath, 218
 Jhunku Lal v Bisheshar Das 382 384,
 390 886 891 892 893
 Jia Bai v Joharmull, 425
 Jia Bibi v Nahi Baksh, 596
 Jiban v Durga, 85
 Jibunti Nath v Shib Nath 484
 Jijibhoy v Chettyar 396
 Jina Ranchod v Jodha Ghella 293
 Jinnat Bibi v Howrah Jute Mill Co, 35
 Jino v Manon, 561
 Jit Mal v Jwala Prasad 190

- Jita Singh v Hari Singh, 883 890
 Jita Singh v Mansingh, 954
 Jiteswari v Sudha, 803, 1059
 Jiteswari v Sudhakrishna, 179
 Jitmand v Ramchand 238
 Jivabai v Teja, 142
 Jivan v Hira, 222
 Jivanguri v Gajanan 356, 1126
 Jivanlal v Bai Manchha, 143
 Jivanlal v Pirojshaw, 1333
 Jivanlal v P R Vakharia & Co, 36
 Jivanlal Varajay, *In re* 1336
 Jivanna v Appalu, 1017
 Jivappa v Jeerji, 94, 165
 Jivarathnam v Srinivasa 1023
 Jivraj v Bhagwandas 764
 Jivraj v Praggi, 441
 Jivraju v Purushotam, 402
 Jiwan Ali v Basa Mal, 1084
 Jiwan Bakhs v Mubinal Huq, 193
 Jiwan Hansraj v Irrawaddy Flotilla Co., 225
 Jiwan Singh v Sawan Mal, 831, 835
 Jiwarem v Nand Ram, 420 421.
 Jnanada v Pramada, 657, 916
 Jnanasundari v Madhab Chandra, 10, 350, 432, 656, 1074
 Jnandasundari v Pramadasundari, 656, 607
 Jnanendra Nath v Kumar Jogendra, 164
 Jnanendra Nath v Surjya Kant, 1105
 Jnanendra v Profullananda, 597 1100
 Jnanendra v Shorashi, 984
 Jodha v Gokaran, 1003
 Jodoonath v Brojo Mohun, 11, 803
 Jogemaya v Baidyanath 1039
 Jogendra v Asutosh 699
 Jogendra v Debendra 4057
 Jogendra v Durga, 966 967, 969
 Jogendra v Govri, 1003
 Jogendra v Monmotha, 820
 Jogendra v Provath, 700
 Jogendra v Sham Das, 189
 Jogendra Chandra Sen v Wazidunnissa 433 436 1125
 Jogendra Narayan v Satvendar 376
 Jogendra Nath v Rajendra Nath, 335
 Jogendranath Poy v Price, 277
 Jogendro Chunder v Dwarka Nath, 520
 Jogesh v Hemendra, 793
 Jogesh Chandra v Emdad Miya, 333
 Jogesh Chandra Gupta, *In the matter of*, 508
 Jogeshwar Roy v Raj Narain, 559
 Jogo Mohan Deb v Daudoong 978
 Jogodindro v Sarup Sundari, 7, 891.
 Jogodishuri v Kailash Chandra, 11, 186, 207
 Jogunnessa v Satish Chandra, 387
 Joharmull v Iswardas, 1040
 Johurmull v Kedarnath, 16, 1009
 John v. Carter, 403
 John v Sambamurthy, 115, 757
 Johnson D Po Min v U Ogh, 308, 309
 Joint Hindu Family v Ghulam Hussain, 504
 Jomathi v Alagappa, 1022
 Jonardan v Ramdhone, 597, 656
 Jonardon v Sambhu Nath, 1271
 Jones v Curling, 144
 Jones v Hughes, 547
 Jones v Monte Video Co., 620
 Jones v Scottish Accident Insurance Co., 122
 Joosub v Kemp, 19, 279
 Jose Antonio v Francisco, 101 124.
 Joseph v Joseph, 486
 Joshi v Dakor, 32
 Joshi v Jhinguria, 434
 Josiam v Swami 851, 853
 Jotendronath v Raj Kristo, 132
 Jotindra Nath v Sarfara, 1067
 Joti v Izari, 901
 Joti Prasad v Amba Prasad, 32
 Joti Prasad v Aziz Khan, 979
 Joti Prasad v Hardwari, 919
 Joti Prasad v Srichand, 700, 701.
 Jotindra v Bejoy, 472
 Jotindra v Dwarka 962
 Jotindra v Mahomed, 184
 Jotindro Nath v Dwarka Nath, 769, 972
 Jowad Hussain v Gendan Singh, 161, 152
 Jowala Ram v Hari, 874
 Jowala Singh v Mast Dhanu, 441
 Joward Hussain v Genlan & Co, 1100
 Jov Chandra v Sreenath, 88
 Joy Gobind v Minulla, 88
 Joy Prokash v Narayan, 1119
 Joykishen Mookerjee v ...
 Joylall & Co v ...
 Jeyman Howe v ...

Joynarain v. Shibpersad, 1016.
 Joytara v. Mahomed, 642, 670.
 Judu Lal v. Janki Koer, 693.
 Jugai Kishore v. Chari, 550
 Jugai Kishore v. Deva Prasanna,
 1058.
 Jugai Kishore v. Homeshwar Singh,
 1137
 Jugalchandra v. Rameshchandra, 825,
 831.
 Jugalkishore v. Lakshmandas, 296, 298,
 301.
 Jugdeo v. Rajah Singh, 788
 Jugdeo Singh v. Habibulla, 983.
 Jugeswar v. Jagadhari, 900.
 Juggannath v. Tulka Kera, 287
 Juggat Chunder v. Roopchand, 146
 Juggernath v. Brynath, 1341.
 Juggobundhu v. Purnanand, 744
 Juggobundhu v. Ram Chunder, 744.
 Juggobundo v. Watson & Co., 890
 Juggodumba v. Puddomoney, 1342
 Juggomohun v. Kaisreechund, 138.
 Juggomohun v. Manickchand, 138.
 Jugobundhu v. Jadu, 386, 389.
 Jugul Das v. Queen-Empress, 293.
 Jugul Kishore v. Jugul Kishore, 277.
 Jugul Kishore v. Kartic Chunder, 560,
 584.
 Juji v. Annai, 696.
 Juma v. Mubarak Khan, 1277.
 Juma v. Abdul, 732.
 Jumna Dass v. Harcharan Dass, 1048
 Jumna Bai v. Viswandas, 1085.
 Jungli Lal v. Laddu Ram, 159, 199,
 863.
 Jupiter General Insurance Co. v. Abdul
 Aziz, 117, 121, 375, 1402.
 Jurana v. Jathi, 837.
 Juravan v. Ramarekh, 1115.
 Jurawan v. Mahabir, 293.
 Justain Hull v. Paul, 143, 145, 147.
 Justin Hull v. Arthur Francis, 328,
 1367.
 Jusef v. Abdullahboy, 1144.
 Jwala v. Pirbhu, 915.
 Jwala Prasad v. East India Railway,
 389.
 Jyoti Prakash v. Mukti Prakash, 426,
 1079.
 Jyoti Prakash v. Jhownmull, 571.
 Jyotiprasad v. Pyarimal, 411.
 Jyotish Chandra v. Har Chandra, 1041.

K

K. B. Dutt v. Taraprasanna, 160.
 K. K. Secunder v. J. A. N. Kasi,
 1058.
 K. M. Koppa v. Velayi, 669.
 K. V. A. L. Chettyar Firm v. Ma,
 821.
 Kabalamurthi v. Subramania, 1068.
 Kachar v. Bai Rathore, 457, 497.
 Kacharbhai v. Kacharbhai, 721.
 Kachu v. Lakshmansing, 85, 1014.
 Kachu v. Trimbak, 818.
 Kadaressur v. Mohim Chandra, 732.
 Kadarmal v. Surajmal, 119.
 Kadarnath v. Hem Nath, 23.
 Kader Buksh v. Shaik Serajuddin, 1032.
 Kader Bux v. Bukt Behari, 929.
 Kader Khan v. Juggeswar, 656.
 Kadhori, *In the matter of the petition of*,
 1318.
 Kadir v. Ilahi Bakhsh, 164, 717.
 Kadir v. Muthukrishna, 866, 867.
 Kadir v. Pir Mahomed, 697, 717.
 Kadir Baksh v. Bhawani, 3.
 Kadir Moudeen v. Rama Naik, 476.
 Kadirvelusami v. The Eastern Develop-
 ment Corporation, 203.
 Kadma v. Muhammad Ali, 1022.
 Kadmubiny v. Kumudini, 915.
 Kadri v. Khubmiya, 313, 477, 478
 Kahan Singh v. Mohan Lal, 1275.
 Kahandas, *In re*, 245.
 Kailash Chandra v. Gupta, 117.
 Kailash Chandra v. Gupta, 151.
 Kailash Chandra v. Sadar Munsif, 1060
 Kailash Mondal v. Baroda Sundari, 48.
 Kaim Ali v. Lakhikant, 197.
 Kain v. Farrer, 621.
 Kaji Ahmad v. Kaji Mahamad, 647.
 Kakarla v. Raja Venkata, 337.
 Kala Chand v. Jaggannath, 877
 Kala Mia v. Harperink, 794.
 Kalappa v. Kalappa, 340.
 Kalavati v. Chedilal, 933, 934.
 Kalee Coomar v. Pran Kishoree, 62.
 Kalenther v. Ma Mi, 472.

- Kalchhar v. Jagan, 489
Kali v. Izzatunnisa, 311.
Kali Charan v. Ashutosh, 676
Kali Charan v. Bibhuti, 704.
Kali Charan v. Jewat, 177.
Kali Charan v. Sarat Chunder, 383, 1273,
1277.
Kali Charan v. Sheo Buksh, 65.
Kali Charan v. Suraj Kumar, 435.
Kali Das v. Draupadi, 547
Kali Dayal v. Nagendra Nath, 863, 864,
865, 1092
Kali Dayal v. Umesh Prasad, 65
Kali Kanta v. Gouri, 29, 464
Kali Kanta v. Shyam Lal, 831
Kali Kishore v. Guru Prasad, 800
Kali Krishna v. Secretary of State,
42, 159
Kali Kristo v. Ram Chunder, 1104
Kali Pado v. Dmo Nath, 155
Kali Prasanna v. Panchanan, 886, 891
Kali Prasanno Ghose v. Rajani Kant,
1275, 1276, 1279, 1280
Kali Rai v. Tulsi Ram, 478
Kali Raj v. Tulsi Rai, 1318
Kali Soonderi Dabia, *In re*, 1137
Kaliakhal v. Palani, 594, 601.
Kalianchand v. Sitabai, 38
Kalian v. Kalian 341.
Kalian v. Ram Ratan, 475
Kalian Singh v. Musst Shanno, 1016
Kalianasundram v. Egnavedeswara, 413
Kaliappa v. Kumarasami, 590
Kaliappan v. Varadarajulu, 204
Kaliacharan v. Bibhuti, 158
Kalidas v. Gor Parjaram, 31
Kalidas v. Keshablal, 86
Kalidas v. Nathu, 476
Kalidas v. Prasanna, 60
Kalidas v. Prasanna Kumar, 782, 793
Kalika v. Tulsi, 1108
Kalikanta v. Gouri, 463
Kaliuddin v. Eshakuddin, 597, 598
Kaliuddin v. Kaliuddin, 151
Kalinga v. Narasimha, 444, 445
Kalipada v. Basanta, 810, 834, 1003
Kalipada v. Bisanta Kumar, 179, 430
Kalipada v. Charubala, 34
Kalipada v. Dwajpada, 86, 87
Kalipada v. Hari, 158, 173, 223, 946, 961
Kalipada Mukerji v. Basanta Kumar,
1002
Kalipada Mukerji, *In re*, 564, 566
Kalishunker v. Gopal Chunder, 67
Kalyugam v. Chokalinga, 95.
Kalyuluri v. Sooryanarayana, 593.
Kalka v. Basant, 173.
Kalka Prasad v. Manmohan Lal, 75.
Kalka Singh v. Paras Ram, 361.
Kallan v. Nanhe, 600
Kallapa v. Venkatesh, 642
Kalloo v. Naider Singh, 1002.
Kallu v. Fayaz, 69.
Kallu v. Manni, 1096
Kally Soondery v. Hurresh Chunder,
1350
Kalma Prasad v. Kunj Behari, 1146
Kalu v. Janmea, 464
Kalu v. Latu, 441
Kalu v. Vishram, 1145
Kalu Dalpat v. Narayan, 1098
Kalu Ram v. Sheonand Rai, 764
Kalumal v. Ahmad, 821
Kaluram v. Gangaram, 325
Kaluram v. Matilal, 778
Kalyan v. Kamta, 693, 696
Kalyan Singh v. Jagan Prasad, 89
Kalyan Singh v. Rahmu, 883
Kalyanbhai v. Ghanshamlal, 720
Kalyanchand v. Bhogulal, 191
Kalyanchand v. Sitabai, 87
Kalyanee v. Hari, 812
Kalyani Pillai v. Thiruvankataswami,
868
Kamal Kutti v. Ibrayi, 173
Kamala Prasad v. Kishori, 866
Kamalakshi v. Ramasami, 944
Kamalamma v. Komandur, 999, 1006
Kamalnath v. Bithal Das, 365
Kaman v. Mulli, 970
Kamaraja Pandja v. Kamaraja Pandja, 8
Kamaruddin v. Puri Lal, 191
Kamatchi v. Sundaram, 1018
Kamatchinathan v. Emperor, 601.
Kamayya v. Dharmasetti, 747.
Kamayya v. Papayya, 891.
Kambhai v. Himatsinghji, 287.
Kameshar Prasad v. Kun Bahadur, 174
Kameswar v. Rajkumar, 61, 81
Kamini v. Ram Nath, 899.
Kamini Debi v. Promotha, 3
Kamini Kumar Deb v. *In re*, 1106
Kamini Kumar v. *In re*, 8
Kamini Kumar v. *In re*, 11
Kamiseti v. Kasi, 11
Kamla Prasad v. *In re*, 11
Kamru v. *In re*, 11

Kamrakh Nath v Sundar Nath 967
 Kamta v Parbhu 1098
 Kamta Prasad v Indomtai 716
 Kamta Prasad v Mohan 811
 Kamta Singh v Bhagwan Das 899
 Kanabhai Lal v Suraj Kunwar 339 1072
 Kanahia Lal v Kali Dhm 749
 Kanai Lal v Purna Chandra 391
 Kanakammal v Rangachariar 1098
 Kanakayya v Janardhan 1117
 Kanakayya v Venkataramayya 900
 Kanaklu v Nagalinga 1968 1979
 Kanara v Govinda 995
 Kanaran v Komappan 109 367
 Kanchan v Baij Nath 1099
 Kandasami v Rappa Mooppan 1006
 Kandasami v Subroya 992
 Kandasamy v Annamala 83
 Kandaswami v Subramania 1003
 Kandiya v Zamorin of Calicut 63
 Kandoth v Abdul 90
 Kandra v Taraprasanna 617
 Kandu Mal v Tilak Pam 437
 Kandunni v Katamma 54
 Kangal Chandra v Nandlal 1908 711
 Kanhai v Durga 70
 Kanhaiya v Kanhaiya 381 411 1066
 Kanhaiya v Kanhaiya Lal 1056
 Kanhaiya Lal v Ashraf Khan 52
 Kanhaiya Lal v Baldeo Prasad 1149
 Kanhaiya Lal v H B The Maharaja of Benares 980
 Kanhaiya Lal v Dham Fatma 07
 Kanhaiya Lal v Jagannath Prasad 1979 1981
 Kanhaiya Lal v Tribeni 396
 Kanhaiya Lal v National Bank of India 1977 776 788
 Kanha v Mahan Lal 339
 Kanha Lal v Narain Singh 1981
 159

Kamamma v Manchamma 800
 Kanti Chunder v Kissorsy Mohun Roy 1339
 Kanti Chunder v Sahgram 1150
 Kanti Ram v Kutubuddin 979
 Kanti Chandra v Radha Rani 408
 Kapil Deo v Pam Rikha 903
 Kapur Chand v Kanhaiya Lal 88
 Kapurchan Lal v Jewraj 1964
 Kapuria v Ganga Devi 96
 Kapuria v Wali 682
 Kapuri v Pannaj 360
 Karakavalas v Karanam 673
 Kara Lal v Punjab National Bank 999
 Karamchand v Balchand 140
 Karam Kuar v Kirpa Singh 148
 Karam Singh v Vir Singh 349
 Karamat v Mir Ali 828
 Karamuddin v Namut 248
 Karim Elahi v Sher Ahmed 1343
 Karim Mahomed v Rajooma 439 440
 441
 Karimbhai v Conservator of Forests 760
 Karim un nissa v Phul Chand 755
 Kariya v Tirukkairvelu 370
 Karmali v Rahimbhoy 906
 Karman v Bala 1071
 Karori v Maharaj Bahadur 1046
 Karpaga v Van 270
 Karsondas v Chhotalal 561
 Karsondas v Gangaba 354
 Karsondas v Surajbhan 547
 Kartick v Juggernath 266
 Kartick v Sridhar 79 589
 Kartick Chandra v Ashutosh 177
 178
 Karunakara v Krishna 815
 Karuppan v Somasundaran 230
 Karappa v Kolanthayan 96
 Karayyan v Ayyathurai 590
 591
 Karan Khan v Kapil Sub 28
 Karandas v Ankleshwar 32
 Karbee Lal v Ameer Jan 950
 Karbeesuree v Greesham Chander 991
 992

Karumakara v Krishna S15
 Karuppan v Somasundara n 230
 Karuppa v Holanthayan 96
 Karuppan v Ayyathora! 59c
 7
 " " 4 20
 Kasam Khan v Kap! Isub 28
 Kasarindas v Ankleshwar 32
 Kashee Lal v Ameer Jan 95
 Kasheesluree v Greesh Cl 1 der 99
 223

- Kashi v Byrang Prasad 58
 Kashi v Jamuna 163, 793
 Kashi v Mukta 683
 Kashi v Sadashiv 474
 Kashi v The Union Bank of India 721
 Kashi Chandra v Kailash Chandra 29
 Kashi Chandra v Priyanath 1000, 1022, 1023
 Kashi Mohun v Bishnoo 5
 Kashi Prasad v Balbhadder 420
 Kashi Prasad v Miller 176
 Kashi Prasad v Notified Area 380
 Kashi Prasad v Secretary of State 430
 Kashi Nath and others *In the matter of* 1316
 Kashi Nath v Anant 106
 Kashi Nath v Gangabai 309
 Kashi Nath v Gangubai 304
 Kashi Nath v Nana 377
 Kashi Nath v Nathoo 490
 Kashi Nath v Rama 1004
 Kashi Nath v Ramchandra 89
 Kashi Nath v Sadashiv 550 553 700
 Kashi Nath v Uthumansa 179
 Kashi Ram v Pandu 673
 Kashi Dass v Kassim Sait 945
 Kashi Nath v Murari 336
 Kashi Ram v Mohendra Nath 43
 Kashi Ram v Asvini 758
 Kassim v Isuf 13 94
 Kassim v Johurmull 517
 Kassam v Vithaldas 783
 Kassam Goolan v Dayabhai 717
 Kastur v Fakira 638
 Kasturbhai v Hiralal 359 364
 Kasturchand v Parsha 160
 Kasturshet v Rama 704
 Katama Natchiar v Rajah of Shivagun 68
 Katchekaleyan v Kachivijaya 641
 Kathiavar and Ahmedabad Banking Corporation Ltd. v Gurdas 509
 Kathiresan v Ramasani 871
 Kattavat v Iaman 179 180
 Kattiya v Pamawam 389 390
 Kattusheri v Vallotil 451
 Kattun v Haj Mahomed 707
 Katvaya v Irithalad 493
 Kaulster v Doot Mulanmal 134
 Kaunila v Chander Sen 243.
 Kaunsilla v Isleri Singh, 104
 Kauśalya v Culabkhar 107 1118.
 Kaikaj v Wallace 113.
 Kaveri v Venkamma 191
 Kaveri v Yasurba 905
 Kaveri Ammall v Sastri Pamiar 58
 Kaveribai v Mehta 1303
 Kaveribai v Mehta & Sons 790 796
 Kay v Poorunchand 623
 Kayam Biswas v Bahadur Khan 1109
 Kazem Ali v Azim Ali 7
 Kazi Hassan v Sagun 306
 Kebal v Rajani 339 1103 1119
 Kedambi v Lakshmi 70
 Kedar v Chand 1084
 Kedar v Protap 946
 Kedar Nath v Anant Prasad 674 720 882
 Kedar Nath v Dinabandhu 482
 Kedar Nath v Harra Chand 880
 Kedar Nath v Kali Churn 812
 Kedar Nath v Kshiroda 55 179 846
 Kedar Nath v Motilal 1133
 Kedar Nath v Prosonna Kumar 122
 Kedar Nath v Pakhal Das 784
 Kedar Nath v Sheo Shankar 47
 Kedar Nath v Vishwanath 690
 Kedarnath v Gonesh 12
 Kedarnath v Jolormull, 142
 Kedarnath v Nomanbhai 404
 Keeley v Wakley 914
 Keen Robinson & Co v Lily B scout Co 933
 Kelle v Fraser 1349
 Kelly v Briggs 333
 Kelu v Meenakshi 697
 Kemcam Swamy v Subbamma 670
 Kemp v Goldberg 539
 Kendall v Hamilton 2 38
 Kennedy v Dodson 611 613 615
 Kent Coal Concessions v Duguid 620
 Kerakoose v Serle 950
 Keramat v Kumar Krishna 43
 Kering Pupchand & Co v Murray 18 226.
 Kesar Singh v Asa Singh 54
 Kesar Singh v Indar Singh 10 1
 Kesava v Govindachari 306
 Keshab v Ajahar 218.
 Keshab v Manirudin 75
 Keshab Rai v Jyoti Prasad 801
 Keshav v Gangadhar 59
 Keshav v Krishnarav 9 0
 Keshav v Vinayak 105 107 303
 Keshav Chandra v Jorfulnessa 694
 Keshava v Lakshminarasana 109

- Keshavlal v Amarchand, 73, 1741
 Keshavlal v Bai Gurja, 25
 Keshavlal v Parvati, 46
 Keshavlal v Sakhdas, 488
 Keshavram v Ranchhod, 491, 979
 Keshawcsarindra v Rani Debendra, 946, 996.
 Kesho v Muhammad, 863
 Kesho Prasad v Shamnandan, 868
 Kesho Prasad v Sheo Pargash, 69
 Kesho Prasad v. Srinibash, 1046
 Kesho Prasad Singh v Narayan Dayal, 1116
 Keshubati v Macgregor, 1065, 1068
 Keshri Mall v Sukun Ram, 548
 Keshub Roy v Kristo Mitter, 878, 880
 Kesowji Issur v G.L.P. Ry Co., 1107, 1108
 Kesri v Abdul Hasam, 844
 Kesri Chand v National Jute Mills Co., 587
 Kesisang v Naransang, 342
 Kesserbai v. Kaku, 767
 Kesseram v Secretary of State, 276
 Kessowji v Khumji, 123, 1340
 Kessowji v Luckmidas, 1344
 Kettramoni v Shyama Churn, 478
 Keraldas v Pestonji, 626.
 Kewny v Attil, 766
 Keymer v Visvanatham, 96
 Keynsham Blue Lias Co v Barker, 122.
 Khadarsaheb v. Chotibab, 493.
 Khadem Houssein v Emdad Houssein, 325.
 Khagaram v Ram Sankar, 1016
 Khagendra v Sahayram, 333
 Khagendra v Shashadhar, 1065.
 Khagendra Nath v. Pran Nath, 698, 830
 Khairajmal v Dam, 242, 243.
 Khaurati v Banni Begum, 979
 Khaur un Nissa Bibi v. Qudh Commercial Bank, Ltd., 426, 1002.
 Khajah Asenoolajoo v. Solomon, 907, 1034
 Khafsa Ganny v Mohamed Ibrahim, 304
 Khalid v Khatir, 674
 Khalid ur Rahman v. Gokul, 803
 Khanniso v Raan, 4.
 Khan v Ali Mahmood, 768
 Khan v Lachman, 667.
 Khan v Omar, 709
 Khardah Co., Ltd v Durga Charan, 485, 885, 892.
 Khatija v. Ismail, 108.
 Khatya Bibi v Taruk, 129
 Khatizan v. Sonaram, 1351, 1352
 Khem Karn v Har Dyal, 945
 Khem Singh v Raghur, 183
 Khema v Dhanj, 1151
 Khemchand v. Khairuddin, 1026
 Khemraj v. Kishanlal, 1084.
 Kherodamoyi Dasi v Habib Shaha, 463, 982, 985
 Kheshta Pal v. Pancham Singh, 122
 Khetpal v Tikam Singh, 160, 190
 Khetra v. Mumtaz Begam, 788, 789
 Khetra Mohan v Anshi Kumar, 140
 Khetrapal v Shyama, 172
 Khetra Mohon v Sheikh, 821
 Khetidas v Narotmadas, 624
 Khetter v Kahi, 680
 Khettra Nath v Ushabala, 1293
 Khairajmal v Daim, 730, 1020
 Khidir Bux v King Emperor, 733
 Khimchand v Bhogul, 897
 Khimchand v Sobhagchand, 887
 Khumji v Forbes, 116
 Khirodamoyi v. Adhar, 326.
 Khutaram v. Surji, 218
 Khyts Chandra v Nagendra Nath, 378, 390
 Khodayatul v Harihar, 155.
 Khorshed v Probbat, 1103
 Khosal v Upendra, 385
 Khotaram v Nawar, 486
 Khub Lal v. Jhapu, 330, 501, 979
 Khub Lal v Jugdish, 1072
 Khub Lal v Raghubans, 676
 Khuda Baksh v. Aziz-Alam, 247
 Khuda Baksh v Mathura Das, 863
 Khuda Baksh v. Allah Ditta, 442
 Khulna Loan Co v Jnanendranath, 192
 Khunji Lal v. Rameshar, 872.
 Khursaidi Begum v Secretary of State, 303
 Khurshed Alam Khan v. Rahmatullah Khan, 1164, 1165
 Khushal v Dhumakar, 242
 Khushal v. Punamchand, 147.
 Khushaldas v Chumanlal, 1133

- Khushali Ram v. Gokul Chand, 122
 Khushalchand v. Nandram, 233, 232
 Khushi Ram v. Tulsa Ram, 9
 Khushnud v. Janki, 378
 Khushrobbhai v. Hormazsha, 198, 717.
 Khwaja Muhammad, *In the matter of*,
 362, 1126
 Kidd v. Thorne, 766
 Kiernandar v. Benimadhab, 773
 Kiersen v. Joseph L. Thompson & Sons,
 Ltd., 143.
 Kifayat Ali v. Ram Singh, 408
 King v. Hoare, 38
 King v. Secretary of State for India,
 1345
 King Emperor v. Barendra Kumar
 Ghose, 1362
 King King & Co v. Davidson, 226
 Kingston v. Corker, 538
 Kirani v. Subabhat, 1111.
 Kiranshashi v. Official Assignee, 53
 Kirchner & Co v. Grubban, 95.
 Kirt v. Chancel, 958.
 Kiron Soshi v. Official Assignee, 743,
 842, 843, 849
 Kirpa v. Babu Lal, 437
 Kirpa Ram v. Mangal Sen, 114
 Kirpa Singh v. Ajai Pal Singh, 296
 Kisandas v. Rachappa, 545, 548, 554
 Kishan Kunwar v. Ganga Prasad, 668
 Kishanchand v. Lachmichand, 353, 360.
 Kishan Lal v. Garuruddhwaja, 247.
 Kishan Lal v. Jai Lal, 133
 Kishan Lal v. Sultan Singh, 628
 Kishan Lal v. Umrao Singh, 1020, 1021.
 Kishanlal v. Ram Chandra, 375, 378, 545
 Kishan Narain v. Pala Mal, 483.
 Kishan Prasad v. Har Naram Singh,
 474, 475, 985.
 Kishen Lal v. Charat Singh, 237.
 Kishen Narain v. Pala Mal, 486, 497.
 Kishen Parshad v. Har Naram, 476
 Kishen Pershad v. Tiluckdhar, 1130
 Kishnanand v. Pratab Narain, 676, 678.
 Kishni Bai v. Budhu Ram, 668.
 Kishorchand v. Madhowji, 576.
 Kishore v. Chunder Nath, 843.
 Kishore v. Gisborne & Co, 715.
 Kishore v. Netherlands Trading Society,
 211
 Kishore v. Sabdal, 561
 Kishore Bun v. Dwarkanath, 739
 Kishore Bun Mohunt v. Prosunno
 Coomar, 89
 Kishore Chand v. Ishar Singh, 251
 Kishore Lal v. Balkishan, 131, 133
 Kishore Singh v. Bahadur Singh, 72
 Kishori v. Chhanga, 440, 441
 Kishori Mohun v. Chundra Nath, 24, 32,
 182
 Kishori Mohun v. Gul Mohamad, 132
 Kishory Mohun v. Mahomed, 824
 Kishun Lal v. Muhammad, 836, 837, 839.
 Kishun Prasad v. Durga Prasad, 63
 Kissen v. Suklal, 587, 872
 Kissorimohun v. Harsukh Das, 785, 790,
 791.
 Kissun Sing v. Sturt, 113
 Kistnasamy v. Municipal Commissioner
 for Madras, 576
 Knapp v. Harvey, 608
 Knight v. Engle, 533
 Knowles v. Roberts, 542, 544
 Ko Maung Gyi v. Daw Tok, 424
 Kochappa v. Sashi Devi, 290, 1052.
 Kodai Singh v. Jaisri Singh, 683
 Kodoomal v. Mangatram, 937
 Koi v. Atul, 57
 Kojo Pon v. Atta Fua, 434
 Kokamal v. Gulabsing, 560
 Kokil v. Edal Singh, 797
 Kokil Singh v. Ramasray, 1278, 1284
 Kolandaivelu v. Ramaswami, 390
 Kolaremathu v. Madhavi, 204.
 Kollantavida v. Tiruwalli, 247.
 Kolliparee v. Kankipati, 1142
 Komappan v. Ulkaran, 68.
 Kombi v. Panji, 1275
 Kombi Achen v. Kochunni, 1093.
 Kommachi v. Pakker, 257, 266
 Kondalu, *In re*, 1357
 Kondayya v. Narasimhulu, 2
 Kondeti v. Nukamma, 245
 Kondi v. Chunilal, 897.
 Kondiba v. Mestrejean, 458
 Konerrav v. Gurrav, 55
 Kooni Meera v. Mahomed, 31.
 Kora Lal v. Punjab National Bank, 731,
 803
 Koramall v. Monglal, 631
 Korian Ally v. Sharada Prasad, 19
 Kosella v. Beharee, 145
 Kotaguri Venkata v. Velamuri, 1146.
 Ko Tha Hayim v. Ma Hing L., 11

- Ko Tha Lin v. Ko Hla Kri, 636
Koti Pujan v. Manjara, 101
Koti Peddi v. Subbiah, 276, 277, 278
Kottich v. Udaya, 105
Kovvuri v. Tallapragadha, 457
Kover Naram v. Sreenath, 17
Kovlash Chandra v. Chit tophendi, 211
Koylash Chunder v. Sonatun, 3
Kovvuri v. Doovv 58, 7-6.
Knpa Ram v. Jawahar Lal, 623.
Kripanath v. Ram Lakshmi, 817
Kri-hadhan v. Brojendra, 1092
Krishna v. Akulanda, 105
Krishna v. Alwarappa 300
Krishna v. Amurul, 57
Krishna v. Atul, 464.
Krishna v. Balaram, 1290.
Krishna v. Bhan Mansaram 134.
Krishna v. Bhan, 161
Krishna v. Bunwari, 43, 47
Krishna v. Corporation of Calcutta, 451
Krishna v. Kedarnath, 353.
Krishna v. Mammad 487
Krishna v. Mees Promila, 220.
Krishna v. Mohesh Chandra 321
Krishna v. Mungara, 65
Krishna v. Nipendra 798, 21
Krishna v. Pachayappa 466, 553.
Krishna v. Protah Chunder, 647
Krishna v. Raman, 102.
Krishna v. Ramkumar, 1138.
Krishna v. Saraswatula, 182, 818
Krishna v. Savinmuthu 695.
Krishna v. Subbarama 1290
Krishna v. Thanikachala, 1351, 1352.
Krishna Ayyangar v. Vallaperumal Pillai, 2
Krishna Ayyar v. Muthu Kumara-
swamy, 978.
Krishna Bai v. The Collector and Govern-
ment Agent, Tanjore, 471
Krishna Behari Roy v. Brojeswar
Chowdhanee, 41
Krishna Bhooopathi v. Raja of Vizian-
garam, 1136.
Krishna Chandra v. Dina Nath, 176.
Krishna Chandra v. Mohesh Chandra,
322.
Krishna Chandra v. Surendra Nath, 48
Krishna Das v. Ram Gopal, 252, 253.
Krishna Das v. Ram Leta, 500
Krishna Das v. The Land Acquisition
Collect v. Satna 200
Krishna Perad v. Moti Chand, 374, 823,
835.
Krishna Rao In the matter of, 1359
Krishnabai v. Framroz, 364
Krishnabai v. Hari Govind, 890
Krishnabai v. Manohar, 963.
Krishnabai v. Savlaram, 200
Krishnabandhu v. Panchkari, 1097
Krishnabhupati v. Vikrama, 775.
Krishnados v. Ghanshandos, 1341
Krishnaiah v. Gajenda, 732
Krishnaivar v. Krishnasamy, 211
Krishnaji v. Damodar, 208.
Krishnaji v. Gajanan, 104, 106, 109
Krishnaji v. Ganesh, 242.
Krishnaji v. Mahadeo, 161, 893, 812
999
Krishnaji v. Motilal 101, 477
Krishnaji v. Rajmal, 17
Krishnaji v. Sangappa, 490
Krishnaji v. Secretary of State, 255
Krishnaji v. Wamanji, 331
Krishnama v. Appasami, 183.
Krishnama v. Krishnasami, 29
Krishnama v. Narasimha, 1107
Krishnamachariar v. Srirangammal, 606.
Krishnammal v. Soundararaja, 490
Krishnamoorthy v. Ramayya, 976.
Krishnan v. Itinan, 211.
Krishnan v. Kannan, 64
Krishnan v. Muthu, 1251
Krishnan v. Venkatapathi, 175, 726, 771
Krishnappe v. Abdul Khader, 784.
Krishnappe v. Peraswamy, 173
Krishnappe v. Shirappa, 446
Krishnarao v. Krishnarao, 795
Krishnasami v. Engel, 1040
Krishnasami v. Kanakasabai, 99, 101
Krishnasami v. Krishnama, 31
Krishnasami v. Krishnamacharyar, 27
Krishnasami v. Ranga, 695
Krishnasami v. Samaram, 30
Krishnasami v. Somasundaram, 784
Krishnasami v. Virasami, 25
Krishnaswami v. Karuppan, 637, 714
Krishnaswami v. Somasundaram, 789
258
Krishner v. Meenakshi, 637
Krisho Kishore v. Hooplall, 161, 164
Krishtopada v. Chaitanya, 983.

- Krista Chandra Ghose v Krista Sakha Ghose, 1067
 Krista v Pancharam, 657, 678
 Kristamma v Chapa, 382 387 391
 Kristam v Janakiramavva, 183
 Kristnam v Pathma Bee, 785
 Kristnama v Mangammal, 191
 Kristnasawmy v Official Assignee of Madras, 238, 239, 1042
 Kristo Indro v Huromonee, 360
 Kristo Ankur v Burrodacaunt, 189
 Kristo Raman v Kedarnath, 197, 727
 Kristodhone v Nandaram, 232
 Krupa Indhu v Mahanta 414, 420, 421
 Kshetra Mohan v Gour Mohan 429
 Kshirode v Nabin Chandra, 517 518, 539
 Kshyish Chandra v Janaknath 1062
 Kuarmoni v Wasif Ali, 562
 Kuber v Ramakar, 950
 Kuberan v Koman, 35
 Kubra Jan v Ram Bah, 108, 498
 Kudhai v Sheo Dayal, 713
 Kudratulla v Kubra Begam, 243 983
 Kudratulla v Upendra, 158
 Kulada Prasad v Khudiram, 484
 Kulada Prasad v Sadhu Charan, 437
 Kulaikada v Vishwanatha, 1094 1097
 Kulandai v Indran 378
 Kulandaivelu v Ramaswami 374 567
 Kuldip v Banvari 334
 Kuldip v Kuldip, 887
 Kulendra v Rai Kishori, 587
 Kulsum v Ali Akbar, 1273, 1293
 Kumar v Rameshwar Mahabir, 340
 Kumar Abhavanand v Maharajadhiraj Rameshwar 894
 Kumar Basanta v The Secretary of State 359
 Kumar Chandra v Narendra Nath, 140
 Kumar Gang v Pirthichand Lal, 1048
 Kumar Ganganand v Maharaja Sir Rameshwar Singh 1000
 Kumar Ganganand v Pirthichand, 1004
 Kumar Krishna v Hari Narain, 580, 943
 Kumar Rameshwar v Rani Rikhnath, 137, 620 623
 Kumar Saradindu v Dhirenda, 940
 Kumara v Thevaraya 785, 787
 Kumarandi v Venkatasubramania, 66
 Kumaraippa v Adiyakkalam 64
 Kumaraippa v Manavala, 337
 Kumarasani v Silloraya 1100
 Kumaravelu v Ramaswami, 66, 67, 461, 463
 Kumaretta v Sabapathy, 158, 172
 Kumbalinga v Ariyaputra, 249
 Kummakutty v Neelakandan, 816
 Kumeda Prosunna v Secretary of State, 333
 Kumud v Hari, 23
 Kumud Nath v Jotindra Nath, 597
 Kundan Lal v Faqirchand, 981
 Kundan Lal v Shiv Dayal, 669
 Kunhamed v Chathu, 836
 Kundaasami v Subba 563 565
 Kunhan v Mannan 1060
 Kunhayan v Ithukutti 229
 Kunhi v Kutti, 1105
 Kunhi v Makhi, 235.
 Kunhi v Muhammad 918
 Kunhi Moidin v Koman, 425
 Kunj Bihari v Bundeshri, 691
 Kunj Behari v Mast Narain, 30
 Kunj Lal v Banwari Lal, 1261, 1273, 1290 1293.
 Kunj Man v Jaganath, 68
 Kunja v Manindra, 105, 128
 Kunja Lal v Narsamba, 141
 Kujamonhan v Karuna Kanta, 1139
 Kunji v Raman 76
 Kunji Lal v Durga Prasad, 1294
 Kunjo Behary Singh v Madhub Chundra, 341
 Kunjola v Idurali 820
 Kunthi Ammal v Sarangapani, 1285
 Kunversi v Pitamberdas, 1152
 Kunwar Lal v Lala Beni 759
 Kuppa v Dorasami, 218, 339
 Kuppana v Kumara, 58, 59, 175, 182, 845
 Kuppaswami Aivar, Pe, 1358
 Kuppaswami v Bayaswami, 908
 Kuppaswami v Subba, 54
 Kuppaswami v Singaravelu, 862
 Kuppaswami v Subramaniam, 1062
 Kuppaswami v Zamindar of Kalahasti, 143
 Kuppaswami v Kamalammal, 949
 Kupusami v Rathnavelu, 1066
 Kuppasami v Venkatarammer, 85
 Kura v Madho 66
 Kura v Udmi, 1071
 Kura Mai v Ram Nath, 1355
 Kurgodigouda v Nanganonda, 420, 421
 Kurrutalain v Nurhat ud Dowla, 42

Ko Tha Lu v Ko Hla Kyi 656
 Kori Pujari v Manjaya, 101
 Kori Reddi v Subbiah 276 277 278
 Kottueth v Udaya, 108
 Kovvuri v Tallapragadha, 457
 Kower Naram v Sreenath, 17
 Koylash Chandra v Christophoridi, 211
 Koylash Chunder v Sonatun, 3
 Koyyana v Doosy 58, 786
 Kripa Ram v Jawahir Lal, 623
 Kripanath v Ram Lakshmi, 817
 Krishadhan v Brojendra 1092
 Krishna v Akulanda, 105
 Krishna v Alwarappa 309
 Krishna v Amrui, 57
 Krishna v Atul 464
 Krishna v Balaram 1290
 Krishna v Bhan Mansaram 134
 Krishna v Bhan, 161
 Krishna v Bunwari, 45, 47
 Krishna v Corporation of Calcutta, 851
 Krishna v Kedarnath, 383
 Krishna v Mammad 487
 Krishna v Meet Promila, 220
 Krishna v Mohesh Chandra, 321
 Krishna v Mungara, 65
 Krishna v Nripendra 798 821
 Krishna v Pachayappa, 466, 553
 Krishna v Protap Chunder, 647
 Krishna v Raman 102
 Krishna v Ramkumar, 1138
 Krishna v S. —
 Krishna Ayyangar v Nallaperumal
 Pillai, 2
 Krishna Ayyar v Muthu Kumara-
 swamy 878.
 Krishna Bai v The Collector and Govern-
 ment Agent, Tanjore 471
 Krishna Behari Roy v Brojeswari
 Chowdranee, 41
 Krishna Bhoopathi v Raja of Viziana
 garam, 1136.
 Krishna Chandra v Dina Nath, 178.
 Krishna Chandra v Mohesh Chandra,
 322
 Krishna Chandra v Surendra Nath 48
 Krishna Das v Ram Gopal, 252, 253
 Krishna Das v Ram Ugra, 590
 Krishna Das v The Land Acquisition
 Bill of 1913 350
 Krishna Kishore v Amarnath 1343

Krishna Persad v Moti Chand, 354, 823,
 835
 Krishna Rao, *In the matter of*, 1358
 Krishnabai v Framroz, 364
 Krishnabai v Hari Govind, 899
 Krishnabai v Manohar, 963
 Krishnabai v Savlaram, 200
 Krishnabandhu v Panchkari 1007
 Krishnabhupati v Vikrama, 776
 Krishnadeva v Ghanshandoss, 1341
 Krishnaiyah v Gajenda, 732
 Krishnaiyar v Krishnasamy, 211
 Krishnaji v Damodar, 208
 Krishnaji v Gajanan, 104, 106, 109
 Krishnaji v Ganesh, 242
 Krishnaji v Mahadeo, 161, 808 812
 999
 Krishnaji v Motilal, 101, 477
 Krishnaji v Rajmal, 17
 Krishnaji v Sangappa, 400
 Krishnaji v Secretary of State, 285
 Krishnaji v Wamanji, 531
 Krishnama v Appasami, 183.
 Krishnama v Krishnasami, 29
 Krishnama v Narasimha, 1107
 Krishnamachariar v Sitrangammal, 606
 Krishnammal v Soundararaja, 490
 Krishnamoorthy v Ramayya, 976.
 Krishnan v. Itinan, 211.
 Krishnan v Kannan, 64
 Krishnan v Muthu, 1281
 Krishnan v Venkatapathi, 175, 726, 771
 Krishnappa v Abdul Khader, 784
 Krishnappa v Periaswamy, 173
 Krishnappa v Shivappa, 446
 Krishnarao v Krishnarao, 795
 Krishnasami v Engel, 1040
 Krishnasami v Kanakasabai, 99, 101
 Krishnasami v Krishnama, 31
 Krishnasami v Krishnamacharyar 27
 Krishnasami v Ranga, 695
 Krishnasami v Samaram 30
 Krishnasami v Somasundaram 784
 Krishnasami v Virasami, 25
 Krishnaswami v Karuppan, 637, 714
 Krishnaswami v Somasundaram, 789
 Krishnaswami v Sundarappayyar, 405
 Krishnasamy v Chengalraya, 434 1091
 Krishnashanker v Chandrashanker, 257,
 258
 Krishner v Meenakshi, 637
 Krishro Kishore v Rooplal, 161, 164
 Krishtopadi v Chantanya, 985

Kurugodappa v Soogamma 424 952
 Kushalehand v Nandram, 1304
 Kusum v Satya, 916
 Kutbuddin v Priyanayaga, 1029
 Kutti v Subramania, 241
 Kutti Ali v Chandan, 54
 Kwai Tong Kee v Lam Chaung 208
 Kylasa v Ramasami 842
 Kyone Hoe v Kyon Soon, 16 1144

L

Labh Singh v Ram Lal 1110
 Lachmi v Bhulli, 40
 Lachharam v Virji 128
 Lachhman v Baba, 702
 Lachhman v Bansi 873
 Lachman v Baldeo 223
 Lachman v Brijpal, 1279
 Lachman v Chaturbhuj 712
 Lachman v Ganga 703
 Lachman v Jamna, 1105.
 Lachman v Jarbundan, 220, 704
 Lachman v Lakshmi 83
 Lachman v Munja 309
 Lachman Das v Abparkash, 1262, 1275,
 1280
 Lachman Lal v Kanbaya Lal, 334
 Lachman Parsad v Ram Kushan 608
 Lachman Singh v Musummat Puna 335
 Lachman Singh v Ram Lagan 328
 Lachmeswar v Manowar 145 335
 Lachmi v Balmakund 354
 Lachmi v Jwala, 159
 Lachmi v Mitthu 268
 Lachmi v Muhammad 854 874
 Lachmi v Ram Bahadur, 967
 Lachmi v Ram Charan, 1047, 1065
 Lachmi Chand v Bepin Behari 1307
 Lachmi Narain v Balmakand, 381, 386
 533 656, 859, 1003
 Lachmi Narain v Durbasi Lal, 7, 383
 Lachmi Narain v Kunji Lal, 206
 Lachmi Narain v Makund, 223
 Lachmi Narain v Uman Das, 1016
 Lachmi Narain v Shiv Nath, 1293
 Lachminarain v Hoare, Miller & Co.,
 1257
 Lachmi Das v Kachubhai 806
 Lachmi Singh v Bhag Singh, 1261
 Laluram Nathmull v Nandlal 1259

Lafone v Falklands Islands Co, 622.
 Lahore Bank v Ghulam, 158
 Lahore Bank, Ltd v Lakhi Ram, 1104.
 Laird v Briggs, 549, 551, 552.
 Lajja Ram v Shambhu Nath, 863
 Lakhchand v Lalchand, 337, 338.
 Lakhpriya v Raikishorn, 1086.
 Lakhami v Ishar, 1071
 Lakhami Das v Balak Ram, 486
 Lakhmichand v Chetooram, 783
 Lakhmichand v Kachubai, 435
 Lakhmichand v M E V R M Chettyar,
 752, 780
 Lakhmiram v Poonam Chand, 1048
 Lakho v Salamat, 439
 Lakhpat Singh v Sat Narain, 331
 Lakhu Rai v Maharaja Kesho Prasad,
 835
 Lakmi Chand v Madho Rao 77
 Lakpati v Daulat Singh, 859
 Lakshan v Nikunja Muni, 878, 879
 Lakshan Chandra v Ramdas, 835, 842
 Lakshminarasimham v Somasundaram,
 1267
 Lakshmakka v Nagi, 452
 Lakshman v Babaji, 21, 73, 101
 Lakshman v Gopal 423
 Lakshman v Govind, 160
 Lakshman v Hari, 559
 Lakshman v Maruti, 390, 1154
 Lakshman v Moru, 745
 Lakshman v Narhari, 202
 Lakshman v Ramchandra, 79, 232
 Lakshman v Shridhar, 1078
 Lakshman Chandra v Ramdas Vondal,
 169
 Lakshmanachandra v Ramdas, 690
 Lakshmana v Appalwar, 834
 Lakshmana v Chinnathamba, 950
 Lakshmanan v Kuttayan, 90
 Lakshmanan v Kannuppar 379
 Lakshmanan v Muthava, 57, 883, 889
 Lakshmanan v Palanisappa, 1081
 Lakshmanan v Parasivam 782
 Lakshmanaswami v Rangamma, 898,
 902
 Lakshmandas v Ganpatray 306
 Lakshmandas v Jugal Kishore, 71, 313
 Lakshmandas v Lane, 341
 Lakshmanan v Lakshmanan 930 1353
 Lakshmi v Atal, 59
 Lakshmi v Ishar, 1110
 Lakshmi v Kaduresan, 787

- Lakshmi v Kuttunni, 819
 Lakshmi v Krishna, 416
 Lakshmi v Maru, 326
 Lakshmi v Ponnassa, 713
 Lakshmi v Sankaran, 813
 Lakshmi v. Subbarama, 839, 800
 Lakshminbai v Hari, 550, 551.
 Lakshminbai v Jagannath, 86
 Lakshminbai v Madhavray, 191
 Lakshminbai v Raju, 88, 163, 593
 Lakshminbai v Santapa, 801
 Lakshminbai v. Yeshvant, 875
 Lakshmi Chand v L. Behari, 874
 Lakshmikanthara v Jagannatharaja, 947
 Lakshmikutti v Mariathummal, 1021
 Lakshminarasimham v Lakshminarasimham, 771
 Lakshmi Narain v Dip Narain, 390
 Lakshmi Narain v Msst Ratni, 1316
 Lakshminarayan v Laduram, 170, 420
 Lakshminshankar v Raghunath, 426
 Lakshminshankar v Vishnuram, 84, 94
 Lakshman v Madhav, 578
 Lal Bahadur v Abharan, 1021
 Lal Behary Singh v Habibur Rahman, 1005
 Lal Bihari v Parkali, 75
 Lal Das v Kishore Das, 168
 Lal Kunwar v Chiranjil Lal, 654
 Lal Mohan v Ram Lakshmi, 64
 Lal Singh v Ghansham, 378
 Lal Singh v Kadir Bakhsh, 118
 Lal Umrao v Lal Singh, 755, 812
 Lala Bhugwat v Rai Pashupati, 363
 Lala Chet Narain v Ramphal, 593
 Lala Chhajmal Das v Brijbhukan Lal, 139
 Lala Das v Mina Mal, 12, 750
 Lala Gauri Shanker v Janki Parshad, 1094
 Lala Kandha v Lala Lal, 741
 Lala Kirt v Palukdhari, 7
 Lala Punjabet v Motiram, 886
 Lala Ram v Thakur Prasad, 227
 Lala Pam Charan v Mst Jasda, 1288
 Lala Rup Narain v Gopal Das, 457
 Lala Sont Ram v Kanhaiya, 52
 Lala Suraj Prasad v Golab Chandel, 295, 985.
 Lalchand v Behari Lal, 375, 376, 379
 Lal Das v Lal Das, 171
 Laldhari Singh v Manager, Court of Wards, 719
 Lalit v Satish, 859
 Lalit Mohan v Radharaman, 87
 Lalit Mohan v Sarit Chandra, 89
 Lalit Mohan Mandal v Satish Chandra Das, 964, 965, 969
 Lalitagar v Bai Suraj, 121
 Laljee v Chander, 837
 Lalji v Brijnath, 1137
 Lalji v Gaya, 696
 Lalji v Odoya, 211
 Lalji v Walji, 24, 30
 Lalji Mal v Nand Kishore, 175
 Lalji Shau v Lachmi Narain, 710
 Lalla v Ramanandan, 70, 947
 Lalla Bunsudhur v Koonwar Bindesara, 825
 Lalla Sheo v Ramanandan, 591
 Lallessor v Janki, 468, 502
 Lalubhai v Bhumbhai, 361
 Lalman v Chintamani, 147
 Lalman v Shyam, 1002
 Lalman Das v Jagan Nath, 184
 Lalmohan v Ramlakshmi, 63, 76
 Lalta v Nandkishore, 590
 Lalta Prasad v Gajudhar, 525
 Lalta Prasad v Nand Kishore, 678
 Lalta Prasad v Miri Lal, 117
 Lalta Prasad v Ram Karan, 592
 Lalta Prasad v Sadli Hussain, 117.
 Lalta Prasad v Sri Ganeshji, 677
 Lalta Prasad v Suraj Kumar, 105
 Lala v Kashibai, 781
 Lamb v Orton, 619
 Lambton v Parkinson, 146
 Lan Jin v Ma Mya, 1152
 Land Mortgage Bank v Badruddeen, 1339, 1342
 Landergan v East, 633
 Lang v Jawantlal, 161
 Langat Singh v Janki Koor, 99
 Langley v D Arcy, 114
 Lanka v Lanka, 795
 Lasso & Sons v Krishna, 578
 Latafat v Muhamma, 193
 Latafat v Anunt, 1060
 Latchayya v Kotamma, 322
 Latchayya v Settamma, 431
 Latchman v Maddan Mohun, 154, 163, 157
 Latifunnissa Bibi v Nazirun Bibi, 307, 308
 Laurentius v Dhuki, 579

- Lawrence v Lord Norreys 546 553
 Lawrence Dawson v Hormasji 1306
 Lawrie v Lees 439
 Laxman v Ramchandra 1269
 Laxmibai v Hussambha 919
 Laxminarayan v Chinnaram 579
 Laxmishankar v Hamjabhai 551
 Le Mesurier v Wajid 1336
 Leake v Daniel 164 704
 Leach v Joy Gobendo 144
 Lecky v Bank of Upper India 26
 Ledgard v Bull 125 126 131
 Lee Conservancy Board v Button 571
 Letich v Abbott 534
 Lekha v Bhauna 7 8 151 1083 1084 1085
 Lekh Ram v Ramji 432
 Lekhan v Babu Ram 1098
 Lekraj v Shamlal 873
 Lekraj Roy v Kanhya Singh 360
 Lever Bros Ltd v Bell 596
 Levy Bros v Subooh Kumar 1356
 Lewis v The Earl of Lonsborough, 693
 L. T. & S. A. P. M. Firm 1085
 Light of Asia Insurance Co Ltd v Bai Chanchal 191
 Lila v Mahange 3 8
 Lalabati v Bishun Chobey 41
 Laladhar v Chaturbhuj 168 172 900
 Lalchand v Luckmishur 1137
 Lalvat v Chote Singh 668
 Lall v Jagru 807 858 807
 Lam Pin Sin v Eng Wan Hoek 605 962
 Lima v Rama 98
 Linga v Ikslumanin 173
 Lingammal v Venkatammal 448 459
 Lingangowda v Basangowda 68 986
 Lipman v Pulman 145
 Little v Spreadbury 16
 Livesley v Gilmore 898
 Llandudno Urban District Council v Woods 299
 Llewellyn v Chunnalal 117
 Lloyd v Great Western & Metropolitan Docks Co Ltd 501
 Lohani v Assam Railway & Trading Co 139
 Lockyer v Fryman 34
 Lodna Colliery Co v Bijn 1341
 Lohre v Deo Hans 1114
 Lok Nath v Abani Nath 370 1316
 Lok Nath v Dasarathi 26
 Lok Nath v Keshab Ram 499
 Lokce v Kallypudde 249
 Lokessur v Purgun 745
 Lokhee v Kallypudde 246
 Loknath v Dwarika 486
 London Association for Protection of Trade v Greenlands Limited 460
 London and Blackwall Ry Co v Cross 1051
 London Bank v Burjorji 97
 London Bank v Govind 97
 London Bank v Hormusji 13 97
 London Bombay and Mediterranean Bank v Mahomed 649
 London Bombay Bank v Badee 116
 London Chatham and Dover Railway Co v South Eastern Railway Co 139
 London Drapery Stores In re 872
 London Gas Light Co v Chelsea 618
 London General Omnibus Co Ltd v Lavell 665
 London & North Western Ry Co v Lindsay 96
 Lord Cranstown v Johnston 107
 Lotlikar v Wagle 218
 Louis Dreyfus v Arunachala 90 1974
 Louis Dreyfus & Co v Purusottam Das 735 760
 Lovell v Beauchamp 930
 Luchman v Puna 339 369
 Luchmee Chund In re 507
 Luchmee Chund v Zorawur Mul 119 121
 Luchmeswar v Darbhanga Municipality 955
 Luchmi Narain v Bal Mukund 868
 Luchmi Narain In the goods of 436
 Luchmun v Bishun 151 152
 Luckumsey v Fazulla 495 497
 Lucky Churn v Budur un n s 7 593
 Luddy v Johnson 121
 Lukhee Kanto v Sumeerull 501
 Lukhi Narain v Jodu Nath 333 338
 Lukm das v Purshottam 459
 Lumb v Beaumont 598
 Lutan v Prayag 20
 Luta van v Lachya 905 1970
 Lutfi Ali v Asgur Ieza 1196
 Lutfunnasa Bibi v Nazrun Bibi 300
 Luxmibai v Ralhaba 144
 Luxman v Manjunath 1987

- Mahant v Sakina 194
 Mahant Damodar v Raj Kumar, 590
 657, 658.
 Mahant Darshhan v Bikramajit, 863
 Mahant Dyal v Mahant Sundar, 1123
 Mahant Gobind v Rani Debendrabala,
 116
 Mahant Rachu v Mahant Raghunath,
 1098
 Mahantha v Mahabir 599
 Mahapatrao v Magata Patrao, 7, 996
 Maharaj Bahadur v P C Lal 797
 Maharaj Bahadur v Siva Saran, 284, 285
 Maharaj Bahadur Sing v Sachundra
 Nath, 829
 Maharaj Bahadur Singh v Balchand,
 356
 Maharaj Bahadur Singh v Basiruddin,
 991
 Maharaj Bahadur Singh v Forbes, 838
 Maharaj Kishore v Kiran, 592
 Maharaj Narain v Shashi, 27
 Maharaj Tewari v Har Charan, 3
 Maharaja v Harihar, 655
 Maharaja Bir Kishore v Ali Ahmad, 951
 Maharaja Kesho Prasad v Lal Brij
 Mohan Lal, 470
 Maharaja Kesho Prasad v Shiva Saran,
 34 362
 Maharaja Kishore v Kiram Sashi, 1302
 Maharaja of Benares v Debi Dayal, 19
 Maharaja of Bharatpur v Kacheru 283
 Maharaja of Bharatpur v Rani Kanno
 Dei, 163 1016
 Maharaja of Bobbili v Narasaraia, 164,
 705
 Maharaja of Burdwan v Apurba, 259,
 386, 1008
 Maharaja of Darbhanga v Homebhar
 Singh 192
 Maharaja of Jaipur v Lalji Sahai 284
 Maharaja of Pithapuram v Rama Rao,
 1333
 Maharaja of Rewah v Swami Saran, 263
 Maharaja of Venkatagiri, *In re* 435
 Maharaja of Vizianagaram v Secretary
 of State, 1074
 Maharaja Laveneshwar v Rai Rajnath,
 1136
 Maharaja Sir Nripendra v Maharaja
 Manindra, 284
 Maharaja Sir Rameshwar v Harihar,
 717
 Maharajah Madhava Singh, *In re*, 352
 Maharajah of Jeypore v Rajah
 Gangaraju 1317
 Maharajah of Pithapuram v Gokuldeo,
 1062
 Maharani of Baroda v Hasturbhai, 1337
 Maharam Dis v Ajudhia, 146
 Mahasukh v Valibhai, 796
 Mahbub Ali v Muhammad, 695
 Mahendra v Girish Chandra, 75
 Mahendra Nath v Khetra Mohan, 1110,
 Mahendra Ram v Singi Lal, 886 892
 Mahendrakumar v Deenaschandrar, 796
 Mahendranarayan v Janakinath, 360
 1128
 Mahesh v Ranjor, 74
 Mahesh Chandra v Jogendra Lal, 735
 Mahesh Chandra v Panchu, 508
 Mahesri v Prosanna 890
 Mahim v Anil Bandhu, 61
 Mahim Chandra v Naba Chandra, 596,
 916
 Mahimchandra v Nabichandra 1144
 Mahindra v Aswini, 142
 Mahindra Chandra v Lal Mohan, 130,
 131
 Mahip Narain v Mannu Singh, 63
 Mahipat v Nathu, 886
 Mahmud Sheikh v Messrs Kankinarah
 & Co., 1265
 Mahmud v Sarat Chandra, 1032
 Mahomed v Abdul Hassan, 308
 Mahomed v Aimala, 908
 Mahomed v Ali Baksh, 589
 Mahomed v Cohen 4
 Mahomed v Collector of Pongoo, 600
 Mahomed v Comandur, 223
 Mahomed v Gajraj 1137
 Mahomed v Hakimun 1261, 1292
 Mahomed v Harperink, 838
 Mahomed v Hasin Bann, 484
 Mahomed v Hooain, 914.
 Mahomed v Husen 463
 Mahomed v Imtiaz, 330.
 Mahomed v Khalilurrahman, 1105
 Mahomed v Kishori Mohan, 237
 Mahomed v Krishnan, 407
 Mahomed v Laldin, 113.
 Mahomed v Mohini Kants, 152.
 Mahomed v Sallaram, 803 809
 Mahomed v Savras, 502.
 Mahomed v Sheikh Ahmed, 509

Mahomed v Sitaramayyar, 339
 Mahomed v Valli 1279
 Mahomed v Wazid Ali 922
 Mahomed v Yeoh, 3.
 Mahomed Aizal Khan v Abdul Rahman 332
 Mahomed Akbar v Sukhdeo, 817
 Mahomed Akl v Asadunissa 667
 Mahomed Ali v Mst Bismillah 789
 Mahomed Ali v William Stansfield, 366
 Mahomed Badsha v Nicol 473
 Mahomed Balah Khan v Hosseini Bibi 561 643
 Mahomed Casm v David, 816
 Mahomed Fazlul v Ahmad Muhammad 1353
 Mahomed Din v Mst Atirajo 462
 Mahomed Golab v Mahomed Sulliman 78
 Mahomed Haji v Jute and Gunns Brokers Ltd, 118 1344
 Mahomed Hamidulla v Tokurenissa Bibi, 601 603 603
 Mahomed Hanif v Ali Paza 593
 Mahomed Ibrahim v Ambika Pershad 57
 Mahomed Ibrahim v Sheikh Hamja, 56
 Mahomed Ismail v Ahmed 301
 Mahomed Ismail v Sharfutullah 81
 Mahomed Jackeria v Ahmed Mahomed, 3
 Mahomed Kanni v Naina Mahomed 467
 Mahomed Kasim v Seeni Pakir 97.
 Mahomed Khaleel v Les Tanneries Lyonnaises, 1107 1117
 Mahomed Khan Bahadur v Mahomed Munawar, 697
 Mahomed Mehdi v Mohini Kant 191
 Mahomed Mira Ravuthar v Savasi Vijaya Paghundha 531, 526, 529
 Mahomed Mozuffer Hoosein v Kishori Mohan Roy, 840
 Mahomed Rashid v Rahmat Ullah 903 904
 Mahomed Raza v Ram Saroop, 436
 Mahomed Shuffi v Laldin 908
 Mahomed Yacoob v P L R M Firm 791 803
 Mahomedah v Bayamma, 32
 n v Dharamsey, 437, 1078
 v Abdul Hussein, 1341
 v Adamji 115 483
 Zohorabuddin, v Mahomed,

Mahommed v Mahommed, 766
 Mahtab Singh v Hub Lal, 851
 Mai Bu v Mai Oh 1061
 Maiden v Bhonda 576
 Majuddin v Jankibai, 31
 Mailthi v Somappa 1122
 Maina Bibi v Chaudhari 47
 Maistry v Aziz, 598
 Mayarjan v Abdul 807
 Major v Nabin, 1114
 Majed v Raghur, 177
 Majraja v Maganlal 1099
 Makand Deb v Gopi Nath 334
 Makani v Bhukardas, 211 212
 Makar Ali v Sarfu Din 836, 838
 Makbool v Bazle Sabhan 815
 Makrand v Kallu, 1007
 Maksud v Nargis 481, 489
 Maksud Ali v Firm Sheikh Abdullah, 1115
 Maktab Beg v Hassan Ali 1095
 Maktum v Imam, 55
 Makund v Bahori Lal, 330
 Makund v Saraswati, 89
 Makund Ram v Naubat Singh, 1294
 Makund Ram v Sahg Ram 1271
 Makund v Parbhu 587
 Malabar Forests & Rubber Co., *In re* 764
 Malamal v Kavalappara, 1080
 Malap kaur v Hakim Singh 1101
 Malawa Ram v Madan Gopal, 1149
 Malchand v Osman, 899
 Malhar v Narasinha 306
 Malhari v Vinavah 58
 Malhi v Imam ud din, 64
 Malik Fazlu Rahaman v Mst Kholi, 715
 Mallikarjun v Nathani, 243, 383, 730
 Mallappa v Alagiri 389 434 1101
 Mallappa v Nagappa 1109
 Mallappa v Venkaji 1108
 Mallapragada v Lingham 867
 Mallano v Punamma, 70
 Mallayya v Punnammam, 54 900
 Mallayya v Veerayya 1102
 Mallikarjuna v Pithaneri 1098 1106
 Mallikarjunadu v Lingamurti 267 812, 983 992 999 1005
 Maloji v Sagaji 56
 Malubhai v Sursangji 76, 77
 Maluka v Sandar Singh 740
 Mama v Sasagon 546, 503

Mamat Ram v. Baji Ram, 28
 Mame v. Mamin, 1102
 Mammod v. Lock, 185
 Mammod v. Locke, 811.
 Man Golunda v. Shashundra Chandra,
 916.
 Man Han v. B. M. A. L. Firm, 1115
 Man Mohan v. Shub Chandra, 39
 Mana v. Mallichery, 1293.
 Manackjee D. v. R. M. N. Chettyar, 1039
 Manadananda v. Tarakananda, 302
 Manager of Court of Wards v. Ramaswamy, 1103
 Manager of Sri Meenakshi Devasthanam
 v. Abdul Kasim, 323, 902, 903.
 Manager, Vithoba Timap Shambog v.
 Vigneshwar, 1017
 Manaji v. Aramita, 816
 Manaji v. Khandoo, 964.
 Manaku v. Sitaram, 604.
 Manali Saravana Mudaliar v. Rajagopala
 Chetty, 148
 Manavala v. Kumarappa, 379
 Manavikraman v. Ananthanarayana, 128.
 Manavikraman v. Avisilan, 317
 Manavikraman v. Collector of the
 Nilgiris, 328, 1358, 1369
 Manavikraman v. Unniappan, 151, 152,
 995.
 Mancharam v. Fakurchand, 845
 Mancharam v. Pranshankar, 218
 Mancherji v. Thakurdas, 253
 Manchershah v. Govind, 545
 Manbharam v. Kaldas, 86
 Mandal & Co v. Fazul, 488
 Mandan Lal v. Gajendrapal, 1115, 1116
 Mane v. Dhan, 45.
 Maneckji v. Goolbai, 909, 1034
 Maneckji v. Wadia, 1353
 Manepalli v. Manepalli, 120
 Mangal v. Rup Chand, 134
 Mangalathammal v. Narayanswami, 58,
 59
 Mongamma v. Mahalakshamma, 355,
 358, 359
 Mangan Lal v. G. I. P. Rly Co, 74
 Mangar v. Bhatoo, 697, 1266.
 Mangar Sabu v. Bhatoo, 1033
 Mangat Rai v. Dulchand, 89
 Mangaya v. Sramulu, 172
 Mani Bai v. Lodd Govind, 910
 Mani Lal v. Durga Prasad, 374, 375, 390,
 567

Mani Mohan v. Ramtaran, 4, 350 1100
 Manick Lal v. Surrut Comaree, 1079
 Manicka v. Narayanswami, 967
 Manickam v. Mahudam, 509, 590, 593
 Manikka v. Rajagopala, 182
 Manijan v. Khadem Houssein, 304
 Manik Lal v. Banamali, 771
 Manikyanayanam v. Lakshminarasimha
 860.
 Manikya v. Lakshminarasimha, 14
 Manilal v. Banubai, 363
 Manilal v. Bharat Spinning & Weaving
 Co, 765
 Manilal v. Goculdas, 896
 Manilal v. Gulam Husain, 591
 Manilal v. Gordhan Spinning & Manu
 facturing Co, 800
 Manilal v. Ishvarbhai, 290, 292
 Manilal v. Manilal, 554, 1352
 Manilal v. Motibhai, 756
 Manilal v. Nanabhai, 260, 261.
 Manilal v. Nathalal, 785
 Manindachandra v. Rabatannessa, 730
 Manindra Chandra v. Bhagabati, 864,
 865, 868 1092
 Manindra Chandra v. Lal Mohan, 124
 Manindra v. Ramlal, 870, 879
 Manindra v. Secretary of State, 275
 Maniram v. Vithu, 162
 Maniram Seth V. Seth Rupchand, 335
 Manisha v. Siyali, 385.
 Manjappa v. Rajagopala, 126
 Manji v. Hoorbai, 250
 Manjunath v. Venkatesh, 88.
 Manly v. Patterson, 1126
 Manmatha v. Abu Zafer, 141
 Manmatha Nath v. Emperor, 1316, 1373
 Manmatha Nath v. Lachmi, 186, 731.
 Manmohan v. Mst Ramdei, 607, 1109
 Manmotha v. Rakhal, 720
 Manni v. Crooke, 477.
 Mannu Nair v. Mathura Prasad, 817
 Mano Mohan v. Surendra, 1066
 Manohar v. Lakhmuram, 296, 298, 314
 Manohar v. Ram Autar, 235, 1046
 Manohar Das v. Futeh Chand, 718.
 Manohar Lal v. Baldeo Singh, 62.
 Manohar Lal v. Jadunath Singh, 953,
 954
 Manohari v. Muhammad, 307
 Manoharlal v. Nanak
 Manorath Das v. Ambika,

- Manphul Singh v Halim Hamud, 1143, 1148, 1149
 Mansa v Ancho, 572
 Mansab Ali v. Nihal Chand, 1351
 Manojendra v Jnan, 859, 868
 Manzur Hasan v Muhammad Zaman, 31
 Maphabala v Kunhanna, 447
 Maqbul v Lakta, 1004, 1006
 Maqbul Shah v Muhammad, 87.
 Marakarutti v Verran, 437
 Marath v Sesbu, 202
 Maria v. Pana, 177
 Maria Ursula v Pana, 341
 Mariamnissa v Joynab Bibi, 39
 Mariam un nissa v Babu Rani, 1150
 Mariannissa v Ramkalpa, 656
 Marimuthu v Subbaraya, 244
 Marivittil v Pathram, 68, 173
 Mariyee v Ponnuswamy, 669
 Maryil Raman v Narayanan, 980
 Markt & Co, v Knight Steamship Co., 450, 463
 Markur, *In re*, 75
 Marris v Ingram, 700
 Marret v Mahomed 170
 Marriott v Chamberlain, 530, 603, 609.
 Marshall v Inter-Oceanic & Co., 535
 Martand v. Dava, 802
 Martand v Dhondu, 1021
 Martin v Hashim, 180
 Martin v Lawrence, 214
 Martin v M Taggart, 531
 Martirosi v Subramanian, 1356.
 Maruthamalai v. Palani, 947
 Maruthamuthu v Krishnamachariar, 914.
 Maruti v Ramchandra, 777.
 Maruti v. Vithu, 516.
 Masyk v Steel, 108, 156
 Mashuat un nissa v Rani, 191
 Masih un nissa Bibi v. Kaniz, 1103
 Masilamani v. Sethuswami, 700.
 Masilamani v. Thiruvengadam, 49, 52, 480.
 Mason v. Mogndge, 938
 Masson v. Westoby, 1061.
 Masum un nissah v. Latifan, 920.
 Mata v Beni, 904.
 Mata Amber v. Sri Dhar, 1008
 Mata Din v. Jamna Das, 1098.
 Mata Din v. Kazim Hussain, 978, 979, 981
 Mata Prasad v. Nageshar, 69
 Mata Prasad v Secretary of State, 1123.
 Matabir Singh v. Abbai Nandan, 856.
 Mateur v. Abdul, 158, 831.
 Mathappa v. Chellappa, 94.
 Mathar Singh v. Rambaz Singh, 338.
 Matheran Steam Light Tramway Co., Ltd, v Lang, 667.
 Mathews, *In re*, 474.
 Mathewson v Gobardhan, 175.
 Mathewson v. Ram Kanai, 476
 Mathooru Kant v. India General S N. Co, 3
 Mathura v. Haran Chandra, 592, 1350
 Mathura v. Jagdeo, 368
 Mathura v Kailash, 163
 Mathura v. Mussammat Anurago, 723
 Mathura v. Nathuni, 801
 Mathura v. Nobin Chandra, 1102.
 Mathura v. Ram Charan, 598
 Mathura v. Ram Kumar, 1096.
 Mathura Das v Jamna, 253
 Mathura Das v. Lachman, 178, 825
 Mathura Das v. Raja Narindar, 1017.
 Mathura Prasad v. Satya Narayan, 121.
 Mathuradas v. Ebrahim, 763, 764, 933, 934.
 Mathuradas v. Panhalal, 253
 Mathuranath v Janakinath, 708.
 Mathura Nath v. Umesh Chandra, 269, 373, 389.
 Mathurapore Zamindary Co., Ltd v. Bhasaram, 714
 Mathurbhai v. Nabadad City Municipality, 1319
 Mathusri v. Mathusri, 1064
 Matigara Coal Co v Shragers, Ltd., 1343.
 Matur Rasul v. Abdul Said, 948
 Matloob v. Kalawati, 1048
 Mata Mondal v. Hari, 99, 100, 101.
 Matru Mal v. Durga Kanwar, 983, 984
 Matthews v. Munster, 15, 16.
 Matukdhari v. Ramdas, 1004.
 Maturi v Kota, 105.
 Maula v. Gulzar, 502.
 Maulvi v. Jagat, 464
 Maulvi v. Kishnudeo, 359.

Maung Aung Myat v Maung Tha Hmat, 752
 Maung Ba Than v District Council, Pegu 350
 Maung Ba Thein v Ma Hlan Myint (5 Rang 56.), 54
 Maung Ba Thein v Ma Than Myint (3 Pang 487) 549, 552
 Maung Be Tu v Ma Thet Su, 591
 Maung Ban Gyi v Ma Ngwe Bin 420
 Maung Bwaung v Maung Shwe, 855, 864
 Maung Chet Pe v Narayan Chettiar 697
 Maung Hla v Ma Hinn 420 422
 Maung Hlaing v Maung Chit, 338
 Maung Hmat v Ma Htay, 87
 Maung Khant v Ma Thet 629
 Maung Kraw v Ko Aye 1145
 Maung Law San v Maung Po Thein, 760
 Maung Lun Bye v Maung Po Nyun, 769, 805
 Maung Mu v Maung Kan, 890
 Maung Naung v Maung Ba Gyi, 837
 Maung No v Maung Po, 49, 51, 55
 Maung Ohn Tin v P R M P S R M Chettyar Firm, 791, 823, 829
 Maung Pa v Abdul Ganni, 389
 Maung Pe v Ma Lon, 481, 484
 Maung Pe v Ma Shwe, 966 976
 Maung Po v Ma Shwe Ma 858
 Maung Po Nyit v Maung Po Sin, 1357
 Maung Po Nyn v Ma Saw Tin, 208
 Maung Po Pe v Maung Kwa, 777
 Maung Po Shan v Maung Po Kim 1133
 Maung Pway v Saya Pe, 590, 658
 Maung Pye v Ma Hla Kyn 787
 Maung Sa v Ma Uma, 669
 Maung San v U Pon Gyaw, 978
 Maung San v Maung Nyi 944
 Maung San Shwe v Haji Ko Ishaq 1123
 Maung Saw v Ma Bwin Byu, 592
 Maung Sein v Maung Tun 1145
 Maung Sein Done v Ma Pan Nyun, 63
 Maung Shwe v Karambu, 983
 Maung Shwe v Ma The, 368
 Maung Shwe v Min Nyun, 1273
 Maung Shwe Myat v Maung Po Sin, 545
 Maung Than v Zainat Bibi, 1691
 Maung Thein v S A S Firm, 201
 Maung Thwe v Ma Shwe, 63
 Maung Tin v Maung Po, 475

Maung Tin v Ma Hmin 91
 Maung Tin v Ma Mi 700
 Maung Tun v Maung Tun 1279
 Maung Tun Sein v Ko Tu 636
 Maung Tun U v Maung Po 381, 1293
 Masula Ammal v Masula Maracoir 342
 Mawazzam v Shebaah, 1002
 Maxim Nordenfelt & Co v Nordenfelt, 634
 May v Newton, 466
 Mayabhai v Triluvandas 189
 Mayaram v Ravi, 93
 Mayashankar v Harishankar, 25
 Mayhew v Tullock, 113
 Mayor of Bradford v Bradford Corporation, 143
 Mayor of Lyons v Advocate General of Bengal, 313
 Mazan v Maung Kyaw, 863
 Mazhar Ali v Sajjad Husain, 498
 McCheane v Gyles, [No 2 (1902) 1 Ch 911] 472
 McColla v Jones, 609
 McInerny v Secretary of State, 32, 273 279
 Md. Warish v Pahaman, 650
 Meah v Durga 1154
 Meango v Bawiah, 661
 Meckjee v Kasowji, 34
 Med Singh v Kabir un nissa, 855
 Medai Kahani, In the matter of, 695
 Medatunnissa v Sewak Ram, 438
 Medni Prasad v Nand Keshwar, 820
 Meenakshi v Myle, 120
 Meenakshi Naidoo v Subramania Sastri, 125
 Meenakshisundaram v Chokkalinga 795
 Meenambal v Aburubammal, 159
 Meenatchi v Ananthanarayana 389, 870
 Meerudin v Rahisa, 849
 Megh Narayan v Radha, 718
 Megh Raj v Tulsi Ram, 904
 Meghan Dube v Pran Singh, 1098
 Meghjee v Kalooram, 1353
 Megh Lal v Hira Lal, 154
 Mehar Chand v Mulki Ram, 837
 Mehbunissa v Mehmedunissa, 698, 699
 Mehdi Ali v Sayed Wilayet 57
 Mehdi Husain v Sughra Begum, 663, 864
 Meher Singh v Ishar Singh, 97
 Mehr Baksh v Sanghe Khan 1621

- Mehr Chand v Amritsar Bank 579
 Mehr Chand v Labhu Pam 303
 Mehra v Devi Datta Mal 63
 Mehta Jethalal v Jarnatram, 30
 Menk v The Midnapur Zamindary Co Ltd 711, 712
 Mela Mal v Bi han Das, 1039
 Mela Mal v Harbhaj, 10
 Mellor v Sidebottom, 632
 Mellor v Snire 439
 Menajuddi v Toom Mandal 828
 Mengha v Sucha 1040, 1307
 Menon v Lafan, 594
 Merah v Sheriff, 273, 380 1281
 Mercantile Marine Service Association v Toms 461
 Mercier v Cotton 611, 624
 Mewa Kuar v Banarsi Prasad 466
 Mewa Lal v Ahmed 190
 Meyappa v Perianan 407
 Meyappa v Subramanian 508
 Meyappa Chettiar v U Tun Hla 609
 Meyappan v Meyappan 204, 205
 Meyyappa v Chudambaram 775, 848, 1043
 Mhasu Bhaaji v Davalit 1112
 Mian Jan v Abdul 33
 Michael v Briggs 463
 Midnapore Zamindary Co, Ltd v Abdul Zahir 441
 Midnapore Zamindary Co, Ltd v Naresh Narayan Roy, 41, 78, 80, 81, 83, 323, 330 676 880
 Midnapur Zamindary Co, Ltd v Secretary of State 333, 565
 Midnapur Zamindary Co, Ltd v Amulga 864 865 1092
 Midnapur Zemindari Co Ltd v Uma Charan 333, 334, 338
 Miguel v Sultan of Johore 124, 284
 Mihar Ali v Muhammad Husen 381
 Milbank v Milbank 520 531
 Milkhi v Mat Punni 337
 Miller v Budh Singh, 878
 Miller v Harper 534
 Miller v Kirwan 610
 Miller v Lakshmani Debi 68
 Miller v National Bank of India, 579
 Miller v Ram Rajan, 1007
 Miller v Bunga Nath, 1007
 Millington v Loring, 526 527, 543
 Mills v Jennings, 981
 Milton & Co, v Ojha Automobile Co,
- Mina Kumari v Bijoy Singh, 234 235, 236
 Mina Kumari v Jagat Sattari, 243
 Minakshi v Kabanaram, 249
 Minakshi v Subramanya, 7, 319
 Minakshi v Velu, 636
 Minahal v Kharsetip 84
 Minna Heatherly v B C Sen, 366
 Minet v Morgan, 618
 Mir Hassan Ali v Sanli Begum, 88
 Mir Khan v Sharju 881
 Mir Umar Ali v Nasir un nissa 7, 9
 Mira Ronther v Muhammad, 731
 Mirali v Rehmoobhor, 321, 954
 Miran Bakhsh v Sher Muhammad, 1260
 Miran Bakhsh v Allah Bakhsh 309
 Mirza v Jhenda Pam, 222
 Mirza Abdullah v Ramzan, 597
 Mirza Abid v Ahmad Husain, 560
 Mirza Hummat Re, 1097
 Mirza Mahommed v Sijjad Mirza, 720, 881
 Misir v Shree Bakhsh, 73
 Misri Lal v Mitul Lal, 798
 Misri Sahu v Bishu 1100
 Misser Debee v Buldeo, 884
 Mitchell v Mathura Dass, 783
 Mitna v Syud Fuzl, 641
 Mital Poddar v Jadab Chandra, 42, 45
 Mitthu v Kishan, 268
 Miya Mahomed v Zorabai, 914, 1350 1352
 Miya Vali Ulla v Savad Bava, 304
 Modhe v Dongre 479 643
 Modhusudon v Brae 79
 Mohalar v Chandra 436
 Mohabir Prossad v Adhokari 1134
 Mohabor v Hazi, 308
 Mohamad Abdul Hafiz v Latif Husein, 31
 Mohamed v Mohamed, 223, 1345
 Mohamed v Monohar, 348 349
 Mohamidu v Pitchay, 204 940
 Mohammad Abdul v Akram 772
 Mohammad Adum v E M Chettyar, 790
 Mohammad Ali v Mast Bismillah 783
 Mohammad v Raghunath 65
 Mohammad Ismail v Abdul Ghaffar 1109
 .
 .
 .

Mohammad Afzuli v. Alul Hamid 1297
 Mohammad Shafiq v. Rami Katori 1031
 Mohanvelu v. Annamalai 451, 468
 Mohanlal v. Bai Kashi 300
 Mohanlal v. Ganga Prasad 900
 Mohanlal v. Yodhai 629
 Mohanlal & Co. v. Yodhai 431
 Mohan Lal v. Bilaso, 481
 Mohan Lal v. Damodar Das 1284
 Mohan Lal v. Kali Charan 823
 Mohan Lal v. Maya Lal 500
 Mohan Manor v. Tago Uka 983
 Mohan Singh v. Jagat Singh 719 720
 Mohan Singh v. Pinchannan 177, 184
 Mohant Bhagwanji v. Secretary of State 461
 Mohant Miriliar v. Baijnath 260
 Mohant Mirildas v. Baijnath, 1300
 Mohanund v. Akial, 805
 Moharam Das v. Ajudhia, 146
 Mohar Chand v. Habib, 1354
 Mohar Singh v. Daulat Ram, 486
 Mohari Bibi v. Shyama Bibi 1009
 Mohendra Lal v. Anundo Coomar, 1306
 Mohendra Nath v. Shamsunnessa, 69, 76
 Mohendro v. Ishun Chunder, 626
 Mohendro Narain v. Gopal, 830
 Mohesh Chandra v. Jamiruddin, 1103
 Mohesh Chandra v. Radha Kishore, 549
 Mohesh Chandra v. Satrugnan, 336 1133
 Mohesh Chunder v. Manick Lal 912
 Moheshwar Singh v. The Bengal Govern-
 ment, 347, 1101
 Mohibulla v. Imami, 901, 902, 903
 Mohideen v. Bukshi Ram, 379, 1317
 Mohideen v. Mahomed, 836, 837
 Mohideen v. Syed Osman, 38
 Mohima Chandra v. Atul Chandra, 494
 Mohim Chandran v. Anil 49
 Mohine v. Ram Kant, 808
 Mohini v. Bungsi, 541
 Mohini v. King Emperor, 733
 Mohini v. Ramdas, 373
 Mohini v. Sankar Das, 341
 Mohini v. Satis Chandra, 320
 Mohini v. Surendra, 317
 Mohit Narain v. Thakan, 796
 Mohitosh v. Satish, 176
 Mohiuddin v. Sayiduddin, 296, 298, 305,
 306, 464
 Mohna Mal v. Tulsi Pam 312
 Mohomedali v. Lakshmi Bai 1039
 Mohori v. Dharmodas 942

Mohsham Ali v. Mula 1115
 Mohsin v. Haider 180
 Mohsin Ali v. Masum Ali 195
 Mohammad v. Mutechand 1126
 Mohummul Zakar Ali Khan v. Rutta
 Keor, 548 549 560
 Mohun v. Azeem 808
 Mohun v. Ram Dial 78
 Mohun Chunder v. Azeez 475
 Mohun Lal v. Nambial 833
 Mohun Lal v. Bebee Doss, 300
 Mohun Lal v. Joy Narain 1278
 Mohunt v. Khetter Moni Das 387
 Mohunt Bhagwan v. Khetter Moni 237,
 779
 Mohunt Das v. Nil Komul, 62
 Moideen v. Moideen 663
 Moitheensa v. Apsa, 839
 Mokham Chand v. Ganga Ram, 715
 Mokund Lal v. Chotay Lal, 490, 496
 Mole v. Smith, 16
 Molloy v. Kirby, 611
 Mon Mohan v. Dwarka Nath 197
 Mon Mohini Ghose v. Parvati Nath
 Ghose, 978
 Mon Mohun v. Durga, 673
 Mon Mohun v. Secretary of State, 85
 Monappa v. Surappa, 219
 Monie v. Scott, 289
 Monul v. Khuroda, 338
 Moniram v. Mirjan, 1317
 Monjram v. Seth Manecklal, 1092
 Monkee v. Bhullunder, 917
 Monmatha v. Josada Lal, 586
 Monmatha v. Musst Luckmi 729
 Monmohiney v. Radha Kristo, 779
 Monmohini v. Banga 899
 Monmotho v. Harish Chandra 310, 461
 Monohar v. Jai Narayan, 1002
 Monohar v. Lakshman, 968
 Monohar Dass v. Futteh Chand, 732
 Monohur v. Ramanauth, 143
 Monohur Lal v. Gouri Sunkur, 486
 Monohur Mookerjee, *In the matter of*,
 1139
 Monomohini v. Nara Narayan Roy, 601,
 604
 Monorath Das v. Ambika, 721
 Montgomery & Co. v. *In re*, 1278
 Mookoond v. Mahomed, 413 415
 Mool Chand v. Alwar Chetty, 1360
 Mool Chand v. Ganga Sahai, 584
 Mool Chand v. S. Ilitaf, 72

- Moola & Sons v Lean Shyam Sway 360, 362
 Moolaswami v Tattayya 1148
 Mooljee Dharsee & Co v Moolia 1050, 1313
 Moolji v B N Ily C 661
 Moolji v Chartered Bank of India 171
 Moon v Dickinson 905
 Moopan v Karupana 589, 786
 Moorajee v Visramjee 1126
 Moore v Gamgee 1311
 Moos v Abdul Husain 1067
 Moos v Culamali 144
 Moosa v Ibrahim 11
 Moran v Mittu 368
 Morarjee *Inter se* 1148
 Morel Brothers & Co Ltd v Westmoreland 516
 Mureshwar v Kushaba 321
 Morgan *Re* Owen v Morgan 525, 529, 543, 544, 551, 570
 Morley v Morley 981
 Moro v Visaji 196
 Moroba v Ghanasham 354
 Morris v Baumgarten 113
 Morris v Edwards 610, 618
 Morris v *Ex parte* 579
 Moru v Gangabai 1013
 Moru v Hasan 693
 Moser v Marsden 472
 Moses v Meyer 380
 Mushangan v Mozari 147
 Mosley v Virgin 561
 Moss v Malings 444, 530
 Mostyn v West Mostyn Co 619
 Mota v Vithal 81
 Motahar v Mohammad 798
 Mthura Mohan v Akhy Kumar 243, 694
 Moti v I am hari 1017
 Motichand v Balaram Das 601, 946
 Moti Chand v Ganga Prasad 355, 358, 361, 364, 1126
 Motilal v Bishrambhar 860
 Motilal v Kali Das 817
 Motilal v Kunlan Lal 622
 Motilal v Pam Narain 866, 868
 Motilal v Pussuck Chandra 185
 Motilal v Bhawanji 821
 Motilal v Hannu 712
 Motilal v Kishori Lal 640
 Motilal v Chhattri Das 566
 Motilal v Bai Mani 171
 Motilal v Chandmal 930
 Motilal v Fulechand 802
 Motilal v Ghellabhai 459
 Motilal v Karrabuldin 238, 239
 Motilal v Nana 376
 Motilal v Nandram 559
 Motilal v Nanhalal 740
 Motilal v Surajmal 118, 119
 Motilal v Thakore, 426
 Motilal v Thakur Ujjar 992
 Motiram v Bharat 981
 Motiram v Ram Kumar 418
 Motiram v Yesu, 898
 Motiuddin v Kashmiri Bibi 899
 Motiyahu v Premiyahu 1060
 Moturi v Sri Pajah Venkatadri 91
 Mouna Gurusamy v Sheikh Muhammadhu 1012
 Moungh Tha v Moungh Pan 368
 Mowar Sheebaksh v Mowar Thakur Dayal 1095
 Mowji v Kuverji 457
 Mowji v Nemchand 914
 Mowla Newaz v Sayidunnissa Bibi 364
 Mozaffer Ali v Hedayet 7
 Mrigendra v Dubakar 1091
 Mritanjay v Balmakund, 36
 Mrs Certrude Oates v Mrs Millicent D Silva 39
 Mrs M A Cunningham Sircar v Fred Stephens 878
 Mst Afzalunnissa v Fayazuddin 52, 71, 461, 467
 Mst Asis v Mahk Azir 713
 Mst Bai Kuar v Shih Das 976
 Mst Basanti v Chotte Lal 378, 785
 Mst Begam v Bulaq Shah 200
 Mst Beti v Sikdar Singh 330
 Mst Bhagwanti v Dewan Zamir 720
 Mst Bibi Sogta v Radha Krishun, 1123
 Mst Choti v Har Dayal 431
 Mst Deoki v Jwala Prasad 442
 Mst Gulab Kuer v Badshah 324
 Mst Hubraj v Balkaran 1123
 Mst Indrani v Babu Bimla 705, 827
 Mst Karam Kaur v Matwal Chand 204
 Mst Kazim v Lachman 929
 Mst Kutai v Jitendra Nath 372
 Mst Lachmi v Mst Bhulli 39
 Mst Jila v Mir Ali 794

Met Naniv v Pandit Pam 487
 Met Mankaur v Ishar Das 782, 783
 Met Siraj v Mahomed Ali 917
 Met Siraj Fatima, v Mahomed Ali, 72
 Met Umrao v Pam Kishor, 803
 Met Umrao Bilal v Pam Kishor 368
 Met Walevattunnissa v Met Chalkhi,
 857, 861, 982
 Met Wiran v Hira 1209 1279
 Mt Muna Koer v Durga Prasad, 183
 Mt Rymphul v Harlaksh Singh 175
 Mubarak v Ahmad 217 222
 Mubarak v Bihari 1101
 Mubarak v Secretary of State 1071
 Mu Idooosooden Dev v Bamachurn, 3
 Mudhun Mohun v Cokul Doss, 144 751
 Mufti v Fazal 313
 Mufti v Lala, 605
 Mugnee Pam v Ganesh, 33
 Mugta Keshi v Munilal 43
 Muhaidin v Lakshmanan, 519
 Muhammad v Abdul (46 Mad 135), 54
 Muhammad v Abdul Karim, 191, 996
 Muhammad v Abdul Majid, 548
 Muhammad v Abdullah 437, 865
 Mohammad v Ahmed 304
 Muhammad v Ajudhiya 372 963, 968
 Muhammad v Alm un Nissa 1007
 Muhammad v Aulia 867
 Muhammad v Bacheho 836 837, 840
 Muhammad v Banki Lal, 1004
 Muhammad v Carlier 223
 Muhammad v Cheda Lal 897
 Muhammad v Chhattoo Lal 162
 Muhammad v Ghulam Bi 49
 Muhammad v Ishanullah 346, 443 831,
 1351
 Muhammad v Jai Narain 836
 Muhammad v Jarao 879
 Muhammad v Jas Ram 1071
 Muhammad v Kallu, 306
 Muhammad v Khushalo 852
 Muhammad v Kunji, 892,
 Muhammad v Mahud un Nissa 1108
 Muhammad v Manavikrama, 1089
 Muhammad v Manohar, 860
 Muhammad v Muhammad 117, 119
 120, 151 441
 Muhammad v Nabian, 79
 Muhammad v Niamat un Nissa, 682, 851
 Muhammad v Panna Lal, 277
 Muhammad v Parag Sahu, 252.
 Muhammad v Radhe Ram, 459

Muhammad v Rahat Ali 1123
 Muhammad v Sayad Ahmed 27
 Muhammad v Secretary of State 368
 Muhammad v Shams un Nissa, 561
 Muhammad v Sumitra 67
 Muhammad v Tikamchand 133 153
 Muhammad v Vishvanath 67
 Muhammad Abdul v Ala Bikhsh 321
 Muhammad Abdul v Dilsukh Pat, 1020
 Muhammad Abdul Jalil v Muhammad
 Obaid Ullah 246 248 249
 Muhammad Abil v Muhammad Asghar
 1285
 Muhammad Ahmad v Zahur, 67
 Muhammad Alladad v Muhammad, 1038
 Muhammad Askari v Nisar Husain, 1061,
 1066
 Muhammad Ayab v Muhammad Mah
 mud, 377
 Muhammad Baksh v Musammat Piri,
 306
 Muhammad Baksh v Shadi Muhammad
 1108
 Muhammad Iayaz v Kallu Singh, 490
 Muhammad Hafiz v Muhammad Zaka
 riyah 480 487 488
 Muhammad Hasan v Inayat, 867
 Muhammad Hussain v Abdul 480
 Muhammad Ibrahim v Ahmad 1201
 Muhammad Ibrahim v Allah Baksh 955
 Muhammad Ibrahim v Umatullah Jan
 643.
 Muhammad Inamullah v Narain 1004
 Muhammad Ishaq v Muhammad Rus
 tam, 86
 Muhammad Kasim v Rukia Begam 170
 Muhammad Kazim v Ali Saghir 298
 Muhammad Mubarak v Sihu, 775
 Muhammad Naim ul lah v Ihsan ul lah,
 372
 Muhammad Newaz Khan v Alam Khan,
 1290
 Muhammad Ramzan Khan v Sardar
 Begam, 1293
 Muhammad Raza v Muhammad Askari,
 290
 Muhammad Razi v Karbalai 191
 Muhammad Saduq v Laute Ram 75
 Muhammad Sayeed v Muhammad Is
 mail, 1304
 Muhammad Shafi v Karamat Ali, 117,
 118
 Muhammad Sharif v Nasir Ali 277

Muhammad Sharif v. Isha Mohan 238
 Muhyarman Sulman v. Fatima 1316
 Muhamad Umar v. Ummatul 484
 Muhammad Wali Khan v. Muhammad Mohi ul Din 37
 Muhammad Yakub v. Hamid Ali 1021
 Muham ad Y. ul v. Muhammad Sadiq 295
 Muhammad Yusuf Khan v. Abdul Ialaman Khan 352
 Muhammad Zafarrah v. Abdul 867
 Muhammad Zakaria v. Khun 755
 Muhammad Zakaria v. Muhammad Hafiz 116
 Muhammadan Association v. Lakhsh 467
 Muhammad v. Fatima Lee 340
 Muir v. Jenks 586
 Mukerjee v. Airuddin 447 441
 Mukl Lal Singh v. Jagdeo Tiwar 465
 Mukhlal Singh v. Vilou Singh 1
 Mukhlida v. Gopal Chunder 244
 Mukhlida v. Iam Churn 500 853
 Mukhtar v. Muquarrab 11 181
 Mukta Prasad v. Mahadeo 496 10 J
 Muktamala v. Iamchandra 78
 Munun Lal v. Joch Chandra 444
 Mukund v. Shantaram 111
 M. K. N. v. Tanu 844
 Mukavirana v. Kalu 452
 Mul Chand v. D. W. C. & Co. Ltd. 842 107
 Mul Chan v. Mukta 444
 Mul Chan v. Isari Lal 68
 Mul Haj v. Bura Mal 438
 Mula Iam v. Jivan Iaram 239
 Mulhan v. Chhagan 200
 Mulhand v. Gil & Co. 3 1047 1048
 Mulhan v. Muhammad Ali 970
 Mulchand v. Suganchand 116 120
 Mulchand v. Tarini Prasad 388 1079
 Mulji v. Ibrahim Rahimulla 1046
 Muklaj v. Ialla 788
 Mulla v. Maung 10 171
 Mulla Alul v. Suklambho 163
 Mulla Singh v. Jagannath 148
 Mullick v. Steo Irasal 484
 Mullick Kefat Hussain v. Si Iapal Singh 47
 Muller v. H. well 81
 Mul v. Ram Lal 7
 M. Raj Khata v. Vidyaratil 1

Multan Chand v. Bank of Madras 701
 Multanchand v. Kharshedji 107
 Mummadi v. Venkata 606
 Mumtaz Ali v. Farhat Ali 1209
 Mumtaz Begam v. Fateh Husain 1160
 Mumtaz Hussain v. Lewis 276
 Mumtazan v. Pasulan, 607
 Mumtaz ud Daula v. James Skinner, 303
 Muna Koor v. Durga Prasad 168
 Munawar Ali v. Jagmohan Iam, 1115
 Muncheeslaw v. New Dhurmer Co 373, 619
 Mungle Chand v. Gopal Iam 1047 1048
 Mungul Iershad v. Grija Kant 88 237
 Munisapan v. Balavan 797
 Muniappa v. Subramania 700
 Municipal Board v. Kanbura Lal 337
 Municipal Board of Agra v. Asharfi Lal 617
 Municipal Commissioner of the Suburbs of Calcutta v. Mahomed Ali, 292
 Municipal Corporation v. Shakur, 379
 Municipal Council Anantapur v. Vasu deva 273
 Municipal Council of Tanjore v. Umanala 37
 Municipal Officer v. Ismail Hayee 1346
 Municipal Officer Aden v. Abdul Kareim 1371
 Muniruddin v. Most Pa sulma 1114
 Munisami v. Munisami, 101 441
 Munisami v. Subbarayar 240
 Munisamy v. Abbu 1097
 Munishi Chinn Danda v. Munishi Pedda Tatiah 169
 Munishi v. Munishi 530
 Muniswami v. Pajaratnam 1308
 Muniswami Mudali v. Meenakshi 302
 Munna Lal v. Collector of Shahjahanpur 183
 Munna Lal v. Ialla Khun 817
 Munna Lal v. Sarat Chunder, 996
 Munna Lal *In the matter of* 437
 Munna Singh v. Qajdar Singh 836
 Muni Balu v. Kunwar Kamta 480
 Muni Balu v. Tirki Natl 67
 Murni Iam v. Balen Ierkash 1104
 Munni Ram v. Steo Churn 1124
 Murnu v. Kunji Belari 1154
 Murnu Ily G. Iam Alias 047
 Murali v. G. Iar 101
 Murali v. Karm n 617
 Murali v. Murali 173

Munshi Dinesh Prasad v Shankar, 413
414

Munshi Lal v Pam Narain 817

Munshi Lal v Ramasami 1103

Munshi Paghunath v Hazarilal 793

Munshi Pal v Pup Narain 173 815

Munshi Pam v Latha 874

Murari v Suba, 20, 28 29

Murari Lal v P V David 275, 276

Murari Prasad v Balvanth Dikshit, 1145
1147

Murugesu v Havat Saheb, 177

Murli Manohar 1e 1357

Murliadas v Baijnath 216

Murliidhar v Anandrao, 817

Murliidhar v Nawab Syaid Muhammad,
798 802

Murliidhar v Parsbaram 1013

Murliidhar v Vishnudas, 1001

Murray v East Bengal Mahajan Flotilla
Co, Ltd, 873

Murray v Epsom Local Board, 542 543
544

Murray v Langford 1364

Murretta v South American Co, 287

Murti v Bhola Ram, 110, 488 489

Murugappa v Ponnusami, 801 1095

Murugesu v Annamalai 93

Murugesu v Jattaram, 317

Murugesu v Jotharam, 671

Murugesu v Ramasami, 992

Murugesu v Venkata 133

Murugesan v Manickavasaka, 622

Musa v Manilal, 116

Musahab v Innayatullah, 491 1000,
1007

Musala v Rammayya, 87

Musammat v Musammat 2 0

Musammat Bibi v Iaras Nath 383 817
818

Musammat Bodha v Pam Chandra 600

Musammat Chander v Musammat
Dulhin, 1037

Musammat Dhanwanti v Sheo Shankar,
384

Musammat Fatima v Raza Ali 848

Musammat Gulab v Syed 717 800

Musammat Hurmoozi v Musammat
Aysha 378

Musammat Jilai v Abdul Rahman
162

Musammat Lakhpati v Daulat Singh,
868

Musammat Lorandi v Mst Nihal, 686

Musammat Madho v Hazari Mal, 173

Musammat Sartaj v Mahadeo 368

Muslehu v Ram Narain 1016

Musammat Bhagwanta v Dewan Zamri,
717

Musammat Hafizun v Abdul Karim, 909,
1084

Musammat Ram Dei v Musammat
Bahu Rani, 893

Musammat Indrani v Bibu Bimala,
12

Musammat Janakbati v Maharaja
dhiraj 803

Musammat Saban v Shahabul, 1071

Musann v Thavara, 66

Mst Fakrussa v Moulvi Izarus, 1059

Musst Dhunesh v Oolfat, 163

Musst Rhodeja v Ghulam Nabi, 1250

Musst Shazadi v Muhammad Qasim,
601

Musst Sumitra Kuer v Bim Kair, 1101

Mustafa Khan v Phulja Bibi 1293

Muthammal v Secretary of State for
India, 83

Muthappa v Muthu, 496 497, 504

Muthaya v Allan 114

Muthia v Orr 1000

Muthiah Chetti v Palamappa, 232 785,
788

Muthiah Chettiar v Karuppan Chetti,
15

Muthiah v Govindlass 715 880

Muthu v Gangathara 311

Muthu Chettiar v Iodd Govindas, 720

Muthu Krishna v Ayyasami, 1011

Muthu Kumara v Thirunarayana, 473

Muthu Kumarasami v Kuppusami, 1101

Muthu Kumarasami v Muthuram, 815

Muthu I amalinga v Shanmuga 11

Muthu Venkatarama v Othula Sankar
222

Muthu Vija v Venkata hallari, 401 11

Muthukarappan v Annamalai, 11

Muthukarappa v Pajja, 177 21

Muthukutti v Acha Naya, 11

Muthulakkammal v Narsayya, 11

Muthunarayana v Lakshmi, 11

Muthuraman v Krishna, 11

Muthusami v Nataraj, 11

Muthuswami v Kalpani, 11

Muthuvijaya v Chellam, 11

Muttalagin v M..., 11

Muttra v Appasami 844
 Muttra v Virammal 158
 Muttra Pershad v Ram Pershad 200
 Muttu Chetti v Muttan Chetti 51
 Muttu Karuppan v Sellan, 241
 Muttuchudambara v Karuppa 208
 Muttumura v Queen Empress 293
 Muttuvayyanganar v Kudalalagayyanganar, 208
 Mutual Society, *In re*, 622
 Mutusami v Prince Alagia, 223
 Muzaffar Ali Khan v Parbati, 94
 Muzaffarnagar Bank v Hafiz ud din 363
 Muzhar Hossein v Bodha 352
 Muzhur v Deno Bundo 1084
 Mylne v Koor 590 657
 Mylapore v Yeo Kay 550
 Myre v Defries 144

N

N K R R M Chetty v Subraya 808, 809
 N W Ry Administration v N W Ry Union 278 279, 927, 1032
 Naba Kumar v Radhashayam 468 481
 Nabadwipchandra v Loke Nath 232 236
 Nabibhai v Dayabhai 165
 Nabin Chandra v Mirtunjoy 211
 Nabin Chandra v Prankrishna, 1100, 1103
 Nachappa v Subbier, 767
 Nachukalai v Atiyakannu 69
 Nachiamma v Subramonian, 116 199
 Nachmai v Subramaniam, 164
 Nadamuni v Veerabhadra 182
 Nadarmuni v Veerabhadra, 177
 Nadair Chand v Chunder, 1107
 Nadir v Wali, 682
 Nadirshaw v Purshottamdas, 700
 Nafar Chandra Pal v Shukur, 313, 336
 .
 Nagamoney v Janakiram, 1344
 Naganada v Krishnamurti, 658
 Naganna v Pattabhiramayya, 379
 Nagappa v Venkat Rao, 858, 899
 Nagar Mal v Ram Chand, 726, 728
 Nagar Mull v Barres Bank 772

Nagarathamma v Nagaya, 1123
 Nagardas v Velmahomed 646
 Nagarimal v Emperor, 777
 Nagaruru v Tangatur, 1079
 Nagendra Kumar v Nabin Mandal, 656, 658
 Nagendra Lal v Ian Bhusan Das, 787
 Nagendra Nath v Frithgool, 1359
 Nagendra Nath v Haran Chandra, 14, 197
 Nagendrabala v Tarapada, 476
 Nagendrianath v Ambiccharan, 440 441, 715
 Nagesh v Gururao, 340
 Nageshar v Judimral, 211.
 Nageshwar v Bisseswar, 517
 Nageshwar v Jai Bahadur, 89
 Nagiah v Seshamma, 667
 Nagindas v Chelabhai 225, 1077
 Nagindas v Nilaji 1355
 Nagindas v Somnath 20 30 434
 Naginlal v Official Assignee, 32, 278, 279
 Nagu v Salu, 327
 Naida v Rajendra, 177
 Nagar v Bhaskar, 842
 Naik v Bulwant 1048
 Nainappa v Chudambaram, 33
 Nainsukh v Gajanand 340
 Nainsukh v Umada, 1274
 Najan v Salemahamed, 577
 Najibai v Golam 179
 Najimunnessa v Nacharaddin, 779, 785, 786, 789
 Najm ud din v Albert Puech, 1281
 Najm un Nissa v Amuna, 356
 Nakimo v Pemba, 957
 Nakta Ram v Chiranj Lal, 82
 Nalinakshya v Mafakhar, 12, 442, 443
 Nalini Kanta v Hari 599
 Nalla v Mahomed 92, 94
 Nallaperumal v Sakul 174
 Nallatambi v Ponnusami 90 98
 Nallavadiva v Subramania 1123
 Nalluri v King Emperor 661
 Nalun v Krishnasawmy, 1339 1341
 Nam Narain v Raghu, 508
 Namagiri v Muthu Velappa, 530 765, 1041
 .
 Namudin v Maniruddin, 864

- Naminna Bilu v Iola Mal 7
 Nan Karu v Ho Htw 57
 Nana v Sisku 320
 Nani Kumar v Golam Clunder 797
 82
 Nannal v Janardhan 104 109
 Nanak Chand v Chheda Lal 706
 Nanak Chand v Jivan Mal 304
 Nanak Chand v Ram Chand 863
 Nankelani v Batarsi 861
 Nankelani v Teluckhe 241
 Nanchani v Vitlu 11
 Nand Coomar v Cour Sankar 317
 Nand Kishore v Abdur Rahman 33
 Nand Kishore v Nand 63
 Nand Kishore v Badan Sing 703
 Nand Kishore *In the matter of the petition* 1100
 Nand Kishore v Paroo Mian 815
 Nand Kishore v Ram Culam 300 430
 436 1149
 Nand Kishore v Sultan 830
 Nand Kumar v Bilas Ram 107 678
 Nand Kumar v Ramjan 78
 Nand Kumar v Sajan 1011
 Nandlal v Kisanlal 118 380
 Nand Ram v Fakir Chand 1104 1961
 1260 1268 1273
 Nand Ram v Ram Prasad 6
 Nanda Kishore v Ram Golam 1133
 Nanda Lal *In re* 1047 1360
 Nanda Rai v Raghunandan 89
 Nandalal v Panchanan 1070 1144
 1102
 Nandalal Mullik v Panchanan 1104
 1100
 Nandan v Kenney 133
 Nandi Lal v Jogenira 840 841
 Nado v Bdlu 3
 Nando Lal v Chatterjee 718
 Nandoo Sing v Baljit Singh 863
 Nandram v Babaji 992
 Nandram v Bhopal Singh 348
 Nandram v Nemchand 129 1980
 Nandhelal v Unrao 698 817 813
 Nanibala v Ichhamoyee 36
 Nanibala v Janani 364
 Nanjappa v Ganapati 317
 Nanjibhai v Ipatlal 206 247
 Nanjunna v Nallakuruppan 708
 Nanku Prasad v Karita Prasad 1007
 Nannu Jan v Bld 759
 Nannu v Nazim 40
 Nannu Lal v Bhagwan Das 237
 Nanna Mal v Rann Chari 984
 Nannu Mal v Sle Sharker 21
 Narain v Bisanta 704
 Narain v Binaik 100
 Narain v Chiranj 1140 1147
 Narain v Durga 248
 Narain v Gurbakash 867
 Narain v Kalu Ram 868 1111
 Narain v Soudendra 814
 Narain Das v Faiz Shah 80
 Narain Das v Kotumal 120
 Narain Das v Ralli 346
 Narain Das v Ramelani 246
 Narain Das v Ram Chand 83
 Narain Das v Sheo Dn 864 860
 Narain Pal v Rulra 821
 Narain Singh v Bichan Singh 413
 Naraini v Makhani Lal 90
 Narayappa v Chidambaram 820
 Narayappa v Chidambaram 23
 Narayana v Naroshankar 667
 Narandas v Shantlal 886 892 1304
 Narappa v Rangaswami 90
 Narasanna v Emperor 708
 Narasayya v Venkata 107
 Narasimha v Rangachari 211 430
 Narasimha v Subbarayudu 790
 Narasimha v Zamindar of Tiruvur
 686
 Narasimha Rao v Revots of Peddamam
 d palli 370
 Narasimhachariar v Krishnamachariar
 208
 Narasimulu v Adiappa 20
 Narasimulu v Noota 467
 Narasimmi v Anantha 218
 Narasimma v Krishna 29
 Narasinga v Govinda 318
 Narasimha v Lakshminpati 919
 Narayana v Veerayya 113
 Narayan v Bijaji 1303
 Narayan v Bhagu 660
 Narayan v Bhagub 134
 Narayan v Ganoo 26 39
 Narayan v Hari 644 849
 Narayan v Janakia 1318 1048 1019
 Narayan v Krishna 26
 Narayan v Laxmibai 1149
 Narayan v Nagindas 347
 Narayan v Mimba 487
 Narayan v Pasulkhan 203
 Narayan v Sagunabai 200

Narayan v Secretary of State 116 116
278 320
Narayana v Srimurug 484
Narayana v Son 676
Narayana v Limbar 742
Narayana v Vaikunt 600, 605
Narayana v Vasudeo 303
Narayana v Veerappa 1084
Narayana v Venkatacharya 17
Narayana v Aivanti 789
Narayana v Bijari 232 441
Narayana v Chingalamma 1074
Narayana v Copalalrishna 20
Narayana v Kallana Sundaram 243 823
Narayana v Kandasami 490
Narayana v Kumarasami 299
Narayana v Kannanamma 1300
Narayana v Lalshmana 473
Narayana v Muthu 593 1148 1152
Narayana v Papayya 992
Narayana v Shankunni 553
Narayana v The Cochim Sircar 284 285
Narayana v Venkatakrishna 431
Narayanamma v Ramappa 474
Narayanamurthi v Achayya 302
Narayanan v Arunachellam 1133
Narayanan v Cheria 564
Narayanan v Kannammal, 83
Narayanan v Theva Amma 173
Narayanappa v I amebandrayya 1280
Narayanarav v Jyehervahu 500
Narayanayami v Natesa 12 443
Narayanayami v Osuru 398
Narayanayami v President H. L. L.
Luarl 808
Narayanayami v Ringasami 696 697
Narayanayami v Chellipala 579
Narasimdas v Lejmal 710
Narasim Rao v Solomon Moses 629 1306
Narayanrao v Balkrishna 784
Narayan v Amgaula 816
Narayan v Gopal 8 9
Narayan v Rango 1102
Narayan v Hari 101
Narayanayami v Seshappier, 175
Naradashankar v Kevaldas, 1066
Narainrao v Abdul Hakim 367
Narendra v Abbi Chirra 561
Narainrao v Aditya 576, 687
Narainrao v Copal 109 168
Narainrao v Jogendra 945 950
Narainrao v Lakshidas 373 402 593

Narendra Lal v Cependra 367
Narendranath v Ananda 41
Naresb v Jogesh, 1041
Naresb v Krishna 140
Naresb Molin v Brij Mohan, 643
Naresbchandra v Mohi Ataul 791, 824
Narhan v Samson 704
Narhar v Krishnaji, 193
Nariman v Hashim 363
Nariman v Municipal Corporation of
Bombay 464
Narinda Bahadur v Khadim Husain,
1017
Narindar Singh v King 573 582
Narinjan v Kurpal 296
Narinjan Singh v Charn Das 339
Naro v Pamchandra 51, 18
Naro Hari v Anpurnabai 644
Narotam v Sukraj 182
Narottam v Mohanlal 1100
Narpal v Har Gayan 677
Narrendas Dhanji In the matter of,
1300 1300
Narsa Peddi v Hajee Tar Mahomed,
1301
Narsa v Sachundranath 912
Narsas v Minhasingh 730
Narsidas v Prashantlar, 307
Narsing v Partap 1011
Narsing Das v Palkkan, 598
Narsing Das v Secretary of State 355
Narsing Das v Mangal Duley 490
Narsinggiji Manufacturing Co v
Budasaheb 545
Narsingh v Sheela Jahi 900
Narsingh v Sheo Prasad, 396, 1318
Narsingh v Vaman 476
Narsingh Das v Ajodhya 1290
Narsingh v Lajji 206
Narsingji v Payne & Co 142
Narsingrao v Bando 192 996
Narsingrao v Lakshmanrao 18
Narsingrao v Jamsalji 1277
Nash v Layton 609
Nasiruddin v Dost Muhammad 712
Nassarwanji v Kharsedji 132, 133
Nasse In the matter of 781
Nataraja v Pamaswamy, 244 249
Natesa v Kannammal 859
Natesa v Venkatrama 44 1103
Natesa v Venkataramayyan 249
Natesa Chetti v Vengu 901
Natha v Dhunbhaji 165, 772

Natha v Jodha, 17, 633
Natha v Schiller, 219
Natha Singh v Chunilal, 486
Natha Singh v Jodha Singh, 573
Nathan v Samson, 126, 158, 163
Nathu v Narsi, 80
Nathmal v Maniram, 263, 264, 265
Nathu v Amrao Singh, 339
Nathu v Banna, 337
Nathu v Budhu, 56, 490
Nathu v Keshowji, 25, 26
Nathu v Umedlal, 1074
Nathu Lal v Raghunir, 365
Nathu Lal v Raghunir Singh, 324, 390, 1144
Nathu Mal v Muhammad Shafi, 1290
Nathu Wilson v McAfee, 7
Nathubha v Bai Ujan, 1020
Nathubhai v Narayanacharya, 501, 503, 504
Nathuji v Lalbhai, 33
Nathumi Ram v Mosammat Sheo Koer, 892, 893
National Bank of India, Ltd v Ghuznavi, 750
National Coal Co v Kshitish Bose, 426
National Engineering Co v Rattan, 129
National Insurance Co Ltd v Nissim, 145
Natraja v The South Indian Bank, 755
Nattu v Annangara, 57
Natwarlal v Sassoon & Co, 763
Naubat Singh v Baldeo Singh, 345, 1102, 1121
Nauratan v Wilford, 375
Naurion v Freeman, 92
Navaj v Totaram, 260, 270, 802
Navajee v Adm Gen of Madras, 680
Navalkar v Sarojini, 379
Navivahoo v Narotamdas, 629, 1238, 1356
Navivahoo v Turner, 1344
Navroji v Dastur Kharsedji, 304, 356, 364
Nawab v Duni Chund, 567
Nawab v Panjaba, 83
Nawab Bahadur v Harish Chandra, 967
Nawab Bahadur v Karnani Bank, 223
Nawab Bahadur v Kumar Dinendra, 358
Nawab Bhram Jung v Haji Sultanali, 319, 1093
Nawab Khajeh Halibula v Kaviraj, 220
Nawab Nazim v Heeralall, 580
Nawab Sayid v Herbert, 914, 915
Nawab Shuja ul Mulk v Umur ul Umra, 193
Nawal Kishore v Khayali Ram, 782, 784
Nawal Singh, *In the matter of the petition of*, 372
Nawaz Ali v Allu, 360
Nawazi Begam v Dildaroz Begam, 47, 51
Nawbut v Mahesh, 482
Nawab v Prosononarain, 648
Nazir v Tamijaddi, 859
Nazirunnissa v Asifa, 57.
Neale v Gordon Lennox, 16, 17
Neckram v Bank of Bengal, 614
Nedungadu Bank v Official Assignee, 535
Neel Kristo Deb v Beer Chandra, 33
Neelakantagiri v Venkatachallam, 799
Neelaveni v Narayana, 600, 1091
Nehora v Radha, 643, 644
Neki v Chhajec, 1125
Nellaiyappa v Thangama, 310
Nellappa v Punnaiyanam, 301
Nelson v Bridport, 107
Nemagauda v Paresha, 30, 780
Nemai Chand v Deno Nath, 825, 830
Nemchand v Saxachand, 30
Nemichand v Kevachand, 964
Nensukhgavri v Rajabally, 766, 767
Neogi v Sardar Nihal, 939
Nepal Chandra v Airoda, 596
Net Lal v Sheik Kareem, 199, 830
Neti Rama v Venkatacharulu, 301, 313
New v Burns, 914
New Fenix Compagnie v General Accident Assurance Corporation, 910
New Fleming Co v Kessowji, 578
New York Life Insurance Co v Public Trustee, 756
Newby v Sharpe, 549, 551
Newen, *In re*, 16
Newington v Levy, 45
Newport Slipway & Co v Paynter, 531
Niadar Mal v Biddulph, 759
Niadar Mal v Patan Lal, 412
Niadar Mal v Raunak Hussain, 599
Nimat Ali v Ali Raza, 304

- Niamuddin v. Maniraddin, 856, 859
 Niaz v. Durga, 376
 Niaz Ali v. Muhammad, 1138
 Niaz Ahmed v. Phul Kunwar, 373
 Niazullah v. Nazir, 66
 Nicholas v. Asphar, 84
 Nicholas v. Evens, 905
 Nichol v. Wheeler, 620
 Nidamarthi v. Thammana, 1282
 Niddha Lal v. Collector of Bulandshahr, 349
 Nidhi Lal v. Mazhar, 98, 99, 100, 127
 Nihal Chand v. Prithi Singh, 821
 Nihal Shah v. Misht Malan, 308
 Nihal Singh v. Hira, 56
 Nihal Singh v. Khushhal Singh, 1294.
 Nihal Singh v. Sowaya, 108
 Nil Madhub v. Brojo Nath, 45
 Nilakanta v. Imamsahib, 836, 837
 Nilakant Banerji v. Suresh Chunder, 642, 978
 Nilkanta v. Gosto, 230
 Nilkanth v. Balvant, 345, 363
 Nilkanth v. Ramkrishna, 300
 Nilkanth v. Vidya Narsing, 109, 1129
 Nilkunto v. Hurro, 221
 Nilmoni v. Dakshineswar, 1270
 Nilmoni v. Kedarnath, 15
 Nilmoni v. Taranath, 4
 Nilmoni Singh v. Kirti Chunder, 366
 Nilmony v. Buresur, 190
 Nilo v. Asurbad, 57
 Nilo v. Govind, 55
 Nilo v. Rama, 786
 Nilratan v. Abdul, 333
 Nilratan v. Ram Ratton, 170
 Nilvaru v. Nilvaru, 83
 Nimbaji v. Vadia, 258
 Nina Dalal v. Merwanji, 1266
 Ningappa v. Gowdappa, 656
 Ningappa v. Shivappa, 1112
 Ningawa v. Ramappa, 402
 Ningaya v. Madivalara, 56
 Niranjan v. Afzal, 860
 Niranjan Singh v. Tulshi Ram, 121.
 Niranka v. Atul, 547
 Nirbhai Das v. Rani Kuar, 367
 Nirman v. Phulman, 54
 Nirod v. Chamatkarini, 1049
 Nirode Nath v. Amuliy, 812
 Nirsan v. Kishuni, 60.
 Nisar Ali v. Ali Ali, 392
 Nisar Ali v. Mohamed Ali, 109
 Nishadiney v. Kalli, 113
 Nishi v. Barda, 351
 Nishi Kanta v. Umar Lal, 348
 Nistarini Das v. Kundo Lal, 97.
 Nistarini Das v. Nando Lal, 78, 122, 201, 916, 1341
 Nitai Dutta v. Bishun Lal, 829
 Nittala Achayya v. Nittala Yellamma, 121
 Nittomoye v. Soobul, 614, 626
 Nitya v. Nani, 1112
 Nityamoni Das v. Madhu Sudan, 1132
 Nityanand v. Juggat, 836
 Nityananda v. Gajapati, 90
 Nityananda v. Sri Radha, 1017
 Nivath Singh v. Bhukhi Singh, 336
 Nizam of Hyderabad, *In re*, 375, 915.
 Nizamuddin v. Abdul Aziz, 1114
 Nizam ud Din v. Ahmad, 41
 Nizam ud din v. Bohra, 996
 Nizam ul Haq v. Muhammad, 297
 Nobin Chunder v. Buroda, 114
 Nobin Chunder v. Romesh Chunder, 140
 Noble's Explosives Co. v. Jones & Co., 554
 Nobo v. Foyzbux, 44, 45
 Nonoo Singh v. Anand, 484
 Noor Ali v. Koni Meah, 152
 Noor Mahammad v. Noor Muhammad, 828
 Noor Mahomed v. Bilasram, 264, 265
 Noor Mahomed v. Mahomed Khan, 90
 Norbury Natzo & Co. v. Griffiths, 460
 Norendra v. Kamal Basini, 2
 North W. P. Club v. Siddullah, 463
 North Western Ry. Co. v. Ram Dhanshib Lal, 280
 Norton's Settlement, *Re*, 131
 Notan Das v. Lachhman, 717
 Nourang Rai v. Latif, 151
 Nourangulal v. Smriti Charubala, 722
 . . .
 . . .
 Nugenderchunder v. Sreemutty Kaminee, 68
 Nugent v. Nugent, 803, 1059
 Nundeeput v. Alexander, 328, 803
 Nundo v. Bidhoo, 80
 Nundo Kumar v. Banomali, 456, 498
 Nundo Lal v. Nistarini, 15, 16
 Nur Ahmad v. Altaf Ali, 241.

Nuridin v Secretary of State, 1071
 Nur Ilahi v. Nawaz Khan, 570
 Nurimahi v. The Ganges Sugar Works, Ltd, 353
 Nurimian v Ambica, 310, 562
 Nurjahan v Asia Khatun, 816
 Nursey v. Harrison, 1090
 Nursing v. Nuffer, 1268
 Nurud Din v. Pran Krishan, 1121
 Nusrat Ali v. Sakina Begam, 180
 Nusseerooddeen Biswas v Ujjul Biswas, 909, 1034
 Nusservanji v Shahjadi Begam, 1050
 Nusserwanjee v Meer Mynooddeen, 1262
 Nusserwanjee v Eleonora, 1366
 Nusserwanji v Gordon, 448, 1051
 Nusur Mohamed v Kazbai, 520
 Nuzhart ud dowlah v Beni Madhab, 712.
 Nuzur Ally v Ojoodhyaram, 1071

O

Oakes, *In re*, 1063
 Oakes & Co, Ltd v Discarcie, 226
 Obhoy v Hury Churn, 479
 Official Assignee v Abdul Hayee, 491
 Official Assignee v Anju, 68
 Official Assignee v Bidyasundari, 529, 561
 Official Assignee v Chinniram, 491 1023
 Official Assignee of Madras v Aiya Dikshithar, 76, 176
 Official Assignee of Madras v Mary Dalgaums, 225
 Official Assignee v Ramalingappa, 1352
 Official Liquidator v Burjorjee, 340
 Official Receiver v Chettiappa, 243 418
 Official Receiver v Nagaratna, 673 1023
 Official Receiver v Palaniswami, 34
 Official Receiver of Tanjore v Venkatarama, 270
 Official Trustee v Krishna, 1104
 Official Trustee v Purna Chandra, 778
 Official Trustee of Bengal v Benode, 1087, 1152
 Official Trustee of Bengal v Smith, 1096
 Oh Ling Tee v Awkinefee, 473
 O'Keefe v Walsh, 456
 Oldfield v Cobbett, 964
 Oliner v Lavezzo, 124
 Olpherto v Mahabir Pershad, 829
 Omritolall, *In the matter of*, 403

Onkar v Gamna, 904, 1121
 Onkar Singh v Mohan Kuar, 1298
 Oolagappa v Arbuthnot, 461
 Oomer Ahmed Bros, *In the matter of*, 133 1347, 1402
 Oppenheim & Co v Mahomed Haneef, 97.
 Orby v. Trigg, 683
 Ordo v Skinner, 113, 139
 Oriental Bank Corporation v. Gobind, 462, 464
 Oriental Bank Corporation v Gobinloll, 1064
 Oriental Corporation v Mercantile Corporation, Ltd, 592
 Oriental Loan Asso Ld v. Hatch, 1138
 Ormerod Grierson & Co v. St George's Iron Works, 623
 Orr v. Chidambaram, 1026
 Orr v. Muthia, 1057, 1069
 Osborne v Chocqueel, 539
 Oula v Beepatheo, 858, 869
 Owen v Homan, 1060
 Owen v. Morgan, 525, 529

P

P K P V E Chidanbaran v N A Chettyar, 1302
 P & O Steam Navigation Co v Secretary of State, 32, 273
 P & O Steam Navigation Co v Tsuro Kijima, 450
 P M Chettyar Firm v Ma Shwe, 1354
 Paban Sardar v Bhupendra Nath, 895
 Pabitra Kunwar v Maharaja of Benares, 1108
 Pabna Dhanabhandar Co v Foyezuddin, 342
 Pachayappan v Narajana, 836
 Pachlauri v Ram Khilawan, 1092
 Pachkauri Ram v Nand Rai, 1263
 Padamchand v Bhicamchand, 789
 Padampat v Narayandas, 295
 Padamsee v Lakamsee, 34.
 Padarath Mahton v Hitan Singh, 1092
 Padayachi v. R M B. M'S Chinnaya, 186
 Paddayya v Krishnamurthy, 335
 Padmalav v Lukmi Rani, 74
 Padma v Gurish Chandra, 549, 886, 892
 Padmatati v Rasik Lal, 436, 666

Padmanabha v Khemu, 1019
 Padmanund Singh v Anant Lal, 565
 Padu v Rakhmar, 242
 Padwick v Scott, 503
 Paget v Ede, 107
 Pahalwan v Narain 266
 Pahar Ujiala Bank v Abu Bhua, 1292
 Pahlad Rai v Shiv Ram, 1353
 Pahlwan v Rival 44
 Paira Mal v Rajnarain 34
 Palanj Kumar v Sudhur Kumar, 510
 Palakdhari v Manners, 338
 Palamal v Fauja Singh 868
 Palamandi v Adakalam 850
 Palani v The Official Receiver, 430
 Palani v Rama Rangayya 985
 Palani v Rangadoss 1099
 Palani v Serugan 509
 Palani v Udayar 317
 Palaniappa v Devasikamony, 336, 337, 367
 Palaniappa v Palaniappa 1066, 1070
 Palaniappa v Raja of Ramnad, 851
 Palaniappa v Subramania (44 Mad 731), 597, 598, 716
 Palaniappa v Subramania (42 Mad L.J. 12), 593
 Palaniappa v Valliammal, 427, 720, 881
 Palaniappa v Velliammal, 190
 Palanisami v Thondama, 132
 Palchur v Vemu 867, 870
 Palikandy v Krishnan, 202, 225
 Pallu v Mathura 1100
 Pallonji v Jordan, 269 1043
 Palmer v Palmer 526
 Panachand v Manoharlal, 912
 Panachand v Sundrabai, 719
 Panaji v Ratanchand, 492
 Panalal v Collector of Mandalay, 976
 Panangat v Achuta, 918
 Panaul v Hishen Mun, 190
 Panch Hari v Giridhari Mal, 165
 Panch v Mani, 12, 186
 Panch Cowrie Mull v Chumroo Lal, 311
 Panchatti v Gauri Kuar, 927, 928
 Panchanan v Kunja, 824
 Panchanan v Radhanath, 1150
 Panchanan v Rabia Bibi, 177
 Panchapakasa v Natesa, 420
 Panchikari v Panchanan, 912, 914
 Panchratan v Pam Sahay, 170, 847
 Panchuram v Kuroo, 157
 Panday Satdeo v Srimati Padhey, 1133

Pando Satdeo v Ramayan, 950
 Pandharinath v Thakordas, 591
 Pandit Brj Krishna v Murli, 566
 Pandit Gokul Chand v Kuar Sarat, 878
 Pandit Sheo Narain v Ram Jitan, 937, 1021
 Pandu v Bhavdu, 378
 Pandu v Derji, 883, 1149
 Pandu v Jannadas 1367
 Pandu v Sayla, 716
 Pandurang v Govind, 814
 Pandurang v Jagya, 700, 701
 Pandurang v Keshavji, 617
 Pandurang v Krishnaji, 222 227, 243
 Pandurang v Narhar, 411
 Panduranga v Vythilingi, 155, 701
 Pankajammal v Secretary of State, 337
 Pankajkumar v Sudheerkumar, 1354
 Pankanni v Raman, 677
 Pankhabati v Nani Lal, 820
 Panna Lal v Bhola Nath, 817, 818
 Panna Lal v Nihal Chand, 139
 Panna Lal v Official Receiver, 381
 Pannalal v Mukhran, 139
 Panuganti v Zamindar of Tiruvur, 577
 Papamma v Vira Pratapa, 108
 Papayya v Chelamayya, 1150
 Paramananda v Mahabeer, 175, 182
 Paramasiva v Krishna, 479
 Paramasivan v Ramasami, 346, 1062, 1066
 Paramaswami v Pichammal, 301
 Paramaswamy v Alamelu, 391
 Parambath v Puthengattil, 56
 Paramen v Sundaraja, 801, 802
 Parameshwara v Seshagunappa, 439
 Parameswara v Land Acquisition Collector, Palghat, 380
 Parameswaran v Narayanan, 312
 Parameswaran v Vishnu, 1142
 Parangodan v Perumtoduka, 484
 Paranjpe v Kanade, 436
 Parasani v Pichammal, 1339
 Parashram v Bulmukund, 730
 Parashram v Govind, 217, 772
 Parashram v Miraji, 642
 Parashram v Secretary of State, 139, 560
 Parashuram v Tata Industrial Bank, 148, 149
 Parasram v Pandohi, 983
 Parasurama v Seshier, 319, 382, 411
 Parasurama v Venkatachalam, 577

- Parathayi v. Sankumani, 102
 Parbati, *In re*, 1736
 Parbati v. Mahmud, 498
 Parbati v. Mathura, 80
 Parbhu v. Jamil, 838
 Parbhu v. Muthi, 1096
 Parbhu Dyal v. Ali Ahmad, 413
 Parbhu Dyal v. Kalvan Das, 413, 418
 Parbhudas v. Lallubhai, 347
 Parbhudas v. Shankarbhai, 207
 Pareeh Nath v. Hari Charan, 243, 244, 825, 826
 Parja v. Mulchand, 831
 Parker v. Wells, 614
 Parker, Gainer & Co v. Turpin, 1286
 Parkins v. Hawkshaw, 17
 Parkinson v. College of Ambulance, 144
 Parma v. Ram Parkash, 1085
 Parma Dat v. Bipju, 1269
 Parma Ram v. Lehna Singh, 699
 Parmanand v. Jagat Narain, 577, 685, 686
 Parmanand v. Lokman Das, 1013
 Parmanand Das v. Kripasindhu, 430
 Parmeshri Das v. Fakira, 485, 487, 539
 Parmeshwar v. Raj Kishore, 57, 985
 Parmeshwar Singh v. Kailaspatti, 1317
 Parmeshwari v. Jagat, 1142
 Parr v. Lancashire and Cheshire Miners Federation, 463
 Parry & Co v. Appasamy, 95
 Parsha v. Lagmya, 32
 Parshad Lal v. Laiq Singh, 982
 Parshadi Lal v. Ram Dial, 683
 Parshotam v. Balwant, 56
 Parshotam Das v. David, 606
 Parshotam Das v. Radha Kishen, 128, 168
 Parshottamdas v. Kekhusru, 1291
 Parshotumdas v. Bhagubhai, 133, 134
 Parshram v. Dorabji, 147
 Parsotam v. Abdul, 585
 Parsotam v. Brahma, 1080
 Parsotam v. Janki, 870
 Parsotam Gir v. Narabada Gir, 74, 84
 Parsotim v. Lal Mohan, 636, 1107, 1108
 Partab Singh v. Achar Singh, 1105
 Partab Singh v. Bhabhuti Singh, 945, 954
 Partap Singh v. Delhi and London Bank, 201
 Partapchand v. Mast Mahni, 591
 Parthasaradi v. Chinnakrishna, 31, 58
 Parton, *Re*, Townsend v. Parton, 526
 Partridge v. Strange, 525
 Parvata v. Digambar, 714, 718
 Parvathammal v. Chokkalinga, 153
 Parrathi v. Govindasami, 838
 Parvati v. Ganpati, 339
 Parvatishankar v. Bai Naval, 397
 Pashputi v. Bank of Behar, 793
 Pasupathy v. Kothanda, 184
 Pasupati v. Nanda Lal, 1082
 Pasupati v. Nando Lal, 152
 Patch v. Lyon, 17
 Pate v. Pate, 61
 Patel Naranjit v. Haridas, 229, 230
 Pateshri Partap v. Rudra Narain, 476
 Patinhare v. Vellur, 590
 Patloji v. Ganu, 7, 151, 995
 Pattaburama v. Neli, 586
 Pattakara v. Rangasami, 195
 Patto Kumari v. Upendra Nath, 1267, 1275
 Pauliem v. Pauliem, 367
 Paya v. Kovamel, 1092
 Payana v. Pana Lana, 483, 484, 485, 488
 Paydanna v. Lakshminarasamma, 242
 Payne v. British Time Recorder Co., 450, 453, 454, 492
 Pearce Mohan v. Raghunath, 699
 Pearee v. Shama Churn, 657
 Peari Lal v. Allahabad Bank, 177
 Peary v. Ambica, 80, 81
 Peary Choudhury v. Sonoo Dass, 436
 Peary Lal v. Chandhi Charan, 175, 203, 237
 Peary Lal v. Komal Kishore, 131
 Peary Lal v. Peary Lal, 269
 Peary Mohan v. Narendra Nath, 477
 Peary Mohun v. Anunda, 195
 Peary Mohun v. Romesh, 175
 Peary Mohun Dis v. Weston, 277
 Pechayee v. Vallaimuthu, 815
 Pedda Subbaraya v. Ganga, 1017
 Peddapalayam v. Peddapalayam, 1260
 Pedro v. Jalbhoy, 797
 Peek v. Gurney, 145
 Peek v. Ray, 612
 Pell v. Gregory, 1007
 Pelly, *Ex parte*, 579
 Pemberton v. Hughes, 96
 Penn v. Lord Baltimore, 107

- Peram Chennamma, *In re*, 1123
 Perayya v Venkayamma, 789
 Percival v Collector of Chittagong, 560
 Peria v Karappanna, 887
 Peria Appaswami v Krishnaswami, 1036
 Periasami v Scttharama, 206
 Periatambi v Vellaya, 695, 698
 Periya Miyana v Subbramaniam Iyer, 1033
 Perlak Petroleum Maatschappij v Deen, 611
 Persee v Persee, 404
 Pertab Chunder v Mohendranath, 332
 Pertab Narayin v Triloki, 68
 Peru v Ronuo, 219
 Perumal v Karuppan, 891
 Perumal v Kaveri, 1004
 Perumal v Perumal, 859, 876
 Perumal v Thurumalarayapuramnidhi Ltd, 964
 Perumalla v Perumalla, 851, 1261
 Perumbra v Subrahmaniam, 1100
 Peruri v Gullapudi, 288, 1287
 Pestonjee v Mirza, 460
 Pestonji v Abdool, 489, 490
 Pestonji v Collector of West Khandesh, 1317
 Pestonji v Jamsedji, 672, 1032
 Pestonji v Manockjee, 1261
 Pestonji v Queen Insurance Co, 367
 Petha Perumal v Chidambaram, 1353
 Pethaperumal v Murugandi, 79
 Pettachi Chettiar v Chunnatambiar, 840
 Pexata v Digambar, 163
 Phanundra, *In the matter of*, 1359
 Phanundra v Pramatha, 912, 916
 Phanundra v Pramatha Nath, 390
 Pheroosha v Sun Mills, Ltd, 440
 Philipps v Philipps, 526, 528, 529, 530, 532, 539, 561, 1039
 Phillips, C J v A E Mitchell, 51, 55
 Phuran v Bahoran, 1273
 Phomon Singh v A. J. Wells, 779
 Phul Chand v Chand Mal, 221
 Phul Chand v Kanhaiya Lal, 89
 Phul Chand v Nursingh, 817
 Phul Chand v Shankar, 413
 Phul Kuar v Hashmatullah, 636
 Phul Kumari v Ganshyam Misra, 789, 790
 Phulli v Debi Parshad, 946, 947
 Phulwanti Kunwar v Jageshwar, 934
 Pundo v Jangi Nath, 78, 58
 Piara Ram v Kesho Nath, 498
 Piare Lal v Bhagwandas, 541, 968
 Piari v Khali Ram, 490
 Piari Lal v Hanif un Nissa, 244, 418
 Piari Lal v Madan Lal, 345, 346, 831, 1351.
 Piari Lal v. Nand Ram, 84
 Pich v Subbarayyar, 54
 Pichai Konar v Narasimha, 83
 Pichamma v Sreeramulu, 658
 Pichaye v Sivagami, 360
 Pichuwayyengar v Seshayyengar, 151
 Pierce Leslie v Perumal, 160, 166
 Pigot v Ali Mahammad, 1317
 Pilcher v Hinda, 501
 Pinapati v Pinapati, 448, 452
 Pindi v U Thaw Ma, 1041
 Pini v Roncoroni, 1062
 Piran Bibi v Jitendriya, 1003
 Purbhu v Rup Sing, 159
 Purbhai v The Bombay Baroda & Central India Rly Co, 1346
 Pine v Richardson, 570
 Piroj Shah v Qarib Shah, 379, 390
 Pirjade v Pirjade, 408
 Pirthi Pal v Jowahir, 675
 Pisani v Attorney General of Gibraltar, 194
 Pita v Chunilal, 253, 816, 817
 Pitam Lal v Balwant Singh, 440, 442
 Pitam Mal v Sadiq Ali, 1259
 Pitam Singh v Tota Singh, 718
 Pitamber v Damodar, 723
 Pitamber Lal v Dodee Singh, 594
 Pitambur v Ram Joy, 559
 Pitchakkuttiya v Doraiswami, 701, 712, 952
 Pitchayya v Rattamma, 474
 Pitchayya v Venkata Krishnamachari, 299, 297
 Pitchi v Bharata, 79
 Pitchiah v Sree Govinda, 1075
 Pittapur Raja v Buchi, 47
 Pittapur Raja v Suriya Rau, 480, 484, 485.
 Piyari Lal v Churamani, 855
 Pleader of Agra, —'A' v Judges of the Allahabad High Court, 1336
 Pleaders of the High Court, *In re*, 15, 509

Pledgers, *In the matter of*, 508
 Plummer v. May, 610
 Pogose v. Fikurooddeen, 719
 Pokker v. Kunhimad, 790
 Ponnammal v. Marimudi, 895
 Ponnammal v. Ramamirtha, 486
 Ponnaya v. Jungala, 946
 Ponnu v. Sambasiva, 1062
 Ponnusami v. Damodar, 120
 Ponnusami v. Letchmanan, 698, 701
 Ponnusami v. Doraisami, 726
 Pooranananthachari v. Gopalswami, 1129
 Pooroo Chunder v. Sassoon, 285
 Poorobashi Pal v. Bhoobun Chunder
 Dev, 290
 Poresh Nath v. Anath Nath, 840
 Poromanand v. Kheppoo, 695
 Postmal v. Firm Radha Krishna, 1023
 Potita v. Narasinga, 1259
 Pow v. Davis, 458
 Prabashinee v. Rasiklal, 714, 715, 717,
 718
 Prabhakar Bhat v. Vishwambhar, 563
 Prabhat v. Emperor, 1356
 Prabhu Narain v. Saligram, 5
 Prabhulingappa v. Gurunath, 89
 Pradice v. Sheppard, 964
 Pradyumna Kumar v. Gopendra, 1007
 Prafulla Nath v. Satya Bhusan Das, 493
 Prafulla v. Bhabani, 328
 Prag Narain v. Collector of Agra, 355
 Prag Narain v. Kamakhia Singh, 413
 Prag Narain v. Kamakhia, 420
 Pragdas v. Dowlatram, 1344
 Pragdas v. Girdhardas, 323, 893, 903,
 904
 Praggi v. Govind, 24, 30
 Praggi Lal v. Maxwell, 576, 577
 Prakasa v. Yelamarti, 235
 Prakas Singh v. Allahabad Bank, 700
 701
 Pram Sukh v. Ram Dajal, 1137
 Pramatha Chandra v. Khetra, 999
 Pramatha Nath v. Bhuvan Mohan, 63
 Pramatha Nath v. H. V. Low & Co., 201,
 202
 Pramatha Nath v. Khetra Nath, 1058
 Pramathanath v. Sujalaksh, 940
 Prameshwari v. Jagal, 1142
 Pramatha Nath v. Mackey, 90, 91
 Pran Krishna v. Prasanna, 334

Pran Kristo v. Collector of Moorsheda
 bad, 972
 Pran Kumar v. Darpoohari, 1346, 1347
 Pran Nath v. Mohesh Chandra, 185
 Pranlal v. Goculdas, 1340, 1341
 Prasada Nayudu v. Virayya, 788
 Prasaddas v. K. S. Bonnerjee, 19, 276,
 278
 Prasanna v. Ibrahim, 837
 Prasannamayi v. Baikunath, 1072
 Pratapa v. A. F. L. Mission, 235, 263
 Pratapa v. Simpi, 63
 Pratab Singh v. Beni Ram, 170
 Pratapmal v. Chunilal, 773
 Pratchett v. Drew, 1061
 Pravaschandra v. Municipal Commission
 er, 963
 Pravat v. Amulja, 473
 Prayagdossyvaru v. T. Srirangacharya,
 302
 Prayag Doss v. Tirumala, 301, 302
 Prayag Raj v. Sidhu Prasad, 840
 Prem Chand v. Mohkoda Debi, 155, 156
 Prem Lal Dhar, *In re*, 238
 Prem Lal v. Sumbhoonath, 1065, 1136
 Prem Narain v. Ram Charan, 42, 314
 Prem Nath v. Chatrapal, 196
 Prem Sukh v. Indro Nath, 611
 Premchand, *In the goods of* (21 Cal
 484) 368, 1107, 1110
 Premchand, *In the goods of* (21 Cal
 832), 908, 909, 910
 Premji v. Ghulam, 117
 Premji v. Premji, 1057
 Premji, *In re*, 751
 Premmoyi v. Preonath, 14, 856
 Premo Mest v. Sheo Nath, 314
 Premsook Das v. Udairam, 632
 Preonath v. Bisnath, 482
 Preston v. Luck, 1045
 Preston Banking Co. v. Allsup, 439, 442
 Price v. Crouch, 580
 Price v. Price, 621
 Prince Victor v. Bhoirabendra, 879
 Printing Machinery Co. v. Linotype and
 Machinery Ltd., 1287
 Prithisingi v. Umedsingi, 92
 Prithi v. Jamshad, 89
 Prithi Chand v. Satya, 163
 Prithi Chand v. Satva Kinkar, 717
 Priyanath v. Kali Charan, 74
 Probhas Kumar v. Nithar Lal, 1145,
 1147

- Prolhat v Hari, 461 463
 Probode Chunder v Dowe, 1075
 Prokash Chudra v Adlam 1009
 Promoda Nath v Secretary of State, 676
 Promode Nath v Harishee 662
 Promotha Nath v Mohini Mohun Sen, 1038
 Promotha Nath v Saurav 839
 Promotha Nath v Rukhal Das, 478
 Prosanno v Baidya 1102
 Prosanno Chundra v Kristo, 198
 Prosonnomoy v Sreenauth 260 262
 Prosunno Kumar v Kali Das, 169, 178, 825
 Prosunno Kumari v Golab Chand, 68
 Protab v Brojanath 7
 Protab Chunder v Arathoon 320
 Protab Chunder v Peary 739
 Pratab Chandra v Sarat Chandra 781, 1042
 Protap Chunder v Pamioty 832
 Puddephatt v Leith 579
 Puddomonee Dossee v Muthooranath, 237
 Pudmanand v Chundi Dat 737
 Pugardm v Mordinsa 1265
 Pukhraj v Jamsetji 427 866, 867
 Pulamada v Paruthu 509
 Pulm v Amin 909
 Pulm v Mahendra 930 936
 Pullen Cletty v Ramlinga Cletty, 231
 Puna Mahton v Emperor 747
 Punamchand v Mollison 303
 Punardeo v Pam Sarup 3
 Punch Duar v Mani 795
 Punchedana v Vaithunatha 39
 Punchedana v Dwarlanath 3
 Punchedana v Shuk Chunder 104, 102, 1342
 Punmathavelu v Bhashyam 877, 878, 980, 983
 Punjab Akkharat Press Co v Ogilvie 1307
 Punjab Akkharat & Land Press Co v Ogilvie 327, 328
 Punjab Marwari Chamber of Commerce v Pam Mal, 340 375 379
 Punjab Mutual Hindu Family Relief, Fund v Sardari, 121
 Punjab National Bank v Uma Dutt, 544 1117
 Puri Lal v Lamautar 851
 Punnamchand v Satvanand, 802, 809
 Punnavyah v Viranna, 70
 Puran Chand v Sheodat Pai, 599
 Puran Chand v Jodh Raj 118
 Puran Chandra v Bawan Das, 184
 Puran Lal v Komal, 583 1003
 Puran Lal v Rupchand, 1265, 1266
 Puran Mal v Dina Nath, 167
 Puran Mal v Janki Pershad, 378
 Puran Mal v Krant Singh, 1071, 1076
 Puranchand v Surendra, 269
 Purmanandas v Vallabdas, 715
 Purnachandra v Bejov, 945
 Purna v Nalini 463
 Purna v Nil Madhub 901 903
 Purna v Rasik, 58
 Purna Chandra v Dhalu, 391
 Purna Chandra v Dhone Kristo, 129
 Purna Chandra v Manoben Devi, 847
 Purnama v Ram Prasad 802
 Purshotam v Henley's Telegraph Works 375 936
 Purshottam v Atmaram 484
 Purshottam v Balvant 218
 Purshottam v Hargu, 1078
 Purshottam v Kala 474 479
 Purshottam v Kasturbhai, 340
 Purshottam v Mahadu, 19, 380
 Purshottam v Sundar, 815
 Purshotamdas v Surajbharthi 260, 261, 264 798 808
 Purshottamdas v Ramgopal 1269
 Purshotum v Hargu 367, 368
 Purushottam v Balkrishna 208
 Purushottam v Pandurang 531
 Purushottam v Rajbari 190, 869 881
 Putali v Tulja, 79
 Putna v Veloth 972
 Puttappa v Virbhadrappa 119
 Puttu Lal v Dayanand 304
 Puttu Lal v Parlati 19
 Pyari v Kedarnath 451 470
 Pyari Mohan v Kalu Khan 1149
 Pydel v Chathappan 439 441

Q

- Qadri v Fazal 898
 Qaim v Nura 854
 Qasim Ali v Bhagwanta 1071
 Qazi v Mani umar, 435
 Qazi Muhammad v Lachman 837

Qazi v Parn Kishen, 429, 430
 Quanthara v Gokul Chandel 246
 Queen v Meers 1373.
 Queen v Nabadwip 1363.
 Queen Empress v Abdul 4 609
 Queen Empress v Bapuji, 702
 Queen Empress v Byramji, 293
 Queen Empress v Gangay Ram, 1314 .
 Queen Empress v Krishna, 515
 Queen Empress v. Mutturaman, 702
 Queen Empress v Pillala, 702
 Queen Empress v Sri Churn 3
 Queen Empress v Tilak, 3
 Queen Empress v Tribhovan, 33
 Queen Empress v Virappa Chetti 293
 Queen Empress v Zakhi ul din, 293
 Quilter v Heatly, 624, 625
 Qurban Ali v Ashraf Ali, 232, 235

R

R v Kartic Chunder, 3
 R v Nabadwip, 72
 R v R, 643, 1333
 Rabbabai v Noorjehan, 383, 478
 Rabeholme v Smith 1064
 Rabiabai v Rahimabai 913
 Rabindra v Abdul 1031
 Rabindra v Jnanendramohan 108
 Rachappa v Sindappa 124
 Pachawa v Shivayogappa, 340
 Rachhea v Upendra, 551
 Rachhpai v Sheo Ratan, 883
 Radha v Kamal, 1098
 Radha v Monohur, 43
 Radha v Radha 410
 Radha v Rajendra 1347
 Radha v Tula, 803
 Radha Binode v Sri Sri Gopal 62
 Radha Charan v Nailash, 170
 Radha Charan v Man Singh, 408, 409
 Radha Gobind v Ralhunath, 847
 Radha Kant v Debendra, 565
 Radha Kant v Musammat Parbati, 699, 702
 Radha Kishen v Collector of Jaunpur, 159, 353, 1101
 Radha Kishen v Hem Chandra, 176
 Radha Kishen v Radha Prasad 492
 Radha Kishun v Khurshed Hossein, 57, 65, 979, 1108
 Radha Krishna Das v Pat Krishna Chand 364

Radha Krishna Das v Pat Krishna Chand, 357, 1125
 Radha Krishna v Beni Madhal 1155
 Radha Krishna v Ram Bahadur, 744
 Radha Krishna v Sundarawamar, 359
 Radha Krishna v Swaminatha, 1125
 Radha Krishna Gopal v Lakshmi Narayan, 959
 Radha Krishnar v Muthusami, 57
 Radha Kunwar v Reoti Singh, 361, 978
 Radha Mohan v Abbas Ali 348, 350
 Radha Nath v Chandi Charan, 678
 Radha Pershad v Ram Parmaswar, 142
 Radha Prasad v Lal Sahib, 47, 79, 159, 168, 191, 242, 500, 868
 Radha Raman v. Pran Nath, 598
 Radhabai v Anant Rao, 68, 72
 Radhakisan v Balvant, 222
 Radhakison v Balmukund, 1288
 Radhakrishna v Kama Kamini, 1102
 Radhakrishna v Swaminatha, 355, 350
 Radhakrishna v Venkata, 1100, 1102
 Radhakrishna Iyer, *In re*, 964
 Radharani v Purna Chandra, 10, 280, 360, 368
 Radhashyam Das v Runga Sundari, 947
 Radho Lal v East India Railway, 927
 Radho Lal v Mulchand 79, 80
 Radhey Shyam v Bihari Lal, 147
 Radhuy Shyam v Mahomed Nasir, 587, 859
 Rafikunnesa Bibi v Tarmi Churn, 915
 Raghannath Prasad v Jamuna Prasad, 57
 Raghava Reddi, *In re* 1170
 Raghavulu v Pillati 307
 Raghavendra v Yalaguri 578
 Raghavendra v Gurumo 1211
 Raghbir v Mat Mohan, 863
 Ragho v Daud, 980
 Ragho v Dipchand 672
 Ragho v Gopal, 17, 172
 Ragho v Hanmati 847
 Ragho Prasad v Mewa Lal, 973
 Ragho Sati v Balkrishna 980, 981
 Ragho Vmayak v Sheikh Daud, 980
 Raghoonath v Gobindnath, 116, 120
 Raghu v Mahant, 1147
 Raghu Kul v Pitam, 56
 Raghu Nath v Syed Samad, 578
 Raghu Parn v Dookall, 816
 Ragulans Lal v Kelano, 1377

Raghunath Puri v Jyoti Swarupa 565
Raghunath Sahai v Phool Kumari, 277
Raghunath v Gokarn, 83
Raghunath v Jwala, 500
Raghunath v Kesho, 299
Raghunath Singh v Jai Indra Bahadur Singh 174, 182, 418 420 1023 1079
Raghunath v Hailal 77 128
Raghunath v Mast Sohan 432
Raghunath Singh v Jodha Singh, 683
Raghunada v Govinda 379
Raghunandan v Badan Singh, 708
Raghunandan v Bhuwal Tewari, 598 1033
Raghunandan v Ghulam 899
Raghunandan v Jadumandan, 1101, 1102
Raghunandan v Parmeshwar, 98
Raghunandan v Ram Charan, 378 844
Raghunandan v Ram Sunder, 566
Raghunath v Deputy Commissioner, 368
Raghunath v Gangaram, 701
Raghunath v Ganpat, 684 739
Raghunath v Issur Chunder, 76
Raghunath v Janardhan, 25, 26
Raghunath v Kondiba 745
Raghunath v Mast Rampari, 1123
Raghunath v Nilo 11, 1075
Raghunath v Sarosh 177, 456, 498, 776
Raghunath v Shamo Koori 11, 1128
Raghunath Das v Sundar Das 14, 238, 239 242, 723 728
Raghunath Prosad v Sarju Prosad 1017
Raghunath Rai v Birdhi Chau 1277
Raghunath Singh v Sheo Pratap Singh, 82
Raghunath Sukul v Ramrup, 1259
Raghunatha v Venkatesa, 723 870
Raghunathadas v District Superintendent of Police 320
Raghurbar v Bhikya, 947
Rahim v Srinivasa, 809
Rahim Ali v Phul Chand, 189, 190
Rahim Baksh v Amran Bibi, 448, 450, 494
Rahim Bux v Abdul Kader, 776
Rahimkhoy v Turner, 352 353, 612
Rahimuddin v Loll Meah, 173
Rai Amrita Nath v Abhoy Charan, 1127
Rai Bahadur v Ram Bahadur, 722
Rai Charan v Biswa Nath, 877
Rai Charan v Debi Prasad 415
Rai Charan v Kumud Mohun, 77
Rai Kashi Nath v Kailas Singh, 863, 865
Rai Narain v Newton, 115
Rai Radha Krishna v Bisheshar Sahay, 501
Rai Ram v Secretary of State, 335
Rai Saheb v John, 1006
Rai Shani Kissen v Damar Kumar Debi, 195
Raj Bahadur v Narayan, Prasad, 870
Raj Chandra v K D O C Ray, 597
Raj Chunder v Gangi Das 863 866
Raj Coomary v Prem Madhub, 979
Raj Kishen v Radha Madhab, 242
Raj Kisto v Nobae, 20
Raj Koomar Singh v Sahebzada, 293
Raj Krishna v Bipin, 101
Raj Kumar v Sheo Narayan, 1006
Raj Lakshmi v Kalyani, 124, 125
Raj Narain v Ananga, 588 589, 596
Raj Simhadri v Ramchandrulu, 77
Raj Singh v Parmanand, 1000
Raja v Jankibai, 1040
Raja Bahadur v Rajeevappa, 488, 489
Raja Brajasunder v Sarat Kumari, 1022, 1023
Raja Dhamara v Bukkapatnam 349
Raja Gokuldas v Sheth Ghasiram, 1017
Raja Gopal v Taj Mahomed, 591
Raja Gopala v Ramanujachariar, 178
Raja Har Narayan v Chundhran Bhagwant Kuar, 1262, 1267
Raja Jagadishchandra v Bhubaneswar, 1021
Raja Joyt v Jadu 1108
Raja Kirtyanand v Prithi Chand 193
Raja Kumara v Thatha, 84
Raja of Bobbili v Suryanarayana, 800
Raja of Kalahasti v Jagganna Iha 881
Raja of Kalahasti v Prayag, 198
Raja of Mandasa v Jagannayakulu, 379, 1317 1208
Raja of Ramnad v Kamath Ravathan, 363
Raja of Ramnad v Mangalam, 336
Raja of Pittapur v Secretary of State, 331

- Raja Peary Mohan v. Manohar, 10,
 325, 678
 Raja Rajeswara v. Arunachalam, 1126
 Raja Rajeswara v. Tirunelkantalai, 356
 Raja Ram v. Chhaddamm, 172
 Raja Ram v. Chuni Lal, 512, 999
 Raja Ram Tewari v. Luchmun, 490
 Raja Rammad v. Velusami Tevar, 88
 Raja Rangit Singha v. Bhagabutti, 34
 Raja Ranjit v. Basunta, 68
 Raja Saheli v. Sub Collector, 381
 Raja Sashikanta v. Raja Sarat Chandra,
 676, 678
 Raja Shyam v. Raj Kumar, 1065
 Raja Singh v. Koolidip, 413, 415
 Raja Sir Mohammad v. Qazi Ramzan
 Ali, 1016
 Raja Sir S. R. M. M. A. Firm v. Burma
 Oil Co., 771
 Raja Valad v. Krishnabhat, 29
 Raja Wazir v. Bhikari Ram, 822, 824
 Raja Wazir v. Rani Jagadamba, 1133
 Rajacharya v. Chemanna, 342
 Rajada v. Ghulla, 956
 Rajagopala v. Ramanujachariar, 186,
 729, 831
 Rajagopala v. Subbimal, 327
 Rajagopala v. Tirupathia, 128
 Rajagopala v. Vardaraja, 335
 Rajagopalachariar v. Bhashyachariar,
 572
 Rajagopalaswami v. Palaniswami, 1008.
 Rajah Ali v. Amir Hossein, 1085
 Rajah Enaet v. Rancee Rowshun, 1370
 Rajah Kotakkal v. Malabar Timber
 Co., 1340
 Rajah of Kalahasti v. Venkatadri, 697,
 702
 Rajah of Karvetnagar v. Venkata Peddi,
 270
 Rajah of Ramnad v. Ramanathaswami,
 45
 Rajah of Ramnad v. Seetharam, 1337
 Rajah of Venkatagiri v. Surga, 424, 702
 Rajah Parthasaradhi v. Rajah Pengual,
 1035
 Rajah Venkata Ramayya v. Veeraswami,
 373
 Rajah Vurmah v. Ravi Vurmah, 218
 Rajammal v. Tiaru, 1060
 Rajani v. Ajmaddin, 91
 Rajani v. Kali, 1067, 1150
 Rajani v. Mahalukmi, 426
 Rajani v. Raja Jyoti, 874, 879, 880
 Rajani v. Rajabala, 375, 376, 786
 Rajani Kanta v. Emperor, 771
 Rajani Kumar v. Mahalakumi Bank, 700
 Rajaram v. Central Bank of India, 78,
 59, 60, 128
 Rajaram v. Ganesh, 222, 336
 Rajaram v. Raghubansiman, 776
 Rajaram Bhagvat v. Jibai, 878
 Rajarathna v. Ramchandra, 719
 Rajaratnam v. Sheikh Hasambi, 170
 Rajbana v. Askaran, 825
 Rajendra v. Biswarup, 63
 Rajendra v. Chunder Mohun, 213
 Rajendra v. Gopal, 1123
 Rajendra v. Gulzari, 773, 822, 828
 Rajendra v. Nil Ratan, 816
 Rajendra v. Panna Lal, 1258
 Rajendra v. Prabodhi, 947
 Rajendra v. Rajendra, 413
 Rajendra Kishore v. Mathura Mohan,
 11, 184
 Rajendra Kumar v. Rash Behari, 357,
 360
 Rajendra Lal v. Atal, 888, 892
 Rajendra Nath v. District Board, 751,
 758, 780
 Rajendra Nath v. Mahes Lata, 1092
 Rajendranath v. Tushtamayee, 976
 Rajendro v. Jan Meah, 517
 Rajendro Nath, *In re*, 1336
 Rajerav v. Nanarav, 163
 Rajeswara v. Hari, 699
 Rajendra Narain v. Sundara Bibi, 202,
 225
 Rajit Ram v. Katesar, 541, 1099
 Rajitagiripathy v. Bhanani, 89
 Rajjalali v. Faku, 418, 420
 Rajjo v. Lalman, 682
 Rajjo kuar v. Debi Dial, 448, 494
 Rajkali v. Gopi Nath, 1103
 Rajkeshwar Prasad v. Mahommed
 Rahuman, 1003
 Rajkishore v. Bhabatosh, 385, 788
 Rajkishore v. Ram Ghulam, 945
 Rajkishori Koer v. Madan Mohan Singh,
 566
 Rajkumar v. Mangal, 150
 Rajkumar v. Ram Khelawan, 691
 Rajkumar v. Ram Sundar, 913
 Rajkumar Lal v. Jaikaran, 1022
 Rajkumari v. Nrityakali, 884

- Bajlal shmi v Katyavani 102
 Pajmal v Hanmant, 278
 Rajmal v Muruti 7 38 1284 1294
 Rajprajeshwarashram v Sharda Math 303
 Rajraje hwarashram v Svaruptanand
 tirtha, 1080
 Rajrup v Abdul 09
 Rajrup Singh v Ramgolam, 198
 Rajuchunder v Pangati, 800
 Rajunder v Bijai, 17
 Rajundernaram Rai v Bijai Govind
 Sing 369
 Rajwant Prasad v Ram Ratan, 383
 Rajwanta v Shiam 1016
 Rajwanti Kuer v Mahabir Rai, 381
 Rak Kumar v Ahmaddi, 45
 Rakhal v Adwtya 904
 Pakhal v Ashutosh 11
 Rakhal Chandra v Rai Kuntha, 903
 Rakhal Doss v Heera, 44
 Rakhmabai v Mahadeo 890
 Raldu Singh v Sanwal Singh, 1102
 Raleigh v Goschen, 473 049
 Ralla v Amir 486
 Ralla v Manglan 1149
 Ralla Ram v Bansil Lal 1279
 Ralla Ram v Raj, 083
 Ralli v Gau Kun, 917
 Ram Adhar v Narain Das 185
 Ram Adhin v Ram Bharose, 636 609
 Ram Adhin v Ram Lot, 191
 Ram Autar v Deoki, 348
 Ram Autar v Ram Samujh 1293
 Ram Bahadur v Radha Krishen 1133
 Ram Bahadur v Ram Shankar, 330
 Ram Baran v Bhagwati 1101
 Ram Bhaj v Ram Das, 238
 Ram Bharose v Ramman Lal, 701
 Ram Bharose v Ganga Singh, 519 599
 Ram Bilas v Burch Singh, 1292
 Ram Bilas v Lal Bahadur, 337
 Ram Bilas v Nityanand, 301
 Ram Chand v Chhajju Ram, 440
 Ram Chand v Durga Prasad, 35
 Ram Chand v Pitam Mal, 1041
 Ram Chand v Sham Parshad, 421
 Ram Chandar v Darayoo Singh, 47
 Ram Chandra v Ah, 464
 Ram Chandra v Mudeshwar, 781
 Ram Chandra v Secretary of State for
 India 1104
 Ram Chandra v Raghurib, 656
 Ram Churan v Bulaqui, 684 686
 Ram Charan v Hamid, 1349 1357
 Ram Charan v Hanifa, 203
 Ram Charan v Kihori Lal, 134
 Ram Charan v Parmeshwari, 176
 Ram Charan v Reizuddin 81
 Ram Churan v Sakh Ram, 89, 172,
 718
 Ram Charan v Sheobirat, 206
 Ram Chunder v Dhurmo, 225
 Ram Chunder v Hamiran 172
 Ram Chunder v Madho 47
 Ram Churn v Protab, 296
 Ram Coomar v Collector of Beerbhoom,
 17
 Ram Coomar v Shushce, 832
 Ram Coomar Coondoo v Chunder Kanto
 Vookerjee, 146, 909
 Ram Das v Badri Narain, 310
 Ram Das v Dubri Koeri, 72
 Ram Das v Habibullah, 132, 133, 389
 Ram Das v Panna Devi 1071
 Ram Das v Secretary of State, 972
 Ram Dayal v Madin, 85
 Ram Dayal v Megu Lal, 208
 Ram Dayal v Sher Singh, 566
 Ram Dayal De, *In re*, 503, 1368
 Ram Dei v Shamshi Lal, 897
 Ram Deo v Frank Coombs, 717
 Ram Dhan v Karon Singh, 1275
 Ram Dhan v Prag Narain, 1129
 Ram Dhan v Lalit Singh, 1011
 Ram Dial v Ram Das, 800, 1357
 Ram Din v Bhoopi Singh, 71
 Ram Din v Kalka, 1007
 Ram Ditta v Shaman 863
 Ram Ditti v Amar Singh, 1203
 Ram Dyal v Mohammad 467
 Ram Dyal v Nurhurry, 568, 624
 Ram Faqir v Bindeshri Singh, 74, 77
 Ram Gharib v Shanker, 080
 Ram Ghulam v Shyam Sarup, 312
 Ram Golam v Chintamon, 391
 Ram Gopal v Har Krishen, 467, 804
 Ram Gopal v Khiali Ram, 178
 Ram Gopal v Shamskhatum, 332, 333,
 334, 336
 Ram Govindha v Mungur Ram, 79
 Ram Gulam v Durga Pershad, 954
 Ram Gulam v Sham Sahai, 954
 Ram Haral b v Ramlal, 486
 Ram Het v. Ram Ratan, 1007
 Ram Iqbal v Telesari, 389
 Ram Jas v Babu, 561

- Ram Jawaya Mal v. Devi Datta Mal, 1277
 Ram Kamal v. Ahmed Ali, 1076
 Ram Kinkar v. Sthiti Ram, 729, 731
 Ram Kinkar v. Tufani, 340
 Ram Kirpal v. Ram Kuari, 135
 Ram Kirpal v. Rup Kuari, 7, 86, 87, 88, 90, 159
 Ram Kishan v. Babu Kundan Lal, 781
 Ram Kishan v. Rameshan, 104
 Ram Kishun v. Jatadhari, 500
 Ram Kishun v. Lalta Singh, 427
 Ram Krishna v. Ramchandra, 1004
 Ram Krishna v. Ratan Chand, 917
 Ram Krishna v. Vithal, 78
 Ram Kumar v. Chartered Bank, 1062
 Ram Kumar v. Mohammad, 357, 361.
 Ram Kumar v. Ram Charan, 180
 Ram Kumar v. Ram Gaur, 836, 837.
 Ram Kumar Lal v. Raja Mukund Sahi, 876
 Ram Labhaya v. Kartar Singh, 867
 Ram Labhaya v. Mukandamal, 170, 694
 Ram Lagan v. Ram Birich, 442
 Ram Lal v. Bama Sundari, 702
 Ram Lal v. Bhola Nath, 117
 Ram Lal v. Chab Nath, 38
 Ram Lal v. Deoraj, 1200
 Ram Lal v. Harpal, 682
 Ram Lal v. Kabul Singh, 1142
 Ram Lal v. Kali Prasad, 597, 1000
 Ram Lal v. Kalka Prasad, 1145
 Ram Lal v. Radhey Lal, 163
 Ram Lal v. Ratan Lal, 1154
 Ram Lal v. Sil Chand, 1008
 Ram Lal v. Tula Ram, 70
 Ram Manohar v. Lal Behari, 1267
 Ram Mehr v. Pali Ram, 337, 1106
 Ram Narain v. Annoda, 497, 499
 Ram Narain v. Baij Nath, 1273
 Ram Narain v. Bansi Pershad, 983
 Ram Narain v. Bisheschar, 65
 Ram Narain v. Brj Banke Lal, 269
 Ram Narain v. Dwarkanath, 832, 840
 Ram Narain v. Harnam Das, 1133
 Ram Narain v. Jagdeo, 658
 Ram Narain v. Mahtab, 836
 Ram Narain v. Mina, 228, 229
 Ram Narain v. Mohanian, 247
 Ram Narain v. Parmeshwar, 131
 Ram Narain v. Ran. Kishen, 471
 Ram Narain v. Ram Prasad, 763, 934
 Ram Narain v. Shew Bhunjan Bho
 Ram Narain v. Umrao Singh, 317.
 Ram Narayan Singa v. Adhindra Nath, 369
 Ram Naresb v. Chirkut, 1109
 Ram Nath v. Nageshur, 1005
 Ram Parakash Das v. Anand Das, 1072
 Ram Pershad v. Jagannath, 173
 Ram Pershad v. Rajunder, 1107
 Ram Pershad v. Shiromani, 68
 Ram Pertab v. Madho Rai, 1040
 Ram Piar v. Kallu, 338, 1110
 Ram Prasad v. Anandji, 937
 Ram Prasad v. Asa Ram, 1149
 Ram Prasad v. Bhikari Das, 983
 Ram Prasad v. Emperor, 404
 Ram Prasad v. Jagtamba, 903.
 Ram Prasad v. Mahabir, 63, 64
 Ram Prasad v. Musst. Ajanasia, 1094
 Ram Prasad v. Msst. Fulpati, 353
 Ram Prasad Mala, *In re*, 391
 Ram Prasad Singh v. Benares Bank, 1047
 Ram Prasnad v. Boursa, 883
 Ram Prosad v. Anandji, 939
 Ram Protap v. Durga Prosad, 1276
 Ram Raghubir v. United Refineries, 1007, 1022
 Ram Ranjan v. Indra Narain, 1005, 1006
 Ram Ratan Rai v. Ramhit Singh, 981
 Ram Rattan v. Banarsi Lal, 415, 420
 Ram Rattan v. Bhuri, 78
 Ram Rattan v. Ram Datar, 190
 Ram Ratun v. Sheo Nandan, 942
 Ram Ravji v. Pralhadas, 123
 Ram Rekha v. Lallu, 75
 Ram Rup v. Khadiru, 249
 Ram Ruttom v. Land Mortgage Bank, 808
 Ram Sahai v. Ahmadi Begam, 56
 Ram Sahai v. Gaya, 682
 Ram Sahai v. Madan Lal, 382, 715
 Ram Sahay v. Komar Lachmi, 565
 Ram Saran v. Chatar Singh, 46, 738
 Ram Saran v. Girdhari Lal, 389
 Ram Saran v. Peary Lal, 337
 Ram Saran v. Radha, 38, 846
 Ram Saran v. Yudhistar, 952
 Ram Sarup v. Bharat Singh, 793
 Ram Sarup v. Dasrath, 190
 Ram Sarup v. Gaya Prasad, 390, 600
 Ram Sarup v. Jaswant Rai, 355
 Ram Sarup v. Mohan Lal, 375, 1277
 Ram Sarup v. Moti Ram, 860, 870

- Ram Sarup v Naram Das, 1015
 Pam Sarup v Shah Lafafat, 936
 Ram Sarup v Sital, 682
 Pam Senik v Lambar, 855, 864
 Ram Shankar v Ganesh Prasad, 981
 Pam Singh v Ganga Ram, 333
 Ram Singh v Salig Ram, 383, 818
 Ram Singh v Sham Prashad, 421
 Pam Singh v Waryan Singh, 14
 Ram Subhag v Narsingh, 981
 Ram Sukh v Pam Sahai, 244
 Ram Sukh Das v Ghulam, 558
 Pam Sukh Das v Tota Ram, 727
 Pam Sukhal v Maharajah Kesho Prasad, 1031
 Ram Sunder v Jai Karan, 897
 Ram Sunder v Ram Dheyan, 1047
 Ram Tahal v Sukeshwar, 1076
 Ram Udit v Ram Samuj, 56
 Ram Ugrah v Achraj Nath, 1290
 Rama v Bhagchand, 82
 Rama v Govinda, 317
 Rama v Krishna, 95
 Rama v Rangayya, 852
 Rama v Shivram, 26
 Pama Aiyar v Venkateshella, 892
 Pama Ayyan v Sreenivasa, 698
 Rama Karup v Sridevi, 247
 Rama Rao v The Paja of Pittapur, 474, 478
 Rama Reddi v Appaji Reddi, 1017
 Rama Shenoi v Hallagna, 97
 Rama Varma v Ramannayar, 218
 Ramabhabra v Kadiryaswami, 179
 Ramachandra v Abdul, 715
 Ramachandra v Chaitana, 324
 Ramakrishna v Anantacharya, 103, 870, 1343
 Ramachandrasayar v Noorulla Sahib, 342
 Ramadhar v Subedar, 897
 Ramados v Hanumantha, 302, 308
 Ramakka v Negasam, 411, 678
 Ramakrishna v Balakrishna, 697
 Ramalinga v Andiappan, 678
 Ramalinga v Gokuldas, 139
 Ramalinga v Raghunatha, 34
 Ramalingam v Subrahmanya, 1115, 1116
 Ramamurthi v Gajapathiraju, 74
 Raman v Bacha, 52
 Raman v Gopala, 1069
 Raman v Gopalachari, 119, 120
 Raman v Kunhayan, 829
 Raman v Secretary of State, 101
 Raman Nayar v Krishnan, 1098, 1101
 Ramana v Amireddi, 565
 Ramana v Babu, 196
 Ramanada v Minatche, 859
 Ramanandan v Pulikutti, 553
 Ramanadhan v Narayanan, 1156
 Ramanand v Chhotey Lal, 105
 Ramanand v Jai Ram, 168
 Ramanarsu v Venkat, 697
 Ramanathan v Annamalai, 568, 624, 626
 Ramanathan v Arunachellam, 242, 468, 1080
 Ramanathan v Chidambaram, 259
 Ramanathan v Doraiswami, 427
 Ramanathan v Kalimuthu, 96
 Ramanathan v Karuppayya, 172
 Ramanathan v Levari, 177
 Ramanathan v Mohideen, 195
 Ramanathan v Subramania, 259, 267
 Ramanathan v Subramanian, 365
 Ramanathan v Venkateshella, 12, 795
 Ramanayakudu v Boya, 232
 Ramanayya v Kotayya, 1357
 Raman v Narayanaswami, 127, 128
 Ramanulu v Aravamudu, 482
 Ramanlal v Chunnal, 1033
 Ramanna v Amireddi, 563
 Ramanna v Venkateswara, 52
 Ramanuja v Devanayaka, 448, 449, 494
 Ramanuja v Rangaswami, 590
 Ramanuja v Solappa, 184
 Ramanujam Chetty v Padmanabham, 1079
 Ramappa v Bharna, 1149
 Ramappa v Ekambara, 787
 Ramappa v Ganpat, 115
 Ramaraya v Sherbott, 691
 Ramasamayyan v Virasami, 985
 Ramasami v Bagirathi, 199
 Ramasami v Chinnam, 682
 Ramasami v Kali, 379
 Ramasami v Karuocan, 39
 Ramasami v Narayanasami, 1098
 Ramasami v Venkatasami, 144
 Ramasamy v Orr, 1142
 Ramasamy v Subramania, 675
 Ramaswami v Alamelu, 78

- Ramaswami v Ayala, 1033, 1066
 Ramaswami v Chinnappa, 518
 Ramaswami v Doraiswami, 947
 Ramaswami v Kameswaramma, 173
 Ramaswami v Mallappa 760
 Ramaswami v Muradai, 80
 Ramaswami v Nuthurh, 168
 Ramaswami v Renjan 893
 Ramaswami v Muthu, 350 385
 Ramaswami v Podamunsiya, 14 856
 Ramaswami v Subbaraya 901, 1022
 Ramaswami v Sundara 152 895
 Ramaswami v Tajaraya, 636
 Ramaswami v Vellayappa, 475
 Ramaswami v Venkatarami, 1281
 Ramaswami v Vithunatha, 49, 52, 56, 480
 Ramaswami v Kannappa, 1352
 Ramathai v Peria, 249
 Ramaya v Rangaya, 656
 Ramayya v Bapayya, 1285
 Ramaya v Krishnamurti, 701, 718
 Ramaya v Subbaravudu 1071
 Ramayangar v Krishnayangar, 297
 Ramayyar v Ramayyar, 698
 Rambhat v Shankar, 123
 Rambh Jhawar v Banley, 420
 Rambrohm v Buns 65
 Ramchand v Goverdhandas 352
 Ramchand v Jana 746
 Ramchand v Maula Bakhsh 66
 Ramchand v Rama Nand, 1071
 Ramchandar v Ganapatram 120
 Ramchandra v Balbhum, 82
 Ramchandra v Balmukund, 184, 1080
 Ramchandra v Belya, 810
 Ramchandra v Gajanan, 182, 484
 Ramchandra v Ganesh, 134
 Ramchandra v Haji Kasm, 3, 841
 Ramchandra v Hanmanta, 888 900
 Ramchandra v Jai Mal, 441
 Ramchandra v Keshav, 113
 Ramchandra v Krishnaji, 208
 Ramchandra v Lodha, 486
 Ramchandra v Madhav, 12, 590, 1355
 Ramchandra v Malkappa, 66
 Ramchandra v Mohendro Nath, 163
 Ramchandra v Narasinhacharya, 70
 Ramchandra v Narayan, 63
 Ramchandra v Radha, 140
 Ramchandra v Rakhmabai, 812, 813
 Ramchandra v Ramchandra, 86
 Ramchandra v Shrinivas, 89, 814
 Ramchandra v Shripatrao, 873, 985
 Ramchandra v Sono, 1105
 Ramchandra v Sri Raja Bhuyanga, 679
 Ramchandra v Subramania, 714
 Ramchandra v Trustees of the Port of Bombay, 512
 Ramchandra v The President of Vakils Association, 1370
 Ramchandra v Vasudev, 551
 Ramchandra v Venkiah, 968
 Ramchandra Das v Joti Prasad, 945
 Ramchandra Deo v Ramamurphy, 59
 Ramchandram v Neelambai, 36
 Ramcharan v Raghunir, 589
 Ramchari v. Duraisami, 942
 Ramcharitar v Basgit, 390, 567.
 Ramchibaibai v. Bechu, 227, 823
 Ramdas v Official Liquidator, 1107
 Ramdas v Vazirsaheb, 64
 Ramdas v Dhanpat, 118
 Ramdas v Kannamal, 729
 Ramdayal v Jankidas, 73
 Ramdeo v Goneshnaram, 894
 Ramdeo v Pokluram, 576
 Ramdhan v Rajballab, 661
 Ramdhani v Rajrani, 799, 805
 Ramdhari Singh v Permanund, 577
 Ramdoyal v Junmejoy 476
 Ramendra Nath v Brajendra Nath, 447, 453 454, 455, 458, 492 493 495, 1350
 Ramesh Chandra v Emperor, 662
 Ramesh Chandra v Karunamoya, 1268, 1280
 Rameshar v Rajdhari 133
 Rameshchandra v Maharaja Birendra, 283, 902
 Rameshra v Kalpi, 1108
 Rameshur v Sheodin, 1108
 Rameshur Singh v Sheodin, 349, 1098
 Rameshwardhari v Sadhu 567
 Rameshwar v Dulu, 157
 Rameshwar v Dwarka Prasad, 1147
 Rameshwar v Lala, 434
 Rameshwar v Mangal, 817, 834
 Rameshwar v Ram Charan, 866
 Rameshwar v Ram Ratan, 711
 Rameshwar v Siddeshwar, 1127
 Rameshwar Pershad v Ram Bahadur Singh, 956
 Rameshwar Singh v Chuni Lal Shaha, 1061
 Rameshwar Singh v Hitendra Singh, 202
 Ramessuri Dass v Durga Dass, 730
 Rameswar v Mehdi Hossain, 1016

- Ramgobind v. Thakur Daval, 1390
 Ramgopal v. Joharmull, 383
 Ramgopal v. Dharendra, 541
 Ramgopal v. Narendranath, 373
 Ramgopal v. Secretary of State, 142
 Ramgopal v. Shivnarayan, 697
 Ramgulam v. Chintaman, 678
 Ramgulam v. Sheo Deonraian, 594
 Ramu Deka v. Brojo Nath, 1086, 1111
 Ramu Reddi v. Palamma, 974
 Ramiah v. Gopalier, 1036
 Ramier v. Muthu, 155, 433
 Ramireddi v. Subbireddi, 80
 Ramji v. Alafkhan, 478
 Ramji v. Ellis, 144
 Ramji v. Giani, 443
 Ramji v. Koman, 1066
 Ramji v. Pandarnath, 82, 990
 Ramji v. Rao Kishore, 333
 Ramjibun v. Oghore Nath, 636
 Ramjidas v. Howse, 288, 1287
 Ramji Das v. Ajudhia, 1096
 Ramji Das v. Kumarakalathu, 606
 Ramji Lal v. Karan Singh, 697, 1003
 Ramji Ram v. Saligram, 1056
 Ramjiwan v. Chand Mal, 575, 1095
 Ramkaran v. Nakhshed, 486
 Ramkhar v. Akhil Chandra, 476
 Ramkisan Singh v. Mahammad, 1304
 Ramkishen Lal v. Manu Kumari, 1125
 Ramkissendas v. Binraj, 743
 Ramkor v. Gangaram, 338
 Ramkrishna v. Ramchandra, 196
 Ramkrishna v. The President of the Ven-
 gurla Municipality, 341
 Ramkrishna v. Vinayak, 206, 985
 Ramkrishnam v. Bhagamma, 102
 Ramkrishnah v. Satyanand, 534
 Ramkumar v. Kalkumar, 145
 Ramlal v. Deodhari Rai, 58, 60, 61
 Ramlal v. Kishanchand, 127, 295, 346,
 354, 1290, 1293
 Ramlal v. Bhajahari, 481
 Ramnand v. Jai Ram, 171
 Ramnarain v. Bandi Pershad, 179
 Ramnath v. Grandhi, 834
 Ramnath v. Matunginee, 580.
 Ramnath v. Parabhu Dayal, 629
 Ramnath v. Sheikh Asanulla, 420.
 Ramjoda v. Kanai Rai, 185.
 Rampal Singh v. Abdul Hamud, 861.
 Rampat v. Habib Ullah, 628
 Rampchand v. Juggernath, 1205,
 Ramphal v. Ram Baran, 158
 Ramphul v. Durga, 1138
 Ramprasad v. Haziramull, 555, 556
 Ramprasad v. Mohanlal, 1256
 Ramprasad v. Shrinivas, 146, 477, 929.
 Rampratab v. Foolhai, 1343
 Rampratab v. Gavri-bankar, 475, 868,
 930, 938, 1343
 Rampratap v. Durgaprasad, 1276.
 Rampurtab v. Premsookh, 116, 120, 1343,
 1345
 Ramratan Sukul v. Mussamat Nandu,
 333
 Ramrup v. Ramdhari, 308
 Ramrup Das v. Mohunt, 374.
 Ramsabay v. Kumar Lachmi, 432.
 Ramsami v. Srinivasa, 756
 Ramsaran Mandar v. Mahabir Sahu,
 549
 Ramsarup v. Mohant, 390
 Ramsebuk v. Ramlall, 476
 Ramsingh v. Balubai, 1084
 Ramsumaran Prasad v. Shyam Kumari,
 69
 Ramu Aiyar v. Palaniappa, 786
 Ramu Aiyar v. Sankara Aiyar, 102.
 Ramu Rai v. Dayal Singh, 164
 Ramuvien v. Veerappudayam, 326
 Ramyad v. Rambikdas, 359
 Ramzan v. Gerard, 211.
 Ramzan v. Nabi Buk, 1109
 Ranchhod v. The Municipality of Dakor,
 277
 Ranchhod v. Secretary of State, 636
 Ranchod v. Bezanji, 976, 977
 Ranchordas v. Bai Kasi, 147.
 Randell v. Thompson, 1287
 Raneer Annapurni v. Swaminatha, 1063
 Rang Lal Singh v. Ravaneshwar, 822
 Ranga v. Narayana, 82.
 Ranga v. Rajagopala, 153
 Rangacharya v. Guru Reoti, 889.
 Rangam Lal v. Jhandu, 1116
 Rangammal v. Sevugan, 779
 Ranganatha v. Hanumantha, 432
 Ranganatha v. Srinivasa, 744, 789
 Ranganayaki v. Shivarama, 312, 378
 Rangappa v. Rangappa, 90
 Rangasami v. Muttusami, 1263
 Rangasami v. Periasami, 237, 243
 Rangasami v. Ranga, 218
 Rangasami v. Varadappa, 295, 299
 Rangasami Nadan v. Subbaraya, 57

- Rangasamy v Chinnasamy, 307
 Rangasamy v Jelli Bodi, 983, 984
 Rangasamy v Thirupati, 158, 172
 Rangasay, v Mahalakshamma, 1129
 Rangaswami v Krishnaswami, 462
 Pangaswamy v Appaswamy, 52
 Rangayya v Nanjappa, 490
 Rangayya v Parthasarathi, 984
 Rangayya v Ratnam, 74
 Rangayya v Subramania, 496
 Rangi Ram v Gangu, 236
 Rangildas v Burjorji, 717
 Rango v Mudiyeppa, 81, 82
 Rango Jairam v Balkrishna, 759
 Rango Lal v Wilson, 105
 Rangoon Botatoung Co v Collector of
 Rangoon, 319, 1369
 Rangpur Raiyati Bank v Hesubuddin,
 691
 Rani Amrita v Munshi, 917
 Rani Bisani v Minor son of Madho Singh,
 381
 Rani Beni Prasad v Edal Singh, 793
 Rani Jotirmoyee v Raghunath, 1039
 Rani Kishori v Raja Ram, 74
 Rani Lalun v Behari, 139
 Ranji v Bhaiji, 11, 702, 1138
 Ranjit v Bissay, 1268
 Ranmalangji v Kundankuwar, 158
 Raoji v Anant, 869
 Raoji v Bansilal, 817
 Raoji v Laxmibai, 357, 361, 363
 Raoji v Ratansi, 50, 1272, 1277
 Raoji Ranchod v Vishnu, 4
 Raojibhai v Dahyabhai, 1281
 Rapaport v Kallianji, 624
 Ranchan v Manakkal, 943, 944, 950, 951
 Raru Kult v Mamad, 1150
 Rasbotham v Shropshire Union Rail
 ways and Canal Co, 615
 Rash Behari v Hemanta, 1144
 Rash Behary v Bhowani Churn, 1047
 Rashbehary v Surnomoyee, 173
 Rashid un nissa v Muhammad, 173, 242,
 945, 946, 949
 Rasik v Kumar Jyotish, 947
 Rasik Lal v Bidhu Mukhi, 3
 Rasam v Budge, 527, 542, 544, 571
 Rasu v Kattara, 359
 Rasul Jehan v Ram Surun, 509
 Rasul Harim v Pirubhai, 1033
 Ratan v Khatoo, 160
 Ratan Chand v Secretary of State, 115
 Ratan Lal v Bala Parshad, 777
 Ratan Lal v Muhammad, 893
 Ratanbai v Narayandas, 537
 Ratanbai v Shankar, 657
 Ratanchand v Dimpi, 1033, 1149, 1150
 Ratanchand v Gobind, 1339
 Ratanlal v Bai Gulab, 713
 Ratchiffe v Evans, 530
 Rathinasabapathy v Gopala, 486
 Rati Ram v Barthmajit, 788
 Ratna Mala Das v Kamakshya, 977
 Ratnagiri Pillai v Vava Ravathan, 108,
 112
 Ratnakar v Chamra, 991, 992
 Ratnam v Annamalai, 877
 Ratnam v Nataraja, 857
 Ratnasabapathi, v Devasigamony, 1007
 Ratnaswami v Ratnammal, 901, 902
 Rattan v Bishan, 771
 Rattan Chand v Ram Krishan, 70
 Ratti Ram v Kundan Lal, 127
 Rattonbu v Chabildas, 943
 Ravi Varma v Koman, 206
 Ravinandan v Jagannath, 821
 Ravji v Mahadev, 472, 981
 Rayalu v Ramudu, 489
 Raynor v Mussoorie Bank, 173
 Re Fazoo v Sultan Ahmed, 814
 Read v Brown, 116, 122
 Reasut v Hadjee Abdoolah, 1146
 Rebati v Harish Chandra, 547
 Rebells v Rebells, 947
 *Rees v. Richmond, 466
 Refaat v Bibi Tuwaif, 151
 Reference, *In the matter of*, 649
 Reg v Nantamram, 18
 Registered Jes-ore Loan Co v Shailoja
 nath, 1018
 Rego v Philip, 482
 Reid v Cupper, 579
 Reid, Hewitt & Co v Joseph, 144
 Relhab Das v Mt Sheobai, 78
 Remfry v Shillingford, 1032
 Renga v Gnanaprakasa, 863
 Rengasami v Subburaya, 1018
 Reoti Prasad v Kunji Lal, 672
 Republic of Peru v Waguelin, 233
 Peranshidaya v Gudnaya, 1129
 Rerji v Sakaran, 964
 Rewa Mahton v Ramkrishen Singh, 243,
 726

- Rewan v Janke, 641
Reynell v Sprice, 620
Rhimbai v Mariam, 350
Rhodes v Sudden, 579
Rhodes v Swythenbank, 320, 428
Richardson v Government, 369
Richardson v Mayor of Oxford, 524
Riddell v Earl of Strathmore, 523
Riding v Hawkins, 553
Rifaqat v Bibi Tawail, 508
Rikhai Rai v Sheo Pujan Singh, 14, 856
Rikki Ram v Dhanpat Rai, 1136, 1137
Rikki Ram v Durga Dass, 467.
Riki Ram v Sheo Pershan, 1017
Risal Singh v Faqira Singh, 1277
Risheshwar Kuari v Hari Singh, 820
Rishukesh v Manik Molla, 837
Robert v Hanson, 1268
Roberts v Marlett, 538
Roberts v Oppenheim, 620, 623
Roberts v Owen, 532
Robindra v Jogendra, 1262, 1267
Robin-on v Lord Byron, 1053
Robinson v Pickering, 1046, 1050
Robin-on v State of South Australia
619 621 624
Rock v Pursell, 542
Rodeshwar v Manroop, 143
Rodger v Ashuto h, 1067
Rodger v Comptoir d'Escompte de
Paris, 413 414, 415
Rodricks v Secretary of State, 274, 1346
Rogers & Co v Lambert & Co 614
Rohilkhand Bank v Row, 327
Rohimoni v Zamruddin, 1111
Robini v Jadunandan, 484
Rohini Kumar v Kusum Kamini, 974
Rohini Singh v Hodding, 414
Rominath v Guggodo, 521
Romdoyal v Ramdeo, 589
Romesh v Monindra, 7, 11, 1085
Ramesh Chunder v Hiru Mondal, 3
Roop Chand v Sardar Khan, 475, 868
Roop Lal v. Bekani, 177
Roop Lall v. Lakshmi Does, 328
Roopchand v. Haji Hussein, 520
Roore v Pyaree Lal, 33
Roper, Re, 440
Roselle v. Buchanan, 532
Roshan Lal v Lallu, 782
Roshan Lal v. Muhammad, 230
Roshan Singh v Mata Din, 699.
Ross v Pitambar, 385, 387
- Ross v Secretary of State, 32, 273
Ross v. Woodford, 914
Ross & Co v. Scriven, 541, 571, 573, 582,
586
Roulet v. Fetterlie, 317, 1033
Roy Kiran v Rams Nath, 207, 208.
Royal Insurance Co v. Akhoy Coomar,
1126
Royzuddi v Kali Nath, 1024
Rubery v. Grant, 543 544
Ruckmani v. Veerasami, 808, 945
Rudd, Re, 440
Rudr Prasad v. Baij Nath, 332, 567
Rudra v. Krishna, 217
Rudra v Mathura, 348
Rudra Prasad v. Mathura Prasad, 1277.
Rudra Pratap v Sarda, 674
Rugghan Prasad v. Dhanno, 305
Rughobur v Mauna Koer, 1273
Ruhul Amin v Shankar Lal, 942
Rukam v Tarachand, 589, 606
Rukhanbai v Adampi, 895
Rukhia v Mewa Lal, 1115, 1116
Rukhmuni v Dhondo, 64
Rukhmuni v Ravi, 74
Rukhmibai v Venkatesh, 58, 71
Rukman Devi v. Shib Devi, 452
Rukmani v. Krishnamacharya, 171
Rukminumayi v Paran Chandra, 7, 12,
1059
Ruha Ram v Ram Chandra 526 547
Ruldu Singh v Sanwal Singh, 345, 346,
1352
Rumsey v King, 16
Rumsey v Reade, 634
Run Bahadur v Bajrang, 11, 373, 721
Run Bahadur v Lucho Koer, 44, 73, 74,
80, 322
Run Bahadur v Ram Nath, 785
Run Bahadur's Case, 42
Rundra Pratap v. Sarda, 674
Rungachariar v Rungasami, 26
Rungrav v Sidhi Mahomed, 911
Runjit Singh v Bunwari Lal, 744, 745
Rup Chand v Banyad, 467
Rup Narain v Sheo Prakash, 152, 191
Rup Nath v Jagannath, 62
Rup Ram v. Fazal Din, 591
Rup Ram v. Harphul, 139, 560
Rupkishore v Collector of Etah, 822

Rupali v. Kalyan Singh, 1302
 Rupanrai v. Subh Karan, 207
 Rupchand v. Bhogilal, 9
 Rupsingh v. Mukhraj, 10, 1074
 Russell v. Russell, 1288
 Russicklall v. Jadubram, 609
 Rustomjee v. Frederic Gaebelo, 1058
 Rustomji v. Kessowji, 659, 1039
 Rustomji v. Nurse, 851
 Rustomji v. Official Liquidator, 321
 Rustomji v. Vinayak, 836, 837
 Rutnam Pillai v. Pappai Pillai, 969
 Rutnessur v. Hurriah Chunder, 139
 Rutter v. Tregent, 572, 633
 Ruttonsey v. Pooribai, 901
 Ryall v. Sherman, 656
 Ryrie v. Shrivshankar, 618, 619, 622

S

S A S Chettyar v. S A R A Firm, 270
 S N V R S Subramanian v. N L V Chettyar, 821
 S P L K S V Chettyar v. U Sient, 233
 S American Co., *Re*, 324
 Saadatmand v. Phul Kuar, 354, 793, 822
 Sabal Singh v. Salik Ram, 330
 Sabapathi v. Thandavaroya, 833, 840
 Sabapathy v. Perumal, 917, 918
 Sabapathy v. Subraya, 1146
 Sabapathy v. Vanmabalinga, 901, 902
 Sabbu v. Ponambala, 837
 Sabha Ram v. Krishan Singh, 227
 Sabhajit v. Sri Gopal, 174
 Sabhapathi v. Lakshmu, 1343
 Sabhapathi v. Narayanasami, 319, 346, 370, 778, 1083
 Sabitri v. Savi, 434, 890, 898, 1085
 Sabitri Thakurani v. Savi, 565, 1083
 Sabta v. Dharam, 1259, 1260
 Saccharine Corporation, Ltd v. Chemische Fabrik Von Heyden Aktiengesellschaft, 927
 Saccharine Corporation, Ltd v. Wild, 493,
 Sachai v. Firm of Kulari, 820
 Sacha Prasad v. Amarnath, 170, 184, 738, 739, 740
 Sachnoyda v. Hironomyec, 947
 Sachitanand v. Padhapat, 174
 Sachs v. Spielman, 533, 534
 Sada v. Brij Mohan, 341

Sada Kaur v. Buta Singh, 10, 567
 Sadagopa v. Raghunatha, 714
 Sadagopa Chari v. Krishnamachari, 467
 Sadagopa Chariar v. Krishnamoorthy Rao, 66, 305
 Sadagopachariar v. Rama Rao, 31
 Sadaka v. Mahomed Hayath, 1307
 Sadanand v. Parashram, 579, 580
 Sadar Ali v. Dalimuddin, 320
 Sadar Singh v. Amar Singh, 380
 Sadashiv v. Jayanti, 163
 Sadashiv v. Maruti, 17
 Sadashiv v. Narayan, 180, 184
 Sadashiv v. Trimbuck, 947
 Sadashiv v. Sakharam, 1307
 Sadashiv v. Soondardas, 1353
 Sadashivappa v. Sangappa, 955
 Sadasiva Pillai v. Ramalinga, 2, 194
 Sadasukh v. Bajnath, 143
 Sadayappa v. Ponnama, 1042
 Saddo v. Bansai, 841
 Saddruddin v. Bani, 485
 Sadek Ali v. Samad Ali, 23, 788
 Sadho v. Abhenandan, 178, 184, 253, 825
 Sadho v. Hawat, 410
 Sadhu v. Dharendra Nath, 564
 Sadhu v. Kuppen, 997
 Sadik Husain Khan v. Hashim Ali Khan, 637
 Sadiq Ali v. Anwar Ali, 870, 1351, 1353
 Sadiq Husain v. Lalita Prasad, 417, 419
 Sadler v. Great Western Railway Co., 454
 Sadogopa v. Sellamalai, 701, 719
 Sadu v. Ram, 463, 785
 Saeed Ahmed v. Izaa Hussain, 174
 Safitannessa v. Megh Lal, 390
 Sagarmal v. Lachmivaran, 670
 Sagarmull v. Galstaun, 642
 Sagore v. Mafjaddin, 418
 Sah Man Mull v. Kanagasabapathi, 175, 771
 Sahadara v. Nabin, 342,
 Sahadeo v. Deo Dutt, 442
 Saharabi v. Ali, 787
 Sahdeo v. Ghasiram, 178, 730,
 Sahdeo v. Kusum, 1094
 Sahdeo Singh v. Melhu Singh, 1281.
 Sahibjan Bibi v. Gopal, 390, 883
 Sahebrao v. Jaiwantrao, 334

- Sahebzadi v Muhammad, 48 72, 76
 Saherjan Bibi v Gopal Chandra, 1150
 Sahib & Co v Adamsa, 884, 889
 Sahib Thambi v Hamid, 96, 467
 Sahodra v Bageshwari, 683
 Sahoo v Narayan Shastri, 391
 Sahu v Mangal, 837
 Sahu Bisheshar v Chandu Lal, 1006
 Sahu Nand Kishore v Shadi Ram, 1080
 Sahu Nandlal v Sahu Dharam, 191
 Sahu Padma v Tej Saroop, 1007
 Sahu Shyam v Shyam Lal, 902
 Saibai v Balkrishna, 647
 Sailabala v Gadadhar, 1087
 Sailendra Nath v Pamsundar, 119
 Sulendranath v Surendranath, 881
 Sam Ditta v Nur Ahmad, 255
 Sait Siva v A E L Mission, 266
 Sayid Ali v Ali Jan, 300
 Sajedur Raja v Bardyanath, 146 461
 Sajedur Raja v Gour Mohun, 295, 296, 297, 299 307
 Sajjad v Isbaq, 353
 Sajjad Ali v Jagmohan, 1123
 Sajjadi v Dilawar, 429
 Sakalchand v Ambaram, 1267
 Sakarlal v Bai Parvati, 739
 Sakarlal v Parvatibai, 14, 500
 Sakena Bibi v Stephens, 373, 388
 Sakhalchand v Velchand, 151, 152
 Sakharan v Gangaram, 132
 Sakharan v Ganu, 301, 302
 Sakharan v Padmakar, 517
 Sakharan v Sadashiv, 7, 320
 Sakharan v Vishram, 105
 Sakina v Ganesh, 190 194
 Sakina v Gauri, 517
 Sakinbai v Shrinbai, 953 956
 Sakkarganda v Bhimappa, 708, 723
 Saklat v Bella, 803, 1130
 Saktiprasanna v Mahuranjan, 1116
 akubai v Ganpat, 1123
 akyahani v Bhavani, 852
 alakshi v Lakshmayee, 219
 alaluddin v Afzal Begum, 945, 1076
 Salig Ram v Ramji Lal, 391, 1318
 Salima Bibi v Sheikh Muhammad, 116, 448 450, 494, 1039
 Salleh Mahomed v Nathoomal, 1272
 Salvarayan v Amalorpavanadam, 596
 Sama Payar v Annamalai, 93
 Samanta v Lokenath, 1006
 Samar Singh v Deonandan, 997
 Samarapuri v Parry & Co, 403, 404
 Samarendra v Birendra, 33
 Samayya v Subbamma, 1091
 Sambasiva v Veera, 599
 Sambasiva v Vydnadaswami, 810
 Samhautta v Bhagwari, 1060, 1070
 Sami v Krishnasami, 755
 Sami v Gopal, 117
 Samibai v Premji, 895
 Samin Hasan v Piran, 1086, 1111
 Saminatha v Rajagopala, 473
 Saminatha v Venkatasubha, 11
 Samunathan v Swamiappa, 1016
 Samratrai v Kasthurbbai, 938
 Samuel v Samuel, 148
 Sandaner v Asser, 1271
 Sanders v Hamilton, 535
 Sanderson v Blyth Theatre Co, 458
 Sandhu v Hussain, 179, 180 182
 Sangangawda v Hanmantgawda, 43
 Sangappa v Gangappa, 26
 Sangliya v Muthu, 723
 Sangli v Mookan, 917
 Sanchar v Raja Dhakeshwar, 58
 Sanjappa v Shivbasawa, 1060
 Sanjivi v Ramasami, 173
 Sankali v Murlidhar, 349, 870
 Sankara v Devaki, 79
 Sankara v. Gopala, 727
 Sankara v Sanyasayya, 424
 Sankara v Subraya, 598
 Sankaralinga v Kandasami, 238
 Sankaralinga v Official Receiver, 1042
 Sankaralinga v Ratnasabhapati, 517
 Sankaran v Atchuthan, 161
 Sankaran v Ambu, 723
 Sankaran v Daraki, 944
 Sankaran v Kanara, 696
 Sankaran v Parvathi, 481
 Sankaran v Raman, 691
 Sankararama v Padmanabha, 134
 Sankari Sitaya v Mudargaddi, 232
 Sankumani v Ikoran, 132
 Sankunni v Narayanan, 249
 Sankunni v Vasudevan, 424

Sannamma v Palhalhaya 173
 Sant Bikksh v Bhagwanlin 99 99
 Sant Lal v Ramji 812
 Sant Prasad v Bhawanji 312
 Sant Ram v Ram Chand 103
 Sant Salai v Cluttai 421
 Sant Singh v Gulab Singh 863 864
 Sant Singh v Mibarak 343
 Santa Singh v Ralla Singh 96
 Santi Lal v Raj Narayan 303
 Santok Chand v Emperor 1009
 Sanwal Das v Bismillah 777
 Sanwal Das v Collector of Etah 163
 Sanwal Singh v Satrupa 366
 Sanyasi v Artaswaro 79
 Sanyasi v Krishnadhan 30
 Sanyasi Charan Mandal v Krishnadhan,
 765 930
 Sanyasi v Yeranna dur 898 955
 Sarabjit v Paj Kumar 743
 Sara Bibi v Hamid 441
 Sarada Kripa v The Comilla Union Bank
 163 73
 Sarada Sundari v Gangahari 1117
 Saradindu v Gosta 246 803
 Sarafalli v Mahasukhbhai 545
 Saraj Bhusan v Debendra Nath 490
 421
 Sarajubala v Obadulla 898
 Saral Chand v Mohun Babu 480 50
 503
 Sarala v Kamashala 787
 Sarala Das v Jogendra 1017
 Saralya v Laxmi 868
 Saranatha v Muthiah 584
 Sarangapani v Narayanasami 1151
 Saran v Bhagwan 170
 Saranyan v Ram Behal 12 490 430
 Saraspur Manufacturing Co v B B &
 C I Ry Co 477
 Saraswati v Golap Das 186
 Saraswati v Moti 11 1080
 Saraswati v The Land Acquisition
 Deputy Collector 360
 Sarat v Rajkumar 1286
 Sarat v Ram 914 915
 Sarat Chandra v Apurba 108
 Sarat Chandra v Bhabhi 900
 Sarat Chandra v Bisweswar 437
 Sarat Chandra v Damodar 97
 Sarat Chandra v Ferman 101

Sarat Chandra v Joy Sankar 704
 Sarat Chandra v Mailar Stone and
 Lime Co 874 876 134
 Sarat Chandra v Nalapati 1343 1000
 Sarat Chandra v Nani Molan 800 802
 Sarat Chandra v Subashini 491
 Sarat Chandra v Tarak Chandra 31
 Sarat Chandra v Tarini Prosad 787
 849
 Sarat Krishna v Bisweswar 410 594
 Sarat Kumar v Official Assignee 436
 1133
 Saratmani Deb v Batta Krishna 172
 198
 Saravana v Arunachalam 269
 Saravana Pillai v Sesha Reddi 1111
 1112
 Sarbhadhary In re 1336
 Sardar Ali v Dal muddin 309 370 1349
 Sardar Begam v Meher Chand 789
 Sardar Shah v Mt Sardar Begam 808
 Sardar Lal v Ram Lal 863
 Sardarmal v Hirdenath 486 490
 Sardarmal v Aranvayal 176 470
 Sardarmal v Jaharmal 590
 Sardarni v Pam Pattan 11 186 204
 250
 Sardarni v Pan Harnam 437 735
 Sardhari v Hukum Chand 1316 1318
 Sardhari Lal v Ambika Pershad 776
 778 780 784
 Sarnatoola v Rajkumar 179
 Sarjan Bibi v Ashanulla 184
 Sarju v District Judge of Benares 808
 Sarju v Ram Sarap 850
 Sarju v Thakur 713
 Sarju Prasad v Bundeshti 247
 Sarju Prasad v Maladeo 74
 Sarju Prasad v Saram 408
 Sarju Ram v Partap Narain 908
 Sarkies v Bundho Bace 238
 Sarkun v Rahaman 56
 Saroda v Harendra 814
 Saroda Churn v Mahomed 413
 Saroda Prosad v Luchmeeput 161, 164
 Saroj v Jatindra 1009
 Saroj v Mahendra 30
 Saroj Ranjan v Joy Durga 771
 Sarojini v Lakhi Priya 45 50 54 58
 Saroop Chunder v Trojlokhonath, 719
 Saruti v Kunj Behari 494
 Sarupa v Khem Lal 76

- Sahebzadi v Muhammad 48 72, 76
 Sicheyan Bibi v Gopal Chandra, 115
 Sahib & Co v Adamsa 884, 889
 Sahib Thambi v Hamid 96, 467
 Sahodra v Bageshwari, 683
 Sahoo v Narayan Shastri 391
 Sahu v Mangal 837
 Sahu Bisheshar v Chandu Lal, 1006
 Sahu Nand Kishore v Shadi Ram,
 1080
 Sahu Nandlal v Sahu Dharam, 191
 Sahu Radha v Tej Saroop 1007
 Sahu Shyam v Shyam Lal 902
 Sarbai v Balkrishna, 647
 Sailabala v Gadadhar 1037
 Sailendra Nath v Pamsundar 119
 Sulendranath v Surendranath 881
 Sam Ditta v Nur Ahmad, 235
 Sait Siva v A E L Mission, 266
 Saiyid Ali v Ali Jan, 300
 Sajedur Raja v Baidyanath 146 461
 Sajedur Paja v Gour Mohun, 295 296
 297 299 307
 Sajjad v Ishaq, 303
 Sajjad Ali v Jagmohan, 1123
 Sajjadi v Dilawar, 429
 Sahalchand v Ambaram, 1267
 Sakarlal v Bai Parvati, 739
 Sakarlal v Parvatibai, 14, 200
 Sakeena Bibi v Stephens, 373, 389
 Sakhalchand v Velchand, 151, 152
 Sakharam v Gangaram, 132
 Sakharam v Ganu, 301, 302
 Sakharam v Padmakar, 517
 Sakharam v Sadashiv, 7, 320
 Sakharam v Vishram, 103
 Sakuna v Ganesh, 190, 194
 Sakuna v Gauri, 517
 Sakinbai v Shrinbai, 953 956
 Sakarganda v Bhimappa, 708, 723
 Saklat v Bella, 803, 1130
 Saktiprasanna v Mahimranjan 1116
 Sakubi v Ganpat, 1123
 Sakyanani v Bhavani, 852
 Salakshi v Lakshmayee, 219
 Salig Ram v Pampal Lal, 391, 1318
 Salima Bibi v Sheikh Muhammad, 116,
 448, 450, 494, 1039
 Salleh Mahomed v Nathoomal, 1272
 Salvarajan v Amalorpavanadam, 596
 Sama Rajar v Annamalai, 93
 Samanta v Lokenath, 1006
 Samar Singh v Deonandan, 997
 Samarapuri v. Parry & Co, 403, 404
 Samarendra v Birendra, 33
 Samayya v Subbamma, 1091
 Sambasiva v Veera, 599
 Sambasiva v Vydinadaswami, 810
 Samhautta v Bhagwari, 1065, 1070
 Sami v Krishnasami, 753
 Sami v Gopal, 117
 Samibai v Premji, 895
 Samin Hasan v Piran, 1086, 1111
 Saminatha v Rajagopala 473
 Saminatha v Venkatasubha 11
 Saminathan v Swamiappa 1016
 Samratrai v Kasthurbhai, 938
 Samuel v Samuel, 148
 Sandaner v Asser, 1271
 Sanders v Hamilton, 535
 Sanderson v Blyth Theatre Co, 458
 Sandhu v Hussain, 179, 180 182
 Sangangawda v Hanmantgawda, 43
 Sangappa v Gangappa, 26
 Sanghiva v Muthu, 723
 Sangli v Moolan, 917
 Sanichar v Raja Dhakeshwar, 58
 Sanjappa v Shivbasawa, 106
 Sanjivi v Ramasami, 173
 Sankali v Murlidhar 349, 870
 Sankara v Devaki, 79
 Sankara v. Gopala, 727
 Sankara v Sanyasayya, 424
 Sankara v Subraya 598
 Sankaralinga v Kandasami, 238
 Sankaralinga v Official Receiver, 1042
 Sankaralinga v Ratnasabhapati, 517
 Sankaran v Atchuthan 161
 Sankaran v Ambu, 723
 Sankaran v Darabi, 944
 Sankaran v Kanara, 696
 Sankaran v Parvathi, 481
 Sankaran v Paman, 691
 Sankararama v Padmanabha, 134
 Sankari Sitaya v Mudargaddi, 232
 Sankumani v Ikoran, 132
 Sankunni v Narayanan, 249
 Sankunni v Vasudevan, 424

Sahib Ram v Basso Mal, 303

Sahib Ram v Chaha Mal, 116, 117

Sahib Ram v Muradan, 994

- Sannamma v Radhabhai 173
 Sant Bikkish v Bhagwandin, 992, 995
 Sant Lal v Ramji 832
 Sant Prasad v Bhawan 712
 Sant Ram v Ram Chand 1065
 Sant Sahai v Chuttai 421
 Sant Singh v Gulab Sing, 863 864
 Sant Singh v Mubarak 383
 Santa Singh v Ralla Singh 96
 Santi Lal v Raj Narain 353
 Santok Chand v Emperor 1059
 Sanwal Das v Bismillah 777
 Sanwal Das v Collector of Etah 163
 Sanwal Singh v Satrupa 366
 Sanyasi v Artaswaro, 79
 Sanyasi v Krishnadhan 352
 Sanyasi Charan Mandal v Krishnadhan, 765 930
 Sanyasi v Yerannaidur, 898, 955
 Sarabjit v Raj Kumar 743
 Sara Bibi v Hamid, 441
 Sarada Kripa v The Comilla Union Bank 163 735
 Sarada Sundari v Gangahari 1117
 Saradindu v Gosta 246 803
 Sarafalli v Mahasukhbhai 545
 Saraj Bhusan v Debendra Nath, 420 421
 Sarajubala v Obaidulla 898
 Saral Chand v Mohun Bibi 480, 550 553
 Sarala v Kamashala 787
 Sarala Das v Jogendra 1017
 Saralya v Laxmi 868
 Saranatha v Muthiah 584
 Sarangapani v Narayanasami 1151
 Saran v Bhagwan 170
 Saranjan v Ram Behal 12 429, 430
 Saraspur Manufacturing Co v B B & C I Ry Co, 477
 Saraswati v Golap Das 186
 Saraswati v Moti 11, 1080
 Saraswati v The Land Acquisition Deputy Collector 350
 Sarat v Rajkumar, 1286
 Sarat v Ram, 914 915
 Sarat Chandra v Apurba, 1058
 Sarat Chandra v Bibhat 950
 Sarat Chandra v Bisweswar 437
 Sarat Chandra v Damodar 597
 Sarat Chandra v Forman, 121
 Sarat Chandra v Joy Sankar 704
 Sarat Chandra v Maibar Stone and Lime Co 874 876, 1354
 Sarat Chandra v Nahypiet 1343 1000
 Sarat Chandra v Nani Mohan 850 852
 Sarat Chandra v Subashini 421
 Sarat Chandra v Tarak Chandra 31
 Sarat Chandra v Tarini Prosad 787, 849
 Sarat Krishna v Bisweswar, 410 594
 Sarat Kumar v Official Assignee, 436 1133
 Saratmani Debi v Batta Krishna 172, 198
 Saravana v Arunachalam, 269
 Saravana Pillai v Sesha Reddi, 1111, 1112
 Sarbhadhicary, *In re*, 1336
 Sardar Ali v Dalimuddin, 352 370, 1349
 Sardar Begam v Meher Chand, 789
 Sardar Shah v Mt Sardar Begam, 858
 Sardari Lal v Ram Lal 863
 Sardarimal v Hirdenath 486 490
 Sardarmal v Aranvayal 176, 470
 Sardarmal v Jaharmal, 590
 Sardarni v Ram Rattan, 11, 186, 254, 255
 Sardarni v Rani Harnam, 437 735
 Sardhari v Hukum Chand 1316, 1318
 Sardhari Lal v Ambika Pershad 776, 778, 780, 784
 Saratoola v Rajkumar, 179
 Sarjan Bibi v Ashanulla, 184
 Sarju v District Judge of Benares, 808
 Sarju v Ram Sarap 855
 Sarju v Thakur, 713
 Sarju Prasad v Bundesri 247
 Sarju Prasad v Mahadeo, 74
 Sarju Prasad v Sitaram 408
 Sarju Ram v Partap Narain, 258
 Sarkies v Bundho Baee, 238
 Sarkun v Rahaman, 56
 Saroda v Harendra 814
 Saroda Churn v Mahomed, 243
 Saroda Prosad v Luchmeeput, 161, 164
 Saroj v Jatindra, 1259
 Saroj v Mahendra 360
 Saroj Ranjan v Joy Durga, 771
 Sarojini v Lakhi Priya, 45, 50 54, 58
 Saroop Chunder v Troylokhonath, 719
 Sarsuti v Kunj Behari 484
 Sarupa v Ahem Lal, 76

- Shahbar v Abhas, 863
 Shabuddin v Deomoorat, 1096
 Shafiq un-Nissa v Shahn Ali, 369
 Shah Fareed v Sheo Chiran, 805
 Shah Mahan Lal v Sree Kishen Singh, 145, 317
 Shah Muhammad v Rahimullah, 1277
 Shah Naim v Gurdhari, 177
 Shah Sankalchand v Ambalal, 110
 Shah Velchand v Lieut Liston, 438
 Shahab Din v Miran Baksh, 1092
 Shahab Din v Suraj ud din, 439
 Shahasaheb v Sadashiv, 474, 476, 978, 992, 985
 Shahbazadeo v Ferguson, 18, 275, 276, 277
 Shahzad Singh v Hanuman Rai, 252
 Shaibali v Jnanendranath, 840.
 Shaikh Abdul Karim v Thakurdas, 947, 949
 Shaikh Atham v Davud, 13, 94, 95
 Shaikh Muhammad Nasrulla v Sheikh Muhammad Shukurulla, 969
 Shaikh Saheb v Mahomed, 79, 657
 Shaikh Elahi Baksh v F I Rly Admini-
 station, 373, 276
 Shaikh Kamar ud din v Jawahir Lal, 237
 Shaikh Niamat v Shaikh Jahl, 696
 Shaikh Moosa v Shaikh Essa, 3
 Shaikh Mahomed v Sheikh Abdul Ra-
 hum, 1293
 Shaikh Moheemooddeen v Shaikh Ahmad, 1045
 Shaikh Muhammad v Chulhai Mahto, 590, 677
 Shaikh Sujud v Sakai Rai, 950
 Shajendranath v Surendranath, 721
 Shalajyambada v Umeshanunda, 296, 300
 Shakir Husam v Chandoo, 395, 426, 752.
 Shakur Abdul Ganny v I M Russel, 396, 1418
 Sham Chand v Bhayaram, 851, 875, 1061
 Sham Charan v Chowdhry Dehya Singh, 913
 Shanky Kishore v Shoshibhoosun, 611, 628
 Sham Lal v Amar Prasad, 173
 Sham Lal v Ghanta, 915
 Sham Lal v Hari Kunwar, 1279
 Sham Lal v Mahanandan, 200
 Sham Parshad v Ram Chand, 421
 Sham Sundar v. Babu Lal, 1109
 Sham Sundar v Muhammad, 991.
 Sham Sundar v Munchi, 816
 Shama Chiran v. Kasi Nauk, 702
 Shama Churn v. Prosunno, 41
 Shama Dass v Hurbuns, 12
 Shama Kanta Chatterji & Co v. Kusum, 1345
 Shama Purshad v Harro Purshad, 419
 Shama Sundaram v Abdul Latif, 1260
 Shambhu Nath v Balmukund, 201.
 Shambhu v Kanhaya, 945
 Shambhu Nath v Satish Chandra, 676, 678
 Shambhusing v Manilal, 501
 Shamchand v. Bhayaram, 859
 Shamchandra v Bhikamchand, 1341, 1345
 Shamji v Poonja, 213
 Shamrao v Malkarjun, 89
 Shamrav v Nilaji, 157, 381
 Shamsher v Pyare Lal, 377
 Shamsunder v Anath Bandhu, 157,
 Shamu Patter v. Abdul Kadir, 436 644, 645
 Shankar v Dattaraya, 730
 Shankar v Ganpat, 1023
 Shankar v Hardeo, 675
 Shankar v. Hirulal, 190, 199
 Shankar v Mathar, 29
 Shankar v. Narsinha, 314
 Shankar v Puttu, 554
 Shankar v Radha, 589
 Shankar v Ramchandra, 1284
 Shankar v Umabai, 220
 Shankar Baksh v. Bulwant Singh, 1152
 Shankar Baksh v. Daya Shankar, 591
 Shankar Das v Amurchand, 1293
 Shankar Das v. Behari Lal, 685 1065.
 Shankar Sarup v Mejo Mal, 57, 269
 Shankara v. Hanma, 26, 29
 Shankarapa v Danapa, 672
 Shankarbhai v. Soonabhai, 1142
 Shankarbhai v. Somabhai, 341
 Shankarbhat v. Sakharambhat, 971
 Shankarlal v. Dakore Temple Committee, 164
 Shankarrao v Vadisal, 816
 Shankerbhai v. Motilal, 863, 864, 865
 Shanker Bharati v Narasimha, 902
 Shanker Ban v. Ram Deo, 377, 964
 Shanker v Gangaram, 674, 677, 678
 Shanks v Secretary of State, 691

Shanmuga v Narayan, 942
 Shanmuga v Ramanathan, 157
 Shanmuga v Subbaya, 330, 451, 468
 Shanmugan v Panchali, 486
 Shanmugsundara v Ratnavelu 413
 Shanmuka v Arunachelam, 457, 499
 Shanran Bibi v Abdus Samad, 969
 Shantanand v Basudevanand, 142, 146
 Shantmurti v Narayan, 816
 Shanto Chunder v Nain Sukh, 836, 837,
 879, 840
 Sharafat Ali v Bhagwati, 1259 1260
 Sharat Chunder v Kartick Chunder, 954
 Shard, *In the matter of*, 368
 Sharfu v Mirkhan 170
 Sharfunnessa v Nazim, 964
 Sharif v Haidar, 605
 Sharifa v Mune Khan, 32, 850
 Sharoda Moyee v Wooma Moyee, 751,
 824
 Sharp v Wakefield, 143
 Sharpington v Fulham Guardians, 278
 Sharup Chand v Pat Dassee, 1145
 Shashi Bhusan v Hari Narain, 900
 Shauran v Abdus, 377
 Sharakshaw v Tyab Haji Ayub, 896
 Shaw v Smith, 611
 Shayam Karam v Collector of Benares,
 1304
 Sheik Ahmed v Shahzada, 710
 Sheik Budan v Ramchandra, 90, 153
 Sheik Ibrahim v Rama Iyer, 985
 Sheik Ismail v Rajab Rawther, 244
 Sheik Maula Bux v Raghubar, 825, 826
 Sheik Muhammed Maracayar v Ragna
 sami, 1102
 Sheikh v Mhatab, 678
 Sheikh Abdul v Shib Lal 985
 Sheikh Elahi Bux v Nawab Lal, 701
 Sheikh Hari v Diljan Bibi, 372
 Sheikh Hasan v Mahomed, 891
 Sheikh Hassu v Ram Kumar, 73
 Sheikh Kallu v Nadir Bakhsh, 592, 600
 Sheikh Kaloo v Bholanath, 173
 Sheikh Karoo v Rameshwar, 200
 Sheikh Khoorshed v Nubee, 64
 Sheikh Mohammad v Mahtab, 22, 157
 Sheikh Nasir v Emperor, 733
 Sheikh Nazir v Muhammad, 177
 Sheikh Yusuf v Jyotishchandra, 743,
 846
 Sheikhkhal v Ahmedkhan, 1357
 Shek Suleman v Shyram, 427

Sheldon *Re* 940
 Shelley Bonnerjee v Raj Chandra Dat
 1026
 Sheo Babu v Udit Narain 1286
 Sheo Charan v Taj Bhai 117
 Sheo Darshan v Beni Chaudhri 1004
 Sheo Dat v Sheo Shankar, 1283
 Sheo Deni v Tulshi 101, 103
 Sheo Gobind v Ram Adhin, 333
 Sheo Kumar v Narandas 486
 Sheo Mangal v Mummat Halsa, 89
 Sheo Narain v Chunni Lal, 174, 175
 Sheo Narain v Nur Muhammad, 840,
 843
 Sheo Narain v Parmeshar, 75
 Sheo Nath v Ram Din, 347, 349
 Sheo Nath v Sukh Lal, 955
 Sheo Parshad v Indore Malwa United
 Mills, Ltd, 581, 1287
 Sheo Parshad v Nawale Singh, 173
 Sheo Prasad v Behari Lal, 980
 Sheo Prasad v Hira Lal, 199
 Sheo Prasad v Kastura Kuar, 377
 Sheo Prasad v Lall, 175, 197, 717
 Sheo Prasad v Muhammad, 233
 Sheo Prasad v Premna Kunwar, 820
 Sheo Prakash v Bhoop Narain 733
 Sheo Ratan v Lappu Kuar, 1145
 Sheo Ratan v Sheo Sahai 41, 56, 502
 Sheo Shankar v Chunni Lal 726
 Sheo Shankar v Jaddo Kunwar, 986
 Sheo Sharin v Mohabir Pershad, 577
 Sheo Tahal v Binaik, 95, 163
 Sheo Tahal v Sheodan Rai, 980
 Sheoambar v Lallu 1098
 Sheoambar v Deodat, 891, 1263
 Sheobaran Singh v Bhagwan Sahai,
 496
 Sheobodh v Shiva, 371
 Sheodan v Balkaran 340
 Sheodeni v Ram Saran, 1020
 Sheodhyan v Bholanath 824
 Sheodial v Durga Kuar, 121
 Sheodihal v Bhawani, 184, 418
 Sheodoyal v Joharmull, 929
 Sheogobind v Mast Kishanbansi, 723,
 732
 Sheogobinda v. Dhanukdhar 832
 Sheonandan v King Emperor, 1316, 1317,
 1318, 1316, 1362.
 Sheonaram v Chunni Lal, 1013
 Sheonath v Pannath, 347
 Sheoparsan v Ramnandan, 41, 66

Sheopat Rai v Harak Chand, 163, 704
 Sheopujan v Maharaja, 335, 338, 553
 Sheoraj v Gopal, 779
 Sheoraj v Kameshar, 88
 Sheoram v Thakur, 330
 Sheorania v Bharat Singh, 942
 Sheoratan v Ram Pargash, 311
 Sheorutton v Net Loll, 827
 Sheosagar v Sitaram, 79, 83
 Shephard *In re* (Atkins v Shephard), 201
 Shepherd v Robinson, 15, 16
 Sher Ali v Jagmohan, 377, 478
 Sher Ali v Mingu, 658
 Sher Singh v Thakur Das, 132
 Sher Singh v Daya Ram, 89
 Sher Singh v Diwan Singh, 349
 Sher Singh v Sri Ram, 220
 Sher Singh v Sundar Singh, 476
 Sheriff of Bombay v Hakimaji, 279
 Sheshiyer v Madan Mohan, 162
 Shew Prosad v Ramchunder, 383, 387, 392
 Shiam v Banarsi, 1098
 Shiam Behari Lal v Rup Kishore, 253 834
 Shiam Karan v Collector of Benares, 196
 Shiam Lal v Dhanpat Rai, 1092
 Shiam Lal v Guraj Kishore, 803
 Shiam Lal v Musammatt Lalli, 465
 Shiam Lal v Nathe Lal, 242
 Shiam Lal v Parshottam Das, 1270 1293
 Shiam Narain v B B & C I Ry., 121
 Shiam Sundar Lal v Kaiser Zamani Begam, 415, 417
 Shib Chandra v Lakhi Priya, 49, 51
 Shib Charan v Raghu, 80, 81
 Shib Das v Kali Kumar, 1020
 Shib Das v Nand Lal, 893
 Shib Deo v Ram Prasad, 69, 541
 Shib Dutta v Sheikh Karim, 867
 Shib Krishna v Satish Chunder, 1267
 Shib Kristo v Miller, 1042
 Shib Kristo Daw & Co v Satish Chandra, 1275 1279, 1280
 Shib Kumar v Sheo, 148
 Shib Kunwar v Sheo Prasad, 782
 Shib Lal v Chaturbhuj, 1279, 1280
 Shib Narain v Bepin Bichary, 163
 Shib Singh v Gandharp Singh, 304
 Shib Singh v Mukat Singh, 831
 Shib Singh v Sita Ram, 755

Shibchandra v Dulchen, 1116
 Shibcharan v. Ratiram, 1266
 Shiba Durga v Gopi, 191
 Shiba Prasad v Pryag Kumari, 501
 Shibba Mal v Rup Narain, 1352, 1353
 Shibkristo v Abdool, 551
 Shibo Rout v Baban Rout, 3, 72, 73, 74, 76
 Shibu v Chandra Mohan, 84
 Shibu Haldar v Gupi Sundari, 105, 110
 Shidappa v Gurusangaya, 230, 269, 270, 802
 Shidaya v Satappa, 196
 Shiddapa v Irava, 388
 Shidlingappa v Shankarappa, 766
 Shidnath Singh v Shaikh Saberuddin, 775
 Shidramappa v Gurushantappa, 1149, 1152
 Shidramappa v Mallappa, 888
 Shields v Wilkinson, 388
 Shiban v Abdul Alim, 308, 460
 Shikarjanath v Janakinath, 1039
 Shileschandra v Bechai, 1094
 Shipwright, v Clements, 440, 441
 Shirekuli v Mahabliya, 899
 Shirin v Agha Ali Khan, 827, 830
 Shital v Gaya, 887
 Shitawa v Rhimappa, 917
 Shiv v Hanhaya, 129
 Shiv Dutt v Moti Ram, 129
 Shiv Dayal v Muhammad, 424
 Shiv Dev Singh v Jai Ram, 986
 Shiva v Jaru, 576
 Shiva v Joma, 372 376, 378, 387
 Shiva v Rani Prayag, 355
 Shivabasava v Sangappa, 337, 338
 Shivabhanjan v Secretary of State, 32 273
 Shivaji v Vithal, 168
 Shivapa v Dod Nagaya, 339, 784
 Shivapa v Shivpanch, 441
 Shivappa v Gurpadappa, 697
 Shivappa v Ramchandra, 1149
 Shivayyagappa v Govindappa, 899
 Shival v Yesoo, 244 418, 420, 421
 Shivaldayal v Bhetu, 509
 Shivrji v Hemraj, 120
 Shivrji v Ramjimal, 1354
 Shivalal v Apaji, 1079
 Shivalal v Jani Ram, 782
 Shivalal v Jumaklal, 151, 159, 441
 Shivalal v Taniram, 232

Shirlingappa v Chanbasappa, 231, 236
 808
 Shirlingappa v Shidmalappa, 162
 Shivrath v Sheikh, 1043
 Shivrath v Jiru 175
 Shivrath v Narayan 55
 Shivrath v Ravji, 242
 Shivrath v Sakharan, 206
 Shivubai v Shiddeshwar, 476
 Shohrat v Bridgman, 151
 Shooljanund v Peary, 218
 Sholapur Municipality v Tuljaram, 380,
 1316
 Short v Pickering 1009
 Shoshemukhi v Nobin Chunder, 1290,
 1293
 Shree Shree Radhakrishna v Official
 Receiver, 340
 Shreemati v Savi, 436
 Shri Kant v Jag Sah, 1073
 Shri Krishna Doss v Chandook Chand,
 375, 378
 Shridar v Babaji, 62
 Shridar v Ganpati 745
 Shridar v Ganu 591
 Shridhar v Lakshman 1039
 Shridhar v Madappa, 857
 Shridhar v Mugniram, 1058 1060
 Shridhar v Narayan, 55
 Shridharan v Paramathan, 323, 903
 Shriman v Goswami, 92
 Shrimant v Smith, 658
 Shrimant Sayaji Maharaj v Madhav
 rao 285
 Shrinivas v Chanbasapagowda, 482
 Shrinivas v Gurunath, 208
 Shrinivas v Radhabai, 260
 Shrinivas v Shiddika, 784
 Shrinivas v Jagadevappa, 252
 Shrinivas v Wazi, 1008
 Shripadbhat v Rama, 66
 Shripat Prasad v Lakshmidas, 301
 Shripatiprasadji v Laxmidas, 302
 Shuma Dass v Hurbuns 605
 Shumbl oo Nath v Luckynath 267
 Shunmugum v Mordin, 1056 1064
 Shurroop Chander v Ameerunnissa, 108
 Shuttrughon v Hokus 32
 Shyam v Mast Mohander, 1006
 Shyam Chand v Land Mortgage Bank,
 222
 Shyam Lal v Ram Narain Lal, 600
 Shyam Mandal v Satinath, 7, 151, 598,
 729 731 1087

Shyam Sundar v Bajpati, 1070
 Shyama v Debendra, 342
 Shyama Charan v Mirinmayi Debi, 54
 Shyama Charan v Prolhad, 1281
 Shyama Churn v Khatromoni, 478
 Sia Ram v Mohabir, 1061
 Sib Kumari v Secretary of State, 652
 Siba Singh v C V R M Chettyar
 Firm, 426, 427
 Sibnath v Sheikh Saberuddin, 1043
 Sibt Ahmad v Amna, 942
 Sibta v Bhagohi, 230
 Siddeshwar, *In re*, 1318
 Siddik Mahomed v Mast Saran, 642
 Sidheswar v Harihar, 157, 339
 Sidheswari v Abhoyeswari, 1060
 Sidheswari v Goshain 836, 837, 838
 Sidhnath v Ganesh, 8, 9, 388
 Sidlingappa v Hirasa 245
 Sidlingappa v Shankarappa 770
 Sikandar v Baland 373 1152
 Sikandar v Khushal, 590
 Sikandar Khan v Baland Khan 1154
 Simbhunath v Golap Singh, 840
 Simmonds v Dunne 526
 Simon v Hakim Mahomed 1031
 Simson v McMaster, 1141
 Sinclair v James, 546
 Singa Raja v Pethu Raja 1003
 Singa Reddi v Madava Rau, 498
 Singa Reddi v Subba Reddi 890
 Singariah v Chinnabbi, 786
 Singaram v Srinivasa 296
 Singaran Coal Syndicate v Balmukund,
 1288
 Singer Manufacturing Co v Bajjnath,
 927
 Singer Manufacturing Co v Yar Muhum-
 mad, 927
 Singji v Ganpat, 278
 Sinnana v Muthupalam 39
 Sinnoppan v Arunachalam, 231 232
 Sinnu v Santhoji, 197 726
 Sir Prodyat Kumar v Bal Gobinda, 1094
 Sir Ralph Bovy's case 527
 Sir Rameshwar Singh v Htendra, 1064
 Sir Tukojirao v Sowkabi 1347
 Sirajulhaq v Akadam, 1085
 Sirur v Mythili, 1055
 Sita Ram v Amir Begum 38, 66
 Sita Ram v Balak Ram, 133
 Sita Pam v Bhawani, 1263
 Sita Pam v Janki Ram, 799, 800, 809

Sheoprat Rai v Harak Chand 163, 704
 Sheopujan v Maharaja 33, 338, 553
 Sheoraj v Gopal 779
 Sheoraj v Kameshar 88
 Sheoram v Thakur 330
 Sheorania v Bharat Singh 942
 Sheoratan v Ram Pargash 311
 Sheorutton v Net Loll 827
 Sheoragar v Sitaram 79 83
 Shephard *In re* (Atkins v Shephard), 201
 Shepherd v Robinson 15, 16
 Sher Ali v Jagmohan, 377, 478
 Sher Ali v Mangi, 618
 Sher Singh v Thakur Das, 132
 Sher Singh v Daya Ram 89
 Sher Singh v Diwan Singh 349
 Sher Singh v Sri Ram 220
 Sher Singh v Sundar Singh 476
 Sheriff of Bombay v Hakimaji 279
 Sheshiyer v Madan Mohan 162
 Shew Prosad v Ramchunder 383, 387, 392
 Shiam v Banarsi 1098.
 Shiam Behari Lal v Rup Kishore, 203 834
 Shiam Karan v Collector of Benares, 196
 Shiam Lal v Dhanpat Rai, 1092
 Shiam Lal v Giraj Kishore 803
 Shiam Lal v Musammat Lalli, 465
 Shiam Lal v Nathe Lal 242
 Shiam Lal v Parshottam Das 1270 1293
 Shiam Narain v B B & C I Ry 121
 Shiam Sundar Lal v Kaiser Zamani Begam 415 417
 Shib Chandra v Lakhi Priya 49, 51
 Shib Charan v Raghu 80 81
 Shib Das v Kali Kumar, 1020
 Shib Das v Nand Lal, 893
 Shib Deo v Ram Prasad 69 541
 Shib Kristo Daw & Co v Satish Chandra 1275 1279 1280
 Shib Kumar v Sheo 148
 Shib Kunwar v Sheo Prasad 789
 Shib Lal v Chaturbhuj 1279 1280
 Shib Narain v Bepin Behary, 163

Shibehandra v Dulchen, 1116
 Shibcharan v Ratiram, 1266
 Shiba Durga v. Gopi, 191
 Shiba Prasad v Prayag Kumari, 501
 Shiba Mal v Rup Narain, 1352, 1353.
 Shibkristo v Abdool, 551
 Shibo Rout v Baban Pout, 3, 72, 73, 74, 76
 Shibu v Chandra Mohan, 84
 Shibu Halder v Gupi Sundari 10, 110
 Shidappa v Gurusangaya, 230, 269, 270, 802
 Shidaya v Satappa, 196
 Shiddapa v Irava, 318
 Shidlingappa v Shankarappa, 766
 Shidnath Singh v Shaikh Saberuddin, 775
 Shidramappa v Gurushantappa, 1149, 1152
 Shidramappa v Mallappa, 888
 Shields v Wilkinson, 388
 Shihan v Abdul Alim 308 465
 Shikarjanath v Janakinath, 1039
 Shileschandra v Bechari 1094
 Shipwright, v Clements 440 411
 Shirekuli v Mahabliya, 899
 Shirin v Agha Ali Khan, 827, 830
 Shital v Gaya, 887
 Shitawa v Bhimappa, 917
 Shiv v Kanhaya, 129
 Shiv Dutt v Moti Ram 129
 Shiv Dayal v Muhammad, 424
 Shiv Dev Singh v Jai Ram, 986
 Shiva v Iaru 576
 Shiva v Joma 372 376 378 387
 Shiva v Rani Prayag 350
 Shivalasava v Sangappa, 337, 338
 Shivalbhayan v Secretary of State 32, 273
 Shivaji v Vithal, 168
 Shivapa v Dod Nagaya, 339 784.
 Shivapa v Shivpranah 441
 Shivappa v Gurpadappa, 697
 Shivappa v Ramchandra, 1149
 Shivayyagappa v Govindappa 899
 Shival v Yesoo, 244 418 420, 421
 Shirdayal v Khetu 509
 Shivji v Hemraj 120
 Shivji v Rampal, 1354
 Shival v Apaji 1079
 Shival v Jani Ram 782
 Shival v Jumaklal, 151 159 441
 Shival v Taniram, 232

Shirlingappa v Chanbasappa, 231, 236, 808
 Shirlingappa v Shidmalappa, 162
 Shivnath v Sheikh, 1043
 Shivram v Jivu, 175
 Shivram v Narayan, 55
 Shivram v Ravji, 242
 Shivram v Sakharam, 206
 Shivubai v Shiddeshwar, 476
 Shohrat v Bridgman, 151
 Shooljanund v Peary, 218
 Sholapur Municipality v Tuljaram, 380, 1316
 Short v Pickering 1059
 Shoshemukhi v Nobin Chunder, 1290, 1293
 Shree Shree Radhakrishna v Official Receiver, 340
 Shreemati v Savi, 436
 Shri Kant v Jag Sah, 1073
 Shri Krishna Doss v Chandook Chand, 375, 378
 Shridar v Babaji, 62
 Shridar v Ganpati, 745
 Shridar v Ganu, 591
 Shridhar v Lakshman, 1039
 Shridhar v Madappa, 857
 Shridhar v Mugniram, 1008 1060
 Shridhar v Narayan 55
 Shridharan v Puramathan 323 903
 Shriman v Goswami 92
 Shrumant v Smith, 608
 Shrimant Sayaji Maharaj v Madhav rao 285
 Shrinivas v Chanbasapagowda, 482
 Shrinivas v Gurunath 208
 Shrinivas v Radhabai, 260
 Shrinivas v Shiddika 784
 Shrinivas v Jagadevappa 252
 Shrinivas v Wazi, 1078
 Shripadbbhat v Rama, 66
 Shripat Prasad v Lakshmidas, 301
 Shripatiprasadj v Laxmidas, 302
 Shuma Dass v Hurbun, 605
 Shumbhoob Nath v Luckynath, 267
 Shunmugam v Mordin, 1056 1064
 Shurroop Chander v Ameerunnissa, 108
 Shuttrughon v Hokua, 32
 Shyam v West Mohandei, 1006
 Shyam Chand v Land Mortgage Bank, 222
 Shyam Lal v Ram Narain Lal, 600
 Shyam Mandal v Satinath, 7, 151, 503, 729 731, 1087

Shyam Sundar v Bajpati, 1070
 Shyama v Debendra, 342
 Shyama Charan v Mirumayi Debi, 54
 Shyama Charan v Prothad, 1281
 Shyama Churn v Khatromoni, 478
 Sia Ram v Mohabir, 1001
 Sib Kumari v Secretary of State, 652
 Siba Singh v C V R M Chettyar Firm, 426, 427
 Sibnath v Sheikh Saberuddin, 1043
 Sibt Ahmad v Amina, 942
 Sibta v Bhagoli, 250
 Siddeshwar, *In re*, 1318
 Siddik Mahomed v Mst Saran, 642
 Sidheswar v Harihar, 157, 339
 Sidheswari v Abhoyeswari, 1060
 Sidheswari v Goshain, 830, 837, 838
 Sidhnath v Ganesh, 8, 9, 388
 Sidlingappa v Hirasa, 245
 Sidlingappa v Shankarappa, 770
 Sikandar v Baland, 373 1152
 Sikandar v Khushal, 590
 Sikandar Khan v Baland Khan 1154
 Simbhunath v Golap Singh, 840
 Simmonds v Dunne, 526
 Simon v Hakim Mahomed, 1031
 Simon v McMaster, 1141
 Sinclair v James, 546
 Singa Raja v Pethu Raja 1003
 Singa Reddi v Madava Rau, 498
 Singa Reddi v Subba Reddi, 890
 Singariah v Chinnabbi, 786
 Singaram v Srinivasa, 296
 Singaran Coal Syndicate v Balmukund, 1288
 Singer Manufacturing Co v Bajinath, 927
 Singer Manufacturing Co v Yar Muhummad, 927
 Singji v Ganpat, 278
 Sinnana v Muthupalani, 39
 Sinnoppan v Arunachalam, 231, 232
 Sinna v Santhoji, 197 726
 Sir Prodyat Kumar v Bal Gobinda, 1094
 Sir Ralph Bovy's case, 527
 Sir Rameshwar Singh v Htendra, 1064
 Sir Tukojirao v Sowkhalai 1147
 Sirajulhaq v Khadim, 1085
 Sirur v Mythili, 1085
 Sita Ram v Amir Begum, 38, 6
 Sita Ram v Balak Ram, 133
 Sita Ram v Bhawani, 1213
 Sita Ram v Janki Ram, 722, 723, 724

Sita Ram v Madho Lal, 82, 683
 Sita Ram v Ram Chandra 116, 117
 Sitab Chand v Hyder, 673
 Sitabai v Laxmibai 105
 Sital v Clement Robson Co, 161, 765
 Sital v Inal Bahdur 895
 Sital v Pearey, 936
 Sital Din v Anant Ram, 429, 1102, 1354
 Sital Prasad v Asho Singh 468, 982, 985
 Sital Prasad v Jagdeo, 422
 Sital Prasad v Messrs Clement Robson & Co, 163, 735, 764
 Sital Singh v Baijnath, 1000, 1003
 Sitamma v Subraya, 914
 Sitapath v Rasudeo 47
 Sitara v Tulshi 658
 Sitaram v Chimandas 549
 Sitaram v Latman, 58, 61
 Sitaram v Nanku 335
 Sitaram v Syad Sirajul, 682
 Sitaram v Thompson 117
 Sitaram Bhat v Sitaram Ganesh, 29
 Sitarama v Surya, 1111
 Sitaramaswami v Lakshmi, 427, 870
 Sitaramayya v Gopalakrishnamma, 731
 Sithamalli v Ramanathan 629
 Sitharama v Subramania Iyer, 302, 311
 Sital v Savgir 957
 Sitalath v Jatindra, 122
 Siva v Nundo, 82
 Siva Bux, *In the matter of* 404
 Siva Prasad v Sreemati 484
 Siva Prasad v Tricomdas 36
 Siva Subramania v Nagappa, 486
 Sivadas v Barendra, 84
 Sivagami v Subramania, 11, 12, 186, 794
 Sivagamme v Gopalaswami, 964
 Sivagiri Zamindar v Teruvengada, 206
 Sivagnana v Advocate General 313
 Sivaprasad v Tricomdas, 375, 388, 389
 Sivarama v Somasundara, 182
 Sivaraman v Ibruram, 95
 Sivaraman v Muthaya, 461
 Sivas Kanda v Raja of Jeypore, 127, 155
 Sivasami v Ratnasami, 793

Smith v. Deaufort, 618
 Smith v Gokul Chand, 821.
 Smith v. Grigg, Ltd, 1046
 Smith v Indian Textile Co, 123
 Smith v. Jeyes, 1062
 Smith v Kailashchandra, 731.
 Smith v Ludha, 1264
 Smith v Tromp, 17
 Smurthwaite v Hannay, 450, 453
 Sobin v. Baijnath, 421, 1137
 Sobha v Tarsi, 842, 843, 844, 849
 Sobhageband v Bhaichand, 839
 Sobhandri v Parthasarathi, 476
 Sohyn Singh v Riddick, 119
 Sohannessa v. Abdul Hamid, 52
 Sohawan v Bibu Nand, 1112
 Sori v Narayanrao, 322
 Sookalingam v Krishnaswami, 317
 Solaiman v Jatindranath, 521
 Solomon v Jyotsna, 912
 Som Saita Bala v Gadadhar, 1150
 Somar Singh v Premai Kuer, 1115
 Somasundara v Kulindaivelu, 66, 67
 Somasundaram v. Administrator General, 1355
 Somasundaram v Arunachalam, 1123
 Somasundaram v Chokkalingam, 89, 415, 420
 Somasundaram v Krishnasamy, 712
 Somasundaram v Vaithilinga, 855, 864, 1116
 Somasundaram v Vadivelu, 560
 Somasundra v Vaithilinga, 7
 Somayya v Subbamma, 599, 600
 Somchand v Chhaganlal, 314, 376
 Somesh v Ramkrishna, 82, 994
 Someshwar v Manilal, 779
 Sonabai v Tribhovandas, 1353
 Sonachalam v Kumaravelu, 66, 461, 1080, 1353
 Sonaram v Mohiram, 832
 Sonatun v Dino Nath 423
 Sonatun Shah v Ali Newaz, 1005
 Sonbai v Ahmedbhai, 627, 1350, 1352, 1371
 Soniram v R D Tata & Co, 119
 Sonu v Bihubai 484, 486
 Sonu Singh v Behari Singh, 1020
 Sonubai v Shivajirao, 1091
 Soobul Chunder v Russick Lall, 238, 681.
 Sooklal v Dal Chand, 970
 Soonabai v Tribhovandas, 910

Skinner v Skinner, 1109
 Sm Sarajubala v Mohini, 375
 South v Allahabad Bank, 220

Soonderlal v Goorprasad, 505, 589, 590
 Soorendro Nath, *In the matter of*, 404, 405
 Sooriah Row v Colaghery, 560
 Soorjomonee v Suddanund, 41, 42, 78
 Sorabjee v. Dwarkadas, 355
 Sorabji v. Govind, 234, 235, 260, 802
 Sorabji v. Kala, 262, 263, 264, 265, 270, 774, 824
 Sorabji v Ramjilal, 592, 600
 Sorabji v Ruttonji, 979, 982, 1340
 Sorimuthu v Muthukrishna, 182, 240, 244, 834
 Sornam v Tiruvazhiperumal, 182
 Soshi v Chandra, 69
 Soudamini v Gopal, 1293
 Soudamini v Nabalak, 1118, 1149
 Soudamone v Maharaj Dheraj, 1370
 Soundaram v Sennia, 341, 342
 Sourendra Mohan v Hari Prasad, 56, 139, 560
 Sourendra Mohun v Murarilal, 145
 Sourendra Nath v Sm Tarubala, 15, 16, 354, 895, 898
 Sourendra Nath v Jatindra Nath, 594
 Sourindra v Nirmal, 1096
 Sourindra v Siromoni, 877
 South American & Mexican Co., *In re*, 84
 Southwark Co v Quick, 619
 Sovachand v Hurry Bux, 1278
 Sovani v Bhima, 171
 Soudamini v Krishna, 836
 Sowkabar v Tukaji Rao, 643
 Sowker Kamurudeen v Noor Mahamed, 250
 Spear's Glass Works, Ltd v Spear, 500
 Special Officer, Salsette v Dosabhai, 1369
 Spedding v Fitzpatrick, 528, 530
 Spedding v Nevell, 458
 Sreedhar v Nilmoni, 1058
 Sreedharan v Kunbunni, 547
 Sree Krishna v Alumbu, 161
 Sree Krishna Doss v Chandook Chand, 382
 Sree Mahant Pravag v Raja of Kala hasti, 261, 799
 Sree Nath Row v Secretary of State, 365
 Sreelal Maganlal v Madan, 1271
 Sreemanchunder v Gopalchunder, 1107

Sreemati Purnima v Nand Lal, 74
 Sreemutty v Sreemutty, 657
 Sreemutty Dossee v Pitamber, 17
 Sreenath v East Indian Ry Co, 927
 Sreenath v. Priyanath, 154, 156, 708
 Sreenath Roy v Cally Doss, 117, 1339
 Sri Bhavani v Devrao, 671
 Sri Chand v Murari Lal, 238
 Sri Chandra Chur v Msst Shyam, 199, 200
 Sri Ganeshtji v. Lalta Prasad, 677.
 Sri Gopal v Parthi Singh, 48, 57, 488
 Sri Kishan v Kashmirao, 362
 Sri Mahant Govind Rao v Sita Ram Kesho, 642
 Sri Mati Hemanigini v Haridas, 435
 Sri Poosapathu v. Sri Rajah, 375
 Sri Raghunadha v Sri Brozo Kishore, 669.
 Sri Raja Simhadri v Prattipati, 456
 Sri Ram v Keshri Mal, 984
 Sri Ram v Sorabji, 1284
 Sri Ranga v Srinavasa, 1095
 Sri Sanker v Sidha, 26
 Sridhar v Jageshwar, 180
 Sridharan v Puramathan, 895
 Sridher Rao v Ram Lal, 900
 Srihari v Khutish Chandra, 44
 Srihari v Murari, 164
 Srikanth v Huri Das, 1111
 Srikanth v Indupuram, 461
 Srimath Jaganatha v Kutumbarayudu, 24
 Srimati v Beni Madhab, 1060
 Srimati v Khagendra Narayan, 366
 Srimati Prosonomoji v Beni Madham, 1061
 Srimati v Ratanmani, 218
 Srimati v Srimati, 1345
 Srimoti v Secretary of State, 971
 Srimotya v Loknath, 668
 Srimut Rajah v Katama Natchiar, 49, 51, 54
 Srimibash v Kesho Prasad, 186, 427, 1078
 Srinvas v Kesho, 11, 183, 1063
 Srinivasa v Arayar, 467
 Srinivasa v Aryathorai, 813, 814, 817
 Srinivasa v Kanthumathi, 268
 Srinivasa v Lakshmi, 974
 Srinivasa v Official Assignee, 131, 386, 1154, 1156
 Srinivasa v Pratapa, 879

Sita Ram v. Madho Lal, 82, 683.
 Sita Ram v. Ram Chandra, 116, 117
 Sitab Chand v. Hyder, 673
 Sitabai v. Laxmibai, 105
 Sital v. Clement Robson Co., 161, 765
 Sital v. Lal Bahadur, 895
 Sital v. Pearey, 936
 Sital Din v. Anant Ram, 429, 1102, 1354
 Sital Prasad v. Asho Singh, 468, 982, 987
 Sital Prasad v. Jagdeo, 422
 Sital Prasad v. Messrs. Clement Robson & Co., 163, 735, 764
 Sital Singh v. Bajnath, 1000, 1003
 Sitamma v. Subraya, 914
 Sitinath v. Basudeo, 47
 Sitara v. Tulsh, 658
 Sitaram v. Chumandoo, 549
 Sitaram v. Laxman, 58, 61
 Sitaram v. Nanku, 335
 Sitaram v. Syad Mirajul, 682
 Sitaram v. Thompson, 117
 Sitaram Bhat v. Sitaram Ganesh, 29
 Sitaram v. Surja, 1111
 Sitaramaswami v. Lakshmi, 427, 879
 Sitaramayya v. Gopalakrishnamma, 731.
 Sithamalli v. Ramanathan, 629
 Sitharama v. Subramania Iyer, 301, 311.
 Sital v. Savgir, 957
 Sitnath v. Jatindra, 122
 Siva v. Nundo, 82.
 Siva Bux, *In the matter of*, 404
 Siva Prasad v. Sreemati, 484
 Siva Prasad v. Tricomdas, 36
 Siva Subramania v. Nagappa, 486
 Sivadas v. Birendra, 84
 Sivagami v. Subramania, 11, 12, 186, 794
 Sivagamme v. Gopalswami, 964
 Sivagun Zamindar v. Teravenpaha, 206
 Sivagnana v. Advocate General, 313
 Sivaprasad v. Tricomdas, 375, 388, 389
 Sivarama v. Somasundara, 182
 Sivaraman v. Ibruram, 95
 Sivaraman v. Muthaya, 461
 Sivas Kanda v. Raja of Jeypore, 127, 155
 Sivasami v. Ratnasami, 793
 Sivathi v. Ramasubbayyar, 980, 983, 984.
 Sivaram v. Rajagopala, 302, 303
 Skipper & Co. v. David, 279.
 Skinner v. Skinner, 1109.
 Sm. Sarajubala v. Mohini, 375
 Smith v. Allahabad Bank, 220

Smith v. Beaufort, 618
 Smith v. Gokul Chand, 821.
 Smith v. Grigg, Ltd., 1046
 Smith v. Indian Textile Co., 123.
 Smith v. Jeyes, 1062.
 Smith v. Kailashchandra, 731.
 Smith v. Ludha, 1261.
 Smith v. Tromp, 17.
 Smurthwaite v. Hannay, 450, 453
 Soban v. Bajnath, 421, 1137
 Sobha v. Turu, 842, 843, 844, 849
 Sobhagchand v. Bhaichund, 839
 Sobhindri v. Parthasarathi, 476.
 Sohan Singh v. Riddick, 119
 Sohanesva v. Abdul Hamid, 52.
 Sohanan v. Bibu Nand, 1112.
 Sonu v. Narayanrao, 322
 Sohlalingam v. Krishnaswami, 317
 Sohaman v. Jatindranath, 521
 Solomon v. Jyotana, 912
 Sorn Sola Bala v. Gadadhar, 1160
 Sornar Singh v. Premji Kuer, 1115
 Somasundara v. Kulindavelu, 66, 67
 Somasundaram v. Administrator-Gere-
 ral, 1355
 Somasundaram v. Arunachalam, 1123.
 Somasundaram v. Chokkalingam, 89,
 415, 420
 Somasundaram v. Krishnasamy, 712
 Somasundaram v. Vaithilinga, 855, 864,
 1116
 Somasundaram v. Vadivelu, 560
 Somasundara v. Vaithilinga, 7
 Somayya v. Subbamma, 599, 600
 Somchand v. Chhaganlal, 314, 376
 Somesh v. Ramkrishna, 82, 994
 Someshwar v. Manilal, 779
 Sonabai v. Tribhovandas, 1353
 Sonachalam v. Kumaravelu, 66, 461,
 1080, 1353
 Sonaram v. Mohiram, 832
 Sonatun v. Dino Nath, 423.
 Sonatun Shah v. Ali Newaz, 1005
 Sonbai v. Ahmedbhai, 627, 1350, 1352,
 1371.
 Sonuram v. R. D. Tata & Co., 119
 Sonu v. Bahimbai, 484, 486
 Sonu Sing v. Behari Singh, 1020
 Sonubai v. Shivajirao, 1091
 Soobul Chunder v. Russick Lall, 238,
 681.
 Soeklal v. Dal Chand, 970
 Soonabai v. Tribhovandas, 910

Soonderlal v Goorprasad, 507, 589, 590
 Soorendro Nath, *In the matter of*, 401, 40
 Sooriah Row v Colaghere, 560
 Soorjomonee v Suddanund 41, 42, 78
 Sorabjee v Dwarakadas, 355
 Sorabji v Govind, 234, 235 260, 802
 Sorabji v Kala, 262, 263, 264, 265, 270, 774, 824
 Sorabji v Ramjilal, 592, 600
 Sorabji v Ruttonji 979 982, 1340
 Sourimuthu v Mathukrishna, 182, 240, 244 834
 Sornam v Tiruvazhiperumal, 182
 Soslu v Chandra 69
 Soudamini v Gopal 1293
 Soudamini v Nabalak, 1118, 1140
 Soudamone v Maharaj Di eraj, 1370
 Soundaram v Senna 341, 342
 Sourendra Mohan v Hari Prasad, 56, 139 560
 Sourendra Mohun v Murarilal, 145
 Sourendra Nath v Sm Tarubala, 15, 16 354, 895 898
 Sourendra Nath v Jatindra Nath 594
 Sourindra v Nirmal 1096
 Sourindra v Siromoni 877
 South American & Mexican Co., *In re*, 84
 Southwark Co v Quick, 619
 Sovachand v Hurry Bux, 1278
 Sovani v Bhuma, 171
 Sowdamini v Krishna 836
 Sowkabar v Tukaji Rao, 643
 Sowker Kamurudeen v Noor Mahamed 250
 Spear & Glass Works Ltd v Spear 500
 Special Officer, Balsette v Dosabhai, 1369
 Spedding v Fitzpatrick 528 530
 Spedding v Nevell, 458
 Sreedhar v Nirmoni 1058
 Sreedharan v Kupbunni 547
 Sree Krishna v Ajumbu 161
 Sree Krishna Doss v Chandook Chand 382
 Sree Mahant Prayag v Raja of Kala hasti 261 799
 Sree Nath Roy v Secretary of State, 365
 Sreelal Maganlal v Madan, 1271
 Sreemanchunder v Gopichunder, 1107

Sreemati Purnima v Nand Lal, 74
 Sreemutty v Sreemutty, 657
 Sreemutty Dossee v Pitamber, 17
 Sreenath v East Indian Ry Co 927
 Sreenath v Priyanath, 154, 156, 708
 Sreenath Roy v Cally Doss, 117, 1339
 Sri Bhavani v Devrao, 671
 Sri Chand v Murari Lal 238
 Sri Chandra Chur v Msst Shyam, 199, 200
 Sri Ganeshji v Lalta Prasad, 677.
 Sri Gopal v Pirthi Singh 48 57, 488
 Sri Kishan v Hashmirao, 362
 Sri Mahant Govind Rao v Sita Ram Kesho, 642
 Sri Mati Hemangini v Haridas, 435
 Sri Poosapathi v Sri Rajah 375
 Sri Raghunadha v Sri Brozo Kishore, 669
 Sri Raja Simbadri v Prattipati, 456
 Sri Ram v Keshri Mal, 984
 Sri Ram v Sorabji, 1284
 Sri Ranga v Srinavasa, 1090
 Sri Sanker v Sidha 26
 Sridhar v Jageshwar, 180
 Sridharan v Puramathan, 895
 Sridher Rao v Ram Lal, 920
 Srihari v Khitish Chandra 44
 Srihari v Murari 164
 Srikanth v Huri Das 1111
 Srikanth v Indupuram, 461
 Srimath Jaganatha v Kutumbarayudu, 24
 Srimati v Beni Madhab, 1060
 Srimati v Bhagendra Narayan, 366
 Srimati Prosonomoji v Beni Madham, 1061
 Srimati v Ratanmani, 218
 Srimati v Srimati, 1345
 Srimoti v Secretary of State, 971
 Srimotya v Lohnath, 668
 Srimut Rajah v Katama Natchiar, 40, 51, 54
 Srinibash v Kesho Prasad, 186, 427, 1078
 Srinivas v Kesho, 11, 183, 1063
 Srinivasa v Arayar, 467
 Srinivasa v Ayyathorai, 81
 Srinivasa v Kanthimathi, 2
 Srinivasa v Lakshmi, 974
 Srinivasa v Official Assign 1154, 1156
 Srinivasa v. Pratapa, 879

- Srinivasa v Raghava, 67, 461, 161, 165
 Srinivasa v Ramaswami, 392
 Srinivasa v Sami Rau, 237
 Srinivasa v Seetharamayyar, 259
 Srinivasa v Subbramanja, 1084
 Srinivasa v Vellayan, 233 235
 Srinivasa v Venkata, 121
 Srinivasa v Venkata, 114, 123, 207, 1341
 Srinivasa v Yamunabai, 979 1018
 Srinivasam v Rukmani, 1085
 Srinivasachariar v Appavoo, 229, 230
 Srinivasathathachar v Srinivasathathachar, 207
 Sripat v Tribeni, 168
 Sripati v Bibbuti, 1063 1066
 Sriramulu v Lakshminarayana 950
 Sriramulu v Sriramulu, 411, 656, 1003
 Srush Chandra v Triguna, 91
 St Gobain Chauny & Crey Co v Hoyermann & Agency, 939
 St Nazaire Co, *In re* 439
 Stanton v Chadwick 618
 Stannard v Harrison, 84
 Stapylton v Scott 361
 Steel v Pobarts, 1263
 Steff v Andrews, 1278
 Steward v North Metropolitan Tramways Co 545 547 554
 Stewart v Rhodes, 441
 Stokes v Grant 543
 Stowell v Ajudha 199 230
 Strachan, *Re*, 608 618
 Stracy v Blake, 17
 Strauss v Francis, 15 16 17
 Striman Sadagopa v Krishna, 26
 Srinivasa v Srinivasa, 306 313
 Strong v Tappin 611
 Stroud v Lawson 449
 Struthers v Wheeler 917
 Stuart Skinner v Orde, 970
 Studd v Mati, 567
 Stumore v Campbell & Co, 725
 Subasini v Ashutosh, 892
 Subal Chandra v Jatindra Mohan, 1068 1069
 Subba v Bala Chandra, 349
 Subba v Haji Badaha, 1045, 1051 1052
 Subba v Krishnamachari, 675
 Subba v Rama 489
 Subba Bibi v Maqbul 131
 Subba Rao v Bhimalingham, 74
 Subba Rao v Venkataratnam, 964, 965, 971
 Subba Rao v Rama Rao, 103
 Subbaya v Ranga, 1109
 Subbalakshmi v Ramanujam, 996, 1004
 Subbamma v Chennayya, 182, 413, 420
 Subbammal v Avudaiyammal, 69
 Subban Ali v Imami Begam, 68
 Subbaraju v Venkatramaraju, 897
 Subbarao v Appadurai, 1260
 Subbaraya v Krishna, 490
 Subbaraya v Manika, 858
 Subbaraya v Ponnusami, 1016
 Subbaraya v Sadashiva, 1289
 Subbaraya v Seetha, 468
 Subbaraya v Vedantachariar, 28
 Subbaraya v Virappa, 831
 Subbarayadu v Chenchuramayya, 650
 Subbarayadu v Pedda Subbarazu, 820
 Subbarayadu v Ramadasu, 859, 876
 Subbarayan v Natarajan, 195
 Subbarayudu v Lakshminarasamma, 813
 Subbarayudu v Seshasaini, 419
 Subbarayudu v Yerram, 417
 Subbaya v Saminadayyar, 854 869
 Subbayan v Thoppai, 815
 Subbayar Bros v J. K. Munuswami Aiyar and Sons, 877, 878
 Subbayya v Krishna, 298, 299
 Subbayya v Rachayya, 321
 Subbayya v Rami, 1105
 Subbi v Ramkrishna, 69
 Subbiah v Bala, 969
 Subbiah v Nellayappa, 915
 Subbiah v Ramanathan, 90, 155
 Subbiah v Subramania, 1272
 Subbier v Moideen, 786
 Subbithavammal v Chidambaram, 11, 721
 Subedar v Jagat, 338
 Subha Bibi v Hara Lal 247
 Subhan v Baburam, 356
 Subhana v Krishna 158
 Subjoo Das v Balmukund, 423
 Subramania v Achuta 794
 Subramania v Balasubramania, 57
 Subramania v Chokkalinga, 231, 765
 Subramania v Corera, 668
 Subramania v Krishna, 824
 Subramania v Krishnaswamy, 299, 311.
 Subramania v Kumara Velu, 171, 183
 Subramania v Punjamma, 163
 Subramania v Rajeswara, 89

Subramania v Sinnammal, 980, 1115
 Subramania v Subramania, 517
 Subramania v Swaminatha, 433
 Subramania v Vaithilinga, 69
 Subramania v Vaithinatha, 159, 168
 Subramania v Varadajulu, 598, 605
 Subramania Ayyar v Muthia Chettiar, 790
 Subramania Ayyar v Sellammal, 359, 362
 Subramanian v Lutchman, 1064
 Subramanian v N L M Chettiar, 821
 Subramanian v Raja Rajeswara, 93
 Subramanian v Raja of Ramnad, 426 1079
 Subramanian v Ramaswami, 701
 Subramaniam v Subbiah, 429
 Subramanian v Vcerabadran, 1114
 Subramanian v Vykunda, 810, 823
 Subramanyam v Narsimham, 790
 Subramanyan v Hurry, 580
 Subrao v Mahadevi, 1042
 Subraya v Rathnavelu, 484
 Subudhi v Singi, 213
 Suchand v Balaram, 812
 Sudali v Velayudham, 492
 Sudalmuthu v Andi Reddian, 606
 Sudamdih Coal Co v Empire Coal Co, 1339 1340 1341
 Sudarsan v Manindra, 770
 Sudarshan Das v Ram Prasad, 22
 Suddindra v Budan, 158 172
 Sudhangshu v Haricharan, 747
 Sudhansu, *In re*, 352
 Sudharam v Sudharam, 23
 Sudhendu v Durga, 499
 Sudhir v Rameswari, 629
 Suganchand v Kanappa, 1157
 Suganchand v Mulchand, 120
 Suhuj v Ram Pershad, 808
 Suikena v Hajee Mahomed, 264
 Suja Hoosein v Monohur Das, 190 732
 Sukalbatty v Babulal, 367
 Sukh Dial v Bhopi, 63
 Sukh Lal v Bhukhi, 85 889
 Sukha v Lachmi, 947
 Sukha v Raghunath Das, 134
 Sukhdeo v Lachman, 553 560
 Sukhdeo v Sheo Ghulam, 252
 Sukhdeo Das v Pito Singh, 436 438
 Sukhi v Ghulam Safdar Khan, 954
 Sukhlal v Eastern Bank Ltd, 1033

Sukhran Das v Nazar Muhammad, 152
 Sukhu v Ram Lotan, 638
 Suklya v Suklal, 1004
 Sukumari v Gopi Mohan, 143
 Sukumari v Mugneeram, 425
 Suleman v Shaikh Ismail, 297
 Sulleman v Joosub, 1097
 Sulleman v The New Oriental Bank Corporation, Ltd, 1146
 Sultan v Hardyan, 947
 Sultan v Savalayammal, 712
 Sultan Kuar v Guzari Lal, 760
 Sultan Muhammad v Sheo Prasad, 1261
 Sultan Singh v Murli Dhar, 353
 Sultanat Jahan v Sunder Lal, 36
 Suman Singh v Deonandan, 1002
 Sumbhu Nath v Surjmoni, 369
 Sumitra Devi v Hazari Lal, 377, 967, 968
 Sundar v Dinanath, 75
 Sundar v Habib Chick, 1085 1154
 Sundar v Musammat Kumari, 866
 Sundar Bibi v Bisheswar, 368, 1112 1113
 Sundar Bibi v Raj Indar, 225
 Sundar Devi v Dattatraya, 402
 Sundar Jha v Bansman Jha, 450
 Sundar Koer v Chandishwar, 1370
 Sundar Kuar v Chandreshwar, 668
 Sundar Mall v Upendra Nath, 1152
 Sundar Nath v Mallu, 512
 Sundar Singh v Bholu, 57
 Sundar Singh v Doru Shankar, 190 383
 Sundar Singh v Ghasi, 177, 776
 Sundar Singh v Krishna Mills Co, Ltd, 1072
 Sundar Singh v Nighaiya, 348
 Sundar Singh v Ram Saran, 1046
 Sundara v Ratnavelu, 360
 Sundara v Sivalingam, 490
 Sundara v Venkata, 837, 839
 Sundara Bai v Tirumal, 1339
 Sundarabai v Jayavant, 141
 Sundaralinga v Ramasami, 366
 Sundaram v Mausai, 384 813 814 818
 Sundaram v Muthuramalinga, 1071
 Sundarambal v Jogavanagurukkal, 898
 Sundarasan v Vewanada, 858, 877
 Sundarathammal v Paramaswami, 963
 Sundaresa v Subba Rao, 594
 Sundarshan Das v Ram, 157
 Sundavee v Krishna, 721
 Sunder v Chhitar, 65

Sunder Das *In re* 269
 Sunder Koer v Chandishwar 354
 Sunder Koer v Rai Shani Kshen, 1016,
 1017
 Sunder Spinner v Makan Bhula 520
 Sunderlal v Raghunathan 1042
 Sundermull v J C Galstaun 1008
 Sundra v Sakharan 70
 Sundram v The Queen 31
 Superior Bank Ltd v Buddh Singh 179
 831
 Suppi v Kunhi 1002 1003
 Suppu v Govindacharyar 1273
 Suraj Bansi Koer v Sico Proshad Singh
 239
 Suraj Deo v Partab Rai 7
 Suraj Din v Mahabir Prasad 213
 Suraj Narain v Jagbati 1072
 Suraj Narain v Ratan Lal 249
 Suraj Prasad v Standard Life Insurance
 Co 910
 Suraj Singi v Phul Kumari 34
 Surajdeo Narayan v Partap Rai 1091
 Surajmal v Horniman 20 319 328
 Surajmal v Maneekchand 317
 Surajman v Anjore 188
 Surajpal Pandey v Utim Pandey 1091
 Suramati v Surjanarayana 1074
 Surapati v Ram Narayan 79
 Surayya v Surya Rao 1116
 Surender Nath v Brojo Nath 66
 Surendra v Aglore 140 90
 Surendra v Garo 812
 Surendra v Hemangini 904
 Surendra Kumar v Sushil Kumar, 1060
 Surendra Mohini v Amresh Chandra
 828
 Surendra Narain v Bhai Lal 100 551
 Surendra Narain v Cop 170
 Surendra Nath v Atul Chandra 576 687
 Surendra Nath v Drarka Nath 307
 360 361 368
 Surendra Nath v Jatindra Nath 437
 Surendra Nath v Kamakhya Narain 43
 Surendra Nath v Keshab Lal 424
 Surendra Nath v Raghunath Das 1087,
 1112
 Surendra Nath v Thripura 877
 Surendra Nath Banerjee v The Chief
 Justice and Judges of the High Court
 of Bengal 43

Surendra Prasad v Atal ud din 700
 Surendra Krishna v Bhulaneshwar 473
 Surendramohan v Manmathanath 791,
 809
 Surendro Keshub Roy v Dargasoondery,
 1067
 Surendro v Doorga Soondery, 870
 Suresh Chandra v Mohendra Chandra
 1130
 Suresh Chandra v Shuti Kanta 1367
 Suresh Chunder v Ambica Churn 1260
 Suresh Chunder v Jugut Chunder 916
 947
 Suresh Chunder v Kristo Ragini 1141
 1142
 Surej Mall v Hudson 120
 Surja v Chandra 409
 Surje v Reel 670
 Surjan Singh v Prag Das 209
 Surjya v Jaynarayan 091
 Surjyamoqi v Kali Kanta 330
 Surnamoyi v Ashutosh 780
 Surno Moyee v Dakhina 708 822 828
 Surnomoyee v Maharajah Sutteeschun
 der 309
 Sursingji v Manihal 337
 Surta v Ganga 440
 Surty v T S Chettyar Firm 368 1129
 1145
 Surujdeo v Partap 12
 Surut Soondari v Prosonno Coomar 917
 Surya v Jogendra 1016
 Surya Datt v Jumna Datt 413
 Surya Kanta v Tirak Nath 435
 Surva Narain v Kunja Behary 1154
 Suryanarayana v Sree Raja Venkata
 385
 Suryaprakasa v Sreeramulu 601, 604
 Sushil v Annada 606
 Susya Pillai v Ayakannu Pillai 861
 Sutherland (Duke) v British Dominions
 Land Settlement Corporation 611
 Sutherland v Singhee Churn 618
 Suttia v Golap 1067
 Swami Iyah v Commissioners for the
 Port of Rangoon 1341
 Sraminatha v Kalyanarama 820
 Sraminatha v Kumaraswami 466
 Swaminatha Odayar v Thiagaraja
 swami 190
 Swamitla v Vaidyanath 900
 Swamirao v Collector of Dharmar, 905
 Swamirao v Kasinath 19 693 696

Swamirao v Valentine, 170 420
 Swanston v Lashman, 623
 Swinfen v Lord Chelmsford 16
 Swiss Bank Corporation v Boehmische Industrial Bank, 757
 Syed v Collector of Kaira, 301
 Syed Amir v Sheikh Masledin, 946
 Sramalados v Subbaya, 190
 Syed v Bibi, 299 309
 Syed v Mahomad, 380
 Syed v Subhan, 1353
 Syed Abdul v Badaruddin, 435
 Syed Ali v Adib, 317
 Syed Hossein v Chettiar, 345, 1037
 Syed Khan v Syed Ebrahim 368
 Syed Kashif v Gangai Baksh, 798
 Syed Mohammad v Janaki, 1146
 Syed Qazi v Lachman, 429
 Syed Sadiq v Asaf Kader, 390
 Syed Sadiq v Asaf, 893
 Syed Shah Mahomed Kazim v Syed Ali Saghir, 300
 Syud Imam v Raj Coomar Dass, 1020
 Syud Tuffuzool v Rughoonath, 210, 220, 754

T

T Wang v Sonawangdi 1261
 Tadeipalli v Nawab Sayed, 123
 Tadeipalli v Siram 806
 Taff Vale Railway Co v Amalgamated Society of Railway Servants 463
 Taj Singh v Jagan Lal 89 718
 Taja v Devi 870
 Tajammul v Banwari Lal, 337
 Tajeshwar Duth v Lakhnan Prashad 950
 Talamand v Fateh Din, 903
 Talebali v Abdul Aziz, 9 158 320 326 349 704, 1101
 Talewar Singh v Bhagwan Das, 338 636
 Talamand v Muhammad, 58
 Talib Ali v Abdul Aziz 704
 Talib Ali v Pizrey Lal, 437 946
 Tallapragada v Ikoorugapalli, 172
 Tamanbhat v Kristadharva, 529
 Tambi Reddy v Devi Peddy, 426, 700

Tameshwar v Thakur Prasad, 11, 164, 717, 721
 Tamiz Bano v Nand Kishore, 203
 Tamizunnissa v Syed Mohammad, 74
 Tamman Singh v Lachhman, 712
 Tan Ma Shwo v Tan Ma Ngwe, 352
 Tanaji v Shanker, 1086
 Tancred v Mullick, 1138
 Tani v Hari, 172
 Tani v Tarachand 38
 Taniran v Gajanan, 999
 Tankin v Uche si, 426
 Tansukh Rai v Sri Gopal, 322 1022
 Tanwanginee Debi v Abhaya Charan, 63
 Tapesri v Deokinandan, 253
 Tapesri Lal v Deoki, 799
 Tapiram v Sadu, 550
 Tapp v Jones, 754
 Taqui Jan v Obaidulla, 942
 Tara v Arun, 335
 Tara v Basiruddin, 383
 Tara Lal v Sarobar Singh 840
 Tara Prasanna v Nilmoni, 174
 Tarachand v Champi 416
 Tarack Nath v Prosonno Coomar, 3
 Tarak Nath v Bhubaneswar, 1020
 Tarak Nath v Sanat 232
 Tarak Nath v Sanat Kumar, 772, 1042
 Taramoni Das Re 146
 Tarangini v Raj Krishna, 199
 Tarapada v Srimati Bagala, 478
 Taraprasanna v Nareish, 461
 Taraprasanna v Nareishchandra, 880
 Tarasundari v Beharilal 710
 Tarinee Churn v Hunsman, 504
 Tarini Charan v Kedar Nath 37 58 53 61
 Tarruck v Divendro, 712
 Taru Bala Das v Sourendra Nath 15
 Tarubala v Sourendra, 954
 Taruck Chunder v Panchu 483
 Tarunchandra, *In re*, 1359
 Tarvadi v Bai Kashi 715
 Tasaddak v Ahmad 797 822 824 826
 Tassadduq v Hayatunnissa 314
 Tassadduq v Kashi Ram 364 1112
 Tata Iron & Steel Co., Ltd v Bailynath 691
 Tata Iron & Steel Co v Chief Revenue Authority 1360 1371
 Tatum v Evans, 426

TABLE OF CASES.

athibhai, 1288
Iasookdoss, 1353
South British Insurance Co.,

atten, 621
ollier 936
erte 1062
ussel 981
Hersukh, 1316
v Ghazi Ram 1259, 1262,

il
a Ram 1005
athimull & Co., 1115
lahomed, 1292
kuvayi 224
shna v Moti Chand, 346, 829
shna v Surendra 101
olam 1068
v Laurie 33 110, 142
v Russell, 462
odenna Franco Espanola v
land Insurance Co 622
Sudersan Das 338

v v Hurbhum 464
igh v Mt Uttam Kaur 69
Leelanund 829
Thakore 33

s v Lallubhai 896
Jajshth 68

armha v Jiban Ram 841
hageshwari v Bindeswari, 62
as v Kishori Lal 1084
as v Narian 1265
as v Ram Das 1265
in Ram v Haridas 511
anmant v Mt Jhamola, 74
Iagandeo v Thakur Mahadeo

Iani v Dai Ram Koeri, 476
ersad v Kalka, 17
Prasad v Fakirullah, 88, 188
9 410 593
is v Joseph 766 767
v Kundan, 1074
yya v Venkataramanamma

aju v Bapiraju, 1265 1273
daram v Chetty, 359
gh v Chundun Singh 1155
ti v Muniappa 67, 465
an v Vallamma, 56
v Kondu, 169, 801, 803
Ammal v Lakshmi, 1017

The Arbutnot & Industrials Ltd v
Muthu Chettiar, 108
The Asia, *In re*, 1364
The Crown v Faid ul Haq, 1376
The Englishman v Lajput Rai, 144
The Henrich Bjorn, *In re*, 1364
The Hope, 580
The Justices of the Peace for Calcutta v
The Oriental Gas Co., 1349 1350,
1351 1355

The New Birbhum Coal Co v Surendra
Nath, 829
The Official Receiver v Palaniswami, 34
The Portugal, *In re*, 1364
The Two Ellens, *In re*, 1364
Thenal v Sokkammal, 16 904
Theyavelan v Kochan, 20
Thiagarajaswami v Belajee, 301
Thimmappa v Balakrishna, 121
Thiraviyam v Lakshmana, 236 261 263
264 808

Thirukumaresan v Subbaraya, 684
Thurumala v Athimoola, 1116
Thurumalai v Ramavayar, 123
Thiruvengada Theingar v Vaidinatha,
1293

Thiruvengadaswami v Achuta, 793
Thiruvengadaswami v Govindaswami,
795

Thiruvengatasami v Paradaai Pilai 509
Thol v Leash, 610
Tholappala v Venkata, 28
Thomas v Moore, 450 453 492
Thomas v Morgan, 539
Thomson v Baskerville, 980
Thompson v Birkley, 530 533
Thompson v Calcutta Tramway Co.,
364 964 1125

Thompson v London County Council,
444 460
Thompson v Reynolds, 558
Thorp v Holdsworth, 524 571 631, 633
634

Tikai v Firm Sheo Dayal, 395
Tikai Chobay v Sheo Dayal 886
Tikam Singh v Kishore, 472, 981
Tilak v Akhil 1123.
Tilak v Chakardhari, 349
Tilakdhari v Kesbo, 367
Tilakram v Kodumal, 36

Tildesley v Harper, 545, 553, 571, 631
 Tiluk Chandra v Jasoda Kumar, 578
 Timappa v Manjamy, 485
 Timmana v Govind, 208
 Timmanna v Mahabala, 820
 Timmaraju v Narasimha, 674, 675
 Timmu v Deva, 1085
 Tin Tin v Maung Ba, 328
 Tincouri v Shib Chandra, 108 156, 821
 Tincowry v Debendro Nath, 161
 Tincowry v Fakir Chand 807, 1284
 Tinkarhi v Narendranath, 979
 Tipangarda v Ramangarda, 816
 Tirmal v Kanhaiya, 1154
 Tirthasami v Annappaia, 410, 659
 Tirumal v Syed Dastaghiri, 815 990
 Tirumalacharyulu v Ammisethi, 947
 Tirumalaisami v Subramanian, 836 837
 Tirupati v Narasimha, 486
 Tirupati v Vissam, 373
 Tiruvambala v Manikkavachaka, 84
 Tiruvangadi v Thiruvangadiab, 766
 Tiruvengada v Vythilinga, 769
 Tokhan v Udwant, 423
 Tokhan Singh v Girwar Singh, 1079
 Toleman, *Re* 940
 Tomlinson v Broadsmith, 936
 Toolsa v Antone 201, 7 6
 Toolsee Dass v East India Ry Co, 807
 Toolsee Money v Sudevi, 346 1083
 Toponidhee v Sreeputti, 43, 76
 Tops v Karami Bank, 383
 Toremull v Kunj Lall 914 1352
 Tota Ram v Panna Lal, 434
 Totaram v Chhoturam, 815
 Tottenham, *Re*, 466
 Town Bank v Rama, 714
 Townsend v Parton, 526 528 530
 Trailokya Nath v Jogendra Nath, 678
 Tredegar v Roberts, 502 503 504
 Tribeni Prasad v Ramasray, 180
 Tribhovandas v Abdulally, 877
 Tribhuwan v Sri Narain, 14, 853
 Tribhuwandas v Jivanachand, 735
 Tribikram v Badri, 1137
 Triccam v B B & C I L Co 909
 Tricumdas v Gopinath 61, 111
 Tricumdass v Khimji, 297, 310
 Triloki v Partab, 48
 Trimbak v Govinda, 177
 Trimbak v Hari, 618, 700
 Trimbak v Lakshman, 107

Trimbak v. Nana, 773 822
 Trimbak v Ramchandra, 815
 Trimbak v Ramchandra (35 Bom L R 37), 1083
 Trimbak v Sakharan, 980
 Trimbak v Ziparu, 787
 Troylonkath v Macleod, 34
 Trustees of the Port of Bombay v Municipal Corporation of Bombay, 1027, 1028
 Tuan Man v Che Son, 468
 Tuhi Ram v Izzat Ali, 814
 Tukaram v Anantbhat, 696
 Tukaram v Babaji, 699, 701
 Tukaram v Gunaji, 221
 Tukaram v Ramchandra, 883
 Tula Ram v Harjiwan Das, 131, 132
 Tulaji v Balabhai, 766
 Tuljaram v Alagappa, 12, 392, 643, 914 1080 1124, 1350 1351, 1352, 1353, 1354 1356
 Tuljaram v Gopala, 889
 Tuljaram v Ramchandra, 812, 822
 Tuljaram v Sitaram, 513
 Tulsa v Gajraj, 339
 Tulsi v Dip Prakash, 1007
 Tulsi Persad v Benayek, 366, 367
 Tulsi Ram v Daya Ram, 657
 Tulsi Ram v Pam Saran Das 568
 Tumman v Sheodarsan, 897
 Turmuklal v Kalyandas, 229
 Turner v Pestonji Fardunji, 1042
 Turner v Ringwood Highway Board 203
 Turnock v Sartoris, 1288
 Turquand v Fearon, 532
 Turquand v Wilson 634
 Turton v Barber, 619
 Tyaballi v Atmaram, 756 777
 Tyabji v Jetha, 270
 Tyabji Dayabhai & Co v Jetha Devji & Co, 579
 Tyabji & Co, *In re*, 580
 Tyeabhai v Abdul Hussein, 1273

U

U Ba Dwe v Maung Lu Pan, 107
 U Ba Po v U Ba Shwe, 379
 U Ba Po v U Po Sein, 10
 U F Maung v P A R P, 107
 Firm 83
 U Gn Maung v Ibrahim, 1057

- U Kala v Ma Hnin, 173
 U Njo v Ma Pwa Thin, 353
 U Njo v Ma Thin, 1105
 U Po Maung v U Jun Pe, 302
 U Po Nyun v Ma Pan Me, 900
 U Po Thein v O A O K R M Firm, 785
 U San v U Chit, 184
 U Sein v Ma Bok, 375
 U Shin v Maung Tha Gywe, 1095
 U Tun v Maung Sein, 169
 Uchant v Basawan, 886, 892
 Uderan v Hyderabad, 1648
 Udhai Chand v Nagin Singh, 57
 Udit Narain v Jhanda, 1105
 Udit Narain v Mathura Prasad, 155
 Udm v Hira, 467 860 869
 Udoy Chand v Khetsidas 400, 1353
 Udoychand v P E. Guzdar, 357, 362
 Udwan v Tokhan Singh, 158 159
 Ugar Chand v Surajmal, 114
 Ugra Narain v Basanta, 158
 Ugrah Lal v Radha Pershad, 815
 Ugrah Singh v Motihari Co., Ltd., 134
 Ujur v Shadhai 334
 Uma Churn v Gobind Chunder, 841
 Uma Sundari v Hindu, 1080
 Umabai v Amritrao, 766
 Umabai v Bhanu Balwant, 454, 495
 Umabai v Vithal, 455, 498
 Umadi v Sri Raja Velugoti, 822, 829
 Umakanta v Dina Nath, 185
 Umamaheswara v Singaperumal, 206
 Umamoyee v Jatan Bewa, 717
 Uman Kunwari v Jarbandhan, 1101
 Umapati v Shekh Masitulla, 945 950
 Umasasi v Akrur, 248
 Umasundari v Bindu, 151, 441
 Umatul v Kulsoom, 129 130
 Umatul Medhi v Kulsoom, 378
 Umbica Churn v Bengal S & W Co., 619, 620 621
 Umda v Nama, 969
 Umda Begam v Muhammad, 486
 Umed v. Goman Bhai, 206
 Umed v Jas Ram, 227, 243
 Umed v Pir Saheb, 488
 Umed Ali v Salima Bibi, 1105
 Umed Khan v Daulat Ram, 105
 Umed Mal v Chand Mal, 387, 388, 478
 Umed Singh v Sobhag Mal, 1260
 Umedmal v Srinath, 169, 244
 Umersey v Shamji, 1263
 Umesh Chunder v Fatima, 179
 Umesh v Hemanga, 463, 982
 Umesh Chandra v. Bibhuti, 147.
 Umesh Chandra Kar, *In the matter of* 293
 Umesh Chunder v Raj Bullabh, 233, 785
 Umesh Chunder v. Zahur Fatima, 242, 983, 984
 Umeshananda v Mohendra, 177
 Umeshchandra v Hamanga, 870
 Umeshchandra v Kunjilal, 815
 Ummatha v Cheria, 53, 54, 55
 Umrao Beg v Mukhtar Beg, 712
 Umrao Begum v Irshad Husain, 366
 Umrao Chand v Bunderban, 7, 1355
 Umrao Singh v Har Prasad, 298
 Umrao Singh v Hardeo, 122
 Umri v Shah Mohammed, 1101
 Uncovenanted Service Bank v Abdul Bari, 246
 Union Bank of London v Manby, 611
 United States of America v Wagner, 282, 283
 United Telephone Co v Donohoe, 632
 Universities of Oxford and Cambridge v George Gill and Sons, 449, 456
 Unni v Pocker, 849
 Unni Koya v Umma, 769
 Upadhya v Persadh Singh, 7, 135
 Upendra v Bisweswar, 143, 144
 Upendra v Daksha, 909
 Upendra v Janaki Nath, 189, 549
 Upendra v Tara, 502
 Upendra Kumar v Sham Lal, 861 863
 Upendra Lal v Girindra Nath, 1114
 Upendra Nath v Bhupendra Nath, 1060.
 Upendra Nath v Bindeshri, 1357
 Upendra Nath v Dutt, 492
 Upendra Nath v Het Lal, 1290
 Upendranath v Kusum 68, 177
 Upmann v Forester, 144
 Usafah v Faizullahbai, 1008
 Usil v Hales, 2
 Uthuman v Nania, 128 1103
 Uttam Chand v Mst Thakur, 559
 Uttupura v Emperor, 391
 Uzir v Haradeb Das, 222
 Uzir Ali v Savai, 1106

V

- V E. A. Annamalai v V E. A. R. Anna
 malai, 1281
 V E. A. R. M. Firm v Maung Ba
 Kyin, 789
 V E. R. M. Firm v Maung Po Kyone,
 790
 V R. M. Raman Chatterjee v Bank of
 Chettinad, 1332
 Vadapalli v Dronamraju, 784
 Vadapuratti v Vallabha, 82
 Vaddat v Pulchand, 1144
 Vadlamudi v Venkataseshayya, 309
 Vaghoji v Camaji, 1340, 1341, 1345
 Vaidinadasamy Aiyar v Somasundram
 Pillai, 266, 696, 770
 Vaidyanatha v Egga, 235
 Vaidyanatha v. Swaminatha, 296, 303
 Vaiguntathammal v. Valliamman, 595
 Vaikunt v Manjunath, 824
 Vaishno v Hemraj, 1108.
 Vaishno Das v. Tirath Das, 763
 Vaithalingam v. Kandaswami, 550
 Vaithilinga v Sadasiva, 472, 475
 Vaithilinga v Somasundaram, 361
 Vaithilingam v Kandaswami, 1099
 Vaithinatha v Kuppu, 1110
 Vaithianatha v Vaithalinga, 1259
 Vakatchand v Advocate General, 472
 Vakil of Azimgarh, *In the matter of*,
 1336
 Vakil of the High Court, *In the matter*
of (40 Mad 69), 1336
 Vakil, *In re*, [(128) A C 820], 1336
 Vakil, *In re*, [(1926), 49 Mad 523], 1336
 Valeswara v Muthukrishna, 76
 Valia v Anujani, 223
 Valia Honi v Marutha Veera, 603
 Vallabha v Madusudanam, 23
 Vallabhbhai v. Chhotalal, 130, 434
 Vallabhdas v Pranshankar, 581
 Valli v Corporation of Madras, 31
 Valli v Mahomed, 431
 Vallubhan v Panguini, 810
 Valluru v Kannamma, 562.
 Vaman v Malbari, 1155
 Vaman v Municipality of Sholapur, 462
 Vamanacharya v Govind, 9, 325
 Vanichand v Lakhmichand, 1048
 Varada v Venkataratnam, 270, 419
 Varada Pillai v Thillai, 360
 Varadiah v Narasimbulu, 501
 Varajlal v Kastur, 318
 Varajlal v Ramdat, 331, 448, 449, 456,
 494, 498
 Varajlal v Shomeshwar, 894
 Varanna v Gopaladasaya, 69
 Varathayyanar v Krishnasami, 55
 Vartharaja v Sunkara, 68
 Vasi Reddy v Secretary of State, 300,
 363, 1127
 Vassanji v Esmailbhai, 466
 Vasudev v Bhavan, 147, 148
 Vasudev v Damodar, 342
 Vasudev v Flnath, 786, 789
 Vasudev v Kuleadi, 457
 Vasudev v Vamanji, 26
 Vasudev v Vishnu, 700.
 Vasudeta v Narayana, 413, 772
 Vasudeta v Shadagopa, 1134
 Vasudeta Samier, *In re*, 1357
 Vathilinga v Kaliaperumal, 131
 Vatsalabai v Sambhaji, 870
 Vatsalabai v Vasudev, 376, 383
 Ved v Wagle & Co, 580
 Vedapuratti v Vallabha, 992
 Vedavijaya v Madura Hindu Sabha
 Nidhi Co, 173, 795, 1000
 Veerabadran v Nataraja, 648, 914
 Veerabhadra v Vythinathaswamy, 531
 Veeradram v Nataraja, 912
 Veerama Channeni v Soma, 462
 Veerana v Muthukumara, 56
 Veerappa v Ponnayya, 698
 Veerappa v Ramasami, 128, 155, 157,
 840
 Veerappa v Sundaresa, 569
 Veerappa v Tindal, 475, 868
 Veeraraghava v Muga Sait, 95, 165
 Veeraraghavachariar v Advocate Gene
 ral, 300, 302
 Veeraraghava v Subba, 878
 Veerarasayan v Ayya Kutti, 342
 Veerasakharaju v Papiash, 203
 Veerchand v B B & C I Ry, 225
 Velappa v Chidambara, 452, 469
 Velayuda v Sundara, 76
 Velayudam v Arunachala, 127, 339
 Velchand v Bourcier, 226
 Velji v Bharmal, 780
 Velji Bhimsey & Co v. Bachoo, 1357,
 1367

Vellasawmy Servai v L Sivaraman
Servai 351
Vellayan v Jothi 867
Velli v Moidin 20
Velhappa v Subrahmanyam 133
Velhappa Chettiar v Govinda Dass 1339
Vellyappa v Vellappa 684
Velu v Arumugam 782
Velu v Ghos 144
Velu v Krishnasami 171
Vemuri v Raja Varlagadda 723
Vengamuthu v Pandaveswara 31
Vengapayyan v Katimpinakai 177
Vengu Naidu v Deputy Collector 435
Venkamma v Parthasarathi 173
Venkamma v Rangrao 1146
Venkanna v Parasuram 19 637
Venkapa v Baslingappa 493
Venkat v Kunjappa 984
Venkata v Alakarajamba 945
Venkata v Anantha Chari r 1106
Venkata v Andavoli 38 61
Venkata v Bhasalyal arlu 17 955 1073
Venkata v Dorasami 26 728
Venkata v Cunneswara 860
Venkata v Koran 696
Venkata v Krishnasami 105 115 481
Venkata v Menda 1092
Venkata v Ranga 489
Venkata v Sama 809
Venkata v Thiagaraya 1013
Venkata v Venkatarama 7 11 35 38
135
Venkata Krishnama v Krishna Rao 184
Venkata Narasimha v Court of Wards
369
Venkata Reddi v Yellappa Reddi 232
Venkata Sa Barod v Malsudan Das
130
Venkata Subba v Sesha Aiyar 1050
Venkata Subbarayudu v Sri Rajah
Krishna 1150 1358
Venkatachala v Rangiah 897 1985
Venkatachala Reddi v Venkatarama
Reddi 158
Venkatachalam v Ajamperumal 76
Venkatachalam v Malalakshamma 79
Venkatachalam v Ramaswami 190 427,
7 0 881
Venkatachallam v Veerappa 738
Venkatachalapat v Subbarayudu 31
Venkatachalapati v Kameshvaramma
1095

Venkatachalapati v Krishna 41
Venkatachalapati v Venkatappaya,
89 174
Venkatachalapati v Nanjappa 1039
Venkatachella v Ranga, 1109
Venkatacharyulu v Yesoba 437
Venkatachellamya v Nulkanta 799
Venkatakrishna v Krishna 860 870
Venkatakrishna v Shrinivasachariar, 467
Venkatalakshamma v Seshagiri, 190
869 881
Venkatanarayana v Puvvada 727
Venkatanarasimha v Achemmah 964
Venkatanarasimha v Ippaimmah 88
Venkatanarasimha v Subba Rao 299,
302
Venkatanarasimha v Surana 20
Venkatanarasimha v Suryanarayana
594
Venkatanarsammah v Ramiah 777
Venkatanarasu v Kotayya 348 1191
Venkatanarayana v Subbammal 14 69
852
Venkatappa v Jalayya 245 249
Venkatappa v Thumma 373 903
Venkataraghavamma v Sugarayya 794
Venkataraju v Ramanamma 80
Venkatarama v Govindrajulu 413
Venkatarama v Nataraja 600
Venkatarama v Senthivelu 206
Venkatarama v The South Indian Bank
Limited 269
Venkatarama v Venkata 484
Venkataramana v Kasturiranga 306
Venkataramana v Rangaswami 981
Venkataramana Iyer v Gompertz 984
Venkataramanachariar v Meenatchi
sundaramaier 169
Venkatarami v Raja of Gadval 289
Venkataranga v Krishnama 312
Venkataranga v Narasimha 349 353
Venkatarangyan v Arunasami 198
Venkataratanam v Secretary of State,
1319
Venkataratnam v Ranganayalamma
787
Venkataratnam v Yanamondara 38 87
Venkatarayudu v Chinna 593
Venkatareddi v Adinarayana 320
Venkatatler sarni v Appaswami 357
Venkatasabbiah v Venkata 1043
Venkatasami v Stridavamma 1065
Venkatasami Gurusami v Channasappa
809

- Venkatasami Naik v Sivani Mudali, 156
 Venkatasomeswara Rao v. Lakshmana swami, 949
 Venkatasubba v Manickammal, 171
 Venkatasubba v Vigneswaradu, 785
 Venkatasubba Rao v Vigneswaradu, 73
 Venkatasubblamma v Ramanadhayya, 1095
 Venkatasubbaraya v Zamindar of Karvetinagar, 827 828
 Venkatasubbayer v Krishnamurthy, 599
 Venkatasubbiah v Lakshminarasimham 586
 Venkatasubbiah v Venkata Seshaya, 232 772 775
 Venkatasubbiah v Venkatasubblamma, 328
 Venkataswami v Kotilingam, 697
 Venkatesa v Ramasami, 564
 Venkatesh Oil Mills v Velmahomed, 477
 Venkatesha v Ramaya, 295.
 Venkatesha v Vitla, 820
 Venkateswara, *In re*, 7
 Venkateswara v Shekari, 367
 Venkateswarlu v Lingayya, 322
 Venkatraman v Mahableshwar, 799, 800
 Venkatrao v Khimji, 1340
 Venkatta Reddi v Yellappa Chetty, 772, 1042
 Venkattrav v Madhavray, 283
 Venkayya v Narasamma, 64
 Venkayya v Raghava, 195
 Venkayya v Suramma, 68
 Venkiteswarayyan v Aswatha 775
 Venkobachari v Radhabayamma, 63 322
 Venku v Mahalinga 58
 Venkuta v Veena, 1154
 Venkubai v Lakshman 387, 388
 Venubai v Damodar, 183
 Venugopal v Venkatasubbiah, 778 785
 Venugopalachariar v Chinnulal 591, 1144
 Vertannes v Robinson, 41
 Veyindramuthu v Maya Nadan, 179, 180 181 182 183 848
 Vibudhapriya v Yusuf, 260, 262, 774
 Vichuvayyengar v Seshavayyengar, 441
 Victoria Mills Co Ltd v Brij Mohan Lal 575, 576
 Vidi v Jai, 1123
 Vidhyapurna v Vidhanidhi 1055
 Vidyananti v Jai Dial, 1123
 Vigneswara v Bapayya, 1020
 Vijaya v Secretary of State, 273
 Vijaya v Venkatasubba, 955
 Vijayasing v Shivapirao, 875
 Vijendra v Sudhundra, 967, 969
 Vilakathala v Vajali, 436
 Vinayak, v Dattatrya, 48, 57, 1014
 Vinayak, v Krishnarao, 342
 Vinayak Narayan, *In re*, 839
 Vinayakrao v Narotam, 620
 Vinayakrao v Deirao, 814
 Vir Singh v Bhola Singh, 573
 Vir Singh v Tirath Ram, 368
 Virabhadrapa v Chinnamma, 655, 657
 Virabhadrauna v Mahalakshamma, 146
 Viranna v Sattiraju, 813
 Viraragava v Varada, 266
 Viraraghava v Subbalka 695
 Viraraghava v Venkata 179 801
 Virarama v Annasami, 194
 Virchand v Kondu, 476 985
 Viruban Dass v Biseswar Lal 400 812
 Virupaksha v Ranganayak 1033
 Virupalshappa v Shidappa 953, 954 955
 Visalatchi v Sivasankara, 195
 Viscount Gort v Rowney, 145 451, 456
 Vishnu v Ganesh, 642
 Vishnu v Krishnarao, 124, 125
 Vishnu v Ragho 246
 Vishnu v Ramchandra, 903
 Vishnu v Ramling, 44 58
 Vishnu v Rampratab 386
 Vishnu v Yusuff, 240
 Vishvambhar v Vasudev, 385
 Vishvanath v Dhondappa 337
 Vishvanath v Pandharinath, 248
 Vishvanath v Ramhat, 306 389
 Vishvanath v Virchand, 259
 Vishwambhar *In re*, 367 368
 Vishwanath v Kondapi 32
 Vishwanath v Lallu 159
 Vishwanathan v Somasundaram, 729 915
 Vishwas v Balchandra, 1285, 1289
 Visnu v Dattu 601
 Visvanadhan v Arunachelam, 767
 Visvanatha v Somasundaram, 914
 Visvanathan v Pamanathan, 442, 443

Viswanadha Reddi v Keymer 91
 Viswanathan v Ma Aye 978
 Visweswara v Nair, 563
 Vithal v Balakrishna 376
 Vithal v Mahadev 714 716
 Vithal v Saktharam 200
 Vithal v Sitabau 72
 Vithal v Vithojirav 842
 Vithaldas v Dattaram 936
 Vithaldas v Hansraj 937
 Vithaldas v Sulraya 769
 Vithaldas v The Hyderabad Spinning
 and Weaving Co Ltd 576
 Vithalrao v Vaghaji 10
 Vithelunga v Cundasawmy 1345
 Vithilinga v Board of Control 1062
 Vithoba v Mahadev 234
 Vithu v Bhuma 475 870
 Vithu v Ganesh 169
 Vithu v Narayan 489
 Volkart v Sabju 488
 Von Hellfeld v Pechnitz 930
 Vora v Japan Trading Co, 970
 Vora Isabai v Daudbhai 377
 Vrajlal v Venkataswami, 803
 Vulcan Iron Works v Bishumbur 1048
 Vyankat v Onkar 73 491
 Vyankatesh v Krishna, 85
 Vyankatesh v Pamchandra 897
 Vyankatesh v Saktharam 79
 Vyankatesh Oil Mill v Velmahomed 930
 Vyavan v Srinath 577
 Vythilinga v Temple Committee 300
 301
 Vythilinga v Vijayathan mal 60

W

Wadlawa v Partab 749
 Wadeer v E I Co 619
 Waghela v Masludin 1145
 Wagstaff v Watson 17
 Wahid v Safat, 649
 Wahiullah v Kanbaya Lal 563
 Wahid un nissa v Girdhari 823
 Wahid un nissa v Gobardhan 984
 Wahid un nissa v Zamin 30
 Wahidunnissa v Kundan Lal 12
 Wajid Ali v Puran Singh 856 863
 Wai v Hira 80
 Wainat v Iamlal 860

Wali Mahomed v Ishak Ali, 506 541,
 912
 Wali Mohammad v Mahlu 865
 Wali Mohammad v Mohammad Bakhsh,
 331 1108
 Wali Muhammad v Bahawal Bakhsh,
 1280
 Wali Muhammad v Barkurdar, 467
 Waliullah v Muhammad, 643
 Waliyan v Binko Behari 916
 Walji v Fbji, 1275
 Walker v Clements, 577
 Walker v Sur 461 46
 Wall v Howard 1351 1354
 Wallace v Jefferson, 619 623
 Wallace v Wallace 133
 Wallingford v The Mutual Society 531
 Walsham v Stainion 619
 Walsingham's case 527
 Walter v Steinkopff 143
 Walters v Green 450, 456
 Waman v Balu 31
 Waman v Hari 58 1143
 Wana v Natu 691
 Wansborough Paper Co v Laughland
 90
 Ward v Marshal 619
 Waryam Singh v Harnam Singh 1101
 Wasappa v Secretary of State, 33
 Wasif Ali v Bernavni Bank, 201
 Waterhouse v Barker 627
 Watkins v Dhunnoo Baboo 943
 Watkins v Laxminarayan 1343
 Watkins v Mahomed 413
 Watkins v Scottish Imperial Insurance,
 Co 122
 Watson v Aga Mehmed 919
 Watson v Collector of Rajshahye 79 84,
 884 885 888
 Watson v Cave [No 1 (1881) 17 Ch D
 19] 466
 Watson v Dhonendra 50
 Watson v Lloyd 18 22
 Watson & Co v Ramchand Dutt 743
 Wavell v Mitchell 981
 Waynes Werthy Co v Padford & Co,
 534
 Wazir Chand v Nathu Pam 1073
 Wazir Khan v Kale Khan 683
 Wazir un nissa v Hahi Bakhsh 960
 Weatherall v Eastern Mortgage &
 Agency Co 1062
 Webb v Macpherson 1126

Webb v Stenton 754
 Webster v Webster 220
 Weinberger v Inghe 533
 Weir & Co v McVicar & Co 761 938
 Weld v Hrnby 292
 Weld & Co v Sher Mahomed 1343
 Weldon v Neal 545 547 548
 Welsbach Incandescent Gas Light Co
 v New Sunlight Incandescent Co
 613 615
 Wentworth v Bullen 898
 West End Watch Co v Berna Watch
 Co 641
 West End Central Gold Mining Co
 v Rex 524 525
 Westgate v Crowe 147
 Weston v Peary Mohan Dass 1337
 Weymouth v Rich 542
 Wheeler v Le Marchant 618 619
 White v Spafford & Co 628
 Whitham v Whitham 614
 Whitney v Moignard 526 527 543
 Whitworth *In re* 619
 Whitworth v Darbshire 503
 Whyte v Ahrens 534
 Wigram v Cox Sons Buckley & Co
 763 933
 Wild v Southwood 761
 Wilding v Sanderson 16 324
 Willesford v Watson 1287
 Williams v Prince of Wales Ass Co
 695
 Williams v Ramsdale 535
 Williams v Wilcox 528
 Williamson v I & N W Ry Co 528
 Willmot v Gardner 139
 Willmott v Barber 141 143
 Wills v Lovick 538
 Wilson v Clurel 466
 Wilson v Nathmull 277 279
 Winter v Attorney General 32
 Winter v Round 120
 Winter v Way 112 117
 Winterbottom v Lord Derby 200
 Wisakli Ram v Alval 1101 1103
 Wise v Jugbundoo 1084
 Wittman v Oppenheim 143
 Woolley v N L R Co 619
 Wmda Khanum v Raj Roop 805
 Womes Clander v Clundee Churn 330
 Wood v Cox 527
 Wood v Durham 527
 Wood v Clark 527

Woolley v N L R Co 619
 Woona Churn v Teal 103
 Woomatara v Unnopoorua 51 54
 Woomeh v Barada 48 69
 Woopendra v Nobin 589
 Worcester City and Country Banking Co
 v Furbank Pauling & Co 930, 932
 Worwar Commercial Bank v Raja
 Maroop 211
 Worraher v Pryer 680
 Wright *re* Burke v North 632 634

Y

Yad Ram v Sundar Singl 384 813 818
 Yad Ram v Umrao Singh 981
 Yagammal v Arulayee 593
 Yakkanath v Manal kat 300
 Yakub v Mahadev 731
 Yakub Ali v Durga 237
 Yakub Fbrahim v Bai Rahimatbai 559
 Yamiye Kweku v Annor Adjaye 1262
 Yaramati v Chundru 245
 Yashvant v DeSouza 1138
 Yastindra Nath v Hari 375
 Yegnarayanamurthi v Balakrishnayya
 876
 Yellappa v Fakira 1108
 Yellappa v Ramchandra 643 694
 Yella Reddi v Syed Muhammad Ali
 696
 Yeo Eng v Beng Seng & Co 684
 Yeshvadabai v Janardhan 1340
 Yeshwant v Genajee 1080
 Yeshwant v Govind 41
 Yeshwant v Shankar 1066 1067 1063
 Yeshwant v Vitlal 486 488
 Yesu Ramji v Balkrishna 3
 Yogammal v Arulayee 583
 Yorkshire Provident Co v Gilbert 444
 535
 Yosef v Moses 170
 Young v Wright 17
 Yule & Co v Mahmood Hossain 1139
 Yusuf v Naza 1154
 Yusuf Ali v Kasim Ali 99
 Yusuf v Abdullahbai (56 Bom 231)
 374
 Yusuf v Abdullahbai 103.
 Yusuf v Abdullahbai (55 Bom. 388)
 435 1141

- Viswanadha Reddy v Keyner 91
 Viswanathan v Va Aye 978
 Visweswara v Nair 563
 Vithal v Balkrishna 376
 Vithal v Mahalev 714 716
 Vithal v Sakharam 209
 Vithal v Satara 72
 Vithal v Vithojrao 842
 Vithaldas v Dattaram 956
 Vithaldas v Hansraj 937
 Vithaldas v Subraya 769
 Vithaldas v Th Hyderabad Spinning
 and Weaving Co Ltd 576
 Vithalrao v Vagholi 105
 Vithelunga v Cundasswamy 1345
 Vithulunga v Board of Control 1062
 Vithoba v Mahadev 331
 Vithu v Bhuma 475 80
 Vithu v Ganesh 162
 Vithu v Narayan 483
 Volkart v Sabju 488
 Von Heilfeld v Rechnitzer 930
 Vora v Japan Trading Co 970
 Vora Isabaili v Daudbhai 377
 Vrajlal v Venkataswami 803
 Vulcan Iron Works v Bishumbur 1048
 Vyankat v Onkar 73 491
 Vyankatesh v Krishna 85
 Vyankatesh v Pamchandra 897
 Vyankatesh v Sakharam 79
 Vyankatesh O I Mill v Velmahomed, 930
 Vyraian v Srinath 577
 Vythulunga v Temple Committee 300
 301
 Vythulnga v Vijayathan mal 65
- W**
- Wadhawa v Partab 549
 Wadeer v I I Co 619
 Waghela v Mastudm 1145
 Wagstaff v Watson 17
 Wahid v Safat 645
 Waliullah v Hanfaya Lal 563
 Walid un nissa v Girdhari 825
 Wali un nissa v Gobardhan 984
 Walid un nissa v Zanin 35
 Walid un nissa v Kundan Lal 12
 Wali Ali v Iuran Singh 856 863
 Wa v Hra 80
 Walaat v Iamul 860
 Wali Mahomed v Isfak Ali 506 541,
 912
 Wali M hammal v Mablur 865
 Wali M hammad v Mohammad Buksh
 733 1108
 Wali Muhammad v Bahawal Bakish
 1285
 Wali Muhammad v Barkurdar 467
 Waliullah v Muhammad 613
 Walian v Banke Behari 916
 Walji v Fbjr 1275
 Walker v Clements 577
 Walker v Sur 464 465
 Wall v Howard 1351 1354
 Wallace v Jefferson 619 623
 Wallace v Wallace 133
 Wallingford v The Mutual Society 531
 Walsham v Stannion 619
 Walsingham case 527
 Walter v Steinkopff 143
 Walters v Green 450, 456
 Waman v Balu 31
 Waman v Hari 58 1145
 Wana v Natu 691
 Wansborough Paper Co v Laughland
 95
 Ward v Marshal 619
 Waryam Singh v Harnam Singh 1101
 Wasappa v Secretary of State 33
 Wasif Ali v Kernaani Bank, 201
 Waterhouse v Barker 627
 Watkins v Dhunoo Baboo 943
 Watkins v Laxminarayan 1343
 Watkins v Mahomed 413
 Watkins v Scottish Imperial Insurance
 Co 122
 Watson v Aga Mebedee 919
 Watson v Collector of Rajshahye 79 84
 884 885 888
 Watson v Cave [No 1 (1881) 17 Ch D
 19] 466
 Watson v Dbonendra 55
 Watson v Lloyd 18 276
 Watson & Co v Ramchand Dutt 743
 Wavell v Mitchell 381
 Waynes Merthy Co v Radford & Co,
 534
 Wazir Chand v Nathu Ram 1073
 Wazir Khan v Kale Khan 683
 Wazir un nissa v Hali Balish 965
 Weatherall v Eastern Mortgage &
 Agency Co 1062
 Webb v Macpherson 1126

Webb v Stenton, 754
 Webster v Webster 220
 Wemberger v Inglis 573
 Weir & Co v McVicar & Co, 764 938
 Weld v Hornby, 292
 Weld & Co v Sher Mahomed 1343
 Weldon v Neal 545 547 548
 Welsbach Incandescent Gas Light Co
 v New Sunlight Incandescent Co
 613 615
 Wentworth v Bullen 898
 West End Watch Co v Berna Watch
 Co 641
 West Rand Central Gold Mining Co
 v Rex 524 525
 Westgate v Crowe 147
 Weston v Pearcy Mohan Dass 1337
 Weymouth v Rich 542
 Wheeler v Le Marchant 618 619
 White v Spafford & Co 628
 Whitham v Whitham 614
 Whitney v Moignard, 526 527, 543
 Whitworth, *In re*, 619
 Whitworth v Darbshire, 503
 Whyte v Ahrens 534
 Wigram v Cox, Sons, Buckley & Co,
 763 933
 Wild v Southwood 761
 Wilding v Sanderson, 16 324
 Willesford v Watson 1287
 Williams v Prince of Wales Ass Co
 620
 Williams v Ramsdale 535
 Williams v Wilcox 528
 Williamson v L & N W Ry Co 528
 Willmot v Gardner 139
 Willmott v Barber 141 143
 Wills v Lovick 538
 Wilson v Church 466
 Wilson v Nathmull, 277, 279
 Winter v Attorney General 32
 Winter v Round 120
 Winter v Way 112 117
 Winterbottom v Lord Derby 290
 Wisakhi Ram v Alwal 1101 1102
 Wise v Jugbundoo, 1084
 Wittman v Oppenheim 143
 Woolley v N I R Co 619
 Womda Khanum v Raj Roop 808
 Womes Chander v Chundee Churn 330
 Wood v Cox 527
 Wood v Durham 527 547
 Woolley v Clark 5, 5

Woolley v N I R Co, 619
 Woona Churn v Teil, 103
 Woomatara v Unnopoorra 51, 54
 Woomesh v Barada, 48 62
 Woopendra v Nobin 589
 Worcester City and Country Banking Co,
 v Iarbank, Pauling & Co, 930, 932
 Worur Commercial Bank v Raja
 Maroop, 211
 Worraker v Pryer, 680
 Wright, *re* Harke v North, 632 634

Y

Yad Ram v Sundar Singh 384, 813, 818
 Yad Ram v Umrao Singh 981
 Yagammal v Arulayee, 593
 Yakkannath v Manakkat, 330
 Yakub v Mahadev, 731
 Yakub Ali v Durga 237
 Yakub Ebrahim v Bai Rahimatbai 559
 Yamiko Kweku v Annor Aljaye, 1262
 Yaramati v Chundru 245
 Yashwant v DeSouza 1138
 Yatindra Nath v Hari 375
 Yegnarayanamurthi v Balakrishnayya,
 876
 Yellappa v Fakira 1108
 Yellappa v Ramchandra 243 694
 Yella Reddi v Syed Muhammad Ali
 696
 Yeo Eng v Beng Seng & Co, 684
 Yeshvadabai v Janardhan, 1340
 Yeshwant v Genajee 1080
 Yeshwant v Govind 241
 Yeshwant v Shankar 1056 1062 1063
 Yeshwant v Vithal 486 488
 Yesu Ramji v Balkrishna, 3
 Yogammal v Arulayee 583
 Yorkshire Provident Co v Gilbert, 444
 535
 Yosef v Moses 170
 Young v Wright, 17
 Yule & Co v Mahomed Hossain, 1139
 Yusuf v Naza 1154
 Yusuf Ali v Kasim Ali 992
 Yusuf v Abdullahbai (56 Bom 231),
 324
 Yusuf v Abdulabbay, 1035
 Yusuf v Abdulabbay (55 Bom 368)
 438, 1144

Yusuf v Abdullahoy (55 Bom 372),
324, 438, 1144
Yusuf v Badsha, 763, 934
Yusuf v Darji, 63
Yusuf Beg v The Board of Foreign
Mission of the Presbyterian Church,
927
Yusuf Khan v Riasat Ali, 1268, 1277
Yusuf Sahib v Durgi, 322.
Yusuf ud Din v Queen Empress, 4

Z

Zafaryag Ali v Bakhtawar Singh, 305,
464
Zaharia v Debia, 39
Zahid Husam v Mohammad Ismail,
355, 362
Zahir ul Said v Lachmi Narayan, 324
Zahirulsaid v Lachmi Narayan, 670
Zahrah v Bhugwan, 1107
Zahur Ahmad v Taslim un nissa, 1277,
1289
Zainah Bibi v Rohla, 863, 874

Zain ul Abdin v. Muhammed Asghar Ali,
244, 418, 802
Zair Hussain Khan v. Khurshed Jan,
102, 319
Zamindar of Ettiyapuram v. Chudam-
baram, 127, 163, 704
Zamindar of Pittapuram v. Proprietor
of Kolanki, 48
Zamindar of Tuni v. Bennayya, 10, 543
Zamindar of Vellur v Adinarayadu, 154
Zamindari of Mandasa v Ryots of
Mandasa, 373
Zamir v Daulat Ram, 683
Zamiran v Fatch Ali, 108, 381, 389
Zamorin of Calicut v Narayanan, 54
Zarina v Wazuddi, 945, 958
Zemindar of Karvetnagar v Trustee of
Tirumalai, 238
Zendoolal v Kishorilal, 605
Zierenberg v Labouchere, 530, 532, 533,
534
Zinat un nissa v Rajan, 55
Zipru v Hari, 849
Zohra Bibi v Zobeida, 1067, 1100
Zulekabat v Ebrahim, 1341

COMPARATIVE TABLE OF THE SECTIONS OF THE OLD AND THE NEW CODE.

| C P Code, 1882 | C P Code, 1908 | C P Code, 1882 | C P Code, 1908 |
|-------------------------|--------------------------------------|-------------------|--------------------------|
| 1 | S 1 | 33 | O 1, r 10 (4) |
| 2 | S 2 | 34 | O 1, r 13 |
| 3 | Ss 154, 156, 157, 158 | 35 | O 1, r 12 |
| 4 | S 4 | 36 | O 3, r 1 |
| 4A | S 5 | 37 | O 3, r 2 |
| 5 | S 7 | 38 | O 3, r 3 |
| 6, paras (c) and (d) | Omitted | 39 | O 3, r 4 |
| 6, last para | S 6 | 40 | O 3, r 5 |
| 7 | Cf S 4 | 41 | O 3, r 6 |
| 8 | S 8 | 42 | O 2, r 1 |
| 9 | Omitted | 43 | O 2, r 2 |
| 10 | Omitted | 44 | O 2, rr 4, 5 |
| 11 | S 9 | 45 | O 2, rr 3 6 |
| 12 | S 10 | 46 | Cf O 2, rr 6 7 |
| 13 | S 11 | 47 | Cf O 2, rr 6, 7 |
| Expln VI | S 14 | 48 | S 26, O 4 r 1 |
| 14 | S 13 | 49 | Cf S 137 |
| 15 | S 15 | 50 | O 7, rr 1, 2, 4, 5, 6 |
| 16 | S 16 | 51 | O 6, rr 14 15 (1) |
| 16A | S 18 | 52 | O 6, r 15 (2) (3) |
| 17 | S 20 | 53 | O 6 r 17 cf O 7, r 11 |
| 18 | S 19 | 54 | O 7 r 11 cf O 6, r 18 |
| 19 | S 17 | 55 | O 7 r 12 |
| 20 | Omitted | 56 | O 7 r 13 |
| 21 | Omitted | 57 | O 7, r 10 |
| 22 | Ss 22, 23 (1) | 58 | O 7, r 9 |
| 23 | Ss 22, 23 (2) | 58 last para | O 4 r 2 |
| 24, paras 1 & 3 | Ss 22, 23 (3) | 59 | O 7 r 14 |
| 24, para 2 | Omitted | 60 | O 7, r 15 |
| 25 | S 24 | 61 | O 7, r 16 |
| 26 | O 1, rr 1, 4 (a) | 62 | O 7 r 17 |
| 27 | O 1, r 10 (1) | 63 | O 7, r 18 |
| 28 | O 1, rr 3 4 (b) | 64 | ~ 27, O 5 r 1 |
| 29 | O 1, r 6 | 65 | O 5, r 2 |
| 30 | O 1, r 8 (1) | 66 | O 5, r 3 |
| 31 | O 1, r 9 | 67 | O 5, r 4 |
| 32 | O 1, rr 8 (2), 10 (2) (3) (3), 11 | | |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Cole, 1882 | C P Cole 1908 | C P Code, 1882 | C P Code 1908 |
|--------------------------------|-----------------------------|------------------------------|----------------------|
| 150 | O 14 r 6 | 191 | O 18 r 15 |
| 151 | O 14 r 7 | 192 | O 18, r 16 |
| 152 | O 15 r 1 | 193 | O 18 r 17 |
| 153 | O 15 r 2 | 194 | O 19 r 1 |
| 154 | O 15 r 3 | 195 | O 19 r 2 |
| 155 | O 15 r 4 | 196 | O 19, r 3 |
| 156 | O 17, r 1 | 197 | S 139 |
| 157 | O 17 r 2 | 198 | S 33, O 20, r 1 |
| 158 | O 17 r 3 | 199 | O 20, r 2 |
| 159 | O 16 r 1 | 200 | } Cf S 137 |
| 160 | O 16 r 2 | 201 | |
| 161 | O 16, r 3 | 202 | O 20, r 2 |
| 162 | O 16, r 4 | 203 | O 20, r 4 |
| 163 | O 16, r 5 | 204 | O 20 r 5 |
| 164 | O 16 r 6 | 205 | O 20, r 7 |
| 165 | O 16 r 7 | 206, first and second | O 20, r 6 |
| 166 | O 16, r 8 | paras | |
| 167 | O 16, r 9 | 206 third para | S 152 |
| 168 | O 16 r 10 | 207 | O 20 r 9 |
| 169 | O 16 r 11 | 208 | O 20 r 10 |
| 170 | O 16, r 12 | 209 | S 34 |
| 171 | O 16, r 14 | 210 | O 20 r 11 |
| 172 | O 16 r 15 | 211 | } S 2 (12) O 20 r 12 |
| 173 | O 16 r 16 | 212 | |
| 174 } 175 } | O 16, rr 10 to 13 17, 18 | 213 | O 20 r 13 |
| 176 | O 16 r 19 | 214 | O 20 r 14 |
| 177 | O 16 r 20 | 215 | O 20 r 15 |
| 178 | O 16 r 21 | 215A | O 20 r 16 |
| 179 | O 18 rr 1 2 (1) | 216 | O 20 r 19 |
| 180 | O 18 rr 2 (2) (3) 3 | 217 | O 20 r 20 |
| 181 | O 18 r 4 | 218 } 219 } | } Cf S 35 (1) (2) |
| 182 | O 18, r 5 | 220 | |
| 183 | O 18 r 6 | 221 | O 20 r 6 (3) |
| 184 | O 18 r 8 | 222 | Cf S 35 (3) |
| 185 | O 18 r 9 | 223 first para | S 35 |
| 185A first and se cond para | S 138 | 223 second and third para | S 39 |
| 185A third para | O 18 r 7 | 223 fourth para | S 41 |
| 186 | O 18 r 10 | 223 fifth para | O 21 r 4 |
| 187 | O 18 r 11 | 223 sixth para | O 21 r 5 |
| 188 | O 18 r 12 | 224 | O 21 r 6 |
| 189 | O 18 r 13 | 225 | O 21, r 7 |
| 190 | O 18 r 14 | 226 | O 21, r 8 |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Code 1882 | C P Code, 1903 | C P Code, 1882 | C P Code, 1903 |
|-------------------------------|------------------------------|-------------------|-------------------|
| 227 | O 21, r 9 | 262 | O 21, r 34 (5) |
| 228 | S 42 | 263 | O 21, r 35 |
| 229 | S 43 | 264 | O 21, r 36 |
| 229A | S 45 | 265 | S 54 |
| 229B | S 44 | 266 | S 60 |
| 230 first para | O 21 r 10 | 267 | O 21, r 41 |
| 230 second para | O 21, r 21 | 268 | O 21, r 46 |
| 230 third and fourth paras | S 48 | 269 | O 21, r 43 |
| 231 | O 21 r 15 | 270 | O 21, r 51 |
| 232 | O 21 r 16 | 271 | S 62 |
| 233 | S 49 | 272 | O 21, r 52 |
| 234 | S 50 | 273 | O 21 r 53 |
| 235 | O 21 r 11 (2) | 274 | O 21 r 54 |
| 236 | O 21 r 12 | 275 | O 21, r 55 |
| 237 | O 21 r 13 | 276 | S 64 |
| 238 | O 21 r 14 | 277 | O 21 r 56 |
| 239 | O 21 r 26 (1) (2) | 278 | O 21, r 58 |
| 240 | O 21 r 26 (3) | 279 | O 21, r 59 |
| 241 | O 21 r 27 | 280 | O 21, r 60 |
| 242 | O 21 r 28 | 281 | O 21, r 61 |
| 243 | O 21 r 29 | 282 | O 21, r 62 |
| 244 | S 47 | 283 | O 21, r 63 |
| 245 | O 21 r 17 | 284 | O 21 r 64 |
| 245A | S 56 | 285 | S 63 |
| 245B | O 21 r 37 | 286 | O 21 r 65 |
| 246 | O 21 r 18 | 287 | O 21 rr 66, 70 |
| 247 | O 21 r 19 | 288 | Omitted |
| 248 | O 21, r 22 | 289 | O 21 r 67 |
| 249 | O 21, r 23 | 290 | O 21 r 68 |
| 250 | O 21 r 24 (1) | 291 | O 21, r 69 |
| 251 | O 21 rr 24 (2) (3) 25 (1) | 292 | O 21, r 73 |
| 252 | S 52 | 293 | O 21, r 71 |
| 253 | <i>Cf</i> S 145 | 294 | O 21, r 72 |
| 254 | O 21, r 30 | 295 | S 73 |
| 255 | O 21, r 42 | 296 | O 21 r 76 |
| 256 | O 21 r 11 (1) | 297 | O 21 r 77 |
| 257 | O 21 r 1 | 298 | O 21 r 78 |
| 257A | Omitted | 299 | O 21 r 79 (1) |
| 258 | O 21, r 2 | 300 | O 21, r 79 (2) |
| 259 | O 21, r 31 | 301 | O 21 r 79 (3) |
| 260 | O 21, r 32 | 302 | O 21 r 80 |
| 261 | O 21 r 34 (1) to (4) | 303 | O 21 r 81 |
| | | 304 | O 21 r 82 |
| | | 305 | O 21, r 83 |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Code, 1882 | C P Code, 1908 | C P Code, 1882 | C P Code, 1908 |
|-------------------|-----------------------|-------------------|--|
| 306 | O 21, r 84 | 340 | O 21, r 30 (5) |
| 307 | O 21, r 85 | 341 | S 59 |
| 308 | O 21, r 86 | 342 } | |
| 309 | O 21, r 87 | 343 | O 21, r 25 |
| 310 | O 21, r 88 | 344—360A | Repealed by the Pro vincial Insolvency Act, 1907 |
| 310A | O 21, r 89 | | |
| 311 | O 21, r 90 | | |
| 312 | O 21, r 92 | 361 | O 22, r 1 |
| 313 | O 21, r 91 | 362 | O 22, r 2 |
| 314 | O 21, r 92 | 363 | O 22, r 3 (1) |
| 315 | O 21, r 93 | 365 | O 22, r 3 (1) |
| 316 | S 65, O 21, r 94 | 366 | O 22, r 3 (2) |
| 317 | S 66 | 367 | O 22, r 5 |
| 318 | O 21, r 95 | 368 | O 22, r 4 |
| 319 | O 21, r 96 | 369 | O 22, r 7 |
| 320 | Ss 68, 70 and 71 | 370 | O 22, r 8 |
| 321 | The Third Schedule | 371 | O 22, r 9 (1) (2) |
| 322 | | 372 | O 22, r 10 |
| 322A | | 372A | O 22, r 9 (3) |
| 322B | | 373 | O 23, r 1 |
| 322C | | 374 | O 23, r 2 |
| 322D | | 375 | O 23, r 3 |
| 323 | | 375A | O 23, r 4 |
| 324 | | 376 | O 24, r 1 |
| 324A | | 377 | O 24, r 2 |
| 325 | | 378 | O 24, r 3 |
| 325A | | 379 | O 24, r 4 |
| 325B | | 380 | O 25, r 1 (1) (3) |
| 325C | | 381 | O 25, r 2 |
| 326 | S 72 | 382 | O 25, r 1 (2) |
| 327 | S 67 | 383 | O 26, r 1 |
| 328 | O 21, r 97 | 384 | O 26, r 2 |
| 329 | O 21, r 98 | 385 | O 26, r 3 |
| 330 | O 21, r 98 | 386 | S 76 O 26, r 4 |
| 331 | O 21, r 99 | 387 | O 26, r 5 |
| 332 | O 21, rr 100 101, 103 | 388 | O 26, r 6 |
| 333 | O 21, r 102 | 389 | O 26, r 7 |
| 334 | O 21, rr 97, 98 | 390 | O 26, r 8 |
| 335 | O 21, rr 97 99, 103 | 391 | S 78 |
| 336 | S 55 | 392 | O 26, r 9 |
| 337 | O 21, r 38 | 393 | O 26, r 10 |
| 337A | O 21, r 40 | 394 | O 26, r 11 |
| 338 | S 57 | 395 | O 26, r 12 |
| 339 | O 21, r 39 (1) to (4) | 396 | O 26, rr 13, 14 |

Comparative Table of the Sections of the Old and the New Code—contd.

| C P Code, 1882 | C P Code, 1908 | C P Code, 1882 | C P Code, 1908 |
|-------------------------------|--------------------------------|-------------------|-------------------|
| 227 | O 21, r 9 | 262 | O 21, r 34 (5) |
| 228 | S 42 | 263 | O 21, r 35 |
| 229 | S 43 | 264 | O 21, r 36 |
| 229A | S 45 | 265 | S 54 |
| 229B | S 44 | 266 | S 60 |
| 230, first para | O 21, r 10 | 267 | O 21, r 41 |
| 230 second para | O 21, r 21 | 268 | O 21, r 46 |
| 230 third and fourth paras | S 48 | 269 | O 21, r 43 |
| | | 270 | O 21, r 51 |
| 231 | O 21 r 15 | 271 | S 62 |
| 232 | O 21 r 16 | 272 | O 21, r 52 |
| 233 | S 49 | 273 | O 21 r 53 |
| 234 | S 50 | 274 | O 21 r 54 |
| 235 | O 21, r 11 (2) | 275 | O 21, r 55 |
| 236 | O 21, r 12 | 276 | S 61 |
| 237 | O 21 r 13 | 277 | O 21, r 56 |
| 238 | O 21, r 14 | 278 | O 21, r 58 |
| 239 | O 21, r 26 (1) (2) | 279 | O 21, r 59 |
| 240 | O 21, r 26 (3) | 280 | O 21, r 60 |
| 241 | O 21 r 27 | 281 | O 21, r 61 |
| 242 | O 21 r 28 | 282 | O 21, r 62 |
| 243 | O 21, r 29 | 283 | O 21, r 63 |
| 244 | S 47 | 284 | O 21, r 64 |
| 245 | O 21 r 17 | 285 | S 63 |
| 245A | S 56 | 286 | O 21, r 65. |
| 245B | O 21 r 37 | 287 | O 21 rr 66, 70 |
| 246 | O 21, r 18 | 288 | Omitted |
| 247 | O 21, r 19 | 289 | O 21, r 67 |
| 248 | O 21, r 22 | 290 | O 21, r 68 |
| 249 | O 21, r 23 | 291 | O 21, r 69 |
| 250 | O 21, r 24 (1) | 292 | O 21, r 73 |
| 251 | O 21, rr 24 (2), (3) 25 (1) | 293 | O 21, r 71 |
| | | 294 | O 21, r 72 |
| 252 | S 52 | 295 | S 73 |
| 253 | Cf S 145 | 296 | O 21 r 76 |
| 254 | O 21, r 30 | 297 | O 21, r 77 |
| 255 | O 21, r 42 | 298 | O 21, r 78 |
| 256 | O 21, r 11 (1) | 299 | O 21, r 79 (1) |
| 257 | O 21 r 1 | 300 | O 21, r 79 (2) |
| 257A | Omitted | 301 | O 21, r 79 (3) |
| 258 | O 21, r 2 | 302 | O 21, r 80 |
| 259 | O 21, r 31 | 303 | O 21, r 81 |
| 260 | O 21, r 32 | 304 | O 21, r 82 |
| 261 | O 21, r 34 (1) to (4) | 305 | O 21, r 83 |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Code, 1882 | C P Code, 1908 | C P Code, 1882 | C P Code, 1908 |
|-------------------|------------------------|-------------------|--|
| 306 | O 21, r 84 | 340 | O 21, r 39 (5) |
| 307 | O 21, r 85 | 341 | S 59 |
| 308 | O 21, r 86 | 342 } | |
| 309 | O 21, r 87 | 343 | O 21, r 25 |
| 310 | O 21, r 88 | 344—360A | Repealed by the Pro vincial Insolvency Act, 1907 |
| 310A | O 21, r 89 | | |
| 311 | O 21, r 90 | | O 22, r 1 |
| 312 | O 21, r 92 | 361 | O 22, r 2 |
| 313 | O 21, r 91 | 362 | O 22, r 3 (1) |
| 314 | O 21, r 92 | 363 | O 22, r 3 (1) |
| 315 | O 21, r 93 | 365 | O 22, r 3 (2) |
| 316 | S 65, O 21, r 94 | 366 | O 22, r 5 |
| 317 | S 66 | 367 | O 22, r 4 |
| 318 | O 21, r 95 | 368 | O 22, r 7 |
| 319 | O 21, r 96 | 369 | O 22, r 8 |
| 320 | Ss 68, 70 and 71 | 370 | O 22, r 9 (1), (2) |
| 321 | The Third Schedule | 371 | O 22, r 10 |
| 322 | | 372 | O 22, r 9 (3) |
| 322A | | 372A | O 23, r 1 |
| 322B | | 373 | O 23, r 2 |
| 322C | | 374 | O 23, r 3 |
| 322D | | 375 | O 23, r 4 |
| 323 | | 375A | O 24, r 1 |
| 324 | | 376 | O 24, r 2 |
| 324A | | 377 | O 24, r 3 |
| 325 | | 378 | O 24, r 4 |
| 325A | | 379 | O 25, r 1 (1), (3) |
| 325B | | 380 | O 25, r 2 |
| 325C | | 381 | O 25, r 1 (2) |
| 326 | S 72 | 382 | O 26, r 1 |
| 327 | S 67 | 383 | O 26, r 2 |
| 328 | O 21, r 97 | 384 | O 26, r 3 |
| 329 | O 21, r 98 | 385 | S 76 O 26, r 4 |
| 330 | O 21, r 98 | 386 | O 26, r 5 |
| 331 | O 21, r 99 | 387 | O 26, r 6 |
| 332 | O 21, rr 100, 101, 103 | 388 | O 26, r 7 |
| 333 | O 21, r 102 | 389 | O 26, r 8 |
| 334 | O 21, rr 97, 98 | 390 | S 78 |
| 335 | O 21, rr 97, 99, 103 | 391 | O 26, r 9 |
| 336 | S 55 | 392 | O 26, r 10 |
| 337 | O 21, r 38 | 393 | O 26, r 11 |
| 337A | O 21, r 40 | 394 | O 26, r 12 |
| 338 | S 57 | 395 | O 26, rr 13, 14 |
| 339 | O 21, r 39 (1) to (4) | 396 | |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Code 1882 | C P Code, 1903 | C P Code, 1882 | C P Code, 1903 |
|------------------|-----------------------------------|-------------------|------------------------------|
| 397 | O 26 r 15 | 440 | O 32 rr 1, 4 (2) |
| 398 | O 26, r 16 | 441 | O 32, r 5 (1) |
| 399 | O 26, r 17 | 442 | O 32, r 2 |
| 400 | O 26, r 18 | 443 | O 32, rr 3 (1), 4 (2) |
| 401 | O 33, r 1 | 444 | O 32, r 5 (2) |
| 402 | Omitted | 445 | O 32, r 4 (1) |
| 403 | O 33 r 2 | 446 | O 32, r 9 |
| 404 | O 33, r 3 | 447 | O 32, r 8 |
| 405 | O 33 r 5 | 448 | O 32, r 10 (1) |
| 406 | O 33 r 4 | 449 | O 32, r 10 (2) |
| 407 | O 33, r 5 | 450 | O 32 r 12 (1) |
| 408 | O 33, r 6 | 451 | O 32 r 12 (2) (3) |
| 409 | O 33, r 7 | 452 | O 32 r 12 (4) |
| 410 | O 33 r 8 | 453 | O 32 r 12 (5) |
| 411 | O 33, r 10 | 454 | O 32, r 13 |
| 412 | O 33 r 11 | 455 | O 32 r 14 |
| 413 | O 33, r 15 | 456 | O 32, rr 3 (2), (3) 4 (4) |
| 414 | O 33, r 9 | 457 | O 32, r 4 (1) |
| 415 | O 33 r 16 | 458 | O 32, r 11 (1) |
| 416 | S 79, O 27, r 1 | 459 | O 32, r 11 (2) |
| 417 | O 27, r 2 | 460 | Omitted |
| 418 | O 27, r 3 | 461 | O 32, r 6 |
| 419 | O 27, r 4 | 462 | O 32, r 7 |
| 420 | O 27, r 5 | 463 | O 32 r 15 |
| 421 | O 27, r 6 | 464 | O 32 r 16 |
| 422 | O 5 r 27 | 465 | O 28 r 1 |
| 423 | O 27, r 7 | 466 | O 28 r 2 |
| 424 | S 80 | 467 | O 28, r 3 |
| 425 | Omitted [See s 55 sub sec (2)] | 468 | O 5 rr 28, 29 |
| 426 | O 27, r 8 (1) | 470 | S 88 |
| 427 | O 27, r 8 (2) | 471 | O 35, r 1 |
| 428 | S 81 | 472 | O 35 r 2 |
| 429 | S 82 | 473 | O 35 r 4 |
| 430 | S 83 | 474 | O 35, r 5 |
| 431 | S 84 | 475 | O 35, r 6 |
| 432 | S 85 | 476 | O 35, r 3 |
| 433 | S 86 | 477 } 478 } | O 38, r 1 |
| 434 | S 87 | 479 | O 38, r 2 |
| 435 | O 29 r 1 | 480 | O 38 r 3 |
| 436 | O 29 rr 2, 3 | 481 | O 38, r 4 |
| 437 | O 31 r 1 | 482 | Omitted |
| 438 | O 31, r 2 | 483 } | O 38 r 5 |
| 439 | O 31 r 3 | 484 } | |

Comparative Table of the Sections of the Old and the New Code contd

| C P Code, 1882 | C P Code, 1888 | C P Code 1882 | C P Code 1888 |
|-------------------|---------------------|------------------|------------------|
| 485 | O 38 r 6 | 521 | O 30 r 3 |
| 486 | O 38, r 7 | 520 | O 30 r 4 |
| 487 | O 38 r 8 | 531 | O 36 r 5 |
| 488 | O 38 r 9 | 532 | O 37 r 2 |
| 489 | O 38 r 10 | 533 | O 37 r 3 |
| 490 | O 38 r 11 | 534 | O 37 r 4 |
| 491 | S 95 | 535 | O 37, r 5 |
| 492 | O 39 r 1 | 536 | O 37, r 6 |
| 493 | O 39 r 2 | 537 | O 37, r 7 |
| 494 | O 39, r 3 | 538 | O 37, r 8 |
| 495 | O 39, r 5 | 539 | See 92 and 93 |
| 496 | O 39 r 4 | 540 | S 96 |
| 497 | S 95 | 541 | O 41 r 1 |
| 498 | O 39, r 6 | 542 | O 41, r 2 |
| 499 | O 39, r 7 | 543 | O 41 r 3 |
| 500 | O 39, r 8 | 544 | O 41 r 4 |
| 501 | O 39, r 9 | 545 | O 41, r 5 |
| 502 | O 39, r 10 | 546 | O 41, r 6 |
| 503 | O 40, rr 1 to 3 | 547 | O 41, r 7 |
| 504 | O 40 r 5 | 548 | O 41, r 8 |
| 505 | Omitted | 549 | O 41 r 10 |
| 506 | The Second Schedule | 550 | O 41 r 13 |
| 507 | | 551 | O 41, r 11 |
| 508 | | 552 | O 41 r 12 |
| 509 | | 553 | O 41, r 14 |
| 510 | | 554 | O 41, r 15 |
| 511 | | 555 | O 41, r 16 |
| 512 | | 556 | O 41 r 17 |
| 513 | | 557 | O 41 r 18 |
| 514 | | 558 | O 41 r 19 |
| 515 | | 559 | O 41 r 20 |
| 516 | | 560 | O 41 r 21 |
| 517 | | 561 | O 41, r 22 |
| 518 | | 562 | O 41 r 23 |
| 519 | | 564 | Omitted |
| 520 | | 565 | O 41, r 24 |
| 521 | | 566 | O 41, r 25 |
| 522 | | 567 | O 41, r 26 |
| 523 | | 568 | O 41, r 27 |
| 524 | | 569 | O 41, r 28 |
| 525 | | 570 | O 41, r 29 |
| 526 | | 571 | O 41, r 30 |
| 527 | O 36 r 1 | 572 | Cf S 135 |
| 528 | O 36 r 2 | 573 | |

Comparative Table of the Sections of the Old and the New Code—contd

| C P Code, 1882 | C P Code, 1908 | C P Code, 1882 | C P Code, 1908 |
|-------------------|---------------------|-------------------|----------------------|
| 574 | O 41, r 31 | 617 | S 113, O 46, r 1 |
| 575 | S 98 | 618 | O 46 r 2 |
| 576 | O 41, r 34 | 619 | O 46, r 3 |
| 577 | O 41, r 32 | 620 | O 46, r 4 |
| 578 | S 99 | 621 | O 46, r 5 |
| 579 | O 41 r 35 | 622 | S 115 |
| 580 | O 41, r 36 | 623 | S 114, O 47, r 1 |
| 581 | O 41 r 37 | 624 | O 47, r 1 |
| 582 | S 107 (2) O 22 r 11 | 625 | O 47, r 3 |
| 582A | Cf S 146 | 626 | O 47, r 4 |
| 583 | Cf S 144 (1) | 627 | O 47 r 5 |
| 584 | Cf S 100 | 628 | O 47, r 6 |
| 585 | Cf S 101 | 629 | O 47, rr 7, 9 |
| 586 | S 102 | 630 | O 47, r 8 |
| 587 | S 108 O 42 r 1 | 631 | S 116 |
| 588 | S 104 O 43, r 1 | 632 | S 117 |
| 589 | S 106 | 633 | S 122 |
| 590 | S 108, O 43, r 2 | 634 | S 118 |
| 591 | S 105 | 635 | S 119 |
| 592 | O 44 r 1 | 636 | O 49, r 1 |
| 593 | O 44 r 2 | 637 | S 128 (2) (i) |
| 594 | O 45 r 1 | 638 | S 120 (1), O 49, r 3 |
| 595 | S 103 | 639 | S 120 (2) |
| 596 | S 110 | 640 | S 132 |
| 597 | S 111 | 641 | S 133 |
| 598 | O 45, r 2 | 642 | S 135 |
| 600 | O 45 r 3 | 643 | Omitted |
| 601 | O 45, r 6 | 644 | O 48, r 4 |
| 602 | O 45, r 7 | 645 | S 137 |
| 603 | O 45, r 8 | 645A | S 140 |
| 604 | O 45 r 9 | 646 | Omitted |
| 605 | O 45 r 10 | 646A | O 46 r 6 |
| 606 | O 45, r 11 | 646B | O 46 r 7 |
| 607 | O 45, r 12 | 647 | S 141 |
| 608 | O 45 r 13 | 648 | S 136 |
| 609 | O 45, r 14 | 649 | S 36 37 |
| 610 | O 45 r 15 | 650 | Omitted |
| 611 | O 45, r 16 | 650A | S 129 |
| 612 | | 652 | S 122 129 130 and |
| 613 | | | 131 |
| 614 | | 653 | S 59 |
| 615 | | | |
| 616 | | | |
| | Omitted | | |
| | S 112 | | |

CHRONOLOGICAL TABLE

OF

PREVIOUS AND AMENDING ACTS.

| Year | No of Act | Short Title | How affected |
|------|-----------|---|--|
| 1841 | VIII | Interpleader . | Rep. Act X of 1877. |
| 1847 | XVII | Defects in Civil Procedure . | „ Act XII of 1873 |
| 1859 | VIII | Code of Civil Procedure .. . | „ Act X of 1877. |
| 1860 | IV | Civil Procedure | „ Act XXIII of 1861. |
| 1861 | X | Repealing Enactments relating to Civil Procedure | „ Act XIV of 1870 |
| 1861 | XXIII | Code of Civil Procedure .. . | „ Act X of 1877 |
| 1863 | IX | Amending the Code of Civil Pro cedure | „ Act X of 1877 |
| 1864 | V | Extension of Civil Procedure Code to Sindh | „ Act VIII of 1868 |
| 1877 | X | Code of Civil Procedure | „ Act XIV of 1882 |
| 1878 | XVIII | Amending the Code of Civil Pro cedure | Act XII of 1873 |
| 1879 | XII | Do do | Act XIV of 1882 |
| 1882 | XIV | Code of Civil Procedure | Act V of 1908 |
| 1908 | V | The Code of Civil Procedure | Amndg Act I of 1914 „ Act IV of 1914 Amndg and Replng Act V of 1914 Amndg and Replng Act XVII of 1914 Amndg Act XIII of 1916 XIV of 1917 „ XVIII of 1919 „ XXIV of 1920 „ XXXI of 1920 „ XXXVIII of 1920 „ III of 1921 „ IX of 1922 „ XI of 1923 „ XXXI of 1923 „ XXX of 1923 „ XX of 1925 „ I of 1926 „ VI of 1926 „ XVI of 1927 „ X of 1932 |



ADDENDA ET CORRIGENDA.

- P 4, f n (j)—Substitute *Krishnachandra v President* (1929) 52 Mad 1 115 I C 824, (28) A M 1181
- P 14, l 11—After r 4, insert full stop and capital A
- P 16, f n (h)—Reference to *Berry v Mullen* is (1871) 5 Ir Rep Eq 368
- P 31 l 7—*For the words* an invasion of a right cannot be enforced by a suit *substitute* would give rise to a suit cognizable by the civil Courts
- P 42, ll 21-23—*For the words* if it was necessary to decide it to adjudicate on the principal issue and if it was decided in fact the judgment was based upon that decision *substitute* if it was necessary to decide it in order to adjudicate on the principal issue and if it was in fact decided and if the judgment was in fact based upon that decision
- P 43, f n (s)—The name of the case reported in 33 Bom LR 1303 is *Shanlar v Ahem Savant*
- P 48 f n (x)—Delete reference to 8 Lah 15
- P 62 l 9 from bottom—*For the word* he *substitute* the words a party
- P 64 l 15 from bottom—*For* co plaintiff *substitute* co plaintiffs
- P 64 last line—*For the words* suit is decreed and subsequently *B* sues *C* for possession *substitute* suit is decreed but the decree was not executed and became time barred Subsequently *B* sues *C* for possession
- P 74 f n (h)—Delete 50 All 306 and *substitute* 25 All L J 103
- P 77, l 4—*For the word* will *substitute the words* does not
- P 82 l 22—*After the word* cannot (h) insert — The Chief Court of Oudh holds that the question is one of interpretation of the decree in the first redemption suit If it provides for the extinction of the relation of mortgagee and mortgagor the second suit is barred but not otherwise (h1)
- (h1) *Irshad v Sailunnissa* (1931) 6 Luck 275 130 I C 75 (30) A C 465
- P 88 f n (f)—The reference to *Hassan Ali v Sanli Begum* is (1931) 33 Bom LR 113
- P 90 f n (b)—The reference to *Badar Bee v Habib Merican Noorlin* is (1909) A C 615
- P 96, l 15—*For the word* irregularity *substitute* irregularities
- P 97 f n (o)—*All* reversed on another point in 50 Mad 261 *supra*
- P 97 f n (p)—*Add* citing *Leuberton v Hughes* (1899) 1 Ch 781
- P 105 f n (q)—*For* Sambamurthy *substitute* Oriental etc Insurance Company
- P 125 l 18—*After the word* Court *at the end of the line add the letter* \
- P 149 f n (g)—Substitute *Coralram v Iero shah* (1933) 55 Bom LR 142 I C 363 (33) A R 142

- P 151, fn (o)—After 21 Bom 548 add , *Lutuk v Inbica* (1932) 11 Pat 40, 138 I C 903 (32) & P 218
- P 163 l 11—For s 37A substitute ' s 37, clause (a) '
- P 192, fn (j)—Add *Faqir Chand v Kundan Singh* (1932) 54 All (22, 138 I C 93, (32) A A 301
- P 194 l 2—Insert the word ' whole ' before the word ' amount '
- P 201 l 2)—For Wasif Ali substitute Nawab Bahadur
- P 226 l 10—For the word ' replace ' substitute ' repeal '
- P 236 ll 7-9—For the words ' that therefore B had no right of rateable distribution, and that therefore the attachment could not affect the rights of A as execution creditor ' substitute the words ' that B had no right of rateable distribution as his application was after the receipt of assets, and that therefore B's attachment could not affect the rights of A as execution creditor '
- P 240 fn (u)—4 Luck should be 1 Luck.
- P 241 l 12—For the word ' decree ' substitute ' decrees '
- P 250 l 1—After the words ' affected by the section (n) ' add the following — ' The suit cannot be said in such a case to have been brought on the ground that the purchase was made on behalf of the plaintiff within the meaning of the section. '
- P 278, l 10—For the word ' subject ' substitute ' entitled '
- P 309 12th line from bottom—After the words, ' which are imposed upon him by the trust (e) ' insert the following —
But in such a suit it is essential that the co trustee should be guilty of breaches of trust and therefore a suit by a trustee against his co trustee demanding merely an account of the defendant's management without any allegations of any specific breach of trust or threatened breach of trust is not maintainable *Varayan v Mootha Podutal* (1930) 53 Mad 214
- P 314, l 8 from bottom—For the word ' formally ' substitute ' formerly '
- P 314 last line—For the words ' may have ' substitute ' has '
- P 314, fn (1)—The correct reference is as follows —
Gurusathan v Rabhayaia (1928) 106 I C 375 (28) A M 401
- P 324, l 25—For the words ' in some cases it may be done by an application for review (u) ' But it cannot be done by a rule (x) ' substitute ' Such an order may be set aside on an application for review (u) '
- P 333 l 5 from bottom—After the word ' recorded ' add (ol)
(ol) *Chandikama v Viswanathamaya* (1933) 64 Mad L J 513 143 I C 32, (33) A PC 117
- P 340 l 15—Delete the words ' as in the above case '
- P 353 l 3—After the words ' Mutthar Hossein's case ' insert ' his Lordship said '
- l 34 l 18—For the words ' in cases ' substitute ' in some old cases '
- l 34 l 19—For ' as a Red li ' substitute ' Chandra '

P 361 l 7—*For the word* appeals '*substitute*' applies

P 361, f n (o)—Add *Mangamma v Mahalakshamma* (1930) 57 I A 56, 53 Mad 167, 121 IC 513 (1930) A PC 44

P 363 f n (h)—Delete *Muaffanagar Bank v Hafiz ul din* and substitute *Vathu Lal v Baburam*

P 363 f n (j)—Delete *Lax Reddy* and substitute *Chandra*

P 366 f n (i)—*For William Stansfield* '*substitute* *W S G Harvey*

P 411, f n (q)—Add *Paghunath v Shamo Koeri* (1904) 31 Cal 344

P 432 —*About the para headed* Revision *insert the following para* —

At any stage—A rule of the Calcutta High Court requires an additional Court fee to be paid on a written statement which contains a counterclaim. Under this section such additional fee was allowed to be paid during the hearing of the suit (q1)

(q1) *Ahmal Kasim v Klatun Bibi* (1932) 59 Cal 833 141 IC 689, (33) A C 27

P 500 l 11 from bottom —*After the words* Court (c) , *add* —

, and under the amending section 67A of the Transfer of Property Act he is bound to bring one suit on both mortgages

P 874 l 6 —*For* 77, '*substitute* '171



THE CODE OF CIVIL PROCEDURE ACT V OF 1908

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL
ON THE 21ST MARCH 1908

*An Act to consolidate and amend the laws relating to the
Procedure of the Courts of Civil Judicature*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, It is hereby enacted as follows —

Preliminary.

Short title
commence
ment and extent

1. [S 1] (1) This Act may be cited as the Code of Civil Procedure, 1908

(2) It shall come into force on the first day of January, 1909

(3) This section and sections 155 to 158 extend to the whole of British India the rest of the Code extends to the whole of British India except the Scheduled Districts

Previous Procedure—The first Code of Civil Procedure was Act 8 of 1859. Before that the procedure of the Mofussil Courts was regulated by special Acts and Regulations which were repealed by Act 10 of 1861 and the procedure of the Supreme Courts was under their own rules and orders and certain Acts e.g. Act 17 of 1822 and Act 6 of 1854. The Code of 1859 applied to Mofussil Courts only. In 1862 the Supreme Courts and the Courts of Saifur Dwyani Alahit in the Presidency Towns were abolished by the High Courts Act 1861 (24 and 25 Vic. c. 104) and the powers of those Courts were vested in the Chartered High Courts. The Letters Patent of 1862 establishing the High Courts extended to them the procedure of the Code of 1859. The Charters of 1865 which empowered the High Courts to make rules and orders regulating proceedings in civil cases required them to be guided as far as possible by the provisions of the Code of 1859 and subsequent amending Acts. Such amending Acts are Act 4 of 1860 43 of 1860 23 of 1861 9 of 1863 Act of 1867 1 of 1870 14 of 1870 9 of 1871 32 of 1871 and 1 of 1872.

The next Code was Act 10 of 1877 which repealed that of 1859. This was amended by Acts 18 of 1878 and 12 of 1879 and then superseded by the Code of 1882 (Act 14 of 1882). This was amended by Acts 15 of 1882, 14 of 1885, 4 of 1886, 10 of 1886, 7 of 1887, 8 of 1887, 6 of 1888, 10 of 1888, 13 of 1889, 8 of 1890, 6 of 1892, 5 of 1894, 7 of 1895, and 13 of 1895, and then superseded by the present Code.

The chief feature of this Code is its division into two parts on the lines of the Judicature Acts and the Rules framed under those Acts. The main body of the Code is in the sections, and the rules refer to matters of mere machinery which the High Courts may adopt to local conditions.

Consolidate and amend.—The preamble shews that the object of the present Act is not only to amend but also to consolidate the law of civil procedure. If the meaning is plain no regard should be paid to the previous law, and the language of the Act must be interpreted uninfluenced by any considerations derived from the previous state of the law. But if the meaning be doubtful, resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act (a).

Interpretation of the Act—The following are some leading rules for the construction of statutes—

1 The golden rule for the interpretation of this as well as all other Acts is to consider the plain meaning of the words used (b). The Court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant (c), and it is always dangerous to paraphrase an Act (d).

2 Procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice (e). The Code should therefore be construed liberally, and so far as possible technical objections should not be allowed to defeat substantial justice (f). No defence should be excluded except where to do so would be to negative the provision of a rule of procedure. It is no longer a province of procedure to exclude defences (g).

3 The Code is one continuous whole, the sections being enacted simultaneously (h), and so when two procedures or two remedies are provided, one of them is not to be construed as in derogation of the other (i).

4 In matters of procedure uniformity of decision is important (j), and if a Judge finds a principle laid down by competent authority it is better to accept and apply it, even if his own mind is not satisfied than to fritter it away in its application to cases which manifestly come within it (k).

5 Previous legislation may be referred to as an aid to construction, but only in case of ambiguity (l).

6 Proceedings of the Legislature in passing an Act are to be excluded from consideration in the judicial construction of the Act. These proceedings include Reports of Select Committees, Statements of Objects and Reasons attached to Bills, and

(a)

(g)

(h)

(i)

(j)

(k)

(l)

(b) Maxwell pp 58 ed 6th

(c) Lala Suraj v Golab Chand (1900) 27 Cal 724

(d) Durga Choudhary v Jawahar Singh (1890)

18 Cal 23

(e) Whill v Hamilton (1878) 4 A. C. 525

(f) Kharee Singh v Koolahuli Singh (1840)

(g) "All India"

101, 144-145

debates of the Legislature Before this rule had been settled by the Privy Council in *Administrator General v Premlal (m)*, the cases were not consistent (n) and even later the Madras High Court referred to the report of a Select Committee in *Assan v Pathumma (o)*

7 Marginal notes to the sections of an Act are not to be referred to for the purpose of construing an Act (p)

8 Illustrations in Acts of the Legislature, although not part of the sections, are helpful in the working and application of the Acts, and it is the duty of a Court of law to accept them, if that can be done, as being both of relevance and value in the construction of the text The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which the sections deal And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves It would be the very last resort of construction to make any such assumption (q) But an illustration cannot be allowed to control the plain meaning of a section (r)

9 The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction (s) In cases however, where there is no specific provision in the Code, the Court has the power, and, it would seem, it is its duty, to act according to justice, equity and good conscience (t) See s 151

10 Every statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation But this presumption does not apply to enactments affecting procedure or practice such as the Code of Civil Procedure The reason is that no person has a vested right in any course of procedure The general principle indeed seems to be that alterations in the procedure are always retrospective unless there be some good reason against it (u) But an appellate Court cannot reverse an order made under an old Code on the ground that the new Code has enacted a different rule (v) The right of appeal however is in the nature of a vested right and hence the provision in s 154 of the Code declaring that nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement

11 The Code consists (1) of that which is termed the body of the Code and (ii) of the rules The body of the Code is fundamental and is unalterable except by the

- (m) (1895) 22 Cal 788 22 I A 107 *Queen Empress v Sri Churn* (1895) 2 Cal 1017
Queen Empress v Tilak (1895) 2 Bom 112
Maharaj Tewari v Har Charan (1903) 8 All 144
 (n) Referred to in *R v Kart e Chunder* (1887) 14 Cal 7-11
Ramesh Chunder v Hiru Mondal (1890) 17 Cal 85-
Shaukh Moosa v Shaikh Fata (1884) 8 Bom

- Halway* (1896) 93 Cal 55
Junardeo v Jam Sarup (1895) 2 Cal 808
 (q) *Mahomed v Iqah* (1916) 43 I A 256 263
 33 I C 401
Mulraj Khatau v Fuzhranah Prabhuram (1913) 40 I A 24 30 37 Bom 198 171 C 7
 (r) *Koylash Chunder v Sonatun* (1890) 7 Cal 132
 (s) *Gokul Mandar v Pulmanwar* (1902) 29 I A 196 20 29 Cal 70 15
Shibu v Boban (1904) 30 Cal 303
 (t) *Hukum Chand v Kamalanand* (1906) 33 Cal 92 93 93 94
Abdul Rahman v Mahana (1900) 1 Lah 33 341 55 I C 48
Yash Lal v Jula Mulla (1906) 33 Cal 1014
Junkanan v Dwarakanath (1905) 3 I J 29
 (u) Maxwell on the Interpretation of Statutes chap viii sec v
Crates on Statute Law pp 327 328
Hajrat Akramnusa v Abdul Nissa (1894) 18 I M 429
Lakshma v Laya (1895) 19 I M 274
Guruk Chandra v Apurba (1894) 21 Cal 940
 955
Jaswanar v Jasoda Lal (1913) 40 Cal 704 19 I C 321
 (v) *Gurumoorli Naidu v Venudappa Chetty* (1911) 2 M W 356 12 I C 553

- (o) (1899) 22 Mad 494 504
 (p) *Balraj Kunwar v Jagan* 1904
 26 All 393 31 I A 15
Datta Malah v

The next Code was Act 10 of 1877 which repealed that of 1859. This was amended by Acts 18 of 1878 and 12 of 1879 and then superseded by the Code of 1882 (Act 14 of 1882). This was amended by Acts 15 of 1882, 14 of 1883, 4 of 1886, 10 of 1886, 7 of 1887, 8 of 1887, 6 of 1888, 10 of 1888, 13 of 1889, 8 of 1890, 6 of 1892, 5 of 1894, 7 of 1895 and 13 of 1895, and then superseded by the present Code.

The chief feature of this Code is its division into two parts on the lines of the Judicature Acts and the Rules framed under those Acts. The main body of the Code is in the sections and the rules refer to matters of mere machinery which the High Courts may adopt to local conditions.

Consolidate and amend—The preamble shews that the object of the present Act is not only to amend but also to consolidate the law of civil procedure. If the meaning is plain no regard should be paid to the previous law, and the language of the Act must be interpreted uninfluenced by any considerations derived from the *previous state of the law*. But if the meaning be doubtful, resort may be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Act (a).

Interpretation of the Act—The following are some leading rules for the construction of statutes—

1 The golden rule for the interpretation of this as well as all other Acts is to consider the plain meaning of the words used (b). The Court's function is not to say what the Legislature meant but to ascertain what the Legislature has said it meant (c), and it is always dangerous to paraphrase an Act (d).

2 Procedure is mere machinery and its object is to facilitate and not to obstruct the administration of justice (e). The Code should therefore be construed liberally, and so far as possible technical objections should not be allowed to defeat substantial justice (f). No defence should be excluded except where to do so would be to negative the provision of a rule of procedure. It is no longer a province of procedure to exclude defences (g).

3 The Code is one continuous whole the sections being enacted simultaneously (h) and so when two procedures or two remedies are provided, one of them is not to be construed as in derogation of the other (i).

4 In matters of procedure uniformity of decision is important (j), and if a Judge finds a principle laid down by competent authority it is better to accept and apply it, even if his own mind is not satisfied than to fritter it away in its application to cases which manifestly come within it (k).

5 Previous legislation may be referred to as an aid to construction, but only in case of ambiguity (l).

6 Proceedings of the Legislature in passing an Act are to be excluded from consideration in the judicial construction of the Act. These proceedings include Reports of Select Committees, Statements of Objects and Reasons attached to Bills, and

(a) " " "

(g)

(h)

(i)

(j)

(k)

(l)

(b)

(c)

(d)

(e)

(f)

Lala Suraj v. Gulab Chand (1900) 27 Cal 724

Durga Choudhram v. Jangahir Singh (1890)

18 Cal 23

Sendell v. Hamilton (18 8) 4 A. C. 505

Chauri Singh v. Koolahull Singh (1840)

debates of the Legislature Before this rule had been settled by the Privy Council in *Administrator General v. Premial (m)*, the cases were not consistent (n), and even later the Madras High Court referred to the report of a Select Committee in *Assan v. Pathumma (o)*

7 Marginal notes to the sections of an Act are not to be referred to for the purpose of construing an Act (p)

8 Illustrations in Acts of the Legislature, although not part of the sections, are helpful in the working and application of the Acts, and it is the duty of a Court of law to accept them, if that can be done, as being both of relevance and value in the construction of the text The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which the sections deal And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves It would be the very last resort of construction to make any such assumption (q) But an illustration cannot be allowed to control the plain meaning of a section (r)

9. The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction (s) In cases, however, where there is no specific provision in the Code, the Court has the power, and, it would seem, it is its duty, to act according to justice, equity and good conscience (t) See s 151

10 Every statute which takes away or impairs vested rights acquired under existing law must be presumed to be intended not to have a retrospective operation But this presumption does not apply to enactments affecting procedure or practice, such as the Code of Civil Procedure The reason is that no person has a vested right in any course of procedure The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it (u) But an appellate Court cannot reverse an order made under an old Code on the ground that the new Code has enacted a different rule (v) The right of appeal, however, is in the nature of a vested right, and hence the provision in s 154 of the Code declaring that nothing in this Code shall affect "any present right of appeal which shall have accrued to any party at its commencement"

11 "The Code consists (i) of that which is termed 'the body of the Code' and (ii) of the rules The body of the Code is fundamental and is unalterable except by the

(m) (1895) 22 Cal 788 22 I A 107 *Queen Empress v. Sri Churn* (1895) 22 Cal 1017, *Queen Empress v. Tulai* (1894) 22 Bom 112 *Maharaj Tewari v. Har Charan* (1903) 26 All 144

(n) Referred to in *R. v. Kartic Chunder* (1887) 14 Cal 721, *Bhimesh Chunder v. Hiru Mondal* (1890) 17 Cal 802, *Shankh Moosa v. Shankh Essa* (1884) 8 Bom

Halees (1896) 23 Cal 55 *Punardeo v. Lam Sarup* (1898) 25 Cal 859

(q) *Mahomed v. Icoth* (1916) 43 I A 256 263 33 I C 401 *Mulraj Khatau v. Isharanath Probstiram* (1913) 40 I A 24 30, 37 Bom 198, 171 C 27

(r) *Jaylaxh Chunder v. Sonatun* (1880) 7 Cal 132

(s) *Gokul Mandar v. Pulmanand* (1902) 29 I A 196 202 29 Cal 707 715, *Shado v. Baban* (1904) 35 Cal 353

(t) *Hukum Chand v. Kamalanand* (1906) 33 Cal 927 931 932 948 *Abdul Rahman v. Shahana* (1920) 1 Lah 33 341 58 I C 748 *Jasik Lall v. Lulaw Mukhi* (1906) 33 Cal 1094 *Punchanan v. Dwarkanath* (1905) 3 C L J 29

(u) "The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

"The body of the Code is fundamental and is unalterable except by the

(o) (1899) 22 Mad 424 504

(p) *Jalraj Kumar v. Jagatpal Singh* (1904) 26 All 323, 31 I A 132 *Dulkishmal v.*

(v) *Gurumoorthi Naidu v. Varadappa Chetty* (1911) 2 M. W. N. 336, 12 I C. 553.

Legislature, the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, and it has to be read in conjunction with the more particular provisions of the rules" (c)

Courts of Civil Judicature—These are Civil Courts in British India. Insolvency procedure is civil procedure, but the procedure of Insolvency Courts both in the Mofussil and in Presidency Towns is regulated by special Acts though in certain matters the procedure of the Code is applied so far as it may be applicable (x). The Code applies to proceedings on the Admiralty side of the High Court (y). It also applies to proceedings in the testamentary and intestate jurisdiction of the High Courts and Mofussil Courts except as otherwise provided by the Indian Succession Act, 1925 (z), and to matrimonial suits subject to the provisions of the Indian Divorce Act. As to Small Cause Courts there is special provision in sections 7 and 8. Revenue Courts are Civil Courts and it has been held that they are governed by the Code except in matters where a special procedure is enacted by the local Act (a). Special provision is made in sec. 5 for such Courts in order to preserve the summary character of rent litigation under local laws. But the Code does not apply to Mamlatdars Courts (b).

British India—The expression "British India" is not defined in the Code. In the absence of any definition of a particular expression in an Act, we are to turn to the definition of it in the General Clauses Act X of 1897. There are several terms of frequent or general occurrence in several Acts, and these are defined in the General Clauses Act. "British India" is one of them, and it is defined in that Act (s. 3, cl. 7) as meaning "all territories and places within His Majesty's dominions which are for the time being governed by His Majesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of India". The words British India therefore exclude the territories of Native States (c) such as the Kathiawar States (d). Territories ceded by Native States not in full sovereignty but for limited purposes such as the establishment of a civil station (e) or for railway administration (f) are not part of British India. Aden (g) and British Burma (h) are within British India but not Singapore (i). Acts 14 and 15 of 1874 declare not only Aden but also the Laccadive, Andaman, and Nicobar Islands and Ajmere and Merwara in Rajputana to be parts of British India. The phrase "the whole of British India" includes the Scheduled Districts (j).

Scheduled Districts—A list of Scheduled Districts is given in Schedule I to the Scheduled Districts Act XIV of 1874. The sections of this Code, except s. 1 and ss. 155 to 158, do not extend to any of the Scheduled Districts. Section 5, however, of the Scheduled Districts Act empowers the Local Government, with the sanction of the Governor General in Council, to extend to any of the Scheduled Districts any

(w) *Mani Mohan v Ramtaran* (1916) 43 Cal 148, 152, 33 I C 329, per Jenkins C J

(x) See Provincial Insolvency Act 1920 sec. 5 and Presidency towns Insolvency Act 1909 sec. 90

(y) *Bombay and Persia S. N. Co v Shepherd* (1887) 12 Bom 237, 240

(z) *Paoji Ranchod v Fakhru* (1884) 9 Bom 241
Esoof Hattim v Fatima (1896) 24 Cal 30

(a) *Nilmoni v Tarannath* (1893) 9 Cal. 295, 31 A 174

(b) *Kishan v Maruti* (1898) 13 Bom 552
Kishan v Ratu (1912) 6 C. L. R. 67, 16 I C 673

(c) *Baker v B. R.* (1888) 17 R 191

(d) *Hemchand v Azam Sakarlal* (1906) 33 I A 1, 8 Bom L. R. 129

(e) *Er...*

(f) *Iusufud-Din v Queen Empress* (1897) 2 C W N 1

(g) Aden Laws Regulation 1891 sec. 2

(h) *Mahomed v Cohen* (1885) 13 Cal 221

(i) Straits Settlement Act 1861, sec. 1

(j) *Collector of Vizagapatam v Patnauk* (1929) 52 Mad 1, (28) A M 1181

enactments in force in British India and the whole of the Procedure Code has accordingly been extended to several Scheduled Districts including Sind Ajmere Merwara and the Scheduled Districts of the Punjab (l) and also to the Berars (l) and to Jalpaiguri (m)

2. [S 2] In this Act, unless there is anything repugnant in the subject or context,—

Definitions

(1) “ Code ” includes rules

See notes on p 3 para No (11)

(2) “ decree ” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default

Explanation —A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final

(3) “ decree holder ” means any person in whose favour a decree has been passed or an order capable of execution has been made

Definition of decree In the Code of Civil Procedure 1882 —The term decree was defined in the Code of 1882 as follows —

Decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court expressing it decides the suit or appeal An order rejecting a plaint or directing accounts to be taken or determining any question mentioned or referred to in section 244 [now s 47] but not specified in section 588 [now s 104 and O 43 r 1] is within this definition an order specified in section 588 is not within this definition

Importance of the definition of decree—The adjudications of a Court of law may be divided into two classes namely (1) decrees and (2) orders Orders again may be sub-divided into appealable orders and non-appealable orders The expression order is defined in cl (14) of the present section as meaning the formal expression of any decision of a Civil Court which is not a decree

Where a suit on amounts to a decree it is invariably appealable unless it is expressly provided that no appeal shall lie from it (a, 96) Further where an appeal is

(l) See Interpretation General Clauses Act s 11 p 59 See also *Kash Mohan v Jankoo* (1882) 15 Cal 365 *Pradhu Narayan v* *af gram* (1905) 31 Cal 56

(m) See *Fau v Farid* (1910) 6 Nag L R 49 61 C 47

(n) *Eroja Kanta v Tufsun Das* (1899) 4 C W N

S. 2 preferred from a decision which amounts to a decree and a decree is passed in a further appeal will lie to the High Court from the decree passed in appeal if it comes within the provisions of s. 100 below. This is called a second appeal. In a case therefore of an adjudication which amounts to a decree the law permits appeal and in some cases also a second appeal.

Where an adjudication amounts to an order, no appeal lies from it unless enumerated in the list of appealable orders given in s. 104 or in the list g. O. 43 r. 1.

We have thus seen that an appeal lies from a decree. We have also seen that an appeal lies from an order specified in s. 104 or in O. 43, r. 1. What then is the distinction between a decree and an appealable order? The distinction is this—that in the case of an adjudication which amounts to a decree the law permits a second appeal in some cases; no second appeal is allowed at all in the case of an adjudication amounts to an appealable order. That is to say, if an appeal is preferred from a decree and a decree is passed in appeal an appeal will in certain cases lie from the decree in appeal. But if an appeal is preferred from an appealable order and an order is passed in appeal no appeal lies at all from the order passed in appeal (s. 104 sub-section 2). To take an instance—An appeal from a decision of a Subordinate Judge to a District Judge. The appellate Court decides against the appellant. He prefers a second appeal to the High Court from the decision of the District Court. If the decision of the Subordinate Judge amounts to a decree a second appeal will lie provided the case comes within s. 100. If the decision amounts to an appealable order no second appeal will lie.

The definition of decree is important not only for determining the right of appeal but for determining whether an appeal lies at all in the first instance. If an adjudication is an appealable order, there is no difficulty whatever in determining whether an appeal lies from it. All that has to be done in such a case is to refer to s. 104 or O. 43 r. 1 and to ascertain whether the order is enumerated in the list there given. No real difficulty in determining the right of appeal arises when the adjudication from which an appeal is preferred is not an appealable order. In such a case the adjudication may be either a decree or a non appealable order and an appeal can lie only if the adjudication amounts to a decree. It matters not that the judgment is headed an order, for if in fact it fulfils the conditions of the definition under s. 2 (2) it is a decree and an appeal lies from it. The appellant would in this class of cases endeavour to show that the adjudication appealed from is a *decree*, while the respondent would endeavour to show that the adjudication is *merely an order*. Instances of this class of cases are given in the next following paragraph.

Essential elements of a decree—The term 'decree' is defined in the Code as meaning "the formal expression of an adjudication which so far as regards the rights expressed in it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." The words italicized above indicate the distinguishing marks of a decree. To constitute a decision a decree, the following conditions must be present—

I—The decision must have been expressed in a suit.

II—The decision must have been expressed on the rights of the parties with regard to all or any of the matters in controversy in the suit.

I In a suit—Every suit is commenced by a plaint (o) and when there is no civil suit there is no decree (p) Some proceedings commenced by an application are statutory suits so that the decision is a decree, e.g., a contentious probate proceeding (q) or an application to file an agreement to refer to arbitration (r) The following are instances of orders which are not decrees, not having been made in a suit —An order rejecting an application for leave to sue in *forma pauperis*, for no suit has till then been filed (s) an order refusing leave to institute a suit for accounts of a Religious Endowment (t), an order on a petition to appoint a new member on the committee of a Religious Endowment (u) an order under the Indian Trusts Act dismissing an application for the removal of a trustee (v), an order on a settlement case under sec 104 (2) of the Bengal Tenancy Act 3 of 1893 as the proceeding is instituted not by a plaint but by an application (w)

II Rights of parties as to matters in controversy—There must have been an adjudication on the rights of the parties (x) An order of dismissal for default of appearance is no determination of the rights of the parties and therefore is not a decree (y) So also an order under O 9, r 2, dismissing a suit when summons is not served in consequence of plaintiff's failure to pay Court fee (z) Special provision is made in the definition of a decree for orders of dismissal for default, apparently because the previous cases were not consistent An order rejecting an appeal under O 41, r 10, for failure to furnish security is not a decree as it does not determine the rights of the parties in controversy in the appeal (a) An order granting leave to withdraw a suit with leave to file a fresh suit is not a decree, for the rights of the parties are left open for determination in the subsequent suit (b), but an order granting leave to withdraw an appeal and dismissing the appeal is a decree, for the appeal is brought before the Court and finally disposed of (b1) The right in controversy must be a substantive right and not merely a processual right for a finding on a processual right is only to enable the Court to inquire into the rights in controversy in the suit (c) Thus an order that a plaint should be stamped with a higher Court fee is not a decree (d)

III Conclusively determines—This expression implies that the decision must be one which is complete and final as regards the Court which passed it The decree may conclusively determine the rights of the parties although it does not completely dispose of the suit See note on p 9, Preliminary Decree

IV Formal expression—All requirements of form must be complied with Thus if no decree has been drawn up, no appeal will lie from the judgment (e)

| | |
|---|---|
| (o) <i>Teakata v Teakatarama</i> (1893) 1 Mad 33 | (y) <i>Rakmininagar v Iaran Chandra</i> (1912) 33 Cal 341 14 IC 823 Shyam Mandal |
| (p) <i>M</i> | |
| (q) <i>Umrao Chant v Bintraban Chaud</i> (1895) 17 All 475 4 | |
| (r) <i>Gru Charan v Uma Charan</i> (1910) 26 Cal 300 5 IC 285 Teakataravara (1896) 10 Mad 98 | (z) <i>M v Umar Ali v Nambunissa</i> (1911) F R 82, 13 IC 840 |
| (s) <i>Secretary of State v Jillo</i> (1899) 21 All 133 | (a) <i>Mahapatrao v Magata Patrao</i> (1933) 56 Mad 520 143 L 4 412 (33) A M 442 |
| (t) <i>Moaffer Ali v Hedavet</i> (1897) 34 Cal 504 Ka em Ali v Um Ali (1893) 18 Cal 300 Protob v Brojanath (1896) 19 Cal 5 285 Teakataravara (1896) 10 Mad 98 | (b) <i>Dattatraya v Padkhar</i> (1921) 45 Bom 227, 634 60 L C 805 (21) A B 220 |
| (u) <i>Minalish v Sulramanya</i> (1888) 11 Mad 6 35 14 L 110 Somasundra v Paudhanga (1896) 12 Mad 285 | (c) <i>M v Umar Ali v Nambunissa</i> (1911) F R 82, 13 IC 840 |
| (v) <i>Naldu Hason v Me Afee</i> (1897) 19 All 131 | (d) <i>Das Dura v Shakh Fakhru</i> (1910) 34 Bom 125 4 L C 823 Sakheram v Salsakher (1913) 37 Bom 400 19 IC 824 |
| (w) <i>Padavan Thakur v Jarradh Singh</i> (1896) 23 Cal 7 372 Lala Kirtu v Lalukdhari (1898) 17 Cal 326 | |
| (x) <i>Me Afee v Manag Myint</i> (1897) 5 Bang 838 10 L C 618 (2) A B 148 | |

Finding on issue—It was at one time held by the High Court of Bombay that a finding on a preliminary issue that a suit was not bad for misjoinder or that it was not barred by limitation or that the Court had jurisdiction to entertain a suit was in the nature of a preliminary decree and appealable as such (f). These decisions have since been overruled by a Full Bench of the same High Court and it has been held that a finding on an issue cannot be the subject of an appeal until it has been embodied in the judgment and decree. It was accordingly held in that case that a finding that the questions in dispute were not estate questions and were not therefore outside the jurisdiction of Civil Courts did not amount to a preliminary decree and that no appeal lay from such finding (g). It has similarly been held that a finding that the matter is not *res judicata* and that the trial can proceed is not a preliminary decree (h).

Again no appeal lies from a finding that an execution application is not barred by limitation and that the execution proceedings are to go on till final determination (i).

Points of distinction between the definition of "decree" in this Code and that in the Code of 1882—The definition of decree as it stood in the Code of 1882 has been modified in the following two respects—

1 Under the Code of 1882 no adjudication came within the definition of a decree unless it decided *the suit*. Under this Code an adjudication which conclusively (j) determines *the rights of the parties* with regard to all or any of the matters in controversy in the suit is a decree though it does not completely dispose of the suit. But the decree in that case is called a preliminary decree as distinguished from a final decree. The present definition is wider than that in the Code of 1882 in that it includes preliminary decrees within its scope the object being to permit an appeal from preliminary decrees. See notes below Preliminary decree.

2 Under the Code of 1882 there was a conflict of decisions as to whether an order of dismissal for default was a decree. The present section expressly declares that an order of dismissal for default is not within the definition of decree the object being to exclude the right of appeal from such order. See note below Order of dismissal for default.

Two other alterations both of a minor character may also be noted here. They are as follows—

(i) An adjudication directing accounts to be taken is no longer to be *deemed* to be a decree as under the Code of 1882 it is a decree by the very terms of the present definition though a preliminary one. Under the Code of 1882 such an adjudication was appealable for it was to be *deemed* to be a decree. Under this Code it is appealable for it is a decree. This distinction however is of no practical importance. See notes to s. 97 below.

(ii) The word *within* has been substituted for *mentioned or referred to in* with a view to bring within the definition of decree orders against sureties (s. 145) and orders as to Court fees in pauper suits (O. 33 r. 13) and thus providing for appeals therefrom. See notes to s. 145 and O. 33 r. 13.

The definition of decree is important because it determines the right of appeal. Hence every material change made in the definition of that term must be taken to have been made for the purpose either of permitting an appeal from adjudications which were not appealable before or excluding a right of appeal from adjudications from which an appeal was permitted under the old law. It is from this standpoint therefore that the new definition has been examined.

f) *Sudhath v. Ganesh* (1913) 37 Bom. 60
1 I C 637 *Varava v. Gopal* (1914)
34 Bom. 33 23 IC 289
g) *Channalavram v. Changantharappa* (1915) 39
1 no. 333 41 C 845
h) *Thama v. Bh. Magads* (1915) 39 B. m.

(i) 421 23 I C 461

(j)

Preliminary decree—The definition of a preliminary decree was characterized by Rankin, C J, as a lame definition for if it were taken literally one might well ask how any decree could be partly preliminary and partly final. In mortgage and partition suits and in suits for partnership and other accounts the preliminary decree is what in the Court of Chancery would have been described as 'the decree', while the final decree corresponds to the 'order on further consideration'. The learned Chief Justice said that sec 97 expressly exempts preliminary decrees from the position assigned to interlocutory orders and precludes an appellant from impeaching them in the course of an attack upon the final decree. The final decree is in its nature dependent and subordinate, because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon. The function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained. The decrees are in the same suit and if the preliminary decree is set aside the final decree is superseded (l).

It was at one time held by the High Court of Bombay that a finding on a preliminary issue that a suit is not bad for misjoinder, or that it is not barred by limitation, or a decision that the Court has jurisdiction to entertain a suit, was a preliminary decree (l). But these decisions have since been overruled by a Full Bench of the same High Court (m). In the last mentioned case it was held that a finding that the matters in dispute are not caste questions, and are not therefore outside the jurisdiction of Civil Courts, does not amount to a preliminary decree from which an appeal can lie. Similarly it has been held that a finding that a matter is not *res judicata*, and that therefore the trial can proceed is not a preliminary decree (n). Nor is a finding that the plaintiff is competent to maintain a suit brought by him a preliminary decree (o), nor a finding that a suit is not barred by limitation (p), nor a finding that the defendant is not an agriculturist (q). A finding that the defendant is an agriculturist within the meaning of the Dekkan Agriculturists Relief Act, 1879 is not by itself an adjudication which can be embodied in a preliminary decree, though it may result in the plaint being returned for presentation to the proper Court (r). (See O 7, r 10.) An interlocutory order that a plaint should be stamped with a higher court fee than what it is stamped with does not amount to a preliminary decree (s). None of these findings determines the rights of the parties with regard to *all or any* of the matters in controversy in the suit, they merely enable the Court to proceed to inquire into those rights (t).

Illustrations

1 A sues B for cancellation of a document and a decree is passed in the suit. This is a final decree, for the suit is completely disposed of.

2 A suit is brought by one partner against another for a dissolution of partnership and for the taking of partnership accounts. Here the Court may pass a preliminary decree declaring the proportionate shares of the parties and directing such accounts to be taken as it thinks fit, and, after the accounts are taken, it may pass a final decree directing payments of debts due by the partnership and the costs of the suit, and directing payment to the parties of the amount found due to them on the taking of accounts. See O 20, r 15.

| | | | | | | |
|-----|--------------------------------|--------|---------|---|---|---|
| (l) | " | " | " | " | " | p 25 39 IC 100 |
| (l) | " | " | " | " | " | (g) <i>Suprehand v. Bhogpal</i> (1906) 28 L A 111 |
| | " | " | " | " | " | 30 94 L C 72 (76) A B 37 |
| (m) | " | " | " | " | " | (r) <i>Dattatreya v. Padmalal</i> (1911) 43 L A 111 |
| (n) | " | " | " | " | " | 60 L C 885 (21) A B 70 (22) L A 111 |
| | " | " | " | " | " | <i>Isuram</i> (1915) 33 L A 111 (23) L A 111 |
| | " | " | " | " | " | <i>Lamane Kanya v. G. and S. S. S. S.</i> |
| | " | " | " | " | " | L A 111 (24) L A 111 (25) L A 111 |
| (o) | <i>Kam ni Joti v. Promotha</i> | (1914) | 19 C | | | (s) <i>M. Umar Ali v. N. S. S. S. S.</i> |
| | <i>W. N. S. S. S. S.</i> | (1914) | 19 C | | | L A 111 (26) L A 111 (27) L A 111 |
| (p) | <i>Khushi Ram v. Tusa Ram</i> | (1914) | 11 L 11 | | | (t) <i>Dattatreya v. Padmalal</i> (1911) 43 L A 111 |
| | | | | | | 63 L C 111 (28) L A 111 (29) L A 111 |

3 A sues B for the recovery of possession of certain immovable property and for mesne profits. The Court may pass a decree for possession of the property, and direct inquiry as to mesne profits. Here the decree is partly final and partly preliminary. It is final so far as it directs delivery of possession to A. It is preliminary so far as it directs an inquiry as to mesne profits. After the inquiry is completed, the Court has to pass a final decree in respect of mesne profits in accordance with the result of the inquiry. See O 20, r 12.

The following is a list of suits in which a preliminary decree may be passed under this Code —

- | | |
|---|--|
| 1 Suits for recovery of possession of immovable property and for rent or mesne profits (O 20, r 12) | 6 Suits for partition of property or separate possession of a share therein (O 20, r 18) |
| 2 Administration suits (O 20, r 13) | 7 Suits for foreclosure of a mortgage (O 34, rr 2 3) |
| 3 Suits for pre-emption (O 20, r 14) | 8 Suits for sale of mortgaged property (O 34, rr 4 5) |
| 4 Suits for dissolution of partnership (O 20 r 15) | 9 Suits for redemption of a mortgage (O 34 rr 7 8) |
| 5 Suits for account between principal and agent (O 20 r 16) | |

The above list is not exhaustive and there is nothing to preclude the Courts from passing a preliminary decree in other cases (u).

Rejection of plaint—As to an adjudication rejecting a plaint it has been expressly provided by the present clause that it shall be deemed to be a decree. Such adjudication therefore, is appealable as a decree (t). An appeal however, is not the only remedy open to a party whose plaint is rejected, for he may cure the defect for which the plaint was rejected and present a fresh plaint (O 7, r 13). As to the cases in which a plaint shall be rejected see O 7 r 11.

Order returning plaint—A plaint may be returned for amendment (O 6 r 17) or to be presented to the proper Court (O 7 r 10). In either case the decision returning the plaint is an order as distinguished from a decree. An order returning a plaint to be presented to the proper Court was appealable under the Code of 1882 [s 588 cl (6)] and it is also appealable under this Code [O 43 r 1, cl (a)]. An order returning a plaint for amendment was appealable under the Code of 1882 [s 588] it is no longer appealable under this Code (w).

Rejection of memorandum of appeal—The Calcutta High Court have held that an order rejecting a memorandum of appeal as insufficiently stamped is not appealable as a decree and that the effect of O 7 r 13 read with sec 107 (2) is that the appellant have been decisions allowing as not duly presented (y), memorandum of appeal which is time barred is dismissed under the Limitation Act and such dismissal disposes of the

(t) *Dattatraya v Padhabai* (1921) 45 Bom 677 633 60 I C 885 (21) A B 22; *Raja Prady Mohan v Manojor* (1923) 27 C W N 989 992 993 74 I C J 73 (24) A C 160; *Abdulshah v Abdulrahman* (1923) 46 Mad 148 72 I C 868 (23) A M 234; *Ila Devi v U Jo Sen* (1923) 6 Pang 97 110 I C 41 (23) A R 168.

(v) *Sata Ka r v Bta S ngi* (1914) F R 80 23 I C 563.

(w) *Gurdas v Bh g* (1911) F R 96 p 334.

11 I C 231.
(x) *J anasundara v Madhab Chandra* (1932) 59 Cal 388 138 I C 643 (3) A C 48, dissenting from *P upsing v Mukharaj Singh* (1885) 7 All 887.

(y) *Ayanna v Nagabhooshaman* (1893) 10 Mad 283.

(z) *Zamindar of Tuni v Bamayya* (1899) 22 Mad 155.

(a) *P upsing v Mukharaj Singh* (1885) 7 All 887; *Mela Mel v Harbhaj* (1884) 1 R 115.

appeal and is appealable as a decree (b) When an appeal is rejected under O 41, r 10 (2) for failure to furnish security for costs, there is no appeal for the order does not determine the rights of the parties (c)

Order returning memorandum of appeal—No appeal lies from an order returning a memorandum of appeal to be presented to the proper Court (d) Nor does an appeal lie from an order returning a memorandum of appeal for amendment

Section 47—Execution proceedings—An execution proceeding though a proceeding in a suit is not a suit (e) The combined effect of sec 2(2) and sec 47 is that an order passed in execution proceedings will be tantamount to a decree if, (a) so far as regards the Court passing it, it conclusively determines a question, (b) arising between the parties to the suit in which the decree was passed, or their representatives, and (c) relating to the execution of the decree (f) If it decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree it falls within the scope of sec 47 and is a decree—but orders that are merely incidental and refer to the conduct of the proceedings are not within the section (g) Thus a decision refusing to recognize the transferee of a decree (h) or to record an adjustment of a decree (i), falls within sec 47 and is appealable as a decree But an order refusing leave to bid at an execution sale is an interlocutory order and is not appealable (j) The Bombay High Court has held that an order staying execution of a decree on security being furnished is an interlocutory order and not appealable (k), but the Lahore High Court after a review of all the authorities has come to the conclusion that such an order falls under sec 47 and is appealable (l) An order refusing to stay execution is an interlocutory order and not appealable (m)

Section 144—Restitution—The determination of a question under sec 144 is a decree and is appealable as such. See note Bar of Suit under sec 144 (2)

Appealable orders —Appealable orders are those specified in sec 104 and O 43, r 1. They are excluded from the definition of decree even though they may fall under sec 47 and would be decrees if the Code had not expressly excluded them *eg* an order setting aside or refusing to set aside a sale under O 21 r 92. The effect of this exclusion is to do away with the right of second appeal.

Order of dismissal for default—A suit may be dismissed for default of appearance under O. 9, r. 8. Such a dismissal is not a decree and is not appealable. Under

(b) *C. ...* ...
(c) ...
(d) ...
(e) *Venkata* v. *Venkatarama* (1890) 22 Mad 256
(f) *Maat Durga Devi* v. *Hanaraj* (1930) 11 Lah 40; 124 I C 349 (3) A L 167; *Saraswati* v. *Moti* (1913) 41 Cal 160 20 I C
(g) *Jonal Shree* v. *Kalash* (1897) 24 Cal 75
33 *Saraswati* v. *Sa rahman* (1904) 22 Mad 203 [B] *Book* v. *Loas* (1917) 16 C W N 144 11 C 371 *Mukhtar* v. *Mugurrah* (1912) 34 All 53 16 I C 50 *Srinivas* v. *Archo* (1911) 35 Cal 54 9 I C 86 *Saraswati* v. *Moti* (1913) 41 Cal 160 20 I C 75 *Hussa* v. *Phas* v. *Patel* *Kash* (1914) 46 All 73 3
23 I C 135 (24) A A 800 *Sardaram*

the Code of 188⁹ there was a conflict of decisions the Madras High Court holding that the order was not appealable (n) while the other High Courts held that it was appealable (o). An appeal may be dismissed for default of appearance under O 41 r 11 (2), or r 17. Such an order of dismissal is not a decree and is not appealable (p). But an order dismissing an appeal under O 41 r 11 (1) has been held to be a decree (q).

There may also be a dismissal for default under O 9 r 3, if neither party appears when the suit is called on for hearing. This is also excluded from the definition of decree.

Non appealable orders—Orders that are not appealable are generally speaking, orders that are processual i.e. interlocutory or incidental orders regulating procedure but not deciding any of the matters in controversy in the suit. Such orders occur both in suits and in execution proceedings. Their number is legion and the following are cited merely by way of illustration. In suits—under sec 148 for enlargement of time (r) under sec 152 for amendment of a clerical error in a judgment (s) under O 9 r 9 granting an application for restoration of a suit (t) under O 9 r 13 granting an application to set aside an ex parte decree (u) under O 14 r 9 refusing to frame an issue (v). In execution proceedings—under O 21, r 40 refusing an application to arrest a judgment debtor (w) under O 21 r 66 settling the terms of a sale proclamation (x). See also cases cited under note Section 47—*Execution proceedings* p 11.

Decree holder—The definition in the Code of 1882 included a transferee of a decree but this was inconsistent with the provisions relating to execution whereby an oral transferee has no *locus standi*; the section therefore enacts that a transferee is not a decree holder unless he has been recognised by the Court. A decree for specific performance of an agreement for the sale of immovable property may be executed either by the plaintiff or the defendant either party being a decree holder in such a case (y).

(4) “district” means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a “District Court”), and includes the local limits of the ordinary original civil jurisdiction of a High Court.

Following this definition the expression District Court as used in the Inventions and Designs Act 5 of 1888 has been held to include a High Court in the exercise of ordinary original civil jurisdiction (z).

(5) “foreign Court” means a Court situate beyond the limits of British India which has no authority in British India.

- | | |
|--|--|
| <p>(n) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(o) 10 I C 143</p> <p>(p) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(q) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(r) <i>Tulja v. Alagappa</i> (1910) 35 Mad 1</p> <p>(s) 8 I C 340 <i>Abraham v. Puckrunnessa</i> (1879) 4 Cal 531</p> <p>(t) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(u) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(v) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(w) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(x) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(y) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(z) <i>Kedarnath v. Gonesh</i> (1907) 10 C W N 446</p> | <p>(n) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(o) 10 I C 143</p> <p>(p) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(q) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(r) <i>Tulja v. Alagappa</i> (1910) 35 Mad 1</p> <p>(s) 8 I C 340 <i>Abraham v. Puckrunnessa</i> (1879) 4 Cal 531</p> <p>(t) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(u) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(v) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(w) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(x) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(y) <i>Sharma v. Jundan Lal</i> (1913) 35 All 47</p> <p>(z) <i>Kedarnath v. Gonesh</i> (1907) 10 C W N 446</p> |
|--|--|

and is not established or continued by the Governor-General in Council

Foreign Court.—The Privy Council is not within this definition, for though it is a tribunal beyond the limits of British India, it is invested with judicial authority within it (a). But the High Court of Justice in England, whether it be the Chancery Division (b) or the King's Bench Division (c) is a foreign Court. The Ceylon Court also is a foreign Court (d) and so is the Supreme Court of Mauritius (e) and Courts in Native States (f). The British Cantonment of Secunderabad is part of the Hyderabad State and the Court of the District Judge, Secunderabad, is a foreign Court (g). As to suits on judgments of the High Court of Justice in England see notes to sec. 17 "A British Indian Court will not give effect to a foreign judgment, etc."

(6) "foreign judgment" means the judgment of a foreign Court :

(7) "Government Pleader" includes any officer appointed by the local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

(8) "Judge" means the presiding officer of a Civil Court :

No judge can act in any matter in which he has any pecuniary interest, nor where he has any interest, though not a pecuniary one, sufficient to create a real bias (h).

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order :

Judgment.—In England the word judgment is generally used in the same sense as decree in this Code. For the meaning of the word in the Letters Patent, see Appendix II.

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Legal representative.—The expression "legal representative" was not defined in the Code of 1832. In its strictest sense the term legal representative was limited to

(a) *Bowles v Bowles* (1884) 8 Bom 571
 (b) *London Bank v Horman* (1871) 8 B H C 200
 (c) See *Deep Narain v Dietert* (1904) 31 Cal 274
 (d) *Shah Athan v Darud* (1900) 32 Mad 469
 471 31 C 190
 (e) *Kasim v Isuf* (1904) 29 Cal 509
 (f) *Gurdial v Raja of Faridkot* (1905) 22 Cal 2^d 21 L A 171

(g)

(h) *Aloo v Gagubha* (1895) 19 Bom 608. See also *Frams United Breweries Co v Bath Justices* [1926] A C 588

executors and administrators only (i), and in cases under the Indian Succession Act that is still the case (j) But its meaning was extended after many conflicting decisions to include heirs and also persons who without title either as executors, administrators or heirs were in possession of the estate of the deceased All these earlier cases are reviewed in *Dinamoni v Flahadut Khan* (l) and the definition settles the meaning of the term as there explained (l) See also notes to sec 50, sec 52, and O 22, r 3, "Party in a representative character" Where a person is a party in a representative character, the legal representative is the person who after his death represents the estate that is the subject matter of the suit Thus on the death of a trustee, or of a shebait of a mutt, his successor in office and not his executor or heir is the legal representative, and the suit would be continued by or against the successor under O 22, r 3 or r 4, a reversioner sues in a representative character as representing the reversionary right to the estate of the last male owner The legal representative of such reversioner is the next reversioner, and a suit by a reversioner to set aside an adoption by a widow may be continued on his death by the next reversioner (m) A suit by a Hindu daughter (n) or by a Hindu widow (o) to recover the father's or husband's estate is continued after her death by the next heirs entitled to come in after her, except in Bombay where the daughter takes an absolute estate It has been held that a coparcener leaves no estate in the coparcenary property at his death and so the surviving coparcener is not his legal representative with reference to that property (p) But a son who has inherited the property of his father is his legal representative against whom the decree can be executed under sec 50 (q) and the correctness of the decision that a surviving coparcener is not a legal representative has been doubted and it has been said that the son who takes the joint family estate by survivorship should be regarded as a person who in law represents the estate of the deceased person (r) See note 'Legal Representative' under O 22, r 3 The Official Assignee has been held to be the legal representative of the insolvent judgment debtor within the meaning of O 21, r 22 of the Code (s)

'Intermeddles with the estate'—One who intermeddles with the estate of a deceased person, even though it may be with part thereof, is a 'legal representative' within the meaning of this clause and is liable to the extent of the property taken possession of by him (t) But it has been held that a mere trespasser is not a legal representative as he has not intermeddled with the intention of representing the estate (u) If a person who is not the heir, wrongly brings himself on the record of a suit after the death of a party, he does not become a legal representative unless he in fact takes possession and so intermeddles with the estate of the deceased (v)

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received

(i) *I rice v Strange* (1887) 6 Mad 159

(j) *Fromm v Adarj* (1894) 18 Bom 377
Barnett Bros v Fowler (1905) 3 Rang
 40 65 I C 325 (25) A R 180

(l) (1904) 8 C W N 843

(l) (1904) 8 C W N 212 at p 250

(m)

(n)

(o)

(p)

(1921) 2 Lah 114 61 I C 6,8 (21) A L 34

(g) *Sakaral v Parat dal* (1907) 28 Bom 283

(r) *Ganesh v Narayan* (1931) 55 Bom 709,
 134 I C 981 (31) A L 484

(s) *Raghunath Das v Sundar Das* (1914) 41 I A
 251 57 42 Cal 72 83 24 I C 304 (14)
 A L 129

(t) *Daropdi v Sada Kvar* (1913) P R No 115
 p 436 22 I C 242 See also *Ram Singh*
v Waryan Singh (1903) 5 Lah L J
 450 77 I C 685 (24) A L 251 ino
 intermeddling

(u) *Safra Ranjan v Sarat Chandra* (1926)
 11 C W N 848 at p 250

(v)

to the other side and counsel consents in spite of dissent or on terms different to those his client authorized (c) In some cases Courts have refused to inquire if there is such a limitation (d), and have refused to set aside a compromise entered into by counsel (e) But the true rule seems to be that the Court has power to interfere, and the House of Lords has held that the Court is not prevented by agreement of counsel from setting aside or refusing to enforce a compromise, that it is a matter for the discretion of the Court and that when in the particular circumstances of the case grave injustice would be done by allowing the compromise to stand the compromise may be set aside even though the limitation of counsel's authority was unknown to the other side (f) Similarly if the consent is given under a misapprehension or mistake and the other party acts on the ostensible authority of counsel the client will be bound But in such a case the consent given under a misapprehension may be withdrawn and the compromise set aside if the application is made before the order is actually drawn up and perfected (g) The application to have the suit restored to the list should be made before the decree is sealed (h) If the client is present in Court at the time of the compromise, it is not open to him to say that he did not consent, for if he desires the case to go on and counsel refuses and if after that he does not withdraw his authority from counsel to act for him, he must be taken to have agreed (i)

The implied authority of counsel is limited to the issues in the suit A compromise will not therefore be binding if it extends to matters outside the scope of the suit (i) The appointment of a receiver of debutter property in a partition suit is a collateral matter and not within the scope of counsel's authority, and an arrangement for the appointment of a party's attorney as receiver interrupts the relationship of attorney and client and will be set aside (j)

The implied authority of counsel is limited to acts and admissions *coram judice* or in Court and a compromise effected out of Court is not binding upon a client (k) But a compromise is not vitiated merely because counsel considered the matter in the corridor of the Court or in the Bar library (l)

Attorney or Solicitor—An attorney or solicitor is entitled, in the exercise of his discretion to enter into a compromise on behalf of his client, if he does so in a *bona fide* manner (m) A solicitor has implied authority by virtue of his position as agent in relation to his client (n) and his authority is limited to the issues in the suit

Pleader—Different considerations apply in the case of a pleader who derives his authority from an express writing the vakalatnama (o) A pleader cannot enter into a compromise on behalf of his client without his client's express authority (p)

(c) *Shepherd v Pabison* (1919) 1 K. B. 474

(d) *In re Hobler* (1844) Beav. 101 *Mole v Smith* (1820) 1 Jac. & W. per Lord Eldon L. C. at p. 673

(e) *Straw v Francis* (1886) L. R. 1 Q. B. 273 *Rumsey v King* (1876) 33 L. T. 728

(f) *Neale v Gordon Lennox* (1902) A. C. 465 470 *Chuni Lal v Hira Lal* (19-7) 3 C. W. N. 44 106 I. C. 309 (28) A. C. 378

(g) *Huckman v Berens* (1890) 2 Ch. 638 *Widd*

(i) *Vundo Lal v Astarani* (1900) 27 Cal. 498 *Sunfen v Lord Chelmsford* (1850) 20 L. J. (Ex.) 382

(j) *Johurmull v Kedar Nath* (1927) 55 Cal. 113 104 I. C. 387 (27) A. C. 714

(k) *Astaran v E. I. Ry. Co.* (1925) 52 Cal. 386 88 I. C. 413 (25) A. C. 696

(l) *Johurmull v Kedar Nath* (1927) 55 Cal. 113, 104 I. C. 387, (27) A. C. 714

(m) *F*

(n) *Mattheus v Munder* (1888) 20 Q. B. D. 141 *Jang Bahadur v Shankar* (1891) 13 All. 272

(o) *Sorrendra Nath v Tarubala* (1930) 57 I. A. 133 57 Cal. 1311 123 I. C. 545, (30) A. P. C. 158

(p) *Jagapati v Ekambara* (1898) 21 Mad. 274 *Jenai v Sokkammal* (1918) 41 Mad. 233 41 I. C. 479

(h)

(i) *Terry v Mullen* (1871) 5 Ir. Rep. 368 *Jang Bahadur v Shankar* (1891) 13 All. 272 *Carrison v Rodrigues* (1886) 13 Cal.

Power to refer to arbitration—The law is the same as regards reference to arbitrators. Counsel has an implied power to consent to a reference and so has a solicitor on the record (g). But the authority does not extend to referring the case to arbitrators on terms different from those which the client has authorised (r). A pleader or vakil has no power to refer a case without the express authority of his client (s), nor to settle a case by the oath of the opposite party (f).

Authority to withdraw suit—Counsel has an implied power to withdraw an action (w). As regards vakils or pleaders it has been held that a vakalatnama couched in general terms suffices *prima facie* to authorise him to apply on behalf of his client for leave to withdraw a suit and in the absence of anything to show that the vakil had acted contrary to the client's instructions or otherwise was guilty of misconduct in making the application the client is bound by the act of his vakil (r).

Power to bind client by admission—Counsel (u) solicitors (x) and pleaders or vakils (y) have an implied authority to bind their clients by admissions of fact provided such admissions are made during the actual progress of litigation and not in mere conversation (z). A verbal admission by a pleader must be taken as a whole and must not be unduly pressed (a), but an admission of liability by a vakil is sufficient to warrant a decree against his client in the suit (b). The result is that the client will be bound by the admission even though it may be erroneous. But counsel, solicitor, or vakil cannot bind his client by an admission on a point of law. Hence if the admission be erroneous the client is free to repudiate it (c). It may here be observed that the omission of a pleader or counsel to argue a question of law, or his abandoning a question of law does not preclude the Court from dealing with the question (d).

Power to abandon issue—A pleader's general powers in the conduct of a suit include the power to abandon an issue which in his discretion, he thinks it inadvisable to press (e).

(16) "prescribed" means prescribed by rules

(17) "public officer" means a person falling under any of the following descriptions, namely—

(a) every Judge,

(b) every member of the Indian Civil Service,

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government,

- (g) *Smith v Tromp* (1849) 7 C B 757 *Fatell v Eastern Countries Ry Co* (1848) 2 Ex 344
 (r) *Veale v Gordon Lennox* (1907) A C 465
 (s) *Thakur Persad v Kalka* (1874) 6 N W P 210
 (t) *Sadashe v Maruti* (1890) 14 Bom 455
 (u) *Chambers v Mason* (1858) 5 C B N S 59
 (v) *Strauss v Francis* (1866) 1 R 1 Q B 379
 (w) *Pam Coomar v Collector of Beerbhoom* (1866) 5 W R 80
 (x) *Haller v Horman* (1860) 2 F & F 163
 (y) *Stracy v Blake* (1836) 1 M & W 168
 (z) *Waynaff v Watson* (1833) 4 B & Ad 379
 (a) *Lathe v Lyon* (1846) 9 Q B 147
 (b) *Kouer Narain v Sreenath* (1868) 9 W R 485 *Lajinder v Bijai* (1839) 2 M I A 253 *Hingan Lal v Mansa Ram*

- (c) *Sreenutt Dossee v Pilamber* (1874) 21 W R 332
 (d) *Dugar Bux v Fatik* (1898) 3 C W N 222 (pleader) *Beni Pershad v Dudhnath* (1900) 27 Cal 156 26 I A 216 (counsel) *Krushnaji v Rajmal* (1899) 24 Bom 360 363 *Narayan v Venkatcharya* (1904) 98 Bom 408
 (e) *Beni Pershad v Dudhnath* (1900) 27 Cal 156
 (f) *Venkata v Bhashyakarl* (1902) 25 Mad. 367 377 (I C.)

- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ,
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ,
- (f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences to bring offenders to justice, or to protect the public health, safety or convenience ,
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government , and
- (h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty

Public Officer—The definition very nearly corresponds to that of a public servant in the Indian Penal Code but a person may be a public servant and not a public officer, *g* , a Municipal Commissioner and Engineer (*f*) The following have been held to be public officers a Collector and Agent for the Court of Wards (*g*) the Official Trustee of Bengal (*h*) an officer of the Indian Staff Corps (*i*) an officer in the Indian Army (*j*)

- (f) *Reg v Nantaram* (1863) 6 Lom H C R 64 CrL 6
 (g) *Collector of I. or v M. naur* (1880) 3 All 21 *Naranyas v Lakshmanrao* (1861) 1 F m 318 *Lbau v Nana* (1864) 13 L n 313
 (h) *Shahabzadee v Ferry son* (1831) - Cal 400

- Abdul v. Doure* (1869) 1 L Mad 250
Muthu Pammalra v Shanmug (1908) 51 Mad 410 IC 804 (S) A.M. 15
 (i) *Watson v Lloyd* (1901) 25 Mad 402
 (j) *Kering v Murra* (1919) 4 Bom 116, 50 IC 643 *Husa v Laksh v Erissen Shae* (1933) 50 All 643 (33) A A 59

an Official Assignee (k) the Administrator General of Bengal (l) a Cantonment Committee (m) a Collector in insolvency (n) a Receiver appointed in a suit (o)

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125

As to the relation of the body of the Code to the Rules see notes to s. 1, p. 3 para No (11)

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds and

(20) "signed," save in the case of a judgment or decree, includes stamped

Signed—The definition is wider than in the General Clauses Act. Indians of rank sometimes use a stamp instead of a signing and inability to write is not a condition precedent to the use of a stamp (p). The Madras High Court has observed that there is no provision that initials may be made by a stamp (q)

3. [S 2] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

Subordination of Courts

Subordination of Courts—The High Court with reference to civil proceedings is the highest Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates see sec. 3 (24), General Clauses Act 1897. The enumeration of subordinate Courts is not exhaustive and a Collector exercising judicial functions under the Mamlatdars Courts Act is subject to the superintendence and control of the High Court (r)

Different rulings of different High Courts—Where there are different rulings of different High Courts on a particular point a Subordinate Judge should follow the decision in law of a Bench of the High Court to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the Legislature (s)

4. [S 4] (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or

Savings

- (k) *Josub v Kemp* (1909) 96 Ind n 809
(l) *Dholaram v Administrator General* (1904) 8 C W N 913
(m) *Cecil Gray v Cantonment Comm ttee* (1910) 34 B n 583 71 C 679
(n) *De Sica v Govind* (1900) 44 Bom 895 58 1 C 411
(o) "

- 3 All 575
(q) *Fenlana v Paras rai* (1909) 56 Mad LJ 633 1901 C 89 (9b) A M 59
(r) *P. raihotam v Mahala* (191) 37 B 114 171 C 676
(s) "

(p) "

power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force

(2) In particular and without prejudice to the generality of the proposition contained in sub section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land

Special or local law—The section does not mean that the Code does not apply to proceedings under special or local laws but only enacts that where there is an inconsistency the rules of the Code do not prevail (t) There is no inconsistency between the Code and sec 77 of the Railways Act 9 of 1890 and if a railway is owned by the Secretary of State in Council notice of a claim to the railway administration under sec 77 of the Railways Act will not dispense with the necessity for a notice under sec 80 of the Code (u) For instances of such inconsistencies the undermentioned cases (t) may be referred to The Mamlatdars Courts Act enacts its own special procedure which excludes that of the Code (w)

The section gives a local Act local validity and special procedure validity within its own sphere No local Legislature can prescribe procedure for any Court beyond its own jurisdiction (x)

Any special form of procedure—It has been held having regard to these words that where two Judges differ in an appeal from the Original Side of the High Court the special procedure laid down in cl 36 of the Letters Patent should be followed, and not the rule laid down in sec 98 of the Code (y) Sec 98 (3) which was added by Act 18 of 1928 gives effect to these decisions

5. [S 4-A] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is

Application of the Code
to Revenue Courts

silent, the Local Government may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government may prescribe

(2) "Revenue Court" in sub section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of

(t) *Aga Mahomed v Cohen* (1887) 13 Cal 2 1
223

(u)

()

Mad 33

(w) *Kasam v Maruti* (1889) 13 Bom 55

(x) *Chhattoo Lal v Nara ndas* (1909) 56 Cal
04 121 IC 403 (30) A C 53

(y) *Dha das v Bas G lab* (1911) 48 I A 181 45
Bom 718 60 IC 8 (21) A IC 6
Surojmal v Horn man (1918) 20 Bom
L.R 185 17 47 IC 449 *Empress v*
Protab Chandra (1911) 51 Cal 504 84
I C 31 (24) A C 668

land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature

Object of the section—The object of this section is to preserve the summary character of rent litigation under local laws.

6. [S. 6] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction

Pecuniary Jurisdiction

Otherwise expressly provided—The section must be read subject to the provisions of the Suits Valuation Act, 7 of 1887, which prescribes the mode of valuing certain suits for purposes of determining jurisdiction. Under sec 8 of that Act the valuation for Court fees and the valuation for jurisdiction in certain suits is the same. Under sec 7, clause (iv) (f) of the Court Fees Act, the valuation for purposes of Court fees in a suit for accounts lies in the discretion of the plaintiff. Therefore in a suit for accounts the plaintiff's valuation in the plaint fixes the jurisdiction of the Court (2)

Pecuniary limits of jurisdiction—See notes to sec 15 under the head "Court of lowest grade competent to try a suit"

Court may pass a decree in excess of its pecuniary jurisdiction—Section 6 refers to the Court's power to entertain a suit. It is the plaintiff's valuation in his plaint which *prima facie* determines the jurisdiction of the Court and not the amount which may be found or decreed by the Court (a). If the plaintiff's valuation in his plaint in a suit for accounts is within the pecuniary limits of the Court's jurisdiction, the Court may pass a decree for a sum in excess of the pecuniary limits of its jurisdiction (b)

Illustration

A sues B in the Court of a second class Subordinate Judge for an account and values his suit for Court fee at Rs 130. Under sec 8 of the Suits Valuation Act the value of the subject matter of the suit is Rs 130. The parties arrive at a compromise whereby the first defendant is to pay Rs 6000 and the second defendant Rs 5000 to the plaintiff. The Court may pass a decree in terms of the compromise although it has jurisdiction limited to suits of which the value of the subject matter does not exceed Rs 500. *Ishwarappa v Dhanji* (1932) 56 Bom 23, 137 IC 702, (32) A B 111

The forum of appeal also is determined by the value of the suit and not by the amount decreed. See notes to sec 38, "Jurisdiction of Court executing decrees" and notes to sec 96, "Forum of Appeal"

Mesne profits after suit do not affect pecuniary jurisdiction—The value of a suit for the recovery of possession and mesne profits is the value of the property plus mesne profits up to date of suit. Mesne profits after suit are a part of the cause of action even though there be a prayer in the plaint for them after suit. If the suit is properly brought in the Court of a *Munsif*...

(2) *Ishwarappa v Dhanji* (1932) 56 Bom 23

137 IC 702 (32) A B 111

(a) *Lakshman v Dabaji* (1883) 8 Bom 31

Mahabir Singh v Behari Lal (1891) 13

All 320

10 All 288

56 Bom 23

(b) *Ishwarappa v Dhanji*

possession of land and mesne profits prior to the date of the suit, and there is also a prayer for mesne profits from institution of the suit which are claimed or assessed at a sum beyond the pecuniary jurisdiction of the Munsiff, the Munsiff has jurisdiction to fix the mesne profits from and after the date of the institution of the suit and to pass a decree therefor although the amount may be beyond his pecuniary jurisdiction (c)

A sues B for possession of land valued at Rs 686 and for the mesne profits up to the date of the suit valued approximately at Rs 200 and for mesne profits subsequent to the date of the suit not valued at all. The suit is brought in the Court of a Munsiff whose pecuniary jurisdiction is limited to Rs 1 000. A decree is passed in the suit for the plaintiff for possession and for mesne profits up to the date of the suit. Subsequently the plaintiff applies to the Munsiff for assessment of mesne profits after the date of the suit claiming Rs 60 000 for such profits. The Munsiff can pass a decree for Rs 60 000 though the amount exceeds his pecuniary jurisdiction.

7. [S 5] The following provisions shall not extend to Provincial Small Cause Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

- (a) so much of the body of the Code as relates to—
 - (i) suits excepted from the cognizance of a Court of Small Causes,
 - (ii) the execution of decrees in such suits,
 - (iii) the execution of decrees against immovable property, and
- (b) the following sections, that is to say,—
 - section 9,
 - sections 91 and 92,
 - sections 94 and 95 so far as they authorize or relate to—
 - (i) orders for the attachment of immovable property,
 - (ii) *wranglements*,
 - (iii) the appointment of a receiver of immovable property, or
 - (iv) the interlocutory orders referred to in clause (e) of section 94, and
 - sections 96 to 112 and 115

(i) *Bulpadhar v Manilal Nath* (1906) 53 Cal 14 89 IC 6 (-5) AC 1076 *Sudarshan Das v Ram Prasad* (1911) 33 All 97 IC 385 *Madho Das v Ramji* (1894) 6 All 246 *Appanna v Appanna* (1902) Mad 543 *Kannayya v Venkata* (1917)

4D Mad 1 7 8 39 IC 439 *Sheikha Moham-mad v Mahlob* (1917) 1st L J 394 41 IC 231, *Dhanath v Musst Maynath* (1921) 6 Pat L J 54 60 IC 346 (21) A P 118

Changes in the section—The words in italics were substituted by Act I of 1926 for the words 'so far as they relate to injunctions and interlocutory orders' which occurred in cl (1) of the original section after the words and figures 'sections 94 and 95'

Attachment before judgment by Provincial Small Cause Court.—A Provincial Small Cause Court has jurisdiction to attach movable property before judgment. An attachment before judgment is not one of the interlocutory orders referred to in cl (1) of the section (d)

As regards immovable property there were conflicting decisions of the Calcutta High Court on the question whether a Provincial Small Cause Court has jurisdiction to order an attachment of such property before judgment. The whole question was considered by a Full Bench of that High Court in the unmentioned case (e) and it was held by a majority that a Court of Small Causes has such jurisdiction, but expressed a doubt as to the intention of the Legislature in the matter when the Code was passed in 1908. To resolve that doubt the words in italics were substituted by Act I of 1926 for the words 'so far as they relate to injunction and interlocutory orders' which occurred in cl (b) of the original section after the words 'sections 94 and 95'. To make the matter clearer a new rule, being rule 13, was added to O 38 by the same Act.

8. [S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay

Provided that—

- (1) the High Courts of Judicature at Fort William, Madras and Bombay as the case may be may, from time to time, by notification in the local official Gazette, direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court
- (2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made

The provisions were inserted in the section by the Code of Civil Procedure Amendment Act I of 1914, s 2

(d) *Kumud v Hari* (1919) 46 Cal 717 53 I C 814

(e) *Barada Ka ta Saha Roy v She la Mojudd n* (1925) 52 Cal 275 8- I C 103 (25)

A C 1 [F B] approving *Sadek Ali v Samed Ali* (1937) 8 C W N 16 80 I C 300 (24) A C 193 and overruling *Kadarnath v Hem Nath* (1922) 49 Cal. 994 70 I C 841 (23) A C 176

PART I.

Suits in General.

JURISDICTION OF THE COURTS AND RES JUDICATA.

9. [S. 11] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Alterations in the section—The words 'either expressly or impliedly barred' have been substituted for the words 'barred by any enactment for the time being in force' which occurred in sec 11 of the Code of 1882. The latter words were held to mean *expressly* barred (f)

Onus—A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so (g)

Suits of a civil nature—Suits may be divided into two classes—(1) those which are of a civil nature, and (2) those which are not of a civil nature. It is suits only of a civil nature which a civil Court has jurisdiction to entertain. A civil Court has no jurisdiction to try suits which are not of a civil nature. The explanation shews that if the principal or only question in the suit is a caste question or a question relating to religious rites or ceremonies the suit is not of a civil nature, for it deals not with the rights of the citizen but with matters that are purely social. But when (1) a caste question or a question relating to religious rites or ceremonies is not the principal question in the suit, but is merely a subsidiary question, and (2) the principal question is of a civil nature, e.g., a question as to any right to property or to an office or to any other civil right, and (3) the principal question which is of a civil nature cannot be determined without deciding the caste question or question relating to religious rites or ceremonies, the Court has the power to decide the caste question or question relating to religious rites or ceremonies to enable it to decide the principal question (h). It is upon this principle that the Explanation to the section is based. We may therefore say that a suit is of a civil nature if the principal question in the suit relates to a civil right. The mere fact that the determination of such a question depends entirely on the decision of caste questions or question as to religious rites or ceremonies does not take the suit out of the category of suits of a civil nature (see the Explanation to the section). In *Hukumchand v Maharaj Bahadur* (i) one sect of Jains sued another sect to restrain acts which were said to be a desecration of the sacred hill of Parasannath and the Privy Council said that whether the acts complained of were sacrilegious was a matter for the Jains themselves, but the civil Courts were only concerned with them in so far as they are relevant to questions of a civil right, such as the plaintiff's right of worship, and that the issue must be, not whether the

(f) *Kishore Mohan v Chandra Nath* (1887) 14 Cal 644 648
Nath Jagannatha v Kumbharayudu
 16 JJ Muz 21 22 25 I C 891

(h) *Lalji v Walji* (1895) 19 Bom 507, *Praggj v Goind* (1887) 11 Bom 534
 (i) (1833) 60 I A 313 12 Pat 681, 144 I C 348, (34) A FC 103

acts complained of were in accordance with orthodoxy or with previous practice, but whether they did in fact interfere with the plaintiff's right of worship. We now proceed to consider the leading cases in which the Courts have refused to try suits on the ground either (1) that the principal question in the suit was a caste question, or (2) that it related to religious rites or ceremonies.

Suits in which the principal question is a caste question are not suits of a civil nature—A caste is any well defined native community (be it Hindu or Mahomedan) governed for certain internal purposes by its own rules and regulations (j). A caste question is one which relates to matters affecting the internal autonomy of the caste and its social relations (k).

To determine whether or not a question is a caste question, the test is—Would the cognizance of the matter in dispute by the Court be an interference with the autonomy of the caste? Would the Court be deciding the question which the caste as a self governing body is entitled to decide for itself? If yes, the question is a caste question and a civil Court has jurisdiction to entertain it (l). Thus a caste may pass a resolution depriving a member of *man pu* invitation, or invitation to dinner, or to *munj* or other ceremonies, for an alleged breach of a caste rule. The excluded member has no remedy in law, for all that he has lost is a *social* privilege, and not a *legal* right, and the caste is the only tribunal to which a casteman deprived of that privilege can resort. A civil Court has no power by its decree to compel the members of a caste to invite a casteman to dinner or to any ceremony (m). Similarly a Court has no power to compel barbers belonging to a certain caste to shave a casteman or to pare his nails though the party aggrieved may allege that he would lose caste by the loss of service at the hands of the barbers (n). On the same principle a member of a caste is not entitled to any remedy in law if the other members refuse to go to his house on the occasion of a death in his family and assist him in the removal of the dead body, though they may, in doing so, break a rule of the caste. It is not for a Court of law to enforce a caste rule or resolution: it is for the caste itself that makes the rule or passes the resolution to do so (o). Hence a Court will not compel a defaulting member to pay to the caste a sum of money which by a resolution of the caste every casteman is liable to pay on the occasion of a marriage in his family (p).

Expulsion from caste—To exclude a member of a caste from invitation to caste dinners or ceremonies is, as stated above, to deprive him of a *social* privilege. But to *expel* him from the caste is to deprive him of a *legal right* which forms part of his *status*. Hence a suit will lie for a declaration that the plaintiff is entitled to be re-admitted into the caste and also for damages for expulsion from the caste (q). But to entitle the plaintiff to a decree it must be shown that his excommunication was wrongful and the Court will in such cases enquire into the validity of the sentence of excommunication. Excommunication is wrongful, if a member is expelled from the caste without opportunity of explanation being offered to him (r). It is also wrongful if a member is expelled for an alleged breach of a caste rule which, as a matter of fact, he has not broken (s). In the *mufassal* of Bombay, however, a suit does not lie for *restoration* to caste, the cognizance of such a suit being expressly barred by Bombay Regulation II of 1827, s. 21 (t). But a suit is maintainable for *damages* on account

(j) *Abdul Kadir v. Dharma* (1896) 20 Bom 190
(k) " " " " " " " " " " " "

(l) " " " " " " " " " " " "
(m) " " " " " " " " " " " "

(n) " " " " " " " " " " " "
(o) " " " " " " " " " " " "

(p) *Abdul Kadir v. Dharma* (1896) 20 Bom 190
(q) *Jaggannath v. Akali* (1894) 21 Cal 463

(r) " " " " " " " " " " " "

(s) *Krishnasami v. Virasami* (1887) 10 Mad 133

(t) *Nathu v. Keshavji* (1902) 26 Bom 174

of an alleged injury to the case and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party

A. to defamation for expulsion from caste, see the undermentioned cases (u)

Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature.—Thus a suit will not lie to establish a right to parade bullocks on certain days (r) or to compel *pujari*s to adorn an idol at certain seasons (s) or to install it in a particular temple instead of in another (x). There is no right of a civil nature involved in these cases and the Court will not pronounce on any religious doctrine unless it is necessary to do so in order to determine rights of property (y)

Suits for vindication of a mere dignity attached to an office are not suits of a civil nature.—A claim by a *Savami* (arch priest) that he is entitled to be carried on the high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil Court (v). What is claimed by the plaintiff in such a case is a mere mark of *honour* appended to the office of a *Savami*. Civil Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature and they ought not to be involved in the determination of trivial questions of dignity and privilege although connected with an office. For the same reason a suit will not lie for a declaration that the plaintiff as *paroda* or spiritual leader is entitled to be received at a *paroda* by the warden of the *paroda* with the honours and emoluments due to his rank on the occasion of the annual festival of the *paroda*. The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practices of their race or sect is in the absence of express legal recognition and provision, an imperfect obligation of a *moral* and not a *civil* nature. Of such obligations the present civil Court cannot take cognizance (a). Following this rule the Courts have declined to entertain claims made by holders of religious office to precedence in worship such as a claim to be the first to worship the deity and to receive gifts of rice and coconut on certain public religious ceremonies (b). They have likewise declined to decide disputes as to precedence or privilege between purely religious functionaries (c). It is important to note that the suit in each of the above cases was not to establish a right to an *office* but for a declaration that the plaintiff was *by virtue of his office* entitled to certain tokens of *dignity* or to *rights of privilege*. In other words the suit was not for a claim to an *office* but to vindicate an alleged *dignity attached to an office*. A suit for an office is of a civil nature but a suit for vindication of a mere dignity though connected with an office is not. But if honours be attached to an office *by way of remuneration* in other words *as part of its emoluments* a civil Court can entertain a suit for such honours (d).

"Office"—Suits in which the principal question is as to a *civil or legal* right are suits of a civil nature. The right to an office is a right of a civil nature. Therefore suits in which the principal question relates to the right to an office are suits of a civil nature and they are not the less so because the right claimed may depend on the

- (u) *and Sankara v. Henna* (1871) 2 Bom. 470. *Andanurami v. Talsidaram* (1911) 40 Bom. 500, 520-526, 60 I.C. 90 (11) A.B. 140.
- (v) *Striman Sadasappa v. Krishna* (1863) 1 Mad. H.C. 301, 30.
- (r) *Vereva v. Krishna* (1870) 10 Bom. 233. *Karappa v. Kallakayam* (1874) 11 Mad. 91. *Sanyal v. Gangappa* (1878) 10 Bom. 46. *Patel v. Thakur* (1911) 41 Mad. L.J. 2. 63 I.C. 115.
- (s) *Mallikarjun v. Shankaracharya* (1909) 32 Bom. 224. 1 I.C. 331.
- (x) *Punpacharya v. Punpacharya* (1909) 32 Mad. 204, 31 I.C. 51.
- (y) *Esau v. Shikam* (1870) 6 Bom. 116.
- (r) *Farde v. Farde* (1871) 5 Bom. 20.
- (s) *Lake v. Lake* (1871) 3 Cal. 1072.
- (x) *Adrian-General of Emory v. Juref Ali* (1871) 4 I.C. 1090. 84 I.C. 32.
- (y) *Esau v. Shikam* (1870) 6 Bom. 116.
- (v) *Striman Sadasappa v. Krishna* (1863) 1 Mad. H.C. 301, 30.
- (r) *Vereva v. Krishna* (1870) 10 Bom. 233. *Karappa v. Kallakayam* (1874) 11 Mad. 91. *Sanyal v. Gangappa* (1878) 10 Bom. 46. *Patel v. Thakur* (1911) 41 Mad. L.J. 2. 63 I.C. 115.
- (s) *Mallikarjun v. Shankaracharya* (1909) 32 Bom. 224. 1 I.C. 331.
- (x) *Punpacharya v. Punpacharya* (1909) 32 Mad. 204, 31 I.C. 51.

decisions of caste questions or questions as to religious rites or ceremonies or even religious tenets (e). See the Explanation to the section.

Suits for secular office—When no remuneration attaches to the office of the secretary of an Association (registered under Act 21 of 1860), a suit for a declaration that the plaintiff is the secretary of the Association and that his dismissal from the office was not justified by the rules of the Association is not maintainable in a civil Court, especially if the Association has the power to alter its rules from time to time. The reason is that in such a case no decree which a civil Court may pass in plaintiff's favour could prevent the Association from altering its rules and then dispensing with the plaintiff's services and employing some one else (f).

Suits for religious office—*Quære whether every suit for a religious office is a suit of a civil nature?* The explanation to the section assumes that a suit in which the right to an office is contested is a suit of a civil nature. Now an office may be either secular or religious in its character. We are here principally concerned with an office of a religious character, for the question as to religious rites and ceremonies contemplated by the Explanation can only arise when the right to a religious office is contested. Religious offices may be divided into two classes, namely,—

I.—Those to which fees are appurtenant as of right, such as the office of the *Kazi* of Bombay, or of the *Joshi* of a village, or the *Upadhayaya* of a caste.

II.—Those to which no fees are attached, but which entitled the holder thereof to receive such *gratuities* as may be paid to him, such as the office of *pujari* or of an officiating priest in a temple, or of the *hya* of a *math*.

Fees are to be distinguished from *gratuities*. When fees are attached to an office the holder of the office is entitled on performance of the services to the stipulated or customary fees. Thus a *Kazi* or *Joshi* is entitled on performing a marriage ceremony to the marriage fee, and if the fee is not paid to him he may enforce payment by a suit. In fact, a fee is a sum which the holder of an office is entitled to demand as payment for the execution of functions attached to the office. Besides the fee paid to a *Kazi* or to a *Joshi* on the occasion of a marriage, there may be gratuities paid to him which are entirely voluntary in their character. If a person invites a *Joshi* for performing a marriage ceremony at his place and pays him the fee but no gratuity, a suit will not lie at the instance of the *Joshi* for payment to him of any sum by way of gratuity though it may be usual to pay gratuities on such occasions, the reason is that there is no obligation in law on the part of the person inviting a *Joshi* to make any payment by way of gratuity (g). The same remark applies to holders of religious offices referred to in class II above.

The question which concerns us at present is whether a suit will lie at the instance of the holder of a religious office for disturbing him in the exercise of his office? If the office is wrongfully usurped, can the person claiming to be the rightful holder of the office sue the intruder in a civil Court for a declaration that he is entitled to the office? Will a civil Court entertain such a suit? To answer these questions we must deal with the two classes of religious offices separately.

As regards religious offices of the first class, that is, offices to which fees are attached, there is no doubt that a suit will lie against an intruder for a declaration that the office is vested in the plaintiff. Such a suit is a suit of a civil nature (h).

(e) *Krushnasami v. Arushanamacharyar* (1882) 5 Mad 313. *Srinivasa v. Thiruvengada* (1848) 11 Mad 450.

(f) *Maharaj Narain v. Shashi* (1915) 37 All 331 29 I C 63.

(g) *Muhammad v. Sayad Ahmed* (1861) 1 Bom H C App p xviii.

(h) *Muhammad v. Sayad Ahmed* (1861) 1 B H

C App p xviii [Kazi Joshi], *Ghulshahi v. Hargovan* (1912) 36 Bom 91, 12 I C 928. *Gurjashankar v. Murlidhar* (1927) 45 Bom 234 59 I C 271, (21) A.E. 21. [Upadhayaya injunction granted against a branch of the caste on the ground that the hereditary office of a priest is of the nature of Vritti or immovable property.]

of an alleged injury to the caste and character of the plaintiff arising from some illegal act or unjustifiable conduct of the other party.

As to defamation for expulsion from caste, see the undermentioned cases (v).

Suits in which the principal question relates to religious rites or ceremonies are not suits of a civil nature—Thus a suit will not lie to establish a right to parade bullocks on certain days (t), or to compel *punjaris* to adorn an idol at certain seasons (w), or to instal it in a particular temple instead of in another (x). There is no right of a civil nature involved in these cases, and the Court will not pronounce on any religious doctrine unless it is necessary to do so in order to determine rights of property (y).

Suits for vindication of a mere dignity attached to an office are not suits of a civil nature—A claim by a *Swami* (arch priest) that he is entitled to be carried on the high road of a town or village in a palanquin on ceremonial occasions will not be entertained by a civil Court (z). What is claimed by the plaintiff in such a case is a mere mark of honour appended to the office of a *Swami*. Civil Courts should discourage as much as possible claims of so unsubstantial and objectionable a nature and they ought not to be involved in the determination of trivial questions of dignity and privilege although connected with an office. For the same reason a suit will not lie for a declaration that the plaintiff as *gurullal* or spiritual leader is entitled to be received at a pagoda by the wardens of the pagoda with the honours and emoluments due to his rank on the occasion of the annual festival of the pagoda. "The duty of individuals to submit to and perform certain religious observances in accordance with the ritual or conventional practices of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature. Of such obligations the present civil Court cannot take cognizance (a). Following this rule, the Courts have declined to entertain claims made by holders of religious office to precedence in worship, such as a claim to be the first to worship the deity and to receive gifts of rice and cocoanuts on certain public religious ceremonies (b). They have likewise declined to decide disputes as to precedence or privilege between purely religious functionaries (c). It is important to note that the suit in each of the above cases was not to establish a right to an office, but for a declaration that the plaintiff was, by virtue of his office, entitled to certain honours."

with an office, is not. But if honours be attached to an office by way of remuneration, in other words, as part of its emoluments, a civil Court can entertain a suit for such honours (d).

"Office"—Suits in which the principal question is as to a civil or legal right are suits of a civil nature. The right to an "office" is a right of a civil nature. Therefore suits in which the principal question relates to the right to an "office" are suits of a civil nature, and they are not the less so because the right claimed may depend on the

- | | |
|-----|--|
| (u) | and <i>Shankara v Hanma</i> (1878) 2 Bom 470, <i>Andaniaswami v Totadswami</i> (1921) 45 Bom 590, 595 596 60 I C 907, (21) A B 140 |
| (v) | (a) <i>Striman Sadagopa v Krishna</i> (1863) 1 Mad H C 301 308 |
| (w) | (b) <i>Narayan v Arishnaji</i> (1886) 10 Bom 233 <i>Karuppa v Kalanthayan</i> (1884) 7 Mad 91 <i>Sangapa v Gangapa</i> (1878) 2 Bom 476 <i>Babu v Thukra</i> (1921) 41 Mad L J 287, 63 I C 115 |
| (x) | (c) <i>Madhusudan v Shankaracharya</i> (1909) 33 Bom 278 1 I C 331 |
| (y) | (d) <i>Rungacharyar v Rungasami</i> (1909) 32 Mad 291, 3 I C 881 |
| (z) | <i>Sri Shankar v Sudha</i> (1843) 3 M. I. A. 108 |

Turning now to religious offices of the second class, the question that faces us is whether a suit will lie for an office to which no fees are attached? Different views have been held on this point by different Courts. It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature, and will therefore be entertained by a civil Court though no emoluments are attached to the office. This conclusion is based upon the reasoning that a religious office though no fees are attached to it, is an "office" within the meaning of the Explanation to this section and that the section assumes that a suit for an "office" is a suit of a civil nature. The office in that case was that of musicians who chanted holy songs in a *satra* at a certain village (i). In another case, the office was that of a *shabait*, and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as *shabait* at the worship performed by votaries at the foot of a certain tree. It was held that the suit was maintainable. In this case also there were no fees attached to the office but voluntary offerings were made by the votaries (j). In a third case the right claimed by the plaintiff was the right of worship of Saradisa Haragouri Thakurani and to make certain offerings to the image installed in the place of worship, and it was held that the plaintiff was entitled to maintain a suit against a usurper (k). It is worthy of note that in all these cases the office was one attached to a place as distinguished from an absolutely personal office.

On the other hand, it has been held by the High Court of Madras that a suit does not lie for a religious office to which no fees are attached. According to that Court a religious office to which no fees are attached is not an "office" within the meaning of this section (l). The office in one of these cases was that of the priest of Samayacharm whose duty was to exercise spiritual and moral supervision over a certain class of persons.

As regards Bombay decisions, if we are to reconcile them all, we must divide them into two classes, namely, (1) those in which the religious office is attached to a temple, shrine, or sacred spot, and (2) those in which the office is entirely personal in its character. And it may be safely said that a suit will lie for a religious office which is attached to a place, though no fees are appurtenant to it, such as the office of an officiating priest in a temple or of the *Aya* of a *math* (m). But a suit will not lie for an office to which no fees are attached, if the office be personal in its character, such as the office of *Chakradary* (n) [bearer on public occasions of the insignia of a caste], or the office of *Guru* (o). The distinction between offices that are attached to a place such as a temple or a *math* and offices that are in their nature personal is our own, and it must be said that none of the Bombay decisions turns expressly on any such distinction. This distinction has been devised to harmonize what would otherwise be a mass of conflicting decisions, and was approved by the High Court of Bombay in a later case where it was held that a right to perform *Uras ceremonies* and to collect offerings at the shrine of a saint appertains to a religious office and can be enforced by a suit (p). It must be observed, however, that there is one Bombay decision in which the office was a personal one and there were no fees attached to the office and yet it was held that a suit would lie for the office (q). The principal question in that case was whether a suit lies for the office of *Khatib* (preacher), regard being had to the fact that no fees were attached to the office, and it was held that it does. The Court said: "Had it been the intention of the Legislature that such a suit should not lie, the same would have been clearly provided for" (q). But if it is a question of the

(i) *Mamat Ram v*

(j) *D no Math v P*

(k) *Dobendra v S*

614 10, 11

(l) *Tholappala v*

Shabaraya v

Mad 21

(m) *Lina v Ram*

Sanjayu v T

intention of the Legislature. It may be said that the Legislature intended that it should not occur in the Code of 1872, appears to have been suggested by the passage in a judgment in a Malabar case (1) in 1871 (a) which was approved in a subsequent case by the Privy Council (b), as if the religious offices in which the ceremonies were performed were attached. The Bombay High Court has also held that a suit will lie for the recovery of money which are payable to a holder of a religious office on the occasion of a festival which are not connected with any ceremony of the performance of any particular duty (c).

The High Court of Allahabad has held that a person entitled to perform *Pong Pong* (religious payments) which had been customary with him at a certain temple or shrine had a right to sue for the recovery of the same in a Court of law (d).

The Patna High Court has held that a right to sue at funeral ceremonies performed upon the banks of the Ganges between certain people which had been customary with them but merely gratuitous cannot be enforced in a civil Court (e).

Suits for recovery of fees attached to an office are suits of a civil nature, but not suits for recovery of gratuities.—It is settled law that if a person usurps an office to which another person is entitled and receives the fees of the office, he is bound to account to the rightful owner for them, and the rightful owner may sue the usurper to recover the fees properly payable to him. But the case is different where the payments are merely voluntary and a suit will not lie to recover voluntary gratuities that may have been received by the usurper (x). The reason is that where voluntary offerings are made, they must be taken to have been intended for the very person who was then actually performing the ceremony, whether rightfully or wrongfully, and, further, that it is quite possible that no gratuities would have been given at all if the rightful owner officiated at the ceremony instead of the usurper (y). The same principles apply when a suit is brought by the lawful holder of an office against a member of the caste for employing the usurper for performing ceremonies which the rightful holder was entitled to perform. Thus a village priest may be entitled by hereditary right to officiate and take fees in the families of a particular caste in the village and if a member of the caste employs an intruder in the office to perform the ceremonies the village priest is entitled to recover from the casteman the fees which would properly be payable to him if he had been employed to perform those ceremonies (y). But a suit will not lie against a casteman for a gratuity which the party might have refused to give if he had pleased (z). If for determining the plaintiff's right to the fees claimed it becomes necessary to determine incidentally the right to perform the ceremonies the Courts should try and decide that right (a). The above principles have been held to apply to Vaidik barbers who are entitled to render services as barbers on ceremonial occasions and to receive the customary fees (b).

The cases in which a suit by the rightful owner of a religious office against a usurper for recovery of voluntary gratuities has been held not to be maintainable must be distinguished from those where a suit is brought by a sharer in a religious office against his

(r) *Narasimma v Krishna* (1871) 6 M H C 449

(s) *Krishnamma v Krishnasami* (1879) 2 Mad 62 65 61 A 120

(t) *Shankar v Malhar* (1931) 33 Bom LR 479 132 I C 440 (31) A B 273

(u) *Chunnu Dat v Babu Nandan* (1910) 3 All 57 61 C 223

(v) *Hira v Bachu* (1916) 1 Pat L J 381 35 I C 345 *Lutan v Prayag* (1919) 4 Pat L J 315 49 I C 393

(w) *Sitaram Bhat v Sitaram Canesh* (1899) 6 B H C 250 *Raja Lalad v Krishnabhat* (1879) 3 Bom 932 *Hira v Bachu* (1916) 1 Pat L J 381 35 I C 345 *Chunnu v*

Babu (1910) 32 All 507 61 C 23

(z) *Kashi Chandra v Kailash Chandra* (1899) 26 Cal 356

(y) *Dhanath v Sadashiv* (1870) 9 Bom 9

(c) "

(d) "

(e) "

(x) *Krishnamma v Krishnasami* (1879) 2 Mad 60 61 A 120

(b) *Bhaooji v Babu* (1920) 44 Bom 733, 57 I C 135

Turning now to religious offices of the second class, the question that faces us is whether a suit will lie for an office to which no fees are attached? Different views have been held on this point by different Courts. It has been held by the High Court of Calcutta that a suit by a person claiming to be entitled to a religious office against a usurper for a declaration of the plaintiff's right to the office is a suit of a civil nature, and will therefore be entertained by a civil Court though no emoluments are attached to the office. This conclusion is based upon the reasoning that a religious office though no fees are attached to it, is an "office" within the meaning of the Explanation to this section and that the section assumes that a suit for an "office" is a suit of a civil nature. The office in that case was that of musicians who chanted holy songs in a *satra* at a certain village (1). In another case, the office was that of a *shebat*, and the suit was by one member of a family against another for a declaration of a hereditary right to officiate as *shebat* at the worship performed by votaries at the foot of a certain tree. It was held that the suit was maintainable. In this case also there were no fees attached to the office, but voluntary offerings were made by the votaries (2). In a third case the right claimed by the plaintiff was the right of worship of Saradiya Haragouri Thakurani and to make certain offerings to the image installed in the place of worship, and it was held that the plaintiff was entitled to maintain a suit against a usurper (3). It is worthy of note that in all these cases the office was one attached to a place as distinguished from an absolutely personal office.

F1 cannot maintain a suit against faction F2 for recovery of one ~~one~~ that a suit does or its value (4). Here the subject matter of the suit is caste property, and a Court a not against an outsider, but against another section of the caste.

As regards user of caste property, it has been laid down that the majority of a caste has the right to regulate the use of the property, and the minority is bound by the resolution of the majority provided the resolution is not so subversive of the interests of the minority as to amount to a complete denial of their rights. Thus if the majority of a caste passes a resolution that the caste oart should not be used for feasting any Brahmins, and the minority invites Brahmins to a feast in the oart, a suit will lie to restrain the minority from using the oart in contravention of the resolution (5).

Suits for inspection of accounts of caste property—Every member of a caste is, at all reasonable times and on proper demand, entitled to full and free inspection of all account books, papers and vouchers relating to the management of a caste property. This is a legal right which does not interfere with the autonomy of the castes. It is preliminary to a right to assert a claim to property and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. A suit to enforce such a right is maintainable (6).

Interference with temple property—Removal or alteration of namams or religious marks in a temple, which are recognized as the badges of a particular religious denomination, amounts to an interference with property, and is a ground of action in civil Courts (7).

Interference with right of worship—Suits for a declaration of the right to worship or to offer prayers at a certain place are suits of a civil nature. It often happens

(c) *Dona Nath v Iratab Chandra* (1900) 27 Cal 30. *Jherma Charyula v Kollakota* (1917) 17 M. L. J. 433, *Durga Chara v*

(d)

(e)

(f)

(g)

(h)

Nemchand v Satachand (1866) 5 Bom 84 (foot note)

(i) *Lalji v Walji* (1893) 19 Bom 507

(j) *Na*

(k) *Krishnasami v Samaram* (1907) 30 Mad. 153

that the members of a particular class are alone entitled to worship in the sanctuary of a temple, and to perform certain portions of the religious worship. Such a right is one of a civil nature, and it may be enforced by a suit in a civil Court (h)

Right of burial.—The right of burial is a civil right, and it has accordingly been held that an interference with the rights of the relatives of a deceased Mahomedan to recite prayers over his body before burial in front of a particular mosque, being an invasion of a civil right may be enforced by suit (m)

Religious processions.—Members of a religious body possess the right to conduct a religious procession with its appropriate observances along a highway, and a suit will lie against those who prevent the procession with its observances. The worshippers in a mosque or temple which abut on a high road could not compel the processionists to intermit their worship while passing the mosque or temple on the ground that there was continuous worship there. But no one sect can claim the exclusive use of the highway for their worship (n)

Suit to set aside election of directors.—Such a suit is of a civil nature and the Court is entitled to take cognizance of it. The matters involved in such a suit are not matters of internal management of the company (o)

Suit to declare Municipal election valid.—When a District Magistrate acting *ultra vires* set aside a Municipal election, it was held that a suit would lie to declare the election valid (p)

Suit for administration of estate of a living Hindu debtor.—Such a suit is not cognizable by a civil Court (q)

Suits expressly barred.—The general rule of law is that when a legal right and an infringement thereof are alleged, a cause of action is disclosed, and unless there is a bar to the entertainment of a suit, the ordinary civil Courts are bound to entertain the claim (r). This is in substance the rule laid down in the present section which provides that suits though of a civil nature, are not triable by civil Courts, if the cognizance of such suits is *expressly* or *impliedly* barred. By *expressly* barred is meant barred by any enactment for the time being in force. Thus section 11 provides that no Court shall try a suit in which the matter in issue is *res judicata*, and section 47 bars a decree holder from filing a suit when he can take execution proceedings. Section 67 of the Income Tax Act provides that "no suit shall be brought in any civil Court to set aside or modify any assessment made" under that Act (s). Similarly, the Pensions Act 23 of 1871, s. 4, enacts that except as provided by that Act, no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government (t). The cognizance of a suit by a civil Court may also be *impliedly* barred. Thus a suit by a 'proclaimed' person whose property has been attached and sold under secs. 87 and 88 of the Criminal Procedure Code, 1898, against the auction purchaser for its restoration is *impliedly* barred by the provisions of that Code, the remedies of the "proclaimed" person being limited to those provided

(h)

(m)

(n) Bom 198
Manzur Hasan v. Muhammad Zaman (1925)
 52 I A 61 47 All 151 80 I C 36, (25)
 A PC 36, in app. from (1921) 43 All
 612 63 I C 984 (21) A A 146 *Sundram*
v. The Queen (1883) 6 Mad 203 (F B)
Jarthasaradi v. Chinnakrishna (1892) 5
 Mad 304 *Sadagopachariar v. Iama Rao*

(o)

(p)

(q)

(r)

(s) *Forbes v. Secretary of State* (1915) 42 Cal.
 151 26 I C 893

(t) *Balkrishna v. Dattatraya* (1918) 42 Bom.
 257, 45 I C 540

for in the Code (u) The mere fact, however, that an enactment provides a summary remedy in certain cases does not constitute a bar to a regular suit Thus the provisions of Act 1 of 1871 do not bar a suit for compensation for wrongful seizure of cattle (v) Again a guardian may apply to the Court for possession of his ward under sec 25 of the Act, but this does not exclude a suit for that purpose (w) Another instance is O 21, r 95 (Code of 1882, s 318) That rule provides a summary remedy to which a purchaser at a sale in execution of a decree may resort to recover possession from a judgment debtor But it does not say that no suit shall lie to recover possession The purchaser may therefore resort to the remedy provided by that section, or he may at his option bring a regular suit (x) Further, the jurisdiction of a civil Court is not excluded unless the cognizance of the entire suit as brought is barred (y) The general rule is that statutes affecting the jurisdiction of Courts are to be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (z) It is for the party who seeks to oust the jurisdiction of a civil Court to establish his contention (a)

The bar is generally in matters affecting the Government revenue but it has been held by the High Court of Bombay that the jurisdiction of civil Courts to try suits brought by superior holders to recover their dues from inferior holders is not barred by sec 85 of the Bombay Land Revenue Code [Act 5 of 1879] (b) The same Court has held that sec 4 (c) of the Bombay Revenue Jurisdiction Act is not a bar to a suit in which there is a claim arising out of the alleged illegality of proceedings taken for the realization of land revenue (c) Some Municipal Acts expressly bar suits relating to the assessment and levy of municipal rates and taxes but the civil Courts have, nevertheless jurisdiction to entertain such suits if it is shewn that the assessment is mala fide or perverse (d) or made on a wrong basis and ultra vires (e) or that the procedure enjoined by the Act has not been followed (f)

Suits impliedly barred—Besides suits of which the cognizance is expressly barred there are suits which are barred by general principles of law, such as suits relating to acts of State and public policy A civil Court has no jurisdiction to entertain suits in respect of acts of State (g) As to suits against the Secretary of State for India, see note under sec 79, Act of State No suit will lie to recover costs incurred in a criminal Court Again a suit will not lie for damages for defamatory statements made in the Court (h) The jurisdiction of the Court is impliedly barred in cases where a special tribunal is appointed by an Act of the legislature to determine questions as to rights which are the creation of the Act, as in disputed Municipal elections (h1)

- (u) *Deera Singh v. Faal Dad* (1879) 10 Lah 338 1111 C 508 (28) A L 562
 (v) *Shuttrughan v. Hokuu* (1890) 16 Cal 159
 (w) *Sharifa v. Mune Khan* (1901) 6 Bom 571
 (x) *Kuhori v. Chunder Nath* (1897) 14 Cal

(f)

(g)

(y)

- (a) *Ali Muhammad v. Hakim* (1878) 9 Lah 504 1111 C 744 (28) A L 171 [Punjab Act 5 of 1871]
 (b) *Isahwanath v. Kondaji* (1918) 47 Bom 49 41 L C 935
 (c) *Changam v. Dinkar* (1913) 37 Bom 547 1111 C 555
 (d) *Jagan Nath v. Anilashwar* (1907) 26 Bom 204
 (e) *Chandani v. Municipal Commr v. Sush*

(h)

(h1)

Again a suit will not lie for damages for defamatory statements made in the course of a judicial proceeding by a party or by a witness. The ground of this principle is that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury (i)

Criminal Procedure Code 1898.—An order made by a magistrate under sec 17^m of the Criminal Procedure Code cannot be called into question in a civil Court but a suit will lie for a declaration of exclusive ownership of land which a magistrate has declared to be a public highway (j) but not a suit to close the road (l). No suit lies by a proclaimed person against an auction purchaser to recover from him property sold under secs 8ⁿ and 189 of the Code of Criminal Procedure (l). But a suit will lie to set aside an irregular sale under sec 88 (m) and a civil Court has jurisdiction to entertain a suit for the recovery from Government of the proceeds of the sale of property attached and sold under secs 523 and 524 of the Criminal Procedure Code (n)

Political questions—The Courts of British India may determine the title of property situated within their jurisdiction belonging to a Native Prince though a political question is involved (o). But where the real object of the suit is to settle the right of succession to the throne and the property right involved is only contingent, the Court should decline jurisdiction (p)

10. [S 12] No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a pre-

Stay of suit

viously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction, or before His Majesty in Council

Explanation—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action

Alterations in the section—The words proceed with the trial have been substituted for the word try. The words except where a suit has been stayed under section 20 which occurred at the commencement of the corresponding section of the Code of 1882 the words for the same relief which occurred after the words previously instituted suit and the words whether superior or inferior which occurred after the words any other Court have been omitted. The words litigating under the same title are new

(i)

(l) *Deva Singh v. Fazal Dad* (1891) 10 Lah 339 111 I C 508 (s) 4 L 56

(m)
()

(o)

(p) *Samerend v. B. Rendra* (1908) 12 C W L 777

(j)
(k)

Scope and object of the section.—The present section provides that where a suit is instituted in a Court to which the Code applies, the Court shall not proceed with the trial of the suit, if—

first the matter in issue in the suit is also directly and substantially in issue in a previously instituted suit between the same parties,

secondly, the previously instituted suit is pending—

(a) in the same Court in which the subsequent suit is brought, or

(b) in any other Court in British India (whether superior, inferior or co-ordinate) or

(c) in any Court beyond the limits of British India established or continued by the Governor General in Council, or

(d) before His Majesty in Council, and

thirdly, where the previously instituted suit is pending in any of the Courts mentioned in cl (b) or cl (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit (g)

The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. *B*, residing in Calcutta, has an agent *A* at Calicut employed to sell his goods there. *A* sues *B* in Calicut claiming a balance due upon an account in respect of dealings between him and *B*. During the pendency of the suit in the Calicut Court, *B* institutes a suit against *A* in Calcutta for an account and for damages caused by *A*'s alleged negligence. Here the matter in issue in *B*'s suit is directly and substantially in issue in *A*'s suit, further both the suits are between the same parties, therefore, if the Court at Calicut is a Court of jurisdiction competent to grant the relief claimed in *B*'s suit, the Calcutta Court must not proceed with the trial of *B*'s suit and the suit in the Calicut Court, being the one instituted prior in point of time, should alone be proceeded with (r). But if *A* was *B*'s agent at Pondicherry instead of at Calicut, and the suit was brought by him in the Pondicherry Court, the Calcutta Court would not be precluded from proceeding with the trial of *B*'s suit the Pondicherry Court being a "foreign" Court. See the Explanation to the section.

The section does not of course empower one Court to stay the proceedings of another Court. A district Court exercising insolvency jurisdiction under the Provincial Insolvency Act 5 of 1920 cannot under this section stay a suit pending against the insolvent in a subordinate Court (s).

Whether the subject matter of both suits must be the same—Sec 12 of the Code of 1882 contained the words "for the same relief" after the words "previously instituted suit". Hence it was necessary for the application of the section not only that the matter in issue in the second suit should also be directly and substantially in issue in the first suit but that the second suit must be for the same relief as that claimed in the first suit (t). The words "for the same relief" have been omitted in the present section. The omission of these words, however, does not materially alter the law. In a Calcutta case (u) Rankin, C J, laid stress on the identity of the subject matter

- (g) *Pura Mal v Rajnarain* (1919) P. R. no. 114 p. 293 53 I.C. 467 *Troukknath v M. Govt* (1900) 24 Cal. 23 34 *Kalipada v Chakrabarti* (1933) 60 Cal. 1036 (33) A.C. 897
- (r) *Lalimasee v Lakshmanee* (1916) 43 Cal. 144 33 I.C. 83 *Meekjee v Ansonji* (189) 4 I.L.R. 32
- (s) *The Off. of Receiver v Pala is can* (1925) 44 S.W.2d 881 (75) A.M. 1051 *Alkhal v Ashkin* (1889) 11 All. 145 *Alkhal v R. J. Mathis* (189) 20 Mod. 414 *Alkhal v Gu. p. d.* 1890) 8

C. L. R. 113 *Raja Ranget Singha v*

(u)

When the two suits were for the recovery of cesses due for different periods the learned Chief Justice said:—"But it must be observed that a judgment for the recovery of subsequent cesses does not differ merely as being for a different form of relief. It is the same kind of relief for an entirely separate subject-matter, namely, a debt which was not in existence at all at the time of the previous suit. It does not follow, because the words 'the same relief' are no longer in the section, that sec. 10 is applicable to suits for recovery of successive rents". It has even been held that a suit cannot be stayed if the main issue in both the suits is the same and the subject matter of the second suit was different from that of the first suit (r). In these cases, the words "matter in issue" have been construed as having reference to the entire subject-matter in controversy between the parties. But in a later Calcutta case (u) it was pointed out that the section contains no reference to the subject-matter or to the cause of action and that one test for the applicability of the section is whether on a final decree being reached in the previous suit, such decree would operate as *res judicata* in the subsequent suit. Again in a case where the first suit was for dissolution of partnership and for accounts, and the subsequent suit was by one of the partners for the return of a deposit the section was held to apply (x).

Previously instituted suit.—Note that it is the pendency of the previously instituted suit that constitutes a bar to the trial of the subsequent suit. The word "suit" includes "appeal". It also includes an appeal to His Majesty in Council (y). But it does not include an application for leave to appeal to His Majesty in Council, for the application may not be granted at all, and, if granted, the applicant may not prefer any appeal (z). It seems that it does not also include applications under sec. 47 (a).

Shall not proceed with the trial.—These words indicate the action to be taken by the Court under this section. The second suit is not to be dismissed as barred; it is only the trial of the suit that is not to be proceeded with. That may render the institution of a subsequent suit unnecessary in many cases, but the section is *no bar to the institution of such suit*. Nay, there are cases in which it is necessary for a party to institute a regular suit to establish a right claimed by him, and failure to institute the suit within the period of limitation may preclude the party from asserting the right in any other suit or proceeding. Suits referred to in O 21, r 63 (Code of 1882, s 283) are suits of this character. This section does not dispense with the necessity of instituting such suits (b). A suit may be stayed under the section even after the hearing has commenced (c).

"Between the same parties."—The mere fact that the first suit is between Z and J as plaintiffs and W, X and Y, as defendants, and the second suit is between W as plaintiff and Z, J and S (not a party to the first suit) as defendants, will not take the case out of the operation of this section, if the other conditions of the section are satisfied (d).

Interlocutory orders pending stay.—A stay order under this section does not take away the power of the Court in the stayed suit to make interlocutory orders, such as orders for a receiver or an injunction, or an attachment before judgment (e).

(r) *Kuberan v. Koman* (1925) 48 Mad. L. J. 251, 88 L. C. 421 (5) A. M. 574.

(u) *Jinnat Bibi v. Howrah Jute Mill Co.* (1932) 36 C. W. N. 667 140 I. C. 155, (32) A. C. 751.

(x) *Mahadev v. Capadhar* (1912) 16 C. W. N. 897 16 I. C. 459.

(y) *Choudhury Jamsai Nath v. Midnapur Zamindari Co.* (1923) 27 C. W. N. 772 75 I. C. 231 (23) A. C. 716.

(z) *Nainappa v. Chudambaram* (1898) 21 Mad.

18
(a) *Venkata v. Yenlotarama* (1899) 22 Mad. 256.

(b) *Venngauda v. Paresha* (1898) 22 Bom. 640.

(c) *Bahilun Nissa v. Zamin* (1920) 42 All. 290 55 I. C. 89.

(d) 42 All. 290 55 I. C. 89 *supra*. See also *Mutcland v. Gill & Co.* (1920) 44 Bom. 293 53 I. C. 515.

(e) *Sennaji v. Pannaji* (1922) 46 Bom. 431, 64 I. C. 560, (22) A. R. 276.

Ss.
0, 11

Contract providing for place of suing.—There is nothing in this section to prevent the Court from giving effect to an agreement that suits in respect of transaction between the parties to the agreement should be brought in the High Court or Small Cause Court of Bombay (f)

Revision.—The Madras and Lahore High Courts hold that an order under this section is open to revision (g); but not so the Allahabad High Court (h). The High Court can interfere under sec 15 of the Charter (i)

Letters Patent Appeal.—An order staying a suit is a judgment under cl 1 of the Letters Patent and an appeal lies from it to the Privy Council (j)

Inherent power to grant stay.—See notes to O. 39, r. 1.

11. [S. 13.] No Court shall try any suit (p. 38) or issue in which the matter directly and substantially in issue (pp. 40-45) has been directly and substantially in issue in a former suit (p. 38) between the same parties (p. 62), or between parties under whom they or any of them claim (p. 65), litigating under the same title (p. 70), in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised (p. 72), and has been heard and finally decided (p. 78) by such Court.

Res judicata

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto (p. 38)

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court (p. 77).

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other (p. 41)

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit (p. 48).

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused (p. 84).

(f) ~ . . .
(g) . . .
(h) *Sultanat Jahan v Sunder Lal* (1920) 42

ALL. 409, 58 I C 90
(i) *Siva Prasad v Tricomdas* (1915) 42 Cal 926, 27 I C. 917
(j) *Jivanlal v P R Jakharia & Co* (1937) 57 Bom 364, 144 I C 808, (33) A. I. 85

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating (p. 66).

Alterations in the section —

- 1 Explanation I is new See notes under the head "Former suit," p. 38 below.
- 2 Explanation II is also new See notes, p. 77 below
3. Explanation IV to sec. 13 of the Code of 1882 has been omitted The reason of the omission is stated to be that it was liable to misconstruction, and that the law was well established apart from the Explanation. The words of the Explanation if literally interpreted, would relieve parties from the bar of res judicata whenever there existed a latent power of alteration: see s. 149, O 20, r 3, and O 20, r 11.
- 4 The words "public right" have been added into Explanation VI in view of the provisions of sec. 91 relating to public nuisances

Res judicata.—The present section deals with the doctrine of res judicata The leading case on the subject is the *Duchess of Kingston's* case (1) and the following classic passage from the judgment of Sir William de Grey is a statement of the leading principles of res judicata:—

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true *first* that judgment of a Court of concurrent jurisdiction, directly upon on the point, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court, *secondly*, that the judgment of a Court of exclusive jurisdiction, directly on the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a Court, of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment "

This passage summarizes the law enacted in this section The rule of res judicata is readily distinguished from the rule in sec. 10, for the latter relates to a res sub judice, that is, a matter which is pending judicial inquiry, while the rule in the present section relates to res judicata, that is, a matter adjudicated upon or a matter on which judgment has been pronounced. Section 10 bars the trial of a *suit* in which the matter directly and substantially in issue is *pending* adjudication in a previous suit The present section bars the trial of a suit or an issue in which the matter directly and substantially in issue *has already been* adjudicated upon in a previous suit Thus if *A* sues *B* for damages for breach of contract, and the suit is dismissed, a subsequent suit by *A* against *B* for damages for breach of the same contract is barred This is the rule of res judicata stated in its simplest form The question of *A's* right to claim damages from *B* having been *decided* in the previous suit, it becomes res judicata, and it cannot therefore be tried in another suit It would be useless and vexatious to subject *B* to another suit for the same cause Moreover, public policy requires that there should be an end of litigation. The question whether the decision is correct or erroneous has no bearing on the question whether it operates or does not operate as res judicata (1), otherwise every decision

(2) 2 Smith & L. C. 13th Ed. 644 645

(1) *Tarini Charan v. Aedra Nath* (1928) 33

C W N. 126, (28) A C 777 (F B.).

would be impugned as erroneous and there would be no finality (m) The rule of *res judicata* may thus be put upon two grounds—the one, the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end of litigation (n) Putting it in another form it may be said that every suit must be sustained by a cause of action, and there is no cause of action to sustain the second suit of A, it being merged in the judgment in the first (o)

Res judicata and estoppel—*Res judicata* is sometimes treated as part of the doctrine of estoppel, but the two are essentially different Estoppel is part of the law of evidence and prevents a man from saying one thing one time and the opposite thing at another time while *res judicata* precludes a man from avowing the same thing in successive litigations (p) Mahmud, J, in *Sita Ram v Amir Begam* (q) said:—“Perhaps the shortest way to describe the difference between the plea of *res judicata* and an estoppel, is to say that while the former prohibits the Court from entering into an inquiry at all as to a matter already adjudicated upon the latter prohibits a party after the inquiry has already been entered upon from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declarations or acts has altered his position. In other words *res judicata* prohibits an inquiry *in limine*, whilst an estoppel is only a piece of evidence”

Suit—Section 11 applies in terms to cases where the matter in issue in a subsequent suit was in issue in a former suit A “suit” is a proceeding which is commenced by a plaint (s 26) The section is not exhaustive, and the doctrine of *res judicata* has been extended to adjudications in proceedings other than suits, see note Section not exhaustive, on p 86 below Some cases extending the doctrine beyond the limits of the Code have given a more extensive meaning to the word suit Thus when probate was refused after a contentious proceeding, the judgment was held to operate as *res judicata* for sec 295 of the Indian Succession Act, 1925, requires the proceeding to take the form as far as possible of a suit (r) On the other hand although an application to file a private award is required by Sch II para 20, to be numbered and registered as a suit a refusal to file a private award has been held not to operate as *res judicata* (s) In a case decided under sec 10 of the Code it was said “the term suit is a very comprehensive one It is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him, that the modes of proceeding may be various, but that if a right is litigated between parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit (t) It has been held that an insolvency proceeding is not a suit for the purpose of this section (u)

Former suit—The expression former suit means a previously decided suit, and the same interpretation applies to appeals Explanation I confirms previous decisions to the same effect (v) It matters not that the previously decided suit was instituted subsequently (w)

(m)

I

(n)

(o) *Jing v Moore* (1844) 13 M & W 494 501
Acadell v Hamilton (1879) L R 4 A C 501 508

(p)

(q)

(r)

(s)

(t) 14 (24) A M 58
Rajmal v Maruti (1921) 45 Bom 320 59
1 C 755, (21) A B 349 *Abul Aziz v Chandu* (1905) 27 Bom L R 60—89
1 C 68 (25) A B 418 But see *Guru Chitran v Uma Charan* (1911) 26 C W N 910 910 I O 935(u) *Venkatarama Venkatarama* (1899) 27 Mad 256 257

(v)

(w)

(x)

(y)

(z)

(aa)

Suits tried together—one judgment.—There is a conflict of decisions as to whether if two suits involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not in the other the matter decided in the latter suit becomes *res judicata* so that it cannot be reopened in the appeal. The preponderance of judicial decisions in different High Courts is in favour of the view that the judgment not appealed against does not become *res judicata* (x). This is on the ground that a decision given simultaneously cannot be said to be a decision in a former suit. The Patna (y) and Rangoon (z) High Courts on the other hand apply the rule of *res judicata*. There is one decision of the Calcutta High Court in which Mookerjee, J., applied the rule of *res judicata* (a) but this was disapproved in a later decision of the same High Court (b). In this later case there were cross suits on an account. A sued B alleging that money was due to him (A), while B sued A alleging that money was due to him (B). These two suits were consolidated and tried as one suit but two decrees were passed. In one decree A's suit was dismissed, and in the other B's suit was partly decreed. A appealed from the decree dismissing his suit but did not appeal from the decree partly allowing B's suit. The Court disapproved of Mookerjee's decision and held that A's appeal was not barred by *res judicata*. The Court did not refer the case to a Full Bench to have Mookerjee's judgment overruled because it considered that the case did not strictly fall within the rule of *res judicata* for the finding that A owed B something was not in issue in a suit where A claimed relief against B.

In *Ghansham Singh v Bholi Singh* (c) A, a mortgagee, sued B, the mortgagor, to recover the amount due on a mortgage. The munsiff passed a decree for A and directed each party to bear his own costs. A appealed as to costs, and B filed a separate appeal as to the amount found due on the mortgage. Both appeals were disposed of in one judgment which reduced the amount payable on the mortgage and awarded A proportionate costs, but two decrees were drawn up one for each appeal. A filed a second appeal against the reduction of the decretal amount in B's appeal, but did not appeal against the decree in his own appeal. It was held that the decree in that appeal did not operate as *res judicata* as A had no reason to appeal from a decree which did not prejudice him. The Full Bench approved of the decision in *Damodhar Das v Sheo Ram Das* (d). This was also a case of one suit and two appeals. A sued B his agent to recover profits made by the agent in dealings on his own account. A's claim was decreed in part. A and B both appealed and the Court dismissed A's appeal and allowed B's appeal. Two decrees were drawn up which were exactly similar. A filed a second appeal against the decree in his own appeal and it was objected that the appeal was barred by *res judicata* as he had not appealed against the decree in B's appeal. The objection was overruled on the ground that the two decrees were in substance one decree. The Full Bench also distinguished the case of *Zaharia v Debis* (e). In this case there were two rival suits for pre-emption filed by two claimants A and B. B was a defendant in A's suit, and A was a defendant in B's suit. A's suit was dismissed and

(x) " " " " " "

(1923) 75 IC 570 (24) A P 823
(z) *Anwar Ali v Ameer Ali* (1925) 2 Rang
633 84 IC 894 (25) A R 104
(a) *Isuf Ali v Gour* (1923) 37 Cal LJ 184 74
IC 591 (23) IC 496

(b) " " " " " "

(c) " " " " " "

(d) " " " " " "

(e) " " " " " "

(1907) 29 All 730

(1911) 33 All 51, 7 IC 156

(y) *Mrs Gertrude Oates v Mrs Milcent*
D Silva (1933) 12 Lat 139 141 IC 762
(33) A L 78, *Dhans Singh v Sri Chandra*

B's suit was decreed *A* filed an appeal against the decree in his suit but not against the decree in *B's* suit. The Full Bench said that it was not necessary to invoke the principle of res judicata for *A* had lost his right by allowing *B's* decree to become final against him. A later Full Bench has followed *Dasmohar Das* a case holding that decrees in cross appeals in the same suit are in fact one decree (*f*).

Suits tried together—separate judgments—If two cross suits are tried together and the same issue is tried and disposed of in two separate judgments the omission to appeal from the decree in one suit will make the decree in the other res judicata so as to bar the appeal (*g*).

Conditions of res judicata—It is not every matter decided in a former suit that can be pleaded as res judicata in a subsequent suit. To constitute a matter res judicata the following conditions must concur

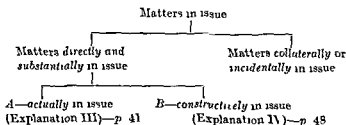
- I—The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was *directly and substantially in issue* either actually (*Explanation III*) or constructively (*Explanation IV*) in the former suit (pp 49 62)
- II—The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. *Explanation I* is to be read with this Condition (pp 62 70)
- III—The parties as aforesaid must have litigated under the same title in the former suit (pp 70 72)
- IV—The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised. *Explanation II* is to be read with this Condition (pp 72 78)
- V—The matter directly and substantially in issue in the subsequent suit must have been *heard and finally decided* by the Court in the first suit. *Explanation V* is to be read with this Condition (pp 78 86)

The above Conditions are considered in order

CONDITION I

Matter directly and substantially in issue

Matters in issue may be classified as follows —



A. Matter actually in issue

Cause of action distinguished from matter directly and substantially in issue.—The expression used in sec 2 of the Code of 1839 was "cause of action". As to that expression their Lordships of the Privy Council said in *Krishna Behari Roy v.*

(1) *Nandau v. Nazim* (1909) 50 All 517 113 IC 93 (1-5) A A 2 4
 (2) *Chatter v. Kailash* (1921) 34 Cal 1 3 281
 574 (1) A C 291 see also

Abd el Basit v. Ashfaq (1908) 28 All WN 211 213 and *Lachmi v. Bhullar* (1909) 8 Lah 284 401 404, 104 IC 219 (27) A L 89

Progenary Choudranee (h): "The expression 'cause of action' cannot be taken in its literal and most restricted sense, but however that may be, by the general law where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them." The expression "matter directly and substantially in issue" was first introduced in the corresponding section (s. 13) of the Code of 1877.

Matter directly and substantially in issue: Explanation III—It is not enough to constitute a matter *res judicata* that it *was in issue* in the former suit. It is further necessary that it must have been in issue *directly and substantially*. A matter cannot be said to have been "directly and substantially" in issue in a suit, unless it was *alleged* by one party and *denied or admitted*, either expressly or by necessary implication, by the other. It is not enough that the matter was *alleged* by one party (i). At the same time it is not necessary to constitute a matter "directly and substantially" in issue that a *distinct* issue should have been raised upon it, it is sufficient if the matter was in issue in *substance* (j). "The application of the rule [of *res judicata*] by the Courts in India should be influenced by no technical considerations of form, but by *matter of substance* within the limits allowed by law" (l). Thus if there is a mutual account between A and B, and A sues B and obtains a decree on the account, a subsequent suit by B against A on the same account for the same year, though beginning and ending about a month earlier, will be barred as *res judicata* (l). On the same principle an issue will be *res judicata* if the judgment of an appellate Court shows that the issue was treated as material and was decided, although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (m).

Matter collaterally or incidentally in issue—Every suit *must* involve a matter "directly and substantially" in issue. It *may* also involve a matter 'collaterally or incidentally' in issue. To constitute a matter *res judicata* it is necessary that it must be in issue "directly and substantially" in the suit under trial, and that it must have been in issue also "directly and substantially," as distinguished from "collaterally or incidentally," in a former suit.

A finding on an issue must be distinguished from an opinion as to the effect of a piece of evidence. In a suit for rent by A against B the Court held that a rent note in which certain land was not included was genuine. B then sued A for a declaration that the land was in fact part of his holding. In this suit the question of the genuineness or the rent note is not *res judicata* for the finding in the first suit is not the decision of an issue but an opinion as to the effect of a piece of evidence (n).

All matters involved in a suit may be 'directly and substantially' in issue, but they cannot all be "collaterally or incidentally" in issue. A *collateral* or *incidental* issue is one that is ancillary to a *direct and substantive* issue, the former is an *auxiliary* issue, the latter the *principal* issue. The expression "collaterally or incidentally" in issue implies that there is another matter which is "directly and substantially" in issue.

(h) (1875) 2 I.A. 283, 285 1 Cal. 144 146
See also *Soorjomonee Dayee v. Sudhanund*
(1873) I.A. Sup. Vol. 212 218, 12 Beng.
L.R. 304

(i) *Shroo Ratan v. Shroo Salai* (1884) 6 All. 358
362 *Slama Churn v. Prosunno* (1879)
5 C.L.R. 251

(j) *Soorjomonee v. Sudhanund* (1873), 12 Beng.
L.R. 304 315 Sup. Vol. I.A. 21.
Lalabati v. Bishun Chobey (1907) 6 C.L.J.
621

(k) *Sheoparsan v. Ramnandan* (1916) 43 I.A.

91, 99 43 Cal. 694 706 33 I.C. 914

(l) *Azam ud-Din v. Ahmad* (1928) 50 All. 28,
103 I.C. 365, (27) A.A. 799

(m) *Mudnapur Zamindari Co. Ltd. v. Naresht*
Narayan Roy (1924) 51 I.A. 233, 51
Cal. 631 80 I.C. 827, (24) A.P.C. 144
Irtannee v. Robinson (1930) 57 I.A. 208,
8 Rang. 326 130 I.C. 319, (30) A.P.C.
224

(n) *Narendranath v. Ananda* (1933) 60 Cal. 1307,
(34) A.C. 60

1 Distinction between matter "directly and substantially" in issue and matter "collaterally or incidentally" in issue.—The leading case on the subject is *Barrs v Jackson* (o) Every suit must involve a matter or matters in respect of which relief is claimed by the plaintiff. It may also involve matters which, though there is no relief claimed in respect of them, are brought in issue for the purpose of deciding matters in respect of which relief is claimed.

Matter directly and substantially in issue—Every matter in respect of which relief is claimed in a suit is necessarily a matter "directly and substantially" in issue.

Illustrations

1 A sues B for the rent due for the year 1907. The defence is that no rent is due. Here the claim for rent is the matter in respect of which relief is claimed. This therefore is a matter "directly and substantially" in issue.

2 A sues B (1) for a declaration of title to certain lands and (2) for the rent of those lands. B denies A's title to the lands, and contends that no rent is due. Here there are two matters in respect of which relief is claimed, namely, (1) the matter of title and (2) the claim for rent. Both these are matters "directly and substantially" in issue.

Matter collaterally or incidentally in issue—A matter in respect of which no relief is claimed but which is put in issue for the purpose of enabling the Court to adjudicate on a matter in respect of which relief is claimed may be "directly and substantially" in issue or it may be in issue "collaterally or incidentally". It would be a matter "directly and substantially" in issue, if it was necessary to decide it to adjudicate on the principal issue and if it was decided in fact the judgment was based upon that decision, otherwise it would be a matter "collaterally or incidentally" in issue. A matter cannot be directly and substantially in issue if the judgment would be correct whether that matter exists or not.

Illustration

A sues B for rent. B pleads abatement of rent on the ground that the area is less than that entered in the lease. The Court finds that the area is greater than that shewn in the lease. The finding as to the excess area is not *res judicata* for it is only ancillary to the direct and substantial issue whether the area is equal to that shewn in the lease or less (p).

Examination of pleadings and judgment—Whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the plaint, the written statement, the issues and judgment. Even if a point is not properly raised in the plaint, yet if both parties join issue upon a matter in dispute the decision will operate as *res judicata* (q). The decree may also be referred to, but it is not enough to refer to the decree *without* the judgment, for a decree states merely how a suit is disposed of, and it is in the judgment that the findings on the issues are recorded (r). The judgment is admissible under s 40 of the Evidence Act. See O 20, rr 5 and 6.

Suits for rent or other recurring liability.—The distinction between a matter directly and substantially in issue and a matter collaterally in issue is well illustrated

(o) (1842) 1 Y. & C. Ch. Cas. 586.

(p)
(q)

(r)

by suits for rent or for other recurring liability. These may be divided into three classes, namely —

A.—Where the first suit is for rent and the subsequent suit is for title

B.—Where both suits are for rent or other recurring liability

C.—Where both suits relate to rate of rent or to the area for which rent is payable

4. *First suit for rent, subsequent suit for title*—In this class of cases it is clear that the subsequent suit being one for title, the question of title is a matter 'directly and substantially' in issue in that suit. Whichever party therefore raises the plea of res judicata in that suit must show that the question of title was also directly and substantially in issue in the former suit, that is in the previously decided suit. If the question of title was in issue in its entirety in the former suit it would be a matter that was 'directly and substantially' in issue in that suit. But if the issue in the former suit did not cover the entire question of title, in other words if it fell short of going to the very root of the title, and was confined only to some of the incidents of title the question of title would be a matter which was 'collaterally or incidentally' in issue in the former suit (a).

In the following illustrations it is assumed that the other conditions of res judicata are fulfilled

Illustrations

(a) *A*, claiming to be the *chela* and heir of a deceased *mohunt* sues *B* for rent of certain lands forming part of the estate of the *mohunt*. *C* claims that he, and not *A*, is the *chela* and heir of the deceased and that he is entitled to the rent. *C* is thereupon joined as a defendant to the suit. The issues raised are—

1. Whether *A* or *C* is the *chela* and heir of the *mohunt*?

2. Whether any and if so what rent is due from *B*?

The Court finds that *A* is the *chela* and heir of the *mohunt*. It also finds Rs. 2,500 due by *B* for rent and *A*'s claim is decreed.

Subsequently *C* sues *A* for a declaration that he is the *chela* and heir of the *mohunt* and claims that as such he is entitled to the whole of the property left by the *mohunt*. *A* contends that the question 'who is the *chela* and heir of the deceased, is res judicata. Is the question res judicata?' The answer is that it is for though the former suit was for rent, the entire question of title to the property of the deceased was directly and substantially in issue in that suit and it was decided against *C*. *Topondhee v Sreeputti* (1880) 5 Cal 832. See also *Gobind v Taruck* (1878) 3 Cal 145 and *Hare Krishna v Gourhari* (1932) 59 Cal. 1250 141 I.C. 56 (32) A.C. 894.

(b) *A* a Hindu, dies leaving a widow and a brother *C*. The widow sues *B* for rent of certain property forming part of the estate of her husband. *C* claims the rent on the ground that it was the joint property of himself and his deceased brother and that he became entitled to it by survivorship. *C* is thereupon joined as a defendant to the suit. The issues are—

1. Whether the deceased alone received the whole rent of the property in his lifetime, or whether the rent was received by him jointly with *C*?

2. Whether any and what rent is due by *B*?

(a) *Gobind v Taruck* (1878) 3 Cal 145. *Ratha v Monohur* (1888) 15 Cal 56 15 I.A. 97. *Kanwar v Mohendra Nath* (1892) 10 Cal 136. *Dwarkanath v Lamchand* (1899) 6 Cal 404. *Karamat v Umar Krishna* (1906) 47 C.L.J. 536 97 I.C. 91 (6) A.C. 108. *Moghtakeshi v Manil* (1930)

57 Cal 371 127 I.C. 763 (30) A.C. 59. *Surendra Nath v Aamakhya Varan* (1930) 3 Bom L.R. 515 123 I.C. 145 (30) A.P.C. 45. *Sangangaeda v Han mantgavla* (1931) 33 Bom L.R. 1303 136 I.C. 801 (32) A.B. 3.

next year's rent and the tenant is at liberty to set up to that suit any defence he thinks proper. The above proposition, however, is subject to this, and here comes in the doctrine of *res judicata*, that neither party is at liberty to re-open in the suit for rent for the next year any question that was substantially and necessarily tried and determined between them in the suit for rent for the *previous year* (2). For the essence of the doctrine of *res judicata* is that where a *material issue* has been tried and determined between the same parties in a proper suit and in a competent Court as to the *status* of one of them in relation to the other or as to a *right or title* claimed by either of them against the other, it cannot again be tried in another suit between them (a).

Maintenance—As regards maintenance, it is to be noted that a decree for maintenance at a particular rate is no bar to a subsequent suit for maintenance at an *enhanced* rate on the ground of altered circumstances, for the rate of maintenance is a variable quantity changing from time to time according to the circumstances of the parties affected by the decree (b). But a right to maintenance may be barred by *res judicata* (c).

C Rate of rent or area for which rent is payable—In this class of cases also both suits are for rent, the first suit being for rent for a particular period and the second for rent for a subsequent period. The matter which is pleaded as *res judicata* is not the plaintiff's *title* to the land of which the rent is claimed, but the *rate* of rent or the *area* for which rent is payable. If the Court in the first suit tries and determines the issue, "what is the proper rate of rent," or "what is the proper area for which rent is payable," the issue relates not merely to the rent for a particular period but to the rent payable for the full term of the lease, and the question as to the rate of rent or the area as the case may be will be *res judicata* in subsequent suits for rent for the remaining period of the lease (d).

Ex parte decree—*Ex parte* decrees operate to render the matter decided *res judicata* (e), and the defendant's failure to appear will not deprive the plaintiff of the full benefit of his decree (f). But in the case of a suit in which a decree is passed *ex parte* [see O D r 6, Code of 1882, s 100] the only matter that can be directly and substantially in issue is the matter in respect of which relief has been claimed by the plaintiff in the plaint. A matter in respect of which no relief is claimed cannot be 'directly and substantially' in issue in a suit in which a decree is passed *ex parte* though the Court may have gone out of its way and declared the plaintiff to be entitled to relief in respect of such matter. In a case where an Insolvency Court made an *ex parte* order declaring a mortgage to be void although no motion to that effect had been made by the Official Receiver, the decision could not operate as *res judicata* for the matter was never directly and substantially in issue (g).

Illustration

A sues B to recover Rs 500, being the rent due for the year 1906 at the rate of Rs 2 per square yard. A does not pray for a declaration in the suit that the rate of rent is Rs 2 per square yard. B does not appear and a decree *ex parte* is passed against him for

- | | |
|---|---|
| (2) <i>Nobo v Foyzbuz</i> (1876) 1 Cal 202 | <i>v Sarbananda</i> (1906) 43 C L J 135 95 |
| (a) <i>Krishna v Bunwari</i> (1874) 1 Cal 144 2 I | I C 130 (26) A C 698 See also <i>Rajah of Ramnad v Ramanathaswami</i> (1911) 44 Mad 514 63 I C 203 (21) A M 306 |
| A 283 | |
| (b) | |
| (c) | (e) <i>Hara Chandra v Bep n</i> (1911) 13 C L J 38 6 I C 860 <i>Rak Kumar v Alimadda</i> (1910) 17 C W N 627 16 I C 911 |
| | <i>Mahammad Gauhar v Samiruddin</i> (1913) 18 C W N 33 27 I C 383 <i>Sarojini v Lakhi</i> (1915) 29 C W N 253 85 I C 123 (25) A C 407 |
| (d) | (f) <i>Biraj Mohini v Chintamani</i> (1901) 5 C W N 877 |
| | (g) <i>Chenchavva v Bapayya</i> (1930) 62 Mad L J 177, 135 I C 31, (32) A M, 233 |

Rs 500. Subsequently *A* sues *B* for rent due for the year 1907 also at the same rate. *B* appears at the hearing, and contends that the rate is Re 1 per square yard. *B* is not precluded from raising that contention, for the question of rate was not "directly and substantially" in issue between *A* and *B* in the former suit, and it cannot therefore be res judicata. Even if the Court in the former suit had declared that *A* was entitled to rent at the rate of Rs 2 per square yard, the question of rate would not be res judicata for *A* had not asked for a declaration in that suit in respect of the rate of rent. *A*'s claim in the former suit was merely for arrears of rent amounting to Rs 500, and the decree in that suit has no greater effect than evidence that Rs 500 was due when the decree was passed. Had *A* in the former suit also prayed for a declaration in respect of the rate of rent as part of the substantive relief, and had the Court then declared that the rate of rent was Rs 2, the question of rate would have been res judicata though the decree was passed ex parte, for it would then have been a matter "directly and substantially" in issue. *Madhusudan v. Brue* (1899) 16 Cal 300.

A suit to set aside an ex parte decree on the ground that it was obtained by fraud may be barred by res judicata if an application to set it aside on the same ground has been dismissed under O 9, r 13. See note under that rule, 'Ex parte decree obtained by fraud'.

Suspension of rent—If the landlord's suit for rent for a particular period has been dismissed on the ground that the premises are let for one rent and that he has dispossessed the tenant of part of the tenure, then if the landlord sues again for rent for a subsequent period, the tenant claiming a suspension of rent must again prove that he has been kept out of possession during the period of the subsequent suit. This is because the onus of proving eviction is on the tenant, and the subject matter of the two suits is different (*A*).

Decree for injunction and res judicata—*A* sues *B* for an injunction restraining *B* from doing certain acts. The injunction is granted. *B* repeats the acts complained of in the suit. *A* again sues *B* for an injunction. The suit is barred as res judicata, for the relief claimed is covered by the injunction granted in the former suit, and *A*'s remedy is to proceed against *B* in execution of the decree [O 21, r 32]. Where the decree is passed by a chartered High Court, *A* may proceed against *B* for contempt (*s*). See notes to s 50 below.

Suit under s 77, Registration Act and res judicata—If a suit under s 77 of the Registration Act to enforce registration of a sale deed is infructuous, the purchaser is not debarred from suing for specific performance of the contract of sale (*j*). But when a party refuses to admit execution on the ground that the document has been materially altered and the Court finds in a suit under s 77 of the Registration Act that the document has been materially altered the finding operates as res judicata in a subsequent suit between the parties (*l*).

Decree for restitution of conjugal rights and res judicata—*A* sues *B*, his wife, for restitution of conjugal rights. Restitution is granted and *B* goes and lives with *A* (that is to say, the decree is satisfied). *B* again leaves *A*, and *A* again sues *B* for the same relief. The suit is not barred as res judicata (*l*). The distinction between this and the case of an injunction is that while in a suit for injunction the defendant is for ever restrained from doing the acts complained of, the wife cannot be directed in a suit for restitution of conjugal rights to live with her husband for the rest of her life, for many things may occur entitling her to leave him, e.g., gross cruelty.

A) *Sulechandra v. Harachand Lal* (1933)

60 Cal 17 143 I C 33 (33) A C 90

B) *Lal Narain v. Chaur Singh* (1901) 23 All

49

Lal v. Lechan (1932) 54 All 64 136

I C 561 (3) A A 96

(*A*) *Dwijendra v. Jogendra* (1924) 39 Cal

L J 40 79 I C 50 (-1) A C 600

(*B*) *Keshavlal v. Parroti* (1924) 18 Bom 3-7

Custom—A mere negative finding that a custom is not proved will not operate as *res judicata*, for one man may prove more than another (m)

Decree for possession conditional on payment.—Where in a suit by the heirs of a Mahomedan against his widow in possession of his estate in lieu of her dower a decree is passed against her that they should have possession of their shares of the estate upon payment of a proportionate part of the dower debt within six months and that upon failure to pay their suit should be dismissed, and the plaintiffs fail to pay within six months the decree is no bar to a subsequent suit for immediate possession by the same plaintiffs against the widow on the ground that the dower debt had in the meantime been satisfied out of the income of the estate in the hands of the widow (n). A right to get possession of land at the date when the suit to recover it is instituted is a wholly different thing, a wholly different *res*, from the right to recover it at some future time and possibly under wholly altered circumstances (o). So a consent decree between a usufructuary mortgagee and his mortgagor tenant will not operate as *res judicata* in a subsequent suit by the latter to redeem the mortgagee (p).

Subject matter of suits may be different.—As the test of *res judicata* is the matter directly and substantially in issue, it follows that the subject matter of the second suit may be entirely different. Thus if A claims certain property as the adopted son of X, and the defendant denies the adoption, a finding in A's favour on the issue as to adoption will be binding on the defendant as *res judicata* in a subsequent suit by A against the same defendant to recover *another property* claimed under the *same title* (q). It is not open to the defendant to contend that the properties claimed in the two suits being different, the decision on the question of A's adoption in the first suit cannot operate as *res judicata* in the second. On the same principle where in a suit brought by A against B for possession of one of two properties comprised in a sale deed passed by B to A, B contends that the deed is fictitious, and the Court finds that the deed is fictitious, the finding that the sale deed is invalid will operate as *res judicata* in a subsequent suit by A against B to recover the other property under the same sale deed (r). Similarly, in the illustration cited under class B of rent suits (p. 44 above) it is no answer to the plea of *res judicata* that the subject matters of the two suits are different. The reason is that the matter directly and substantially in issue in both the suits is the same, namely, whether the particular land of which the rent is claimed is rent free, and the decision therefore on that issue in the first suit operates as *res judicata* in the subsequent suit. But the decision cannot apply to *other lands* unless they form part of the *same tenure* (s).

From the same fundamental principle that the matter directly and substantially in issue, and not the subject matter, constitutes the test of *res judicata* it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit, the trial of that matter will *not* be barred as *res judicata* though the subject matter of the two suits may be the same (t).

- (m) *Ram Chander v Darayoo Singh* (1933) 14 Lah 365 141 I C 493 (33) A L 593
 (n) *Manna Bibi v Chaudhari* (1951) 52 I A 145 47 All 250 86 I C 579 (25) A PC 63 affirming (1919) 41 All 538 51 I C 242 *Nasrati Begam v Dufaraz Begam* (1976) 49 All 803 98 I C 978 (77) A A 39 *Compare Hadi v Kasim* (1977) 93 I C 48 (77) A O 60
 (o) *Manna Bibi v Chaudhari* (1951) 52 I A 145 47 All 250 86 I C 579 (25) A PC 63
 (p) "
 (q) "

Kushan Lal (1889) 11 All 148 137

- (r) *Kedar Nath v Shree Shankar* (1923) 45 All 515 61 I C 370 (23) A A 613
 (s) *Ram Chander v Madho* (1886) 12 Cal. 484 12 I A 183
 (t) *Jagatjit v Sarabjit* (1892) 19 Cal 159 172 18 I A 165 176 *Ragho v Gopal* (1930) 54 Bom 162, 124 I C 225 (30) A B. 132

Where both the matter directly and substantially in issue and the subject matter are the same in both the suits, the matter in issue will be *res judicata* not because of the identity of the subject matter, but because of the identity of the matter directly and substantially in issue (u) Where the matter directly and substantially in issue and the subject matter are both different in the two suits, the matter in issue is not *res judicata* not because the subject matters are different, but because the matters directly and substantially in issue in the two suits are different (t)

B Matter which might and ought to have been made ground of attack or defence.

Matter constructively in issue Explanation IV—A matter which might and ought to have been made a ground of attack or defence is a matter which is constructively in issue In the cases cited in the note under “A—actually in issue Explanation III the matters were ‘actually in issue for they were actually alleged by one party and denied by the other It often happens, however, that a matter which *might and ought* to have been made a ground of attack by the plaintiff to substantiate the relief claimed by him in the suit is not alleged by him as a ground of attack, and also that a matter which *might and ought* to have been made a ground of defence by the defendant is not set up as a ground of defence A matter which *might and ought* to have been made a ground of attack or defence in the former suit, but which has not been alleged as a ground of attack or defence, will be deemed to have been a matter directly and substantially in issue in such suit (Explanation IV), that is to say, though it has not been *actually* in issue directly and substantially it will be regarded as having been *constructively* in issue directly and substantially This section draws no distinction between the claim that *was actually* made in a suit and the claim that *might and ought* to have been made If the parties had an opportunity of controverting it, that is the same thing as if the matter had been actually controverted and decided (w) The plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and to pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time (x)

Where a matter has been *actually* in issue, it is necessary to constitute the matter *res judicata* that it should have been *heard and finally decided* But where a matter has been *constructively* in issue, it could not, from the very nature of the case, be heard and decided, and it will be *deemed* to have been heard and decided against the party omitting to allege it This is in accordance with the view of the section taken by the High Courts of Allahabad and Bombay (y) In *Kailash Mondal v Baroda Sundar Das* (z), Banerjee, J, observed that though a matter, which might and ought to have been made a ground of attack or defence should be *deemed* as provided by Explanation IV to have been *directly and substantially* in issue, yet it could not be deemed to have been ‘heard and finally decided’ as there was nothing in Explanation IV to suggest that such matter should also be deemed to have been *heard and finally decided* This view was followed in a subsequent case (a), but it is obviously incorrect, and it was

(u) *Triloki v Pertab* (1888) 15 Cal 809 15 I A 13

(v) *Zamindar of Futargram v Proprietors of*

(w)
(x)

Muhammad (1927) 8 Lah 15 17, 96 I C 1002 (26) A L 603

(y) “ “ “ “ “

(z)

(a) *Woomesh v Baroda* (1901) 28 Cal 17

rejected by the same Court in later cases (b), and it has been dissented from by the High Court of Lahore (c). Moreover, in a recent case, the Judicial Committee took exception to the language in which the observations of Baggallay, J., were couched saying that the language was not so careful as it might have been (d). The Privy Council case illustrates the rigidity with which the principle laid down in Explanation IV is to be applied. In that case it was held that where a matter which might and ought to have been made a ground of attack is not raised in the plaint, and an application is afterwards made to amend the plaint, but it is refused, the matter will be deemed to have been directly and substantially in issue in that suit. See ill 4 below.

Illustrations

1. *X*, a Hindu, dies leaving a widow. The widow makes a gift to her brother, *B*, of certain property belonging to her husband. After the death of the widow, *A*, alleging that he and *X* were members of a joint family, sues *B* for a declaration that he is entitled to the property by right of survivorship. The Court finds that *A* and *X* were separate and the suit is dismissed. Subsequently *A* sues *B* for the recovery of the same property, alleging that as the nearest reversionary heir of *X*, he became entitled to the property on the death of the widow, and that the alienation made by her in favour of *B* was not binding upon him. The suit is barred as res judicata. *A* might and ought to have set up the title by *heirship* as a ground of attack in the former suit. It will therefore be deemed to have been "directly and substantially in issue" in that suit, and it will also be deemed to have been "heard and finally decided" against *A*. *Guddapa v. Tirkappa* (1901) 25 Bom 189. (The Bombay ruling was dissented from in *Ramaswami v. Iyithinatha* (1903) 26 Mad. 760, a case on different facts altogether. The grounds of dissent, it is submitted, are not satisfactory. See also *Masilamani v. Thiruvengadam* (1908) 31 Mad. 385, being ill (3) below.)

2. *A*, a Hindu, dies leaving a widow and a brother, *B*. The widow sues *B* for recovery of certain property alleging that it was the self-acquired property of her husband and that a will alleged to have been executed by her husband and relied on by *B* is a forgery. *B* alleges that the property was joint family property, and that on the death of *A* he became entitled thereto by right of survivorship, but he does not claim any title to the property under the will. The Court finds that the property was the self-acquired property of *A*, and decrees the widow's claim. Subsequently *B* sues the widow to recover the same property from her, now claiming the same as a devisee under *A*'s will. The suit is barred as res judicata. *B* might and ought to have set up the claim under the will as a ground of defence in the former suit. "When a plaintiff claims an estate, and defendant, being in possession, resists that claim he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." *Srinivas Rajah v. Katama Natchiar* (1866) 11 MIA 50, 73, *Doorga Perai v. Doorga Konwars* (1879) 4 Cal 190, 5 IA 149.

3. *A* sues *B* to recover certain property belonging to the estate of *C*, alleging that his father had been adopted by *C*'s brother, *D*, to whom the property descended on *C*'s death. The suit is dismissed on the ground that the adoption is not proved. *A* then sues *B* to recover the same property claiming it as *C*'s bandhu. The suit is barred as res judicata. *A* ought to have claimed the property in the first suit in the alternative as *C*'s bandhu. *Masilamani v. Thiruvengadam* (1908) 31 Mad 385.

(b) *Jamadar Singh v. Serazuddin* (1908) 35 Cal 979. *Mohini Chandra v. Anil* (1908) 13 C W N 513 515 11 C 66. *Shib Chandra v. Lakshmi Rija* (13 4) 40 Cal L J 507 511, 85 I C 1*3 (*5) A C 427. See also *Bayan Naidu v. Suryanarayana* (1914) 37 Mad 70 74 171 C 445. *Maung No v. Maung Lo* (19-3) 1 Rang 363, 365 366.

76 I C 612 (23) A R 229

(c) *Gobindal v. Baldeo Singh* (1915) P R no 12 P 69 24 I C 9*1. *Muhammad v. Ghulam Bi* (19 9) 11 Lah L J 97.

(d) *Fateh Singh v. Jagannath Baksh Singh* (19 5) B- J A 100, 47 All 158, (*25) A 1 C 55.

4 *A*, claiming as the next reversioner of a deceased Hindu, sued his widow for a declaration that a gift by her to *D* of property inherited by her from her husband was void. *D* was joined as a party defendant, and so also *G* who claimed to be a reversioner nearer than *A*. As to *G*, *A* alleged that he was colluding with the widow and the donee *D*. The defence was that *G* was the nearest reversioner and the only person entitled to dispute the gift. In this state of pleadings the widow died. On the death of the widow the question of collusion became comparatively unimportant, for if *G* was the nearest heir *A* could get no title to the property. *A* then applied for leave to amend the plaint by setting forth the death of the widow, and claiming that he had become entitled to institute a suit for possession and by setting up a family custom that he was equal in degree with *G*. The application was rejected on the ground that it was an attempt to introduce a new case. The question then arose whether it was worthwhile contesting the suit. *A*'s counsel admitted that, apart from custom, *A* was one degree more remote than *G* and that if *A* could not make out the case of a family custom, the suit must fail. The trial judge thereupon dismissed the suit with costs but gave liberty to *A* to bring a fresh suit for possession. Subsequently *A* sued *D* and *G* for possession of one half of the property founding his title on family custom. The Privy Council held that the second suit was barred for *A* 'might and ought' to have alleged the family custom in the first suit it being clearly a 'ground of attack' in that suit. As the first suit was dismissed and not withdrawn under O 23 the trial judge had no power to grant leave to bring a fresh suit. *Fateh Singh v Jagannath Balsh Singh* (1925) 52 I A 100 47 All 158 (25) A P C 55

5 *A* sues *B*, *C*, *D* and *E* as joint tenants for rent on the basis of a pottah. The property in respect of which the rent is claimed consists of 25 kattas of land. None of the defendants appears in the suit and a decree is passed against them *ex parte*. Subsequently *A* sues *B*, *C*, *D* and *E* for rent for a subsequent period. *B* appears and contends that he does not hold the land jointly with *C*, *D* and *E* and that he is liable only for one fourth rent for one fourth of the whole area. *B* is precluded from setting up the case of separate tenancy, because he might and ought to have set up that case in the previous suit. It is immaterial that the decree in the previous suit was passed *ex parte*. *Sarojini v Lakhi Priya* (1924) 29 C W N 253 85 I C 123 (25) A C 427

6 In April 1921 a consent order was made referring to arbitration three suits relating to syndicates of two six and ten firms each. In a chamber summons for extension of time for making the award some of the defendants objected that the syndicate of ten was an illegal association as it was not registered under sec 4 of the Companies Act although it was composed of more than 20 persons. These defendants therefore objected that the reference was invalid. But in August 1927 a consent order was made superseding the reference of April 1921 and referring to arbitration the same three suits along with two other suits also. In this consent order all the parties agreed that the

August 1927. It was also held that the number of persons composing a syndicate is a mixed question of law and fact which could be the subject of a valid compromise. *Raoji v Ratansi* (1930) 54 Bom 696, 126 I C 305, (30) A B 431

7 *A*, a Mohamedan heir sued to recover his share of the inheritance from the widow of the deceased who was in possession of her husband's estate in lieu of dower. *A* was decreed subject to the payment of Rs 75 22½ less the profits of the property in the possession of the widow from the date of the decree to the date of delivery of possession.

More than 20 years later a legal representative sued the representatives of the widow alleging that the amount of the decree had been satisfied out of the usufruct. The widow's representatives urged that interest should be added to the decretal amount which was the balance of the dowry debt. The Privy Council held that the claim to interest might and ought to have been made a ground of defence in the first suit and that it was barred by *res judicata* in the second suit. *Mst Narsara Begum v Mst Dulafro Begum* (1930) 57 I A. 181, 52 All 273, 126 I C 430 (30) A PC 177

Test.—The question whether a matter *might* have been made a ground of attack or defence in the former suit rarely presents any difficulty. Whether it *ought* to have been made a ground of attack or defence depends on the facts of each case. As a general rule every ground of attack with reference to the title sued on must be pleaded if necessary in the alternative (e), for the plaintiff will not be allowed to make out a fresh case afterwards. Thus if a plaintiff sues for possession on the ground of ownership, and his suit is dismissed, he cannot afterwards claim possession as mortgagee, for it was an alternative ground of attack which he did not raise in the first suit (f). If the matter raised as a defence would have defeated, varied, or in any way affected the decree in the previous suit, it ought to have been raised (g). Conversely, if the decree in the previous suit is inconsistent with a defence which ought to have been raised, that defence must be deemed to have been raised and finally decided, and is barred by *res judicata* (h). Thus if the plaintiff sues on a contract and obtains a decree, the defendant cannot afterwards sue for rescission of the contract on the ground that it did not fully represent the agreement between the parties (i). If a matter could have been set up as a ground of attack or defence in the former suit, and if its introduction into that suit was *necessary* for a complete and final decision of the right claimed by the plaintiff therein it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in that suit, *unless* the matters in that and the subsequent suit are so dissimilar that their union might lead to confusion (j). Thus in ill (1) on page 49 the title by heirship *could* have been made a ground of attack *in the alternative* in the first suit: it was *necessary* to do so for the complete and final disposal of all questions as to A's right to the property, and it was not forbidden by any rule of pleading, and further the question in both suits being the same, namely, whether A was entitled to the property or B, the title by survivorship and the title by heirship could not be said to be so dissimilar that their union might lead to confusion. It may appear at first sight that the two matters are dissimilar, for the title by survivorship and the title by heirship have to be supported by *different evidence*. But the test of *evidence* which was relied on in some old cases (l) is not a satisfactory test, and though it was advanced in argument in two cases before the Judicial Committee of the Privy Council no notice was taken of it in the judgments (l). The reason is when a plaintiff sets up *alternative* grounds of attack, or when a defendant sets up *alternative* grounds of defence, the evidence in support of such *alternative* ground would in most cases be different. But it has been said where the evidence in support of one ground is such as might be destructive of the other ground the two grounds need not be set up in the same suit. The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is

(e) *Alluri v Kunjusha* (1884) 7 Ma 1 264

(f) *Imam Khan v Ayub Khan* (189) 19 All 517

(g) c

(h) J

A R 39

(i) *C J Phillips v A E Mitchell* (1932) 52 Cal 953 141 I C 50 (3) A C 889

(j) *Kamencar v Rajkumar* (1893) 9 Cal 79 82 19 I A 34 *Moosa v Ebrahim* (1913)

40 Cal 1 39 I A 37 16 I C 0 6 I dappa v Turappa (1901) 25 Bom 183 19. *Srimut Rajah v Katama Nalchir* (1868) 11 MIA 50 73 *Hoon lars v Unuoporna* (1873) 11 Eng LR 158 167 *Grihari Lal v Lmaji* (1911) 3 Lat I J 25 2 1 63 I C 717 (1) A J 17 *Abendra Nath v Nagen lars Nath* (1913) 60 Cal 1155 (33) A C 900

(l) *Muttu Chetty v Muttu Chetty* (1882) 4 Mad 295 233 *Naro v Ratcha* (1882) 2 Bom 3 6 3 J

(l) 11 MIA 50 and 11 MIA J K 1st *supra*

afforded by the provision of O 2, r 1, and the provisions of that rule as to the framing of suits are only to be applied 'as far as practicable' (m)

It is clear that it cannot be said of any matter that it ought to have been set up as a ground of attack in a former suit, if its introduction would have been incongruous to the matter of that suit (n). Thus a person claiming property on the allegation that it is wakf property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not wakf property. Having asserted that the . . . property was wakf property, [he] could not have consistently claimed the same property as [his] personal property except possibly in an alternative form [He was], however, not under an obligation to adopt the latter course. The mere fact that he could have claimed the property in the alternative as his own property is no ground for saying that he ought to have done so (o). Again Explanation IV does not apply unless the parties are litigating under the same title. Thus if A sues B for a declaration that he is the owner of a certain property he is not bound to plead in the alternative that if he is not the owner he is a permanent tenant. If his suit in the capacity of owner is dismissed and B files a suit against him for possession he may plead in the second suit that he is a permanent tenant and defend the suit in that capacity (p). Where a person who is joined as a defendant in a mortgage suit as being interested in the equity of redemption is entitled to the property by a paramount title, but his title is not disputed in the plaint, he is not bound to set it up as a ground of defence in that suit (q). See note to O 34, r 1, 'Persons having an interest either in the mortgage security or in the right of redemption'.

The decisions bearing on this branch of the subject are numerous. An examination of these decisions leads to the following four Rules.

Rule I—Where the right claimed in both suits is the same, the subsequent suit will be barred as *res judicata*, though the right in the subsequent suit is sought to be established by a title different from that in the first suit.

The dismissal, however, of a plaintiff's suit for the recovery of land based on an alleged lease is no bar to a subsequent suit for the recovery of the same land on the strength of his general title, the reason given being that the legal relation put forward in the subsequent suit is different from that in the former suit [see ill (5)].

In the following illustrations it is assumed that the other conditions of *res judicata* are fulfilled.

Illustrations of Rule I

1 *Guddappa v. Tyrkappa* (1901) 25 Bom 180, ill (1) on p 49 above, *Masilamani v. Thirusengadam* (1903) 31 Mad 383, ill (1) on p 49 above, and *Fateh Singh v. Jagan Nath Bakesh Singh* (1925) 52 I A 100, 17 All 154, (25) A 190 55, ill (4) on p 50 above, are cases under this Rule.

2 A Hindu H dies leaving a widow W, and a son in law S, the husband of a predeceased daughter D. W sues S, as the heir of her husband H, to recover certain property, alleging that it forms part of the estate of H. The defence is that H had made

| | |
|--|---|
| (m) <i>Masilamani v. Thirusengadam</i> (1903) 31 Mad 383, ill (1) on p 49 above. | <i>Masil</i> (1910) 11 K no 91 p 28° 37 I C 110. |
| (n) <i>Guddappa v. Tyrkappa</i> (1901) 25 Bom 180, ill (1) on p 49 above. | (i) <i>Kanhali Lal v. Lakshmi Han</i> (1924) 48 All 230 241 281 402 (24) A A 353. |
| (o) <i>Fateh Singh v. Jagan Nath Bakesh Singh</i> (1925) 52 I A 100, 17 All 154, (25) A 190 55, ill (4) on p 50 above. | (p) |
| | (q) |

a gift of the property to his daughter *D*, and that on *D*'s death *S* as *D*'s husband, became entitled to the property as *D*'s heir. *H* alleges that the deed of gift relied upon by *S* is a forgery. The Court finds that the deed of gift is genuine and the suit is dismissed. *H* then sues *S* to recover the same property, alleging that as it has been found that the property belonged to *D* she is entitled to the property as the heir of her daughter *D*. The suit is barred as res judicata. Here the right claimed in both the suits is the same, namely, the right to the property in question. In the first suit, it was claimed by *H* as her husband's heir. In the second suit it is sought to be established by her by a different title, namely, as her daughter's heir. *H* "might and ought" to have claimed in the alternative as her daughter's heir in the former suit. Having failed to do so, her title, as her daughter's heir, will be deemed to have been directly and substantially in issue in the former suit, and it will also be deemed to have been heard and finally decided against her in that suit. *Denofundhoo v. Kristomonee Dowse* (1877) 2 Cal 152. The Calcutta decision has been dissented from in *Ummatha v. Cherna* (1882) 4 Mad 308 but the Madras case falls within the Exception rather than the Rule. See ill (4) below.

3. *A* lends Rs 50,000 to a Hindu widow on a mortgage of her husband's property. The widow then surrenders the property to *B*, the reversionary heir of her husband, on *B* agreeing to pay all her debts. *A* sues *B* and the widow to recover Rs 50,000 by sale of the mortgaged property. *A* also asks for a personal decree against the widow, but he does not ask for a personal decree against *B*. *B* is joined as a defendant on the ground that the mortgaged property formed part of the property transferred by the widow to him. The Court finds that the mortgage is not binding upon the husband's estate, and the suit against *B* is accordingly dismissed. As against the widow, a personal decree is passed for the amount of the loan. *A* realises Rs 5,000 only from the widow and after her death he sues *B* for the balance of the money due under the decree (that is to say, *A* asks for a personal decree against *B* for the balance) alleging that *B* was personally liable under the agreement with the widow to pay her debts. The suit is barred as res judicata for *A* might and ought to have alleged in the former suit that if the mortgage was not binding on the estate, *B* was at all events personally liable to pay the debt in consequence of the agreement which he (*B*) had entered into with the widow. *Jameswar Pershad v. Rajkumari* (1893) 20 Cal 79, 19 I A 234.

Note—Suppose that in the above illustration, *A* had applied in the first suit for amendment of the plaint by adding a claim for relief against *B* personally, but the application was refused. In such a case it has been held that the subsequent suit would not be barred. *Alagirisami v. Sundareswara* (1898) 21 Mad 278. *Thakore v. Thakore* (1890) 14 Bom 31. But these decisions it is submitted are not correct. *Fateh Singh v. Jagannath Bakhsh* (1925) 52 I A 100, 47 All 158 (25) A PC 55.

3A. *A* in 1896 makes a gift of her property to *B* who mortgages it to *C*. *C* sues for sale on his mortgage and purchases the property himself in 1918. *A* who is still in pos-

is extinguished by her adverse possession for 12 years. The application is refused and the suit dismissed. *A* continues in possession and in August 1930 *C* files a suit to recover possession from *A*. *A* again pleads adverse possession. *A*'s plea is a valid defence, for although she is debarred from pleading that she had acquired a title by adverse possession in August 1918 it is still open to her to prove that she has acquired title by adverse possession in August 1930. *Kiranshahi v. Official Assignee* (1933) 60 Cal 8, 143 I C 679, (33) A C 246 (facts simplified).

4. *A*, alleging that he is the *lutima* adopted son of *B*, claims the whole estate of *B*, and sues for the administration of *B*'s estate. *A* fails to prove the adoption and the

suit is dismissed. *A* afterwards sues for administration of the same estate claiming one half of the estate as the *apatika* adopted son of *B*. The suit is barred as *res judicata*. *Maung Ba Thein v. Ma Jhan Myint* (1927) 5 Pang 565 105 I C 586, (28) A.R. 9

5. *A* sues *B* to recover certain lands from him alleging that *B* held the lands under a lease and that the lease had expired. The lease is not proved, and the suit is dismissed. Subsequently *A* sues *B* to recover the same land on the strength of his general title. The suit is not barred as *res judicata*. *Zamorin of Calicut v. Narayanan* (1899) 22 Mad 323. *Autti Ali v. Chindan* (1900) 23 Mad 629. *Kandunni v. Kathamma* (1886) 9 Mad 201. *Ummatha v. Cheiria* (1882) 4 Mad 308. *Girdhar v. Dayabhai* (1884) 8 Bom 174

For other cases under this Rule, see foot note (r)

Rule II—If a matter which forms a ground of attack in the subsequent suit could have been alleged as a ground of defence in the former suit, but was omitted to be so alleged in that suit it will be deemed to have been directly and substantially in issue in that suit within the meaning of Explanation IV

This rule contemplates cases in which the plaintiff in the subsequent suit was defendant in the former suit. Thus a claim which might have been pleaded by way of set off (s) or counter claim (t) to a previous suit will not be barred

Illustrations

1. *Srimut Rajah v. Katama Natchiar* (1866) 11 M I A 50, which is ill (2) on p 49 above, *Doorga Persad v. Konuuri* (1879) 4 Cal 190, 5 I A 149 cited in that illustration, and *Sarojini v. Lakhmi Priya* (1920) 29 C W N 203, 85 I C 123, (25) A C 427, which is ill (5) on p 50 above, belong to this class

2. *A* and *B*, two Hindu brothers divide the whole of the joint family property except a garden. *A* dies leaving a widow who sells *A*'s half share in the garden to *C*. After the death of the widow *C* sues *B* for partition of the garden, and an ex parte decree is passed under which he (*C*) enters into possession of a moiety of the garden. *B* then sues *C* to recover possession of the moiety sold by *A* a widow to *C*, alleging that the sale was made by the widow without legal necessity and that on the death of the widow, he became entitled to the moiety as the reversionary heir of *A*. The suit is barred as *res judicata* because *B* might and ought to have raised the question of the validity of the sale as a ground of defence in the former suit. *Shyama Charan v. Minmaya Deb*, (1904) 31 Cal 79

3. A mortgagee, who holds the mortgaged property also as lessee from the mortgagor sues the mortgagor to recover Rs. 3 000, being the amount of the mortgage debt. At the date of the suit the mortgagee owes Rs. 4 000 to the mortgagor for rent under the lease, and this sum the mortgagor claims to set off against the mortgage debt under an express agreement in that behalf. The agreement is not proved, and a decree is passed against the mortgagor for Rs. 3 000. The property is sold in execution of the decree, and it is purchased by the mortgagee with the leave of the Court. The mortgagor then sues the mortgagee to have the sale set aside and for a declaration that the mortgage

- | | | | |
|-----|---|---|---|
| (r) | " | " | v. S. bba (1901) 63 I C 001. <i>Mallaji v. Iyannammam</i> (1924) 47 Mad 46. 7 I C 6-8 (24) A M 603. <i>Hara Chandra v. Phagabai</i> (1901) 34 C W N 41. 129 I C 54 (30) A C 690. <i>Dattatraya v. Matha</i> (1933) 30 Bom L R 1131, (34) A R 30 |
| | | | (i) <i>Amritsar National Building Co. v. Faza</i> H R (1919) 1 R 74 5-1 C 800 |
| | | | (t) <i>Pich v. S. bba</i> (1915) 28 Mal L J 23 23 I C 34 |

debt is extinguished, now claiming that a general account may be taken as between him and the mortgagee, and that in taking such account the rent due to him may be set off against the mortgage-debt. The suit is barred, for the mortgagor "might and ought" to have set up that claim in the alternative in the former suit. *Mahabir Pershad v. Macnaghten* (1889) 16 Cal 682, 16 L.A. 107.

4. *A, who owns a share in a village, mortgages it to B, and sells it subsequently to C. C sues B for redemption of the mortgage, and obtains a decree. Subsequently B sues C for pre-emption of the share sold by A to C, alleging that he is a co sharer in the village and entitled as such to pre-emption. The suit is not barred. The right of pre-emption not being a "vested and ascertained" right when B filed his written statement in the former suit, it could not have been properly pleaded by B as an answer to the claim for redemption in that suit - Ram Chand v. Durga Prasad (1904) 26 All. 61.*

For other cases under this rule, see foot note (u)

Rule III.—Where the right claimed in the subsequent suit is *different* from that in the former suit, and it is claimed under a *different title*, the subsequent suit is not barred as res judicata.

Illustrations.

1. *A* sues *B* for possession of certain lands alleged to have come to his share on a partition of joint family property with *B*. The defence is that the family property has not yet been divided, and the suit is dismissed on a finding to that effect. A subsequent suit by *A* against *B* for partition of the family property is not barred. *Shivram v. Narayan* (1881) 5 Bom. 27; *Konerrav v. Gurrar* (1881) 5 Bom. 589, *Nilo v. Gound* (1886) 10 Bom. 24; *contra*, *Bheeka v. Bhugoo* (1878) 3 Cal. 23, which was dissented from in *Ummatha v. Cheria* (1882) 4 Mad. 308.

2. *A*, alleging that *B* held certain lands from him under a lease and that the lease had expired, sues *B* to recover Rs 500 for use and occupation of the land by *B* after expiration of the lease. The defence is that the lease is a subsisting lease, and the suit is dismissed on a finding to that effect. A subsequent suit by *A* to recover Rs 500 as rent payable under the lease is not barred. *Watson v. Dhondra* (1878) 3 Cal 6.

[*Note the peculiar character of the cases cited above*—In ill (1), *A* suing on the basis of a partition, the Court finding that there was no partition, and *A* subsequently suing for a partition; in ill (2), *A* suing on the basis that the lease has expired, the Court finding that the lease has not expired, and *A* subsequently suing on the basis that the lease is a subsisting lease. For other cases of this class, see foot note (v)]

3 *A* sues *B* in 1869 to recover a talukdari estate from him. The suit is dismissed on a finding that the estate had become the absolute property of *B* under a conditional sale made by *A* to *B* in 1853. *A* then sues *B* in 1875 for redemption of the same property, alleging that he had mortgaged the property as absolute owner thereof to *B* in 1854. The suit is not barred. "It may be difficult to reconcile the position of [*B*] as mortgagee in 1854 with his position as absolute owner in 1853. . . But if it be established that [*A*] was mortgagor in 1854, why should he be barred of his right [of redemption] merely because at an earlier date [*i.e.*, in 1853] he may have had no right to the property at all?" *Amanat Bibi v Imdad Husain* (1888) 15 Cal 800, 15 I A 106, 111, *Ralghadar v Ram Lal* (1904) 28 All 501.

(u) *Maklum v Imam* (1873) 10 RHC 203
Dost Muhammad v Said Iqam (1898)
 10 All 81 *Hari v Ganpatrao* (1887) 7
 Bom 272 *Jagan Nath v Balkaran* (1907)
 All W N 25 *Mauzo No v Mauzo*
 Po (1923) 1 Rang 363 76 IC 612 (23)
 A R 239 (J Phillips v A F Mc
 chell (1932) 50 Cal 985 141 L C 50

(32) A C 88; *Kedar Nath v Kshiroda*
(1933) 60 Cal 832 (33) A C 680

| | | | | | | | | |
|-----|-------|---|------|----|----|----|----|-------|
| (t) | S^j | 1 | 1972 | 44 | 76 | 77 | 78 | 80-82 |
|-----|-------|---|------|----|----|----|----|-------|

498-499-

4 *A* sues *B* for redemption of a mortgage alleged to have been executed in 1856 of 50 cawnies of land. *B* denies the genuineness of the mortgage, and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853, and that the 14 and the remaining 36 cawnies were sold to him by *A* in 1855. The mortgage is not proved, and the suit is dismissed. *A* then sues *B* to redeem the 14 cawnies on the footing of the mortgage of 1853. The suit is not barred. *Ramaswami v Vythinatha* (1903) 26 Mad 769, *Veerana v Muthu Kumara* (1904) 27 Mad. 102, *Parambath v Puthengattil* (1905) 28 Mad 406, *Thrikaklat v Thruthiyal* (1906) 29 Mad 153, *Mahabir v Purbhoo Nath* (1907) 12 C W N 292, *Ram Sahai v Ahmadi Begam* (1911) 33 All 302, 9 I C 53.

5 *A*, alleging that he mortgaged certain lands to *B* with possession, sues *B* for redemption, the suit being brought by him as mortgagee. The mortgage is not proved, and the suit is dismissed. *A* then sues *B* for possession of the same lands claiming them as absolute owner thereof. The suit is not barred. *Mahomed Ibrahim v Sheik Hamya* (1911) 35 Bom 507, 12 I C 387.

For other cases under this rule, see foot note (u).

Rule IV—It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit (x).

Suits on Mortgage—If a mortgagee in a suit for redemption against him by the mortgagor, omits to obtain an order for sale of the mortgaged property on failure of payment by the mortgagor of the mortgage debt within the time allowed for redemption, he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within that time. The mortgagee 'might and ought' to have claimed the right of sale in the suit for redemption brought against him (y). So also if the mortgagee omits to ask for a personal decree against the mortgagor, he cannot do so in a subsequent suit on the same mortgage (z), but if he applies for a personal remedy and his claim is not adjudicated upon, he may renew the claim at a later stage of the same proceeding (a).

In a case from Oudh (b) a puisne mortgagee sued to redeem a prior mortgagee and made the prior mortgagee's sub mortgagee a party. The prior mortgagee pleaded that the sub mortgage was fictitious, and a decree for redemption was passed on payment of the amount due on the mortgage to the mortgagee alone. The sub mortgagee then sued the prior mortgagee for a personal decree under s 68 of the Transfer of Property Act. The Court held that the issue as to the genuineness of the sub mortgage was not res judicata as the sub mortgagee's presence in the prior suit was not compulsory and there was no necessity for the sub mortgagee to ask for a personal decree in the former suit. On the other hand a sub mortgagee is a person interested in the mortgage security under O 34, r 1 and in *Narayan v Ganoy* (c) it was said that in a redemption suit of land which has been sub mortgaged the judgment directs an account of what is due to the original mortgagee and then of what is due to the sub mortgagee.

(u) *T* .

J. C. O. Aishan v Junda neta Din (1910) 1 R 94 37 I C 119, *Dhanapala v Anantha* (1913) 24 Mad L J 418 18 I C 973, *Dola v Balya* (1922) 46 Icm 803 66 I C 815, (2-) A B 29, *Meey Lal v Chandra Khan* (1923) 45 All 53 80 I C 1041 (23) A A 176, *Parashram v Balwant* (1930) 11 Lah 92 1 I C 48 (23) A L 872, *Angaya v*

Madivalata (1931) 33 Bom L R 204 130 I C 606 (31) A B 187, *Ram Udit v Ram Samuj* (1931) 7 Luck 73 134 I C 465 (31) A O 263.

(z) *Kura v Madho* (1915) P R no 68 p 202, 31 I C 159.

(y) *Maloji v Sagaji* (1889) 15 Bom 587.

(z) *Sourendra v Hari Prasad* (1925) 5 Pat 135 52 I A 418 91 I C 1033 (25) A IC 280.

(a) *Raghi K d v Pitam* (1930) 52 All 901, 130 I C 198 (31) A A 99.

(b) *Jaganath v Sheo Shankar* (1930) 6 Luck 309 (—) A O 455.

(c) (1901) 15 Bom 602.

If a puisne mortgagee sues for sale on his mortgage and makes the prior mortgagee a party without claiming any relief against him, the prior mortgagee is in the position of a holder by title paramount outside the controversy (d). He need not appear in the suit and his rights under the prior mortgage are not affected. But if the puisne mortgagee suing on his mortgage raises any controversy as to the prior mortgage and seeks to sell the property unencumbered, the prior mortgagee, if he omits to plead his prior mortgage, will be debarred from doing so in a subsequent suit (e). On the same principle it has been held that when a person is joined in a redemption suit as heir and legal representative of a deceased mortgagee, he need not set up a claim to a part of the property by title independent of and paramount to the mortgage (f).

If a puisne mortgagee sues to redeem a mesne mortgage and the latter omits to set up a prior mortgage which he has redeemed and to which he is subrogated the rights of subrogation will be lost by res judicata, and if the mesne subsequently sues the puisne mortgagee claiming to be subrogee of the prior mortgage his suit will be barred (g).

If a mortgagee has successive mortgages of the same property from the same person there is a conflict of decisions whether he can obtain an order for sale on one alone. The Bombay High Court has held that if a mortgagee sues on a subsequent mortgage without reference to a prior mortgage he is barred by Explanation IV as he might and ought to have included the prior mortgage in his suit (h). Similarly the Madras High Court has held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property (i). But it was held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage (j). In Madras there was a conflict of decisions at one time which was set at rest by a decision of the Full Bench in *Subramania v Balasubramania* (k) which adopted the above view. In doing so the Full Bench followed the decision of the Allahabad High Court in *Sundar Singh v Bholu* (l) which held that the two mortgages constituted different causes of action. This view is correct and has been generally followed (m). But as it is a hardship on the mortgagor that his property should be sold twice, it is now provided by sec 32 of the Transfer of Property Amendment Act 20 of 1929 that a mortgagee having several mortgages of the same property from the same person must sell all or none. See sec 67A of the Transfer of Property Act.

In suits for redemption, foreclosure or sale, there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption, foreclosure or sale as the case may be (n). A mortgagor

- | | |
|--|--|
| <p>(d) <i>Patt v ...</i></p> <p>(e) <i>Gopal v Benaru</i> (1904) 31 Cal 425. <i>Goya dhar v Bhagwanra</i> (1917) 34 All 59, 16 I C 8.</p> <p>(f) <i>Mehdi Ali v Saaved Wilayet</i> (1930) 5 Luck 658 L.I.C. 277 (30) A O 97.</p> <p>(g) <i>Sri Gopal v Pirthi Singh</i> (1907) 29 I A 118 24 All 429. <i>Mahomed Ibrahim v Ambika Pershad</i> (191) 3 J I A 69 39 Cal 5, 7 14 I C 496. <i>Kanhaiya Lal v Ikram Fatima</i> (1933) 8 Luck 107 13 J I C 358 (3) A O 68.</p> <p>(h) <i>Dhondo v Bhikaji</i> (1915) 39 Bom 138 27 I C 1015. <i>Dalchand v Akema</i> (1911) 45 Bom 55 5 J I C 347 (1) A B 25.</p> <p>(i) <i>Nattu v Annangara</i> (1907) 30 Mad 333.</p> | <p>dissenting from <i>Sundar Singh v Bholu</i> (1898) 20 All 322.</p> <p>(j) <i>Subramania v Balasubramania</i> (1915) 39 Mad 927 30 I C 317. <i>Dhondo v Bhikaji</i> (1915) 39 Bom 138 145 27 I C 1005.</p> <p>(k) (1915) 38 Mad 927 30 I C 317.</p> <p>(l) (1898) 20 All 322. <i>Paghanath Prasad v Jamuna Prasad</i> (1907) 23 All 33. <i>Nazirunnissa v Anila</i> (1927) 100 I C 577 (27) A A 341.</p> <p>(m) <i>Lalshmanan v Muthajay</i> (1921) 40 Mad L J 126 6 I C 833. <i>Tarmeshwar v Raj Kishore</i> (1914) 3 Pat 8 J 80 I C 34 (-5) A P 59. <i>Udhai Chand v Nayin Singh</i> (1919) 50 I C 40. <i>Corind v Harwar</i> (1910) 39 Cal 60 7 J I C 370. <i>Ndo v Anirbad</i> (1910) 5 C W N L.J. 60 I C 609.</p> <p>(n) <i>Mahabir Pershad v Macnaghten</i> (1882) 16 Cal 68 16 I A 107. <i>Pinayak v Datta Iroya</i> (1902) 26 Bom 661.</p> |
|--|--|

4 *A* sues *B* for redemption of a mortgage alleged to have been executed in 1850 of 50 cawnies of land. *B* denies the genuineness of the mortgage, and alleges that 14 out of the 50 cawnies were mortgaged to him in 1853 and that the 14 and the remaining 36 cawnies were sold to him by *A* in 1855. The mortgage is not proved, and the suit is dismissed. *A* then sues *B* to redeem the 14 cawnies on the footing of the mortgage of 1853. The suit is not barred. *Ramaswami v Vythinatha* (1903) 26 Mad 760, *Veerana v Muthu Kumara* (1904) 27 Mad 102, *Parambath v Puthengattil* (1905) 28 Mad 406, *Thirukaitak v Thiruthiyal* (1906) 29 Mad 153, *Mahabir v Purbhoo Nath* (1907) 12 C W N 292, *Pam Sahai v Ahmadi Begam* (1911) 33 All 302, 9 I C 53.

5 *A* alleging that he mortgaged certain lands to *B* with possession, sues *B* for redemption the suit being brought by him as mortgagor. The mortgage is not proved and the suit is dismissed. *A* then sues *B* for possession of the same lands claiming them as absolute owner thereof. The suit is not barred. *Mahomed Ibrahim v Sheik Hamja* (1911) 35 Bom 507 12 I C 387.

For other cases under this rule, see foot note (w).

Rule IV—It cannot be said of a relief which if claimed in the first suit would have made that suit bad for multifariousness that it ought to have been made a ground of attack in that suit (x).

Suits on Mortgage—If a mortgagee in a suit for redemption against him by the mortgagor, omits to obtain an order for sale of the mortgaged property on failure of payment by the mortgagor of the mortgage debt within the time allowed for redemption he will be precluded from bringing a separate suit for sale in default of payment by the mortgagor within that time. The mortgagee might and ought to have claimed the right of sale in the suit for redemption brought against him (y). So also if the mortgagee omits to ask for a personal decree against the mortgagor he cannot do so in a subsequent suit on the same mortgage (z), but if he applies for a personal remedy and his claim is not adjudicated upon he may renew the claim at a later stage of the same proceeding (a).

In a case from Oudh (b) a puisne mortgagee sued to redeem a prior mortgagee and made the prior mortgagee a sub mortgagee a party. The prior mortgagee pleaded that the sub mortgage was fictitious and a decree for redemption was passed on payment of the amount due on the mortgage to the mortgagee alone. The sub mortgagee then sued the prior mortgagee for a personal decree under s 68 of the Transfer of Property Act. The Court held that the issue as to the genuineness of the sub mortgage was not res judicata as the sub mortgagee's presence in the prior suit was not compulsory and there was no necessity for the sub mortgagee to ask for a personal decree in the former suit. On the other hand a sub mortgagee is a person interested in the mortgage security under O 34 r 1 and in *Narayan v Ganoy* (c) it was said that in a redemption suit of land which has been sub mortgaged the judgment directs an account of what is due to the original mortgagee and then of what is due to the sub mortgagee.

(w)

Madrasaia (1931) 33 Bom L R 204 130 I C 606 (31) A B 187 *Ram Udd v Ram Samuj* (1931) 7 Luck 73 134 I C 465 (31) A O 263

(x) *Kura v Madho* (1915) P R no 68 p 299, 31 I C 159

(y) *Maloji v Sagaji* (1880) 13 Bom 567

(z) *Sourendra v Hari Prasat* (1905) 5 Pat 135 57 I A 418 91 I C 1033 (15) A 1 C 980

(a) *Rajit Kul v Pitam* (1930) 5 All 901, 130 I C 108 (31) A A 93

(b) *Jagannath v Sheo Shankar* (1930) 5 Luck 363 (31) A O 453

(c) (1901) 15 Bom 69

If a puisne mortgagee sues for sale on his mortgage and makes the prior mortgagee a party without claiming any relief against him, the prior mortgagee is in the position of a holder by title paramount outside the controversy (d). He need not appear in the suit and his rights under the prior mortgage are not affected. But if the puisne mortgagee suing on his mortgage raises any controversy as to the prior mortgage and seeks to sell the property unencumbered, the prior mortgagee, if he omits to plead his prior mortgage, will be debarred from doing so in a subsequent suit (e). On the same principle it has been held that when a person is joined in a redemption suit as heir and legal representative of a deceased mortgagee, he need not set up a claim to a part of the property by title independent of and paramount to the mortgage (f).

If a puisne mortgagee sues to redeem a mesne mortgagee and the latter omits to set up a prior mortgage which he has redeemed and to which he is subrogated, the rights of subrogation will be lost by res judicata, and if the mesne subsequently sues the puisne mortgagee claiming to be subrogee of the prior mortgage his suit will be barred (g).

If a mortgagee has successive mortgages of the same property from the same person there is a conflict of decisions whether he can obtain an order for sale on one alone. The Bombay High Court has held that if a mortgagee sues on a subsequent mortgage without reference to a prior mortgage he is barred by Explanation IV as he might and ought to have included the prior mortgage in his suit (h). Similarly the Madras High Court has held that a suit on a prior mortgage bars a suit on a subsequent mortgage of the same property (i). But it was held that a mortgagee might sue on a later mortgage reserving his rights on a prior mortgage (j). In Madras there was a conflict of decisions at one time which was set at rest by a decision of the Full Bench in *Subramania v. Balasubramania* (l) which adopted the above view. In doing so the Full Bench followed the decision of the Allahabad High Court in *Sundar Singh v. Bholu* (l) which held that the two mortgages constituted different causes of action. This view is correct and has been generally followed (m). But as it is a hardship on the mortgagor that his property should be sold twice, it is now provided by sec 32 of the Transfer of Property Amendment Act 20 of 1929 that a mortgagee having several mortgages of the same property from the same person must sell all or none. See sec 67A of the Transfer of Property Act.

In suits for redemption, foreclosure or sale, there ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee right up to the time of actual redemption, foreclosure or sale, as the case may be (n). A mortgagor

(d) *Pi*

disenting from *Sundar Singh v. Bholu*
(1898) 20 All 322

(j) *Si*

(e) *Gopal v. Benarasi* (1904) 31 Cal 429. *Gaja dhar v. Bhagwant* (1912) 34 All 533, 16 I C 8.

(f) *Mehdi Ali v. Sayed Wilayet* (1930) 5 Luck 658, 121 I C 277, (30) A O 97.

(g) *Sri Gopal v. Parthi Singh* (1902) 29 I A 118, 24 All 429. *Mahomed Ibrahim v. Ambika Pershad* (1912) 39 I A 68, 33 Cal 527. 14 I C 490. *Kankaiya Lal v. Ikram Fatima* (1933) 8 Luck 103, 133 I C 338, (32) A O 208.

(h) *Dhondo v. Bhikaji* (1915) 39 Bom 138, 71 I C 1005. *Dolachand v. Ahema* (1921) 45 Bom 55. 59 I C 347. (21) A B 282.

(i) *Nattu v. Annangara* (1907) 30 Mad 353,

(k) (1915) 38 Mad 927, 30 I C 317.

(l) (1898) 20 All 322. *Paghnath Prasad v. Jamuna Prasad* (1907) 29 All 233. *Nazirunnissa v. Asifa* (1927) 100 I C 577, (27) A A 341.

(m) *Lalshmanan v. Muthaya* (1921) 40 Mad L J 126, 62 I C 833. *Parmeshwar v.*

(n) *Mahabir Pershad v. Macnaghten* (1889) 16 Cal 682, 16 I A 107. *Mayak v. Dattatraya* (1902) 26 Bom 661.

therefore, who has obtained a decree for redemption against a mortgagee in possession and paid what was due according to the decree, and obtained possession, cannot afterwards sue for profits realized by the mortgagee for a period prior to the delivery of possession. Such profits 'might and ought' to have been taken into account at the time of passing the decree (o). Similarly, where a mortgagor deposits the mortgage money in Court under sec. 83 of the Transfer of Property Act and obtains a decree for possession from a usufructuary mortgagee under sec. 62, he cannot subsequently sue for profits realized by the mortgagee from the date of the deposit to the date of the delivery of possession (p). See notes, 'Finality of decree in redemption suit,' on p. 92 below.

Suits for partition.—If in a previous suit for partition some of the properties are left out by mistake or with the consent of the parties, a subsequent suit for partition of those properties is not barred, but it will be barred if they were excluded by the Court from partition after a contest between the parties on the ground that they are incapable of partition (q).

Suit for declaratory decree.—Failure to sue for a declaratory decree in no way bars a claim for substantive relief when it arises (r).

Subject matter may be different.—It is not necessary for Explanation IV to be applicable that both the issue and the subject matter of the two suits should be the same. It is enough if the matters in issue are the same, otherwise in suits for arrears of rent there could be no res judicata at all, for the subject matters of successive suits for arrears of rent are necessarily different (s). See note under the same heading at page 47, *supra*.

Issue of law.—This section provides that no Court shall try any suit or "issue," etc. Issues are of three kinds (1) issues of fact (2) issues of law, and (3) mixed issues of law and fact. An issue of fact may be res judicata. A mixed issue of law and fact may also be res judicata (t). An issue of law, it has been held, may or may not be res judicata. The law on the subject may be summarized as follows:—

(1) A decision on an issue of law operates as res judicata if the cause of action in the subsequent suit is the same as that in the first suit (u). It is immaterial that the decision was erroneous in law (v). See ill. (1) below.

(2) There is a conflict of decisions whether, if the causes of action in the two suits are different, an erroneous decision on a question of law operates as res judicata. It has been held in some cases that it does not (w) [ill. (2)], and in some that it does (x).

(o) *Kathi v. Bajrang Prasad* (1908) 30 All. 36.
(p) *Lukminibai v. Venkatesh* (1907) 31 Bom.

39 Cal. 848 14 I. C. 124 *Chamanlal v.*

(q)

(r)

(s) *Jamadar Singh v. Serradina* (1908) 33
Cal. 379 *Sarajni v. Lakhi Prasad* (1925)
29 C. W. N. 253 259, 85 I. C. 13 (25)
A. C. 40.

(t) *Devan Prava v. Dhabu Sundari* (1901) 28

(u)

(x) *Venkata v. Andarolu* (1917) 32 Mad. L. J.
63 3 I. C. 85 *Sudaram v. Laxman* (1911)
45 Bom. 1260 84 I. C. 162, (21) A. B. 8.

Kor v. Andar (1884) 10 Cal.
111 *Prad in Tarini Charan v. Andar*
(1903) 30 Cal. 334 (21) A. C. 7.
Asma Charan (1901) 32
Cal. 111 *Nath v. Lalmanand* (1912)

[il. (3)] The latter view was adopted by a Full Bench of the Calcutta High Court in *Tarini Charan v. Kedar Nath* (y). The judgment proceeded on the broad ground that the correctness or otherwise of a judicial decision has no bearing upon the question, whether it does or does not operate as *res judicata*. It was also pointed out that it was the identity of the matter directly and substantially in issue that was the test of *res judicata* and not the identity of the cause of action. It was contended in that case that the law had been altered by judicial decisions since the judgment in the first suit, and reliance was placed upon the judgment of Maclean, C.J., in *Alimunnissa v. Shama Charan* (z) where it was said: "Cases must be decided upon the law as it stands when judgment is pronounced, and not upon what it was at the date of a previous suit, the law having been altered meantime. It has been conceded that, if the law had been altered meanwhile by statute, the objection [of *res judicata*] could not prevail: it is difficult to see why it should prevail because the law has been since determined to be otherwise by judicial decisions. Referring to this passage Rankin, C.J., observed in the Full Bench case that the reasoning in *Alimunnissa* case was erroneous. The learned Judge said: "The legislature, by statute, may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties. They propose, at all events, to ascertain the law, and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. The principle relied upon is abhorrent to section 11 of the Civil Procedure Code and to the general intention of the doctrine of *res judicata*." At the same time the learned Judge observed that when a plea of *res judicata* is raised with reference to a point of law which concerns questions of jurisdiction (a), or procedure (b), or limitation (c), and in which besides the parties the Courts and the public have an interest, it was at least a question whether special considerations should not apply. In a Bombay case (t) Baker J., after an exhaustive review of the case law expressed entire agreement with the judgment of Rankin C.J. In the Bombay case however the decision was not on a pure point of law. The holder of a *Saranjam* sought to execute an award decree of 1855 under which he was entitled to a share of the collections made by a junior branch of his family. The defence was that the award had been superseded by a resumption and regrant of the *saranjam* by Government in 1900. This same defence had been made to an execution application for a share of the collections of previous years and had been disallowed and the Court had then held that the regrant and resumption of the *saranjam* had not the effect of nullifying the award. This construction of the regrant was held to be a mixed question of fact and law which operated as *res judicata*. Again when a deed of partition was construed to be an award, the construction was held to be a mixed question of law and fact and to operate as *res judicata* (e). *Tarini Charan's* case has been followed by the Madras High Court (el).

(3) There is no doubt, as observed by Rankin, C.J., that if the law is altered by the passing of a new Act after a decision in a case, the decision cannot operate as *res judicata*. Thus in *Lalshmi v. Atal* (f) after a preliminary decree for sale had been passed on a mortgage and before a final decree was made, the Chota Nagpur Tenancy Act, 1908, was extended to the district in which the property was situate. That Act provided that no

(y) (1929) 56 Cal 723 (28) A C 777

(z) (1905) 32 Cal 749 754

(a) See *Rajaram v. Central Bank* (1926) 28 Bom L R 879 981 C 341, (26) A B 481

(b) See *Kuppana v. Kumara* (1911) 34 Mad 450 71 C 418

(c) See *Attamma v. Naraina* (1907) 30 Mad 504

(d) *Keshav v. Gansadhar* (1931) 33 Bom J R 1443 135 I C 470, (31) A B 570

Savitri v. Holebasappa (1932) 34 Bom L R 198 137 I C 600 (32) A B 257

(e) *Abdul Rahim v. Fateh Ullah* (1933) 14 Lah 31, 142 I C 724, (33) A L 274

(el) " " " " " "

" " " " " "

(f)

that the decision in the previous suit was erroneous. *Hellly v Full Bench of the Calcutta High Court* that the decision in the previous suit even if erroneous operated as res judicata: *Tarini Charan v Kedar Nath* (1929) 56 Cal 723 (28) A C 777. *Chandi Prasad v Maharaja Mahendra* (1931) 23 All 5, at pp 10-13.

In the cases in which it was held that an erroneous decision on a point of law where the causes of action were different does not operate as res judicata the Courts were influenced by the consideration that they would be perpetuating an injustice for all time if they were to hold that an erroneous decision on a point of law in a former suit was binding upon the parties in a subsequent suit instituted upon a new cause of action. It must, however, be recognized as stated by Mookerjee, J, in *Aghore Nath v Kamini Devi* (A), that the effect of this is to substitute in the present section the expression 'cause of action' for 'the matter in issue'. In *Benlata v Andarolu* (1), Naicker, J, took the extreme view that where a decision on a point of law, whether it be on the construction of a document or of a statute or on common law or on customary law once settles a question that arises directly out of conflicting views as to the rights of the parties it is res judicata. A similar opinion was expressed by Shah, J, and Lawrence, J, in *Sitaram v Larman* (2), and by Das J, in *Ramlal v Deodharas Rai* (1). To get over the difficulties which might arise from this extreme view, some judges have suggested a distinction between a decision on an abstract question of law, such as a question of limitation, and a decision on a concrete question, such as the construction of a document entered into between the parties to a suit, the latter question being treated as one to which the rule of res judicata applies, and the former as one to which the principle of *stare decisis* applies (1). It is difficult to see what the principle of *stare decisis* has to do with the rule of res judicata (m). In *Tarini Charan v Kedar Nath* (n), Rankin, C J, said that whether a decision was correct or erroneous it had no bearing on the question of res judicata, and that what was res judicata between the parties to a suit was not the reasoning or any principle of law, but the actual decision declaring the rights of the parties.

In this connection it is interesting to note the recent decision of the Privy Council in *Broken Hill Proprietary Co v Broken Hill Municipal Council* (o). The appeal was from a judgment of the Supreme Court of New South Wales. The question for determination was as to the correct method of ascertaining the annual value of a mine for rating purposes for the years 1919, 1920 and 1921. That question turned upon the construction of s 153 (3) of the Local Government Act, 1919, of New South Wales. The company was assessed for the years 1917, 1918 and 1919 by the Council on a particular construction of the section and that construction was upheld by the High Court of Australia. The Council adopted the same method for assessment for the years 1919, 1920 and 1921 and it was upheld by the Supreme Court. The company appealed to the Privy Council. It was contended on behalf of the Council that the question as to the matter of valuation was res judicata, but this contention was overruled and the appeal was allowed. As to the plea of res judicata their Lordships said: "There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply." This case shows that according to the English law an erroneous decision on a question at least of the interpretation of a statute does not operate as res

(A) (1910) 11 Cal. L. J. 461 471 6 I C 54.

(1) (1911) 11 Cal. L. J. 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000.

(1) (1911) 11 Cal. L. J. 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000.

(1) (1911) 11 Cal. L. J. 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000.

(1) (1911) 11 Cal. L. J. 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174

judicata If a decision of every question of law were *res judicata*, a decision that one of several co sharers may alone maintain a suit for rent of the entire holding, though in contravention of the express provisions of s 194 of the Agra Tenancy Act, 1901, would operate as *res judicata* in a subsequent suit between the same parties so as to preclude the tenant from raising the same defence in that suit, but it has been rightly decided that such a decision has not the effect of *res judicata* (p)

Estoppel against a statute—Whether or not a finding on a point of law can be *res judicata*, it is a settled principle that there can be no estoppel against a statute, for estoppel cannot supersede the law of the land (q) Thus in *Hoomesh v Barada* (r) where a previous rent suit had been decreed at a rate which included illegal cesses the defendant was not precluded from questioning the legality of the claim The Bombay High Court has allowed the plea of *res judicata* to sanction what is prohibited by law This was in a case (s) where a mortgagor lessee of a portion of a bhag which was inalienable under the Bombay Bhagdari Act 5 of 1862, when sued for rent, was not allowed to plead that the bhag was inalienable, because he had omitted to do so in a previous *ex parte* rent suit In a more recent case (t) the Allahabad High Court dismissed a suit by a single co sharer for rent because that form of suit was forbidden by section 194 of the Agra Tenancy Act It was objected that the defendants had not raised this plea in previous rent suits and as to this the Court said that 'where the law forbids a certain thing being done in a suit no amount of failure by a defendant in previous suits to plead the positive bar created by legislature will prevent its being taken up in a subsequent suit'

CONDITION II

The same parties or parties under whom any of them claim

This condition is the principle that judgments and decrees bind only parties and privies (u) A privy is a convenient term of English Law to describe a person who claims under a party Latham, J, in a Bombay case (v) classified persons other than parties as (1) privies (2) persons not claiming under parties but represented by them, and (3) strangers A privy who claims under a party is bound for he who takes the advantage must bear the burden—*qui sentit commodum debet et sentire onus* Persons represented are in fact parties through their representatives—Explanation VI In the absence of fraud an adjudication is binding on the first two classes, for as to strangers the maxim applies that *res inter alios acta nocere non debet*

Same parties—Parties are persons whose names are on the record at the time of the decision, and he may be a person who has intervened in the suit (u) A party who withdraws or whose name is struck off, ceases to be a party (x) A party who dies during the pendency of the suit but whose name erroneously remains on the record is not a party (y) If the parties are different there is no *res judicata* (z) Thus A sues B for rent The defence is that C, and not A, is the landlord A fails to prove his title, and the suit is dismissed A then sues B and C for a declaration of his title to the property The suit is not barred for the parties to the two suits are not the same, C not having been a party to the former suit (a) It has been doubted if the Secretary of State can be said to be a party to Land Acquisition proceedings taken by the Collector (b)

| | | | |
|-----|---|-----|--|
| (p) | 283 | (r) | <i>Ahmed Jai v Tulleebhoy</i> (1889) 6 Bom 703 703 |
| (q) | . | (s) | <i>Gobind v Tarick</i> (1878) 3 Cal 145 |
| (r) | . | (t) | <i>Kales Coomari v Pran Kishoree</i> (1872) 18 W R 22 |
| (s) | . | (v) | <i>Bepin Behary v Brojo Nath</i> (1889) 8 Cal 357 |
| (t) | . | (x) | <i>Raia Binod v Sri Sri Gopal</i> (1927) 54 Cal 770 54 I A 238 101 I C 8 3 (7) A 1 C 108 |
| | . | (y) | <i>Durkannth v Ram Chaml</i> (1899) 26 Cal 424 43 |
| | . | (z) | <i>Secretary of State v Talga Sahab</i> (1932) 56 Lm 501 140 I C 171 (3) A B 386 |
| (u) | <i>Mohunt Das v Nal Kom</i> (181) 4 C W N | | |

the house from *K*'s son who claimed title under *K*. *M* urged that the question of title as between her and *K* was res judicata by reason of the decision in the creditor's suit. The Privy Council held that the conditions of res judicata were established because there was a conflict of interest between *M* and *K* for it was only if the house belonged to Amernath that the plaintiff's case could succeed and this question was decided in the plaintiff's favour. Their Lordships observed that it was immaterial that *K* had not entered an appearance or contested the suit for she was a proper party and had a right to be heard if she so desired. In a case, however, where one defendant actually gave evidence and supported the case of the other defendant, it was held that there was no conflict of interest and no res judicata between the defendants (1).

A Hindu *H* dies leaving two daughters *D1* and *D2* and a nephew *N*. *D1* sues *D2* and *N* to recover certain property under an oral will of *H*. *D2* claims the property under a will in writing executed by *H*. *N* claims the property as undivided nephew of *H*. The Court finds that *H* and *N* were divided that the will in writing is the valid will, and dismisses *D1*'s suit. Subsequently *D2* sues *N* to recover the property under the written will. *N* contends that he and *H* were joint, and that he became entitled to the property by right of survivorship. The question whether *H* and *N* were joint is res judicata. That question was directly and substantially in issue in the first suit, and it was necessary to decide it in that suit to adjudicate upon *D1*'s claim, and it was decided against *N* (2). Another type of cases in which a question between co-defendants may become res judicata is where a suit is brought against two or more defendants, and a will has to be construed by the Court to adjudicate upon the plaintiff's claim which is founded on the will. In such cases the decision with regard to the construction of the will on the rival contentions of the defendants may be res judicata in a subsequent suit by some or one of them against the rest (3), but not if no rival contentions were raised at all (4). A decree for partition is in favour of each party to whom a share is awarded and is res judicata not only as against the plaintiff (5), but as between the (6), co-defendants (6).

Res judicata as between co-plaintiffs.—Next, as to res judicata between co-plaintiffs. As a matter may be res judicata between co-defendants, so it may be res judicata between co-plaintiff subject to the same conditions which apply to the case of co-defendants (7).

Pro forma defendant.—A party may be joined as a defendant in a suit merely because his presence is necessary in order to enable the Court effectually and completely to adjudicate upon the question involved, see O 1, r 10 (2) and sec 32 of the Code of 1882. In such a case no relief is sought against him and the matter in issue in the suit is not in issue between him and any other party, and cannot therefore be res judicata against him. For instance *A*, claiming to be entitled to possession of a tank as tenant of *Y* sues *B* for possession. *A* is joined as pro forma defendant and no relief is claimed against him. The suit is dismissed on a finding that *B* is the owner. *X* then sues *B* for possession and *B* contends that the issue of ownership is res judicata. This contention must fail for the issue was decided in the former suit between *A* and *B*, and not between *A* and *B* for *A* was only a pro forma defendant (8). Again *A* sues *B* for possession of a house and joined *C* as a party alleging that part of the house had been let to him. The suit is decreed and subsequently *B* sues *C* for possession. The decree in the first case

(1)

(2)

(3)

(4)

(5)

(6)

(7)

(8)

between *A* and *B* may operate as res judicata in a subsequent suit between *A* and *C*, it is necessary to show that *C* claims under *B* by a title arising *subsequently* to the commencement of the first suit. Thus a purchaser, mortgagee, lessee or donee of a property is not estopped by a decree obtained in a suit against the vendor, mortgagor, lessor or donor commenced *after* the date of the purchase, mortgage, lease or gift (c)

See notes below under the head "Condition III Litigating under the same title"

Representative suit—Explanation VI—This section deals with representative suits, that is, suits instituted by or against a person in his representative, as distinguished from individual character. Suits brought or defended by one or more persons on behalf of themselves and others with the leave of the Court under O 1, r. 8, are common instances of this class. Explanation VI provides that where persons litigate bona fide in respect of a public right or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. It refers to cases in which a decision in a suit may operate as res judicata against persons *not expressly named* as parties to the suit as where a suit is instituted by *A* and *B* on behalf of themselves and others, or where it is instituted against *A* and *B* on behalf of themselves and others. The conditions under which the decision in such a suit may constitute res judicata against the parties not expressly named in the suit are—

- (1) that there must be a *right claimed* by one or more persons in common for themselves and others not expressly named in the suit,
- (2) that the parties not expressly named in the suit must be *interested in such right*
- (3) that the litigation must have been conducted bona fide on behalf of all parties interested (d) and
- (4) that if the suit is one under O 1, r. 8 all the conditions of that section have been strictly complied with (e)

Where a person claims a right *for himself* which happens to be common to him and others, he cannot be said to be litigating on behalf of the others, and the Explanation does not apply (f)

Illustrations

(1) A decree in a suit against certain members of a sect alleged to be wrongdoers in their *individual* capacity cannot operate as res judicata in a subsequent suit against the other members of the sect *Sadagopa Chariar v Arishnamoorthy Rao* (1907) 30 Mad. 185 34 I A 93 [The wrong complained of in the former suit was that the defendants carried an idol in procession through certain streets and that such processions were in violation of the plaintiffs' rights. The suit was against the defendants in their *individual* capacity, and not as representing the sect to which they belonged.]

(c) *Sda Ram v Anur* (1886) 8 All 324 *Jay Chandra v Sreenath* (1904) 32 Cal 357 (vendor and purchaser) *Muttan v*

(d) "

(e) *Kumaranth v Ramaswami* (1933) 60 I A 278 56 Mad 627 143 J C 605 (34) A FC 183

(f) *Kumaranth v Venkatasubramania* (1971) 61 Mad L J 841 101 J C 59 (21) A M 645

"J purchaser]

(2) *A*, alleging that he is the proprietor of a village, sues *B*, *C* and *D* for ejectment. The defence is that *A* is not the proprietor and that part of the village belongs to *B*, *C* and *D*, and the rest to *X*, *Y* and *Z*. The Court finds that *A* is not the proprietor, and *A*'s suit is dismissed. *A* then sues *X*, *Y* and *Z*, and also *B*, *C* and *D*, for a declaration that he is the proprietor of the village and for possession. The question of *A*'s title to the village is *res judicata* so as to bar the suit against *B*, *C* and *D*, who were parties to the former suit, but it is not *res judicata* so as to bar the suit against *X*, *Y* and *Z* who were not parties to the former suit. It cannot be said that *B*, *C* and *D* litigated in the former suit in respect of a private right claimed in common for themselves and *X*, *Y* and *Z*. They set up only their own right to a part of the property and as to the rest they alleged that it belonged to *X*, *Y* and *Z*. *Jaimangal Deo v. Bed Saran* (1911) 33 All. 493, 9 I C. 819.

(3) *A* files a suit on behalf of himself and other members of his community to establish a right to worship in a temple, but through oversight omits to give notice under O 1, r 8, to the other members of the community. The suit is dismissed but the judgment will not operate as *res judicata* to bar a subsequent suit by another member of the community to establish the same right: *Kumaravelu v. Ramaswami* (1933) 60 I. A. 278, 56 Mad. 657, 143 I C. 665, ('33) A. P. C. 183.

The right referred to in this Explanation may either be a public right or a private right. The words "public right" have been added into this Explanation in view of the provisions of sec. 91 below. The right to have a public nuisance abated is a public right. The right of pasturage claimed by custom by the inhabitants of a village over a tract of land or to take water from a spring or well is a private right (g).

In some of the cases that arose under the Code of 1882 the opinion was expressed that the present Explanation, so far as it relates to private right, must be confined to cases where leave to sue has been obtained under sec. 30 of that Code [now O. 1, r. 8 (1)] (h). But the Explanation is not confined to suits under O. 1, r. 8, but extends to include any litigation in which apart from the rule altogether, parties are entitled to represent interested persons other than themselves (i). But if the suit is one under O. 1, r. 8, the Privy Council has held that the provisions of the rule must be strictly complied with otherwise the Explanation will not apply, even though the omission is due to inadvertence and has caused no injury (j). It had previously been held that it was sufficient if the litigation was carried on bona fide on behalf of all others interested. See the under-noted cases (l) which are no longer law. Suits by a Hindu widow or by a manager of a joint Hindu family or by a reversioner in her or his representative character are instances of this class.

Shebat, Larnayan, trustee, administrator, etc—If the parties in the subsequent suit can be said to have been represented by the parties in the former suit, the decision in the former suit will bind the parties in the subsequent suit.

Illustration.

Nine Akali Sikhs sue for the removal of the Mohant of a religious institution. The suit is dismissed on the ground that the institution is a Hindu Dera and not a Sikh Gurudwara. Subsequently and after the passing of the Sikh Gurudwara Act, 1925,

(g) *Kalshankar v. Gopal Chunder* (1881) 6 Cal. 49

(h) " " " " " " " " " " " "

(i) " " " " " " " " " " " "

(j) " " " " " " " " " " " "

(l) " " " " " " " " " " " "

(j) *Kumaravelu v. Ramaswami* supra approving on this point *Thanakoti v. Munappa* (1885) 8 Mad. 496 and *Baiju Lal v. Bulak Lal* (1897) 24 Cal. 385 and *Srinivasa v. Raghava* (1900) 23 Mad. 28 but dis-

(k) " " " " " " " " " " " "

(l) " " " " " " " " " " " "

sixty four Sikhs sue for a declaration that the institution is a Sikh Gurudwara. The suit is not barred by res judicata as in the former suit the plaintiffs were a sect of religious reformers and were not litigating on behalf of the general body of Sikhs. *Ram Parshad v Shiromani* (1931) 12 Lah. 497 130 I C 657, (31) A. L. 161

But a shebait, a trustee of a devasnam, a karnam a holder of vatan or saranjam lands, an administrator of the estate of a deceased person a holder of an inam grant, represents each his successor therefore a decree against him will bind his successor (l). If however the trustees of a temple instead of representing the interests of the idol allows a decree to be passed ex parte, the decree will not operate as res judicata in a suit by the succeeding trustee (m). A decree against the karnavan of a tarwad in his representative capacity binds the members of the tarwad (n). There are certain purposes for which the Official Assignee represents the insolvent (o). When, however, the Official Assignee brings the insolvent's property to sale for the benefit of the creditors he represents the whole body of creditors. When a claim to an attached house was dismissed, and on the insolvency of the judgment debtor the claimant filed a suit to establish his title to the house as against the Official Assignee the suit was not barred by res judicata as the Official Assignee represented not the judgment debtor but the whole body of creditors (p). A benamidar represents the real owner and a decree against the benamidar binds the owner (q).

Joint Hindu family—The question whether the manager of a joint Hindu family represents the other members in a suit affecting the family depends very largely upon the facts of the case. If he was acting in the suit in the interests of the minor members and with the consent of the adult members they all are bound (r). If the cause of action is a wrongful act of the father the son who is not a party is not bound (s). For mortgage suits see note under O 34 r 1.

Hindu widow as reversioners—A decree passed against a Hindu widow as representing the estate of her husband in respect of a debt or other transaction binding on the estate is binding upon the reversioners (t) unless as was observed by their Lordships of the Privy Council in the *Shiranganga* case, it could be shown that there had not been a fair trial of the right in that suit—or in other words unless that decree could have been successfully impeached on some special ground (u). The reason of this qualification is that though a Hindu widow represents the estate of the reversioners for some purposes it is her duty not only to represent the estate but also to protect it (v). The observations of their Lordships in the *Shiranganga* case were construed in many cases to mean, that a decree passed against a Hindu widow or other limited heir did not bind the reversioners unless the decree was passed in a suit contested to the end

(l) *Madahvan v Kesharan* (1933) 11 Mad

(o) *Mitter v Lalh man Dahi* (1901) 23 Cal 419

(p) *Official Assignee v Anju* (1905) 43 Mad L J 530 55 I C 85 (5) A M 683

(q) *Gur Narayan v Sheo Lal & ags* (1919) 46 I A 1 46 Cal 566 49 I C 1 A and *Kubora v Ahmad* (1896) 18 All. 69

(r) *Lingayanda v Batangonda* (1907) 51 Bom 450 54 L A 127 101 I C 41 (27) A IC 56 *Kunj Man v Jagannath* (1907) 42 All 352 55 I C 816.

(s) *Varatharaja v Sontara* (1907) 17 Mad L J 197

(t) *Kalams Vathkar v Rajah of Srirangapatna* (1863) 9 M L A 539 *Pertab Nara v Pradits* (1885) 11 Cal 186 11 J A 197 *Hari Nath v Mohan Mohan* (1894) 21 Cal 8 20 I A 153

(u) "

(m) *Sudermania v Fakhri* (1911) 60 Mad L J 509 133 I C 40 (31) A M 641

(n) *Komappa v Chigga* (1894) 27 Mad 14 *Maharaja v Pathan* (1907) 30 Mad 215

(v) "

and that neither a consent decree nor a decree on an award, however bona fide the compromise or reference might be, bound the reversioners. But this view has now been definitely rejected by the Privy Council as it involves very extreme consequences, one of them being that a Hindu widow must fight the case up to the Privy Council, and another that her opponent can never suggest a compromise because he would know that any compromise would be upset. The rule of law as now established is that a widow has power to compromise a suit, and a decree passed against her, though on a compromise or on an award, binds the reversioners as much as a decree in a suit contested to the end, provided the compromise was entered into by her bona fide for the benefit of the estate which she represents and not for her personal advantage (w). A decree, however, against a Hindu widow not in her representative but personal character, does not bind the reversioners (x). A decree passed against the legal personal representative of a Hindu widow in respect of her husband's estate does not bind the reversioners, for the representative of a widow does not represent the estate of the husband (y).

There is no authority for the proposition that a Hindu widow, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to a personal disability or disadvantage as a litigant although the merits of a suit by or against her are tried and the trial is fair and honest. The mere fact, therefore, that she is personally estopped from denying the material facts of a case is no ground for withholding the application of the rule enunciated at the commencement of this paragraph, namely, that where the estate of a deceased Hindu has vested in his widow or other limited heirs a decree fairly and properly obtained against her is binding on the reversionary heirs. Thus where a Hindu widow instituted a suit for a declaration that an adoption made by her to her deceased husband was invalid, and the suit was dismissed on the ground that the widow was estopped by her conduct from denying the validity of the adoption and it was further found upon the facts that the adoption was valid, it was held in a suit brought by the reversionary heir after the widow's death for a declaration that the adoption was invalid, that the reversionary heir was bound by the decision in the first suit as *res judicata* (z). The dismissal of a suit brought by a widow on the ground that it was barred by the provisions of sec 47 below, does not operate as *res judicata* so as to bar a subsequent suit by the reversioners (a).

A suit by the next reversioner for a declaration that an alienation made by a Hindu widow is not binding on the reversion is a representative suit on behalf of all the reversioners (b). A decree fairly and properly obtained against the reversioner in such a suit is binding not only upon him, but the whole body of reversioners presumptive and contingent on the one hand and the alienee or his representative on the other (c).

(w) *Rameswar Prasad v Shyam Kumari*
(1933) 60 A. 213 31 L.A. 213 60 L. 71

209
(z) *Chaudhri Nihal Singh v Balwant Singh*
(1909) 107 A. 100 100 C. 100 107 C. 100

(a)

(b)

(c)

(x)

(y)

Jagdish Singh v Jai Chander Aggar (19-3)
10 Lah. 613, 118 I. C. 449 (29) A. L.
235 *Jagdamba v Badri Prasad* (1933)
8 Luck. 386 145 I. C. 332, (33) A. O. 322

Consent decree in a representative suit on behalf of the public.—In the under-mentioned case (d) the Privy Council left it an open question whether in India persons instituting a suit on behalf of the public can bind the public by a compromise decree

Judgment in rem.—As already explained a judgment in a suit is binding only upon the parties to the suit and their privies. "As a general principle, a transaction between two parties, in judicial proceedings, ought not to be binding upon a third, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous" (e). There are however, certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies. A judgment that is binding upon the parties and their privies only is called a judgment *in personam*. A judgment which binds all the world is called a judgment *in rem*. Judgments *in rem* are outside the scope of the present section. They are dealt with in the Indian Evidence Act sec 41.

Decree against minor.—A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult. A minor, however, is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence in allowing the decree to be passed (f). It has been said in one case that any act or omission on the part of the guardian ad litem which in the result has wrought prejudice to the minor's interest is gross negligence (g). But in another case (h) the Court said: "It is not every kind of negligence that would be a sufficient ground for setting aside a decree or for declaring that the proceedings in Court are null and void, but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor, which would not have been otherwise decreed against him it must be held that the guardian's negligence contributed to the Court proceeding in the manner it did." An omission on the part of a guardian ad litem to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of res judicata has been held not to constitute negligence (i).

A decree passed against a minor not properly represented is a nullity and cannot operate as res judicata (j). But it has been held that if a suit is brought on the minor's behalf to set aside a sale in execution of such decree, but the plea that the minor was not properly represented in the suit in which the decree was passed is not then taken, it cannot be taken in a subsequent suit to set aside the decree and sale by reason of the rule contained in Explanation IV to the section (k).

CONDITION III

Litigating under the same title.

Litigating under the same title.—The third condition of res judicata is that the parties in the subsequent suit must have litigated under the same title in the former suit. The expression same title means the same capacity. A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, and,

| | |
|-----|----------------------------------|
| (d) | Bom 787, 56 I C 455 See notes to |
| (e) | O 9 + 9 |
| (f) | (g) |
| (h) | (A) |
| | (i) |
| | (j) |
| | (k) |

Consent decree in a representative suit on behalf of the public.—In the under-mentioned case (d) the Privy Council left it an open question whether in India persons instituting a suit on behalf of the public can bind the public by a compromise decree

Judgment in rem—As already explained a judgment in a suit is binding only upon the parties to the suit and their privies "As a general principle, a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous" (e) There are, however, certain judgments which bind all the world and not only the parties to the proceeding in which they were passed and their privies. A judgment that is binding upon the parties and their privies only is called a judgment *in personam*. A judgment which binds all the world is called a judgment *in rem*. Judgments *in rem* are outside the scope of the present section. They are dealt with in the Indian Evidence Act, sec 41

Decree against minor—A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult. A minor, however, is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence in allowing the decree to be passed (f) It has been said in one case that any act or omission on the part of the guardian *ad litem* which in the result has wrought prejudice to the minor's interest is gross negligence (g) But in another case (h) the Court said "It is not every kind of negligence that would be a sufficient ground for setting aside a decree, or for declaring that the proceedings in Court are null and void, but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor, which would not have been otherwise decreed against him it must be held that the guardian's negligence contributed to the Court proceeding in the manner it did" An omission on the part of a guardian *ad litem* to bring to the notice of the Court a previous judgment between the parties for the purpose of raising the plea of *res judicata* has been held not to constitute negligence (i).

A decree passed against a minor not properly represented is a nullity and cannot operate as *res judicata* (j) But it has been held that if a suit is brought on the minor's behalf to set aside a sale in execution of such decree, but the plea that the minor was not properly represented in the suit in which the decree was passed is not then taken, it cannot be taken in a subsequent suit to set aside the decree and sale by reason of the rule contained in Explanation IV to the section (k)

CONDITION III

Litigating under the same title.

Litigating under the same title—The third condition of *res judicata* is that the parties in the subsequent suit must have litigated under the same title in the former suit. The expression "same title" means the same capacity. "A verdict against a man suing in one capacity will not stop him when he sues in another distinct capacity, and,

(d) *Abdur Rahim v. Mahomed Barkat Ali* (1928) 55 I A 98, 55 Cal 519, 108 I C 561, (28) A PC 16

(e) *L. v. L.* (1851) 10 C 16

(f) *C. v. C.* (1851) 10 C 16

(g) *C. v. C.* (1851) 10 C 16

(h) *C. v. C.* (1851) 10 C 16

(i) *C. v. C.* (1851) 10 C 16

(j) *C. v. C.* (1851) 10 C 16

(k) *C. v. C.* (1851) 10 C 16

Bom 787, 56 I C 455 See notes to G 9 r 9

(g) *C. v. C.* (1851) 10 C 16

(A) *C. v. C.* (1851) 10 C 16

(i) *C. v. C.* (1851) 10 C 16

(j) *C. v. C.* (1851) 10 C 16

(k) *C. v. C.* (1851) 10 C 16

in fact, is a different person in law' (l) Thus where a suit is brought by a person to recover possession from a stranger of math property claiming it as the heir of a deceased mohunt, but the suit is dismissed on his failure to produce a certificate of succession to establish his *heirship*, the dismissal is no bar to a suit by him as *manager of the math on behalf of the math* (m) Where the trustees of a public charity fail in a suit to eject a trespasser, they are not barred from suing again as members of the public with the consent of the Advocate General (n) The dismissal of a suit by A against B, C and D in their individual capacity on a finding that a temple is public property does not operate as res judicata against A in a subsequent suit brought by B, C, D and others in their representative capacity against A for a declaration that the same temple is public property (o) Similarly the dismissal of a suit brought by a son against his father for maintenance claimed *under an agreement* is no bar to a suit by him against his *eldest brother* for a declaration that he is entitled to maintenance out of certain lands in his hands *held under a grant* from Government whereby, it was alleged, the lands were charged at the time of grant with the maintenance of the junior members of the family (p) Where in a suit by A against B for the recovery of a property, B sets up a *jus tertii* in C and the Court finds that C has no title to the property, and allows A's claim, the finding does not operate as res judicata in a subsequent suit by B after C's death against A, claiming the same property as the heir of C, as it could not have operated as such against C himself (q) A judgment against a party will not operate as res judicata when he subsequently acquires a fresh title under sec 43 of the Transfer of Property Act (r)

A mortgagee in possession does not lose the character of mortgagee and become a trespasser because he refuses to deliver up possession of the mortgaged property to the mortgagor on deposit being made by the latter in Court of the amount payable on the mortgage A executes a usufructuary mortgage of his property to B, and places B in possession thereof At the proper time A tenders the mortgage debt, Rs 500, to B and asks to be restored to possession B refuses to accept the tender on the ground that more is due to him and to deliver up possession of the property to A A sues B for redemption, and deposits Rs 500 in Court The Court finds that the tender was proper, and directs B to deliver up possession to A After entering into possession, A sues B to recover mesne profits from B from the date of the deposit in Court to the date of the recovery of possession The suit is barred, for A "might and ought" to have claimed the mesne profits in the first suit The suit is between the same parties litigating "under the same title," that is, as mortgagor and mortgagee The mortgage is not extinguished after the tender and deposit, and B does not become a trespasser after that date It cannot therefore be said that the suit against B for mesne profits is against him as a trespasser, and not as a mortgagee (s)

The words 'between parties under whom they or any of them claim litigating under the same title' cover a case where the later litigant occupies by succession the same position as the former litigant There may be a succession by the ordinary rules of inheritance or succession by some very special rules as in the case of saranjam estates or vatan estates The words of the section do not make any distinction between different

(l) "A different person in law" is a legal fiction, and is not to be taken literally. It is a fiction, and is not to be taken literally. It is a fiction, and is not to be taken literally.

(m) *Dabajirao v. Laxmandas* (1904) 28 Bom 215 distinguished *Hargovan v. Mulji* (1910) 34 Bom 416 & 1 C 241, *Ghela bhai v. Uderam* (1912) 36 Bom 23, 12 I C 577

(n) *Lakshman Das v. Jugul Kishore* (1898) 22 Bom 216

(o) *Hari Kishen v. Paghbar* (1926) 1 Luck 489 97 I C 853 (26) A O 578

(p) *Ahmad v. Akhal ud Din* (1883) 9 Cal 945, 10 I A 45

(q) *Jagannadham v. Yenlatasubba Rao* (1927) 50 Mad 877, 104 I C 468, (27) A M 844

(r) *Deb Nath v. Sashi Bhushan* (1933) 37 C W N 1144 (34) A C 82

(s) *Rukhminibai v. Venkatesh* (1907) 31 Bom 527, *Satyabadi v. Harabadi* (1907) 34 Cal 2-3 *Ism Din v. Bhoop Singh* (1908) 30 All 225

Here the Court which decided the former suit was not a Court of jurisdiction concurrent with that of the Court in which the subsequent suit is brought—In such a case the Court which decided the former suit cannot be a Court 'competent to try the subsequent suit' within the meaning of this section (b)

Here the Court which decided the former suit was a Court of concurrent jurisdiction—In such a case the Court which decided the former suit might or might not have been "competent to try the subsequent suit" If it was, the decision would operate as *res judicata*, but not otherwise

Summarising the above, we may say that in order that a decision in a former suit may operate as *res judicata*, the Court which decided that suit must have been either—

- 1 a Court of *exclusive jurisdiction*, or
- 2 a Court of *concurrent jurisdiction* competent to try the subsequent suit

The following are the principal rules as to concurrent jurisdiction—

(1) *The jurisdiction of the two Courts must be concurrent as regards the pecuniary limit as well as the subject matter*—This rule was laid down by Sir Barnes Peacock in *Edun v. Bechun* (c) and it was approved by the Privy Council in *Misir v. Sheo Baksh* (d). The learned Chief Justice said that there were in India many grades of Courts with different pecuniary limits of jurisdiction presided over by judges whose qualification differed widely, that it would be improper that a finding as to the validity of an adoption or of a will in a petty suit in a Munsiff's Court should be conclusive in a suit for a property of a large amount in a High Court, and that by taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided. In *Run Bahadur v. Luchu Koer* (e) the Privy Council said that 'if this construction of the law were not adopted, the lowest Court in India might determine finally and without appeal to the High Court, the title to the greatest estate in the Indian empire'. It is essential therefore that the first Court was a Court competent to try and decide not only the particular matter in issue but also the subsequent suit in which the issue is subsequently raised (f).

First, as to pecuniary limit—The jurisdiction of the Court which decided the former suit, and that of the Court in which the subsequent suit is brought, must be concurrent as regards the *pecuniary limit*. A sues B in Court X to recover interest due on a bond for Rs 12 000. For the defence it is alleged that the amount actually lent by A was Rs 4 000 and that A was not entitled to interest on more than Rs 4 000. The Court finds that the amount actually lent was Rs 4 000 and awards A interest on that sum only. Court X is a Court of which the jurisdiction is limited to suits of which the value does not exceed Rs 5 000. A then sues B in a High Court to recover the principal sum of Rs 12 000 alleging that that was the actual amount lent by him to B. B contends that the actual amount advanced was Rs 4 000 and that the question as to whether Rs 12 000 was lent or Rs 4 000 is *res judicata*. The question is not *res judicata*, for the jurisdiction of Court X being limited to Rs 5 000 it was not a Court competent to try the subsequent suit in which the amount claimed is Rs 12 000. Pecuniary jurisdiction is determined by the plaintiff's estimate of the value of his claim and if the Court awards less that does now show that the suit was brought in the wrong Court (g). But the plaintiff cannot

(b) *Edun v. Bechun* (1868) 8 W. R. 175, 179.
Misir v. Sheo Baksh (1883) 9 Cal. 432, 445.
9 I. A. 197.

(c) (1868) 8 W. R. 175, 179.

(d) (1883) 9 I. A. 197, 204, 9 Cal. 432.

(e) (1885) 11 Cal. 301, 12 I. A. 33, 34.

(f) *Misir v. Sheo Baksh* (1883) 9 Cal. 432, 9

I. A. 197. *Gobul Mandal v. Padmanand*

(1901) 9 I. A. 196, 197, 9 Cal. 407.

Padmanand v. Jankuldas (1900) 24 Bom. 456.

Giriya v. Sabapathy (1906) 3 Mad. 65.

Shekh Hatsu v. Ram Kumar Singh (1894)

(g) *La*

All. 370

1

prevent a decision in a previous suit from operating as *res judicata* by overvaluing the second suit (k). Where A brought two suits in a Provincial Small Cause Court for compensation in each suit for loss of one parcel, and the suits were dismissed, and he subsequently brought a suit in the Munsiff's Court, joining together the claims in the respect of both the parcels so as to bring the valuation above the Rs. 500 limit, it was held that the suit was barred on the principle of *res judicata* (i). If a suit as to one parcel is dismissed in a Munsiff's Court, and then a suit is subsequently brought between the same parties on the same cause of action as to that parcel and several other parcels in the Court of the Subordinate Judge the second suit as to that one parcel will be barred by *res judicata* (j).

Secondly, as to subject matter—The jurisdiction of the two Courts must be concurrent as regards subject matter. Thus certain Courts have no jurisdiction to adjudicate upon questions of title, though that question may be gone into incidentally in order to decide the principal question. A finding on a question of title by such Courts cannot operate as *res judicata* in a subsequent suit on title. This generally happens in the three following cases—

(a) *Where the first Court is a "Munsiff's Court" and the second Court a "District Court"*—A sues B for rent in a Munsiff's Court. The defence is that C and not A is the landlord. The Court finds that A is not the landlord, and the suit is dismissed. A then sues B in a District Court for a declaration of title to the land. The suit is not barred, for a Munsiff's Court has no jurisdiction to adjudicate upon questions of title (l). A decision of a District Munsiff's Court in a suit for possession will not operate as *res judicata* in a suit for redemption of a mortgage, for a District Munsiff's Court is not competent to try a mortgage suit (kl).

(b) *Where the first Court is a Provincial Small Cause Court*—A decision in a suit for damages instituted in a Provincial Small Cause Court (a Court not competent to try a suit on title) does not operate as *res judicata* in a subsequent suit for establishment of title (i) and thus is also the case when the Small Cause Court decree is based on an arbitrator's award (m). A decision in a suit for rent in a Provincial Small Cause Court [a Court not competent to try a suit for possession] does not operate as *res judicata* in a subsequent suit for possession (n).

(c) *Where the first Court is a "Revenue Court" and the second Court is a "Civil Court"*—A decision of a Revenue Court on a question of title is no bar to the trial of the same question by the ordinary Civil Courts, unless the Revenue Court is empowered by the Legislature to determine questions of title so as to constitute it *pro tanto* a Civil Court (o). The reason is that Courts of Revenue are generally Courts of jurisdiction limited to adjudicate upon questions of rent, tenure, etc. (p). There are, however,

(h) *Tamranniss v Syed Mahmood* (1924) 50 All 200, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(i) *F*

(j)

(k)

(kl) *Subba Rao v Jhamaalingam* (1933) 65 Mad L.J. 761, (33) A.M. 515

(l) *Dulara Lal v Harsari Lal* (1914) 12 All L.J. 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(n) *Hurry Sauter v Multiram* (1875) 15 B. L.R. 225, *Pani Kishori v Raja Ram* (1904) 26 All 408, *Ashraf v Ali Ahmad* (1904) 26 All 501, *Madhesh v. Laxmi* (1905) 27 All 183, *Inayat Ali v. Murad Ali* (1905) 27 All 569, *Dharani v. Gaber* (1903) 30 Cal 379, *Rangayya v. Palnam* (1897) 20 Mad 392, *Radmalay v. Lukmi Rani* (1907) 12 C.W.N. 8, *Aerafonnessa v. Hemchandra* (1927) 54 Cal 114, 100 J.C. 293, (27) A.L.J. 210

some matters of which the decision by a Revenue Court is expressly declared by the Act constituting the Court to have the force of a decree in a civil suit (q), and some as to which it is declared that the decision shall be final (r) In such cases, the decision of a Revenue Court will operate as res judicata so as to bar the trial of the same matter in a Civil Court When the Revenue Act bars suits claiming an alteration of shares made on a partition by a Revenue Court a party to such a partition cannot sue in a Civil Court for an enhanced share (s), but if on a revenue partition one mahal has been allotted to several co sharers jointly, a suit to declare the rights of such co sharers *inter se* is not barred for it in no way interferes with the revenue partition (t) But when a partition made by a Revenue Court has assigned to the plaintiff lands as under proprietor a suit for a declaration that he is a superior proprietor is barred (u) In a case under the Agra Tenancy Act, 1901, (z), an occupancy tenant sued in a Revenue Court to evict the defendant alleging that he was a sub tenant The suit was dismissed on the ground that the defendant was not a sub tenant but probably a sharer in the occupancy. The plaintiff then sued in the Civil Court to eject the defendant as a trespasser, but the suit was dismissed on the ground that its object was to reverse the decision of the Revenue Court This decision, it is submitted, is incorrect. The finding of the Revenue Court that the defendant was not a sub tenant was final But it had no such jurisdiction to declare who were sharers in the occupancy, and in any event its finding on that point was only incidental. See notes "Where the Court which decided the former suit was a Court of exclusive jurisdiction," on p 72 above For other cases see foot note (w) See note "Where the Court which decided the former suit was a Court of exclusive jurisdiction," on p 72 above.

(2) When the first Court is a "Criminal Court" and the second Court is a 'Civil Court'—Criminal proceedings are not a 'suit' hence no finding of a Criminal Court can be res judicata in a subsequent suit. It has thus been held that a conviction or an acquittal in a criminal case is not conclusive in a civil suit for damages in respect of the act charged against the accused (x). On this principle the finding of a Criminal Court that A assaulted or abducted B is not res judicata in a suit for damages against A for assault or abduction (y); nor is an acquittal a bar to a civil suit against the accused (z).

The High Court of Bombay had held that the judgment of a Civil Court may in a proper case be admissible in evidence in a criminal proceeding between the same parties. Thus where *A* charged *B* with criminal breach of trust in respect of certain items, and it appeared that all those items had been dealt with by the Civil Court and the contentions of the accused with reference to all of them had been found to be correct by that Court, it was held that the judgment of the Civil Court was admissible in evidence in the criminal proceedings against the accused (a)

(3) To determine whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the

- | | |
|--|---|
| <p>(q) <i>Durga Churn v Hateen</i> (1902) 29 Cal 252, <i>Sheo Narain v Jarneswar</i> (1896) 18 All 270 <i>Kaila Prasad v Manmohan Lal</i> (1916) 38 All 302, 310, 33 IC 86</p> <p>(r) <i>Mahendra v Gurah Chandra</i> (1918) 3 Pat LJ 379 46 IC 125</p> <p>(s) <i>Ram Rekha v Lallu</i> (1931) 53 All 568 133 IC 468 (31) A A 462 <i>Muhammad</i> <i>Sadiq v Latif Ram</i> (1901) 23 All 291</p> <p>(t) <i>Chandra Bali v Drigpal</i> (1931) 6 Luck 419, 129 IC 173 (31) A O 21 <i>Lal Bahari v</i> <i>Iarkali</i> (19-0) 42 All 309, 65 IC 22</p> <p>(u) <i>Bayram Bahadur v Beni Madho</i> (1930) 7 Luck, 716, 137 IC 606, (3-) A O 19J F B</p> <p>(v) <i>Balwant Singh v Sarabjit</i> (1926) 48 All</p> | <p>774, 98 IC 983, (27) A A 70 (F B)</p> <p>(w) <i>K</i></p> <p>(z) <i>Bishanath v Huro</i> (1886) 6 W R 27, <i>Doorga</i> <i>v Doorga</i> (1866) 6 W R Civ Ref 26</p> <p>(y) <i>Ali Buzak v Shauk</i> (1869) 12 W R 477, <i>Pam Lal v Tula Ram</i> (1882) 4 All 97 See Evidence Act, s 43</p> <p>(z) <i>Keshab v Maniruddin</i> (1908) 1 C W N 501, 41 C 523</p> <p>(a) <i>In re Markur</i> (1914) 41 Bom 1, 33 IC 633</p> |
|--|---|

- (3) that when a Court merely for the purpose of preventing a remand records its finding on an issue not necessary for the decision of the case, it does not operate as *res judicata* (c)

See notes "Examination of pleadings and judgment, on p 42 above

A matter will be said to have been "heard and finally decided," notwithstanding that the former suit was disposed of in any of the following ways —

- (i) *ex parte* (d), or
- (ii) by dismissal under O 17, r 3 (c), or
- (iii) by a decree on an award (f) or
- (iv) by oath tendered under s 8 of the Indian Oaths Act, 1873 (g),
- (v) by dismissal owing to plaintiff's failure to adduce evidence at the hearing (h)

The decision in the former suit must have been one on the merits — In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been one on the merits. Hence it could not be said of a matter that it was "heard and finally decided," if the former suit was dismissed —

- (i) for want of jurisdiction (i), or
- (ii) for default of plaintiff's appearance under O 9, r 8 (j), [but a fresh suit on the same cause of action may be barred under O 9, r 9], or
- (iii) on the ground of non joinder of parties (k), or misjoinder of parties (l), or multifariousness (m), or on the ground that the suit was badly framed (n), or on the ground of a technical mistake (o), or
- (iv) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree (p) or
- (v) for failure to furnish security for costs under O 25, r 2 (q), or
- (vi) on the ground of improper valuation (r), or for failure to pay additional court fees on a plaint which was undervalued (s) or

- (c) *Juchhi v Bharota* (1924) 47 Mad L J 532 82 I C 455 (24) A M 893
- (d) *Modhurudun v Brue* (1889) 16 Cal 300
- (e) *Venkatachalan v Mahalakshamma* (1887) 10 Mad 272 *Shank Sahab v Mahomed* (1890) 13 Mad 510 *Hingo v Jhura* (1918) 40 All 590 46 I C 390
- (f) *Vyankatesh v Sakharam* (1897) 21 Bom 465
- (g) *Akmed v Moudun* (1901) 24 Mad 444 *Sanyasi v Artancaro* (1913) 30 Mad 287, 18 I C 835
- (h) *Watson v Collector of Rajshahye* (1869) 13 M I A 160, *Kartick v Sridhar* (1896) 12 Cal 563
- (i) *Lakshman v Ramchandra* (1881) 5 Bom 48 7 I A 18 *Jutali v Tulja* (1879) 3 Bom 293, *Bhukhandas v Lallubhai* (189) 17 Bom 562 *Ram Gorundha v Mungur Ram* (1883) 13 C L R 83 *Abdul Kadir v Doolanbibi* (1913) 37 Bom 563 20 I C 530 See also *Evidence Act 1872 s 44*
- (j) *Rashta Farshad v Lal Sahab* (1890) 17 I A 150 13 All 53 *Chand Kour v Farid Singh* (1888) 16 Cal 98 15 I A 156 *Ramchandra v Narasimacharya*

- (1900) 24 Bom 251 254 As to suits for partition see *Bhushar Das v Ram Prasad* (1906) 28 All 627 *Madon Mohon v Bankanta Nath* (1906) 10 C W N 839 *Radha v Lal Mulchand* (1924) 46 All 820 821, 80 I C 933, (24) A A 905
- (k) *Sheosagar v Sitaram* (1897) 24 Cal 616, 24 I A 50 *Sankara v Devaki* (1922) 43 Mad L J 672 73 I C 491, (22) A M 259 *Jadvi Nath v Amulya* (1927) 46 C L J 118, 104 I C 576, (27) A C 794
- (l) *Muhammad v Vabian* (1886) 8 All 282
- (m) *Fatteh Singh v. Lachmi* (1874) 13 B L R App 37
- (n) *Doodhara v Lala Seosaran* (1878) 3 Cal L R 395
- (o) *Janakdular v Ambika Prasad* (1917) 2 Pat L J 313 39 I C 126
- (p) *Pethapuramal v Murugandi* (1895) 18 Mad 466
- (q) *Hariram v Lalba* (1902) 26 Bom 637
- (r) *Dullabh v Narayan* (1868) 4 Bom H C A C 110
- (s) *Irava v Sanyappa* (1911) 35 Bom 38, 7 I C 967 *Muhammad v Nabian* (1886) 8 All 282,

not liable to be evicted. The finding in the first suit that the land was not majhes land does not operate as res judicata so as to preclude *B* from raising the same contention in the subsequent suit, the reason being that in a suit having been dismissed, *B* could not have appealed from the finding that the land was not majhes land. The Court having found in the first suit that *A* had not given notice to quit it was not necessary for the determination of the suit to decide whether the land was majhes land or not. The first suit was dismissed in spite of the finding in its favour that the land was not majhes land. *Thakur Magundeo v Thakur Mahadeo* (1891) 18 Cal 647, *Sundo v Bidhoo* (1880) 13 Cal 17.

Suppose that in the above illustration *B* had not raised the defence that the land was majhes land in the first suit. Would he be precluded from raising that defence in the second suit on the ground that he might and ought to have raised that defence in the first suit? No. The reason being that when a point of defence that has been actually raised and disallowed cannot operate as res judicata against a defendant, it certainly cannot operate as such when it has not been raised at all though it might and ought to have been raised (b).

(2) *A* sues *B* for possession of certain lands after the expiry of a lease granted by him to *B*. *B* pleads (1) an occupancy right, and (2) that the suit is premature as he (*B*) had a right of renewal. The trial judge finds that there was no occupancy right, but that the suit was premature and the suit is dismissed. *A* files an appeal to the High Court. *B* files a cross objection to the finding against him, namely that he had no occupancy right. The High Court affirms the decree on the ground that the suit was premature and upon the cross objection affirms the finding that *B* had no occupancy right. After some years *A*, after giving notice to *B*, again sues *B* for possession. *B* again pleads an occupancy right. *A* contends that the finding of the High Court in the previous suit that *B* had no occupancy right is res judicata. Held by the Judicial Committee that the finding is not res judicata the reason being that *B* having succeeded on the plea that the suit was premature he had no occasion to go further as to the finding against him. *Midnapur Zamindari Co., Ltd v Naresh Narayan Roy* (1921) 48 I A 49 48 Cal 460 64 I C 231, (22) A PC 241. The decision to the contrary in *Mota v Uthai* (1916) 40 Bom 662, 36 I C 74, is not good law.

(3) In a suit by *A* against *B* for damages for not removing filth from *A*'s land *B* contends (1) that no notice was given as required by the Bengal Municipal Act, and (2) that he was not bound to remove the filth. The suit is dismissed upon two grounds, namely, that no notice was given as required by the Act, and that *B* was not bound to remove the filth. *A* then sues *B* for damages for not removing filth during a subsequent period after giving notice to *B*. *B* contends that he is not liable to remove the filth, and that the question of his liability is res judicata by reason of its having been decided against him in the first suit. *A* contends that the question is not res judicata for the Court having decided in the former suit that the suit must fail for want of notice it was not necessary for the Court to decide the issue as to *B*'s liability to remove the filth. Held by the Calcutta High Court that the question is res judicata and *A* cannot raise it again in the second suit. *Peary v Ambica* (1897) 24 Cal 900, *Mahomed Ismail v Sharfutullah* (1930) 57 Cal 872, 129 I C 310 (30) A C 810. The Allahabad High Court would seem to take a different view. *Shib Chiran v Raghu* (1895) 17 All 174 195.

RULE II—If the plaintiff's suit is decreed in its entirety no issue decided against the plaintiff can be res judicata for the plaintiff cannot appeal from a finding on any such issue the decree being wholly in his favour (c). But every issue decided against

(b) *Abdulla Khan v Khanmua* (1908) 3 L Bom

315

(c) *Rango v Mudtyappa* (1899) 23 Bom

296 *Abdul Fahir v Ojamahee* (1929) 56 Cal 639

the defendant is *res judicata*, for the defendant can appeal from a finding on such issue, the decree being against him (d)

Illustration

A, alleging that he is the adopted son of X, sues B to recover certain property granted to him by X under a deed and forming part of the estate of X. The Court finds that A is not the adopted son of X, but that he is entitled to the property under the deed and a decree is passed for A. The finding that A is not the adopted son of X will not operate as *res judicata* in a subsequent suit between A and B in which the question of adoption is again put in issue, for the decree being in favour of A, A could not have appealed from that finding. The Court having found that A was entitled to the property under the deed, the finding on the question of adoption was not necessary to the determination of the suit. The decree, far from being based on the finding as to adoption, was made in spite of it. *Rango v Mudiyappa* (1839) 23 Bom 296

Finality of decree in redemption suits—If the mortgagor files a suit for redemption and no order for foreclosure extinguishing the right of redemption in default of payment is made the preliminary decree for redemption does not have that effect. The right of redemption continues until a decree absolute for foreclosure is passed (e), or the sale is confirmed (f). In such a case there is a conflict of decisions as to whether the mortgagor can enforce his right of redemption by a second suit, after a preliminary decree on which no further proceedings have been taken. According to Allahabad, Bombay, and Lahore decisions he can (g), on the other hand, according to Calcutta and Madras decisions he cannot (h). But though according to the Allahabad and Bombay High Courts a second suit for redemption is not barred, the same High Courts have held that any matter decided in the earlier suit, e.g., the amount of the mortgage debt, cannot be re-opened in the subsequent suit (i).

In the converse case of the mortgagee not taking further proceedings on his decree

Where a decree is appealed from, it is the appellate decree that must be looked to determine the question of *res judicata*, and not the decree appealed from—A decision liable to appeal may be "final" within the meaning of this section until the appeal is preferred. But once the appeal is filed the decision loses its character of 'finality,' and what was once *res judicata* again becomes *res sub judice*, that is, matter under judicial inquiry. With reference to s 207 of the Ceylon Civil Procedure Code which is in pari materia with this section the Privy Council said: 'Where an appeal lies the finality of the decree on such appeal being taken, is qualified by the appeal and the decree is not final in the sense that it will form *res judicata*'

- | | |
|---|--|
| <p>(d)</p> <p>(e)</p> <p>(f)</p> <p>(g) <i>Sita Ram v. Maitho Lal</i> (1902) 24 All 41 <i>[P. B.] Hari Ram v. Indraj</i> (1922) 44 All 730 83 I L 167, (2-) A. A. 377, <i>Madams Begum v. Tufail Hasan</i> (19 6) 44 All 17 9- I C 290 (20) A A 20 <i>Lachunath Singh v. Shro Pratap Singh</i> (19 2) 7 All L J 761 119 I C 52- (22) A A 409 <i>Pamji v. Jander-math</i> (1919) 43 Bom 334 49 I C 834 <i>[P. B.] Lachandra v. Balhath</i> (1923) 25 Bom L R 211 72 I C 313 (23) A B 1- <i>Hernandes v. Khilji</i> (1923) 47 Bom 23 I L 506 (23) A B 300 <i>Gorind</i></p> | <p>v. Narayan (1931) 33 Bom L R, 844, 134 I C 63) (31) A B 490 <i>Arora</i></p> <p>(A) S</p> <p>(B) R</p> <p>A O 465</p> <p>(h) <i>Pama v. Bhagchand</i> (1915) 33 Bom 41 27 I C 249 <i>Radrudin v. Sitarani</i> (1930) 32 Bom L R 933 126 I C 882, (30) A B 403</p> <p>(i) <i>Rango v. Narayana</i> (1915) 29 Mad. 866 32 I C 50 <i>Madrayan v. Jangarani</i> (1925) 49 Mad 591, 96 I C 607, (26) A. B. 816</p> |
|---|--|

as between the parties. In this case (l) *A* in 1921 sued *B* on an account and obtained a decree on the 17th January 1927. *B* filed an appeal on the 19th January 1927 and *A* to avoid a possible bar of limitation filed a fresh suit on the same cause of action on the 2nd June 1927. The suit was dismissed as res judicata although *B*'s appeal in the first suit was pending. The Privy Council reversed this decision and said that the proper course was to have stayed the second suit pending the decision of the appeal in the first suit. The appeal destroys the finality of the decision, the decree of the lower Court is superseded by the decree of the appellate Court, and it is the latter decree that should be looked to to determine the question of res judicata (m). In an Allahabad case (n) the Court passed a decree for costs and in an application for execution this decree was construed as not making the defendant personally liable. Subsequently the decree was confirmed by the Court of Appeal. In a second execution application of the decree of the appellate Court the construction of the decree in the first application did not operate as res judicata.

A sues *B* for damages for cutting and removing trees from his land. The suit is dismissed on the grounds (1) that the land did not belong to *A*, and (2) that *B* did not cut the trees. *A* appeals from the decree on both these grounds, but the appeal is dismissed on the ground that *A* had failed to prove that *B* had cut the trees. Note that the appellate Court does not decide the question of *A*'s title. *A* then sues *B* for possession of the land claiming that the land belongs to him. *B* contends that the suit is barred as res judicata as the first Court had found in the former suit that the land did not belong to *A*. The suit is not barred for the question of *A*'s title became res sub judice when the appeal was preferred and it did not become res judicata as the appellate Court did not adjudicate upon the question. But a judgment of an appellate Court will operate as res judicata as regards all findings of the lower Court which, though not referred to in it, are adopted by a decree which grants a relief that is possible only on such findings (o). An issue again is res judicata where the judgment of the appellate Court shows that the issue was treated as material and was decided although the decree passed merely affirms the decree of the lower Court which did not deal with the issue (p).

The Rangoon High Court has held that a decree may be final as regards a party *A* who has not appealed although another party *B* has appealed if *A* has not been made a party by *B* in his appeal. The mere possibility that the appellate Court might make *A* a party and proceed under O 41, r 33, does not make it less final (q).

If only a part of a decree is appealed from the rest of the decree may become final and operate as res judicata.—The defendant had obtained a decree on a mortgage. The plaintiff who had paid off a prior mortgage filed a suit claiming to be subrogated to the prior mortgagee and to recover the amount he had paid from the defendant. The original Court found that the plaintiff was subrogated and awarded him the principal sum he had paid with interest. The defendant on appeal claimed that the plaintiff was not entitled to interest. The defendant could not on second appeal dispute plaintiff's right of subrogation which was res judicata by reason of the decree of the original Court, this part of which had not been appealed against (r).

- | | |
|--|---|
| <p>(l) <i>Annamalai v Thornhill</i> (1931) 61 Mad L.J. 400 36 C W N 1 134 I C 1 (31) A PC 263</p> <p>(m) <i>Shrotagar v Sudaram</i> (1897) 24 Cal 616 24 I A 50 <i>Abdullah v Ganesh Das</i> (1918) 45 Cal 442 44 I A 214 42 I C 959 <i>Nalwaru v Nalwaru</i> (1882) 6 Bom 110 <i>Chunder v Shibu</i> (1887) 11 C L R 20 <i>Kailash v Girdja</i> (1917) 39 Cal 9.5 14 I C 299 <i>Balkishan v Kishan Lal</i> (1883) 11 All 148 <i>Chengalatala v Venkateshwar</i> (1916) 30 Mad L J 379 33 I C 9</p> <p>(n) <i>Lachman v Lakshmi</i> (1932) 54 All 414 137 I C 70 (32) A A 38</p> | <p>(o) <i>Varayanan v Kannammal</i> (1905) 23 Mad 338 <i>Cokul v Shrimai</i> (1904) 6 Bom L R 288 <i>Muthammal v Secretary of State for India</i> (1916) 39 Mad 100 100 I C 817</p> <p>(p) <i>Mudnapur Zamindari Co Ltd v Naresah</i></p> <p>(q)</p> <p>(r)</p> |
|--|---|

Consent decree and estoppel—The present section does not apply in terms to consent decrees, for it cannot be said in the case of such decrees that the matters in issue between the parties "have been heard and finally decided" within the meaning of this section (a). A consent decree, however, has to all intents and purposes the same effect as *res judicata* as a decree passed *in iudicio* (i). It raises an estoppel as much as a decree passed *in iudicio* (u). So long, therefore, as a consent decree stands, it is not open to either party thereto to give it the go by, even if it contains clauses that are bad in law (i). A consent decree, however, is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties (w). But unless all the parties agree, an application cannot be made to the Court of first instance in the original suit to set aside the decree (x). Though it may be done in the case of an interlocutory order (y). See notes to s. 96, Procedure for setting aside consent decree."

Explanation V Relief claimed but not expressly granted—If a relief is claimed in a suit but is not expressly granted in the decree, it will be deemed to have been refused, and the matter in respect of which the relief is claimed will be *res judicata*. Thus where in a suit by a mortgagee (1) for a money decree, and (2) in default of payment for sale of the mortgaged property, the mortgagee was content to take a money-decree only, it was held that a subsequent suit by him, on failure of the mortgagor to satisfy the decree, to have the amount of the mortgage debt paid to him by the sale of the property, was barred as *res judicata*. The relief as to sale having been claimed by the mortgagee, but not having been expressly granted in the former suit, must be deemed to have been refused so as to bar the subsequent suit (z).

Liberty to bring a fresh suit—Where a former suit between the same parties in the same Court and for the same relief results in a decree of dismissal, but the judgment leaves it open to the plaintiff to bring a fresh suit and leaves "open untouched and undecided all matters" affecting the rights of the parties, the decree does not constitute *res judicata*, as such matters cannot be said to have been "heard and finally decided" within the meaning of this section (a). But if the Court has in the particular circumstances of a case no power to reserve liberty to a party to bring a fresh suit, the subsequent suit may be barred as *res judicata* notwithstanding the liberty to bring a fresh suit. Thus in *Hatson v. Collector of Rajshahye* (b) the former suit was dismissed for the plaintiff's failure to produce evidence but a direction was given that the plaintiff could institute a fresh proceeding as if no suit had been brought. Nevertheless the Privy Council held that the subsequent suit was barred by *res judicata* for the reservation was of no effect.

(a) If suit is final and binding on parties.

effect as *res judicata*?

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

effect as *res judicata*?

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

effect as *res judicata*?

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

(u) *Huddersfield Banking Co. v. Henry Lister and Son* (1895) 2 Ch. 273. *Great North-West Central Railway v. Charlebois* (1899) A.C. 114.

(z) *Harrison v. Rumney* (1702) 2 Ves. Sen. 488. *Blannard v. Harrison* (1871) 19 W. R. [Eng.] 811. *Ainsworth v. Building* (1896) 1 Ch. 673.

(i) *Mulling v. Howell* (1879) 11 Ch. D. 763.

(i) *Shibu v. Chandra Mohan* (1900) 23 Cal. 849. *Jay Lal v. Dand Ram* (1909) 31 All. 19, 11 C. 501.

(a)

(u)

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

effect as *res judicata*?

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

effect as *res judicata*?

(i) *Bhoshanker v. Sioraryi* (1912) 36 Bom.

(u)

The expression former suit does not exclude the application of the rule when suits are tried together. See note *Suits tried together—One judgment* at pp 39 40 above.

The rule of res judicata has been extended beyond the limits of the section in the case of proceedings in a Probate Court and in the case of execution proceedings and interlocutory orders in the same suit.

Probate proceedings—When a question of the relationship of parties has been decided in a probate proceeding a subsequent suit between the same parties involving the same question is barred by the rule of res judicata although the words of the section are not strictly applicable. This was decided by the Privy Council in the case of *Kali pada v. Dityapada* (1) confirming a decision of the Calcutta High Court (u) and approving that Court's dissent from previous decisions to the contrary (v). The undernoted cases (w) though not expressly mentioned must be treated as overruled. Any order passed after contention in a probate proceeding is res judicata in any subsequent proceeding against the caveators who contested it (x). In a Bombay case (y) A, alleging himself to be the executor of B's will applied for probate of the will but C, B's widow, opposed the application and probate was refused on the ground that the will was not proved. C then sued A to recover her husband's property and A was precluded from contending that he was entitled to possession as B's executor. The Court observed that though the judgment of the Probate Court refusing probate to A does not operate as a judgment in rem yet it operates as res judicata between A and C under s 83 of the Probate and Administration Act, 1881 (now replaced by s 29 of Indian Succession Act, 1925) read with s 11 of the Code.

A decision on a question of relationship in a proceeding on an application for letters of administration after trial of an issue is binding as res judicata in a subsequent suit between the same parties (z).

Orders in execution proceedings—The leading case on the application of res judicata to interlocutory orders and to execution proceedings is *Ram Airpal v. Rup Kuari* (a), decided by the Judicial Committee in 1883. The principle of that decision is that s 11 is not exhaustive and that the principle of res judicata still remains apart from the limited provisions of the Code. Prior to that decision the Courts in India generally held that sec 13 of the Code of 1882 (corresponding with the present section) was not applicable to execution proceedings. The Judicial Committee held that though the section in terms did not apply to execution proceedings the principle of res judicata applied to such proceedings. The question in that case was whether a decision in the course of execution proceedings, that the decree which according to its true construction awarded future mesne profits, operated as res judicata so as to preclude the Court from trying the question over again at a subsequent stage of the proceedings. The High Court of Allahabad held that it did not. Their Lordships of the Privy Council held that it did. Their Lordships said—

The matter decided by Mr Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties.

(1) (1930) 57 I.A. 24 34 C.W.N. 201, 121 I.C. 200 (30) A.P.C. 29

(u) *Dityapada Das v. Kalipada Das* (1926) 31 C.W.N. 893 100 I.C. 510 (27) A.C. 421

(v) *Arunmoy v. Mohendra Nath* (1893) 20 Cal. 888 *Lalit Mohan v. Radharaman* (1911) 15 C.W.N. 1021 10 I.C. 434

(w) *Chintam v. Ramchandra* (1910) 34 Bom. 559 7 I.C. 844 *Mogbul Shah v. Muhamad* (1918) P.R. 49 p. 167 43 I.C. 423

(x) *Vashtatuddola v. Mirza Kurrat-ulain* (1903)

31 Cal. 186 *Perkaturatnam v. Yana madara* (1904) 46 Mad. L.J. 383 79 I.C. 44 (24) A.M. 578 *Babu Lal v. Hari Baksh* (1918) P.R. 13 p. 60 41 I.C. 479

(y) *Kalyanchand v. Subabi* (1914) 38 Bom. 309 23 I.C. 375 See also *Brendon v. Sundarabai* (1914) 33 Bom. 27 23 I.C. 221

(z) *Maug Hmat v. Ma Hlay* (1923) 1 Rang. 258 76 I.C. 494 (23) A.R. 257

(a) (1883) 11 I.A. 37 6 All. 269

in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon sec 13, Act X of 1877 [s. 11 of the present Code] but upon general principles of law. If it were not binding there would be no end to litigation. The parties were bound by the decision of Mr. Probhn who, whether right or wrong, had decided that it did [that is that the decree awarded future mesne profits], a decision which, not having been appealed, was final and binding upon the parties and those claiming under them."

The ratio decidendi of *Pam Karpal* a case is that if a particular construction is put on a decree in proceedings on a former application for execution, it is not competent to the Court to treat that construction as erroneous and put another construction on it at a subsequent stage of the execution proceedings (b). Parties cannot raise a second time in the same suit or execution proceeding an issue that has already been determined (c). Thus the Judicial Committee held in *Mungul Pershad v. Gria Kant* (d), that a decision on an application for execution after hearing both the parties that the application is not barred by the law of limitation though erroneous is binding on the parties in subsequent proceedings in execution. Their Lordships said: "The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it. Admitting for the sake of

valid, not is barred by limitation though erroneous is conclusive between the parties and the question cannot be re-tried on a subsequent application for execution (e).

The principle laid down in *Ram Karpal* a case referred to above is that when a question has been raised in an execution proceeding and decided, the decision, even if erroneous, is binding on the parties and the same question cannot be re-tried in a subsequent proceeding in execution, in other words, that the principle of res judicata is applicable to proceedings in execution. This principle has been followed by the High Courts of India (f). But this principle does not apply unless the parties to the subsequent proceeding were also parties to the former proceeding (g) and had litigated under the same title (h). Nor does it apply unless the former application was heard and decided. Hence an order dismissing an application for execution for default of appearance (i) or allowing it to be struck off for the present (j) or allowing it to be withdrawn with liberty to present a fresh application (k) is no bar to a fresh application for execution. Similarly where an application for execution under O 21, r 32, is dismissed on the ground that the decree holder had not given the judgment-debtor an opportunity of obeying it, a second application for execution after such opportunity had been given is not barred as res

| (b) | Held in execution and what property is |
|---|--|
| (c) | |
| (d) (1882) 8 I.A. 123, 8 Cal 51. <i>Fapa Ramnath v. Telusam, Tatar</i> (1921) 48 I.A. 45, 40 Mad 1, 2, 107 K.A. 1 C. No. (11) & 34, 35 | |
| (e) | (g) |
| (f) 65 <i>Kapur Chand v. Kanhaiya Lal</i> (1923) 45 All. 35, 74 I.C. 513, (4) A.A. 34 in app. (from 1923) 44 All. 130, 65 I.C. 295 (2), A.A. 247. See below as to which persons are | (h) <i>Courson v. Jagul Chandra</i> (1880) 17 Cal 57, (i) 63 (j) 5 (k) 1 |

judicata (l) Further, the decision in the former application must have been *necessary* for the determination of the application. Thus if *A* applies for execution, and *B* pleads limitation, and neither party appearing on the date fixed for the hearing of the objection, *A*'s application is dismissed and *B*'s objection is disallowed, *B* is not precluded from raising the plea of limitation on a fresh application for execution made by *A*, the reason being that *A*'s application being dismissed for default, it was not necessary for the Court to decide the question of limitation (m)

Where an assignee of a decree applied for execution under O. 21, r. 16 and the judgment debtor took no objection to the validity of the decree it was held that he was not debarred on the principle of Explanation IV from impeaching the validity of the decree in a subsequent suit (n). But the principle of Explanation IV has been applied to a subsequent stage of the execution proceeding. Thus if the judgment debtor being entitled and having an opportunity to raise a plea in bar of execution e.g., a plea of limitation fails to do so and execution is ordered, he will be precluded from raising the same plea at a subsequent stage of the execution proceeding (o). Thus where *A* applies for execution of a decree against *B* and an order is made directing execution to issue, *B* cannot in a subsequent application for execution raise the plea that the first application for execution was barred by limitation (p). Again when a judgment-debtor objected in an execution proceeding that an attachment was not legal and proper, only because the decree was declaratory, it was not open to him to object to the sale on the ground that the property was not liable under sec. 60 to attachment and sale (q). If the decree has been executed on previous applications the judgment debtor cannot in a subsequent application object that the decree is merely declaratory (r). In one case the Allahabad Court held that the principle of Explanation IV does not apply to a case where a judgment-debtor omits to object to the amount erroneously set forth in the application for execution, and that he is entitled to raise the objection at a later stage of the execution proceedings (s). This decision however, may be supported on the ground that the Court had inherent power to rectify the error. The undermentioned cases (t) contain

(l) *Kishore Bux Mohut v. Irogunio Coomar*

(m) *B*

(n) *B*

(o)

Sattu (1918) 35 Mad L J 319 44 I C 4
[propriety of order of attachment]

(p)

(q)

(r)

(s)

(t)

application has been dismissed for default and there has been no adjudication on the merits the dismissal will not operate as *res judicata* (g)

Application for review—Where an application is made for a review of judgment and the application is refused, it does not operate as *res judicata* so as to bar a subsequent suit for the same relief and on the same grounds as those put forward in the application for review. Neither sec 11 nor any doctrine of constructive *res judicata* can rightly be applied to such a case (h)

Waiver of plea of *res judicata*—The plea of *res judicata* is not one which affects the jurisdiction of the Court. It is a plea in bar which a party may waive. If a party does not raise the plea of *res judicata*, it will be deemed to be a matter directly and substantially in issue and decided against him (i)

Conflicting decree—Where there are two or more conflicting decrees the last decree alone is the effective decree and it is this decree and not any other which can operate as *res judicata* (j)

Maintenance order—S 488 Criminal Procedure Code—An order refusing to enforce a maintenance order under sec 488 of the Criminal Procedure Code for one period will not bar a subsequent application for a different period (k)

Income tax proceedings—A decision of the Commissioner under sec 33 of the Income tax Act, 1922 in respect of the assessment for a particular year does not operate as *res judicata* so as to prevent that decision from being re opened in assessments for subsequent years (l)

12. [New] Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies

Bar to further suit

Rules precluding institution of a further suit in respect of the same cause of action—This section is new and is necessitated by the transfer of certain of the provisions of the Code of 1882 to Rules. The following is a list of the Rules that bar a fresh suit in respect of the same cause of action —

- O 2, r 2—Omission to sue in respect of part of a claim
- O 9 r 9—Decree against plaintiff by default bars a fresh suit
- O 22, r 9—Abatement of suit bars a fresh suit
- O 23 r 1—Withdrawal of suit without leave of Court bars a fresh suit

13. [S 14] A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

When foreign judgment not conclusive

(a) where it has not been pronounced by a Court of competent jurisdiction,

- | | |
|---|---|
| <p>(g) <i>Iramatha Nath v Marley</i> (1933) 1 Pat 179 144 I C 59 (33) A I 208</p> <p>(h) <i>Sruha Chandra v Triguna</i> (1913) 40 Cal 541 181 C 444</p> <p>(i) <i>Sholra v Sri Jayah Venkateswari</i> (1916) 31 M L J 219 36 I C 229 <i>Tajani v Ajmud n</i> (1918) 48 C L J 57 114 I C 129 (3) A C 163</p> | <p>(j) <i>Tajani v Ajmud n</i> (1918) 48 C L J 57 114 I C 129 (3) A C 163</p> <p>(k) <i>Shauing T n v Ma Hmin</i> (1933) 11 Bang 26 144 I C 127 (33) A II 133 F B</p> <p>(l) <i>Commissioner of Income-tax v Messrs & Co Ltd</i> (1917) 25 Mad L J 451 115 I C 814 (3) A II 453 F B</p> |
|---|---|

11

observations to the effect that Explanation IV should not be extended to execution proceedings and that an order made in execution proceedings should not have the force of res judicata unless the point raised in the subsequent proceedings was *actually* raised in the former proceedings and *decided*. But these observations are *obiter*. And so are the observations in a Madras case that Explanation V does not apply to proceedings in execution (u).

Ex parte orders—An *ex parte* order in execution proceedings passed after issue of notice and after the Court is satisfied that the notice was served is on general principles binding as res judicata (v). But the order will not have the force of res judicata if no notice is issued (w) or if the notice is not duly served (x) or if the notice does not clearly specify the nature of the claim (y).

Consent orders—An order made by consent of parties in an execution proceeding is as binding on the parties as an order after a contentious trial (z).

Interlocutory orders—In *Ram Harpal v Rup Kaur* (a) the Privy Council said that upon general principles of law an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit. A decision in an administration suit as to the validity of a gift will be res judicata in a subsequent proceeding in the same suit (b). In a Lahore case (c) the Court ordered an agreement to refer to arbitration to be filed under para 17 of Schedule II. A party applied that the reference should be cancelled as the Court had no jurisdiction. The Court decided that it had jurisdiction and dismissed the application. The party was debarred from raising the same point as an objection to the award.

Again in *Louis Dreyfus v Trunachala* (d) an order was made on the 20th July 1922 setting aside an award, under the Arbitration Act 1899 made between D and A and remitting the matter back to an umpire. A appealed from the order but the appeal was ultimately dismissed by the Privy Council. After a fresh award was made by the umpire A objected that he was not bound by the submission to arbitration. The Privy Council said: 'Under the order of 20th July 1922 the appeal from which to His Majesty in Council was dismissed the matter was remitted to the umpire. This could have been done only upon the footing that the respondent (A) was bound by a submission to arbitration. Their Lordships accordingly held that the question as to the umpire's jurisdiction over the parties was res judicata.'

Insolvency proceedings—When an Official Receiver dismissed an application under sec 54 of the Provincial Insolvency Act, 1920, holding that a sale was not a fraudulent preference, a creditor was debarred by the rule of res judicata from applying under secs 4 and 56 of the Act to set aside a sale as being in fraud of creditors (e).

Application for amendment of decree—Though an application for amendment of a decree is not a suit within the meaning of this section yet if such an application is heard and finally decided it will debar a subsequent application for the same purpose upon general principles of law analogous to those of res judicata (f). If the

| (u) (v) | | This |
|------------|------------------------------|-----------------------|
| (w) | | equal 841 7444b |
| (x) | | |
| (y) | | |
| (z) | | |
| (a) | usanna (19 0) 47 Col 410 454 | |

It was at one time doubtful whether a suit could be maintained in British India upon the judgment of a Court of a Native State in India or whether the plaintiff could sue only upon the original cause of action. The Madras High Court held that a suit could be maintained on the judgment (r). The Bombay High Court held that no such suit was maintainable (s), and that the only remedy was by way of suit on the original cause of action. The general rule is that a Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original claim or the propriety of the decision (t). The Bombay High Court was apprehensive that a suit on the judgment of a Native State Court might lead to miscarriage of justice, as judicial inquiries in Native States are not ordinarily conducted with intelligence and integrity. To enforce the view of the Madras High Court and to remove the apprehensions expressed in the Bombay judgments a clause was added to sec 14 of the Code of 1882, by sec 5 of Act 7 of 1888 to make it clear on the one hand that a suit was maintainable on the judgment of a Court of a Native State or any other Court in Asia or Africa (u), and on the other hand to provide that in such a suit the British Indian Court should not be precluded from inquiry into the merits of the case (v). The clause has now been omitted as the reason for the distinction between Courts of Asia and Africa and Courts of other countries has disappeared especially in the case of Japan. The result is that a suit will lie upon a foreign judgment of any Court in Asia or Africa, and such a suit now stands upon the same footing as a suit brought on the judgment of a foreign Court in Europe or America.

Though a foreign judgment may be enforced by a suit in British India, it is not to be supposed that British Indian Courts are bound in all cases to take cognizance of the suit, and they may refuse to entertain it on grounds of expediency (w).

Operation of the section—The operation of the section may be illustrated by the following cases—

(a) *A* sues *B* in a foreign Court. If the suit is dismissed the decision will operate as a bar to a fresh suit by *A* in British India on the original cause of action unless the decision is inoperative by reason of one or more of the circumstances specified in the section (x). If a decree is passed in favour of *A* in the foreign Court, and *A* sues *B* on the judgment in British India, *B* will be precluded from putting in issue the same matters that were directly and substantially in issue in the suit in the foreign Court unless the decision of the foreign Court is inoperative on any one of the six grounds specified in the section.

(b) *A* obtained a decree against *B* in the Cochin Court and applied for execution of the decree in the High Court of Bombay. [Decrees of the Cochin Court may be executed in British India under sec 44.] It was proved that *A* obtained the decree at Cochin by concealment of essential facts and by fraud [see cl (e) of the section]. It was held that execution of the decree should be refused (y).

A British Indian Court will not give effect to a foreign judgment pronounced by a Court without jurisdiction.—The leading case on the subject is *Gurdial v Paja of Faridkot* (z). In that case *A* sued *B* in the Court of the Native State of Faridkot claiming Rs 60,000 alleged to have been misappropriated by *B* while in *A*'s service at Faridkot. *B* did not appear at the hearing and an ex parte decree was passed against him. *B* was a native of another Native State Jhind. In

(r) *Jama Payar v Annamalai* (1884) 7 Mad. 164.

(s) *Himmat Lall v Shitajrar* (1884) 8 Bom. 523.

(t) *Ganga Prasad v Ganeshji* (1914) 46 All. 119 79 I C 330 (4) A A 161.

(u) *Gurdial Singh v Raja of Faridkot* (1895)

22 Cal 2 337 21 I.A. 171

(r) *Mayeram v Raju* (1900) 4 Bom 86

(w) *Murugesu v Annamalai* (1900) 23 Mad. 453

(x) *Bababhat v Varharhat* (1889) 13 Bom. 224

(y) *Hajimusa v Furmanand* (1891) 15 Bom. 216

(z) (1895) 22 Cal. 222, 21 I.A. 171

- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ,
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ;
- (f) where it sustains a claim founded on a breach of any law in force in British India

Alterations in the sections -- Clause (a) is now "The last clause of sec 14 of the Act of 1882 has been omitted as to which see note below, 'How a foreign judgment may be enforced in British India' Other alterations are verbal

Foreign judgment -- The expression "foreign judgment" is defined in sec 2 as meaning the judgment of a foreign Court, that is a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council. The present section provides that a foreign judgment may operate as *res judicata* except in the six cases specified in the section, and of course in order to so operate the other conditions of sec 11 must be fulfilled (a). The foreign Court must be competent to try the suit, not only as regards pecuniary limits of its jurisdiction and the subject matter of the suit, but also with reference to its territorial jurisdiction. So a decision of a Kathiawar Court as to a custom governing partition will not be *res judicata* in a suit for partition between the same parties of lands in British territory (a). In matters of foreign judgments the Courts here are guided by very much the same principles as those adopted by the Courts of England (b). As in England the foreign judgment must be final and conclusive in the Court in which it is passed and it may be final although it is subject to appeal to a higher Court (c). An act of State is not a judgment, and it cannot therefore have the effect of *res judicata*. Thus it has been held that an order of the Political Agent of Mewar and the Maharana of Udepore deposing a high priest from his *gadi* is not a foreign judgment, but merely an act of State, and it cannot, therefore, operate as *res judicata* (d).

How a foreign judgment may be enforced in British India -- A judgment of a Court of British India can only be enforced by proceedings in execution. A foreign judgment, however, may be enforced by proceedings in execution in certain specified cases only (s 44). In these cases a foreign judgment can only be enforced by a suit upon the judgment. That is to say, if A has obtained a decree against B for Rs 5,000 in a French Court at Pondicherry, and if B has got no property in Pondicherry to satisfy the decree, but has got property in Bombay, A may bring a suit against B in Bombay to recover the amount of the judgment. The suit must be brought within six years from the date of the judgment (e) and if a decree is passed in favour of A, he may proceed to execute it by attachment and sale of B's property in Bombay. See notes on sec 41.

(a) *Jadar v Thakur* (1911) 2 Lah 207, 63 I C 287 (21) A 1 29

(b) *Prithvi Singh v Umeddas* (1903) 6 Bom 111 29, *doubling Bahabhai v Narhar* (1884) 13 Bom 24

(c) *Nabha v Mohamed* (1897) 15 Mad 112 114

(d) *Bairath v Lalchand* (1833) 56 Mad 91 141 IL 253 (3) A C 511, *Neelam v Prerady* (1830) 15 A C 1

(e) *Shrinani Gungani Loringhianlal v Gungani* (1893) 17 Bom 409

(f) *The Indian Limitation Act 1908 art. 117*

Submission to jurisdiction of foreign Court.—Where a suit is instituted in British India on the judgment of a foreign Court, effect will be given to the judgment, though that Court *had no jurisdiction* over the defendant, if the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction (h), for having taken a chance of judgment in his favour, it is not right that he should take exception to jurisdiction when judgment goes against him (i). But if he protests against the jurisdiction, and the suit is then proceeded with against him, the judgment is a nullity, and no effect will be given to it in a suit brought on the same facts made at an early stage of the case had submission to jurisdiction (j) submission to jurisdiction A

defendant who employs a pleader in a suit in a foreign Court will not be said to have submitted himself to the jurisdiction of that Court if the pleader states at the hearing that he has no instructions from his client (k). But if a defendant while protesting against the jurisdiction, appears on the argument of the point of jurisdiction, thereby taking the chance of getting a decision in his favour, he will be deemed to have submitted himself to the jurisdiction of the Court (l). A fortiori it is so if he also pleads on the merits (m). On the same principle the Lahore High Court held that an application to a foreign Court to set aside an *ex parte* decree is a submission to its jurisdiction (n). But this has been dissented from on the ground that a submission after decree is of no effect, and when a defendant applied to a foreign Court to set aside its decree passed without jurisdiction after the decree had been transferred for execution to a Court in British India, the Madras High Court held that the decree continued to be a nullity and inexecutable (o). But submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceedings, in such a case the judgment of the foreign tribunal is not binding on the party. Whether submission was voluntary or it was for the purpose of saving property is a pure question of fact (p). A person who sues in a foreign Court as plaintiff voluntarily submits to the jurisdiction and cannot afterwards dispute it (q). An *ex parte* decree was passed by a Court of a Native State against a native of British India who was not resident in that State. In 1926 the decree was transferred under sec 44 to a British Court for execution. The judgment-debtor's movable property was attached and the judgment-debtor paid Rs 100 into the British Court and applied for further time. In 1928 the decree was again transferred to the same British Court for execution, and the judgment then for the first time objected that the decree was a nullity for want of jurisdiction, but it was held that the judgment debtor's appearance in the British Court did not amount to submission to the foreign Court, and that the objection was not barred by *res judicata* (r).

Agreement to submit to foreign jurisdiction—Where there is an *express* agreement to submit to the jurisdiction of a foreign Court, a judgment pronounced by such Court binds the parties and effect will be given to such judgment in British Indian Courts (s).

(h) *Ganga Prasad v Ganesh Lal* (1904) 46 All 119 79 I C 33 (21) A.A. 161, *Shauk Atham v Darud* (1909) 32 Mad 469 3 I C 190

(i) —
(j) —
(k) —
(l) —

(m) —

(n) —

(o) *Narappa v Pangaswami* (1933) 64 Mad L J 531, 144 I C 507 (33) A M 393

(p) *Veeraraghava Ayyar v Muga Sani* (1916) 39 Mad 24 26 I C 287

(q) *Nallalambi v Ponnusami* (1879) 2 Mad 400 404

(r) *Shoo Tahal v Binak* (1931) 53 All 747, 136 I C 353 (31) A A 603

(s) *Austran Lloyd Steamship Co v Cresham Life Assurance Society* [1903] 1 K. B. 949, *Kirchner & Co v Grubben* [1909] 1 Ch 415 *Burpee v Ellerman Cuy Lines, Ltd* (1925) 49 Bom 854 89 I C 866 (25) A B 419 *Haji Abdulla v Stamp* (1904) 26 Bom L R 224 80 I C 523, (24) A B 381

13

1860 he left Jhind, and went to Faridkot to take up service under A. In 1874 he left A's service, and returned to Jhind. The suit was brought against him in 1879. At the date of the suit B neither resided in Faridkot nor was he a domiciled subject of the Faridkot State nor did he owe allegiance to that State. On these facts the Faridkot State had on general principles of International Law no jurisdiction to entertain the suit against B in respect of the claim which it should be noted, was a mere *personal* claim as distinguished from a claim *relating to land or movables* (a). The decree of the Faridkot Court was therefore an absolute nullity. A then sued B in a British Indian Court on the judgment of the Faridkot Court. The Court of first instance dismissed the suit on the ground that the Faridkot Court had no jurisdiction to entertain the suit. This decision was upheld by their Lordships of the Privy Council. The mere fact that the alleged *embroilment* took place at Faridkot was not sufficient to give jurisdiction to the Faridkot Court. The result would be the same if the suit were for damages for *breach of a contract* entered into by B with A at Faridkot (b). In other words a foreign Court cannot assume jurisdiction in cases where the claim is a *personal* one merely because the *cause of action* arose within its jurisdiction. But if B was *residing* at Faridkot at the date of the suit, the Faridkot Court would have had complete jurisdiction. In the case of *personal* claims it is *residence* alone that gives jurisdiction in a suit against a foreigner (c). The same rule applies where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature though owing allegiance to the same Sovereign. Thus a decree passed by the Ceylon Court [which is a foreign Court within the meaning of sec 2] in a suit on a contract against a native of British India who was not at the time of the action residing in Ceylon is a nullity and it cannot be enforced by a suit in a Court of British India (d).

Suppose that in the above case the Faridkot Legislature had passed an Act empowering the Courts of Faridkot to entertain suits in cases where the *cause of action* had arisen in Faridkot though the defendant was a foreigner neither residing in Faridkot nor owing any allegiance or obedience to the Faridkot State. Could effect be then given to the judgment of the Faridkot Court in a suit brought upon the judgment in a Court in British India? It could not—for jurisdiction conferred against the general principles of international law is not recognised and no one State can by its legislation confer jurisdiction upon its Court to entertain a suit in respect of a *personal* claim against foreigners who at the date of the suit were neither resident in that State nor owed any

... subjects owe allegiance to
... therefore by legislation
... done, against British
... a judgment passed by the Queen's Bench
Division of the High Court of Justice of England (a foreign Court) against a British Indian subject residing in British India in an action founded on a breach of a contract committed within the jurisdiction of that Court, is not a nullity, and a suit may be brought on the judgment in British India (g).

In the case of the *Raja of Faridkot* the decree passed against the defendant by the foreign Court was an *ex parte* decree, that is to say, the defendant did not appear before the foreign Court, and the decree was passed in his absence. But what if the defendant had appeared and defended the suit in the foreign Court? This question is considered in the following paragraph.

(a) *Lakshmeshankar v Fakhram* (1900) 24 Bom 77, *Nalla v Mahomed* (1897) 20 Mad 112.

(b)

(c)

3 IC 190

(e) *Christen v Delaney* (1899) 26 Cal 931.

(f) *Hinde v Ponnath* (1882) 4 Mad 359.

(g)

Submission to jurisdiction of foreign Court.—Where a suit is instituted in British India on the judgment of a foreign Court, effect will be given to the judgment, though that Court *had no jurisdiction* over the defendant, if the defendant appears and defends the suit brought against him in that Court without making any objection to its jurisdiction (h), for having taken a chance of judgment in his favour, it is not right that he should take exception to jurisdiction when judgment goes against him (i). But if he protests against the jurisdiction, and the suit is then proceeded with against him, the judgment is a nullity, and no effect will be given to it in a suit brought on the judgment. The protest against jurisdiction must be made at an early stage of the proceedings, hence where no objection to the jurisdiction was made until the case had reached the stage of appeal, it was held that there was submission to jurisdiction (j). Nice questions sometimes arise as to what amounts to submission to jurisdiction. A defendant who employs a pleader in a suit in a foreign Court will not be said to have submitted himself to the jurisdiction of that Court if the pleader states at the hearing that he has no instructions from his client (k). But if a defendant while protesting against the jurisdiction, appears on the argument of the point of jurisdiction, thereby taking the chance of getting a decision in his favour, he will be deemed to have submitted himself to the jurisdiction of the Court (l). A fortiori it is so if he also pleads on the merits (m). On the same principle the Lahore High Court held that an application to a foreign Court to set aside an *ex parte* decree is a submission to its jurisdiction (n). But this has been dissented from on the ground that a submission after decree is of no effect, and when a defendant applied to a foreign Court to set aside its decree passed without jurisdiction after the decree had been transferred for execution to a Court in British India, the Madras High Court held that the decree continued to be a nullity and inexecutable (o). But submission is not voluntary if the appearance is made only to release property seized by a foreign tribunal in attachment or other proceedings, in such a case the judgment of the foreign tribunal is not binding on the party. Whether submission was voluntary or it was for the purpose of saving property is a pure question of fact (p). A person who sues in a foreign Court as plaintiff voluntarily submits to the jurisdiction and cannot afterwards dispute it (q). An *ex parte* decree was passed by a Court of a Native State against a native of British India who was not resident in that State. In 1926 the decree was transferred under sec. 44 to a British Court for execution. The judgment-debtor's movable property was attached and the judgment-debtor paid Rs. 100 into the British Court and applied for further time. In 1928 the decree was again transferred to the same British Court for execution, and the judgment then for the first time objected that the decree was a nullity for want of jurisdiction, but it was held that the judgment-debtor's appearance in the British Court did not amount to submission to the foreign Court, and that the objection was not barred by *res judicata* (r).

Agreement to submit to foreign jurisdiction—Where there is an express agreement to submit to the jurisdiction of a foreign Court, a judgment pronounced by such Court binds the part

- | | |
|-----|---|
| (h) | Ganga Prc 119 79 <i>Aikam</i> I.C. 190 |
| (i) | Kandath v . . . |
| (j) | Kalyugum v Chokalinga (1874) I Masd 200 |
| (k) | . . . |
| (l) | . . . |
| (m) | . . . |
| (n) | . . . |
- (r) Sheo Tahal v Bansk (1931) 53 All 747,
130 I C 553 (31) A.A. 68J

(t) Amstran Lloyd Steamship Co v Gresham
Life Assurance Society [1903] 1 K.B.
249 Aircher & Co v Grubben [1907]
1 Ch 415, Burjor v Ellerman City Lines
Ltd (1925) 49 Bom 654 89 I C 866
(25) A.B. 449 Haji Abdulla v Stamp
(19 4) 26 Bom L.R. 224 80 I C 525,
(28) A.B. 541

The mere fact of entering into a contract of partnership in a foreign country does not involve an agreement that all matters and disputes arising in connection with the partnership shall be submitted to and therefore lie within the jurisdiction of the Courts of that country (i)

Carrying on business in a foreign country through an agent.—Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving the agent a general power of attorney including the right to institute or defend suits relating to matters connected with their business or otherwise (u)

Possession of immovable property in a foreign country.—The possession of immovable property in a foreign country gives the Courts of that country jurisdiction to deal with the property itself (t) but not jurisdiction in personam over the possessor, even in regard to obligations connected with that property (w)

Irregularities not affecting jurisdiction.—In cases where a foreign Court has jurisdiction or where the defendant has submitted himself to the jurisdiction of a foreign Court the judgment of such Court is not vitiated by irregularity which do not affect the jurisdiction of the Court even when they are such as would, in the view of the foreign Court render the judgment there a nullity (x)

Foreign judgment against a foreign firm.—A B and C carry on business at Singapore in partnership in the name of X Y D a creditor of the firm, brings an action against the firm in the supreme Court of Singapore but A alone is served with the writ of summons B and C are British Indian subjects, and they did not reside at Singapore at the date of the suit or at any other time A decree is passed against the firm by the Singapore Court A suit is then brought by D in British India on the judgment of the Singapore Court against A B and C for a personal decree against them No personal decree can be passed against B and C as they were not served though such a decree may be passed against A (y) Compare O 21 r 50

Foreign judgment on a decree of a British Indian Court.—The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree in British India (z)

Foreign judgment, as res judicata.—This section applies not only to suits on foreign judgments but also to cases in which the defendant relies on a foreign judgment as a bar to a suit in British India (a)

Clause (b).—In order that a foreign judgment may operate as res judicata it must have been given on the merits of the case whether it was the judgment of a foreign Court in Europe or America or of a foreign Court in Asia or Africa (b) In *Kejmer v Viswanatham* (c) an action was brought in the King's Bench Division of the High Court of Justice in England to recover a liquidated amount The defendant failed to comply with an order to answer interrogatories and his defence was struck out and judgment was entered for the amount claimed for the plaintiff under R S C O 31 r 21 corresponding to O 11 r 21 below The plaintiff subsequently instituted a suit on the judgment in the Madras High Court It was held

(i) *Emanuel v Symon* [1908] 1 K B 302
Gurram v Mubshad Khan (1932)
 63 Mad L J 61 140 I C 588 (33)
 A M 11ⁿ

(v) *Iamanathan v Kaluthu* (1916) 37 Mad
 163 1 174 18 I C 189 *Janon v*
Ukhamad (19 4) 47 Mad 677, 8 I
 C 425 (25) A M 155

(v) *Duplas v Forrest* (1828) 4 Mag 686
London and North-Western Fy Co v
Lunsay (1858) 3 Mag 99

(w) *Emanuel v Symon* [1908] 1 K B 30ⁿ
 (x) *ularu v Marudupula* (19ⁿ) 30 Mad 29

Pemberton v Hughes [1899] 1 Ch 781
 (y) *Sah b Thamba v Ramid* (1913) 36 Mad. 414,
 12 I C 1006

(z) *Fakruddeen v Official Trustee of Bengal*

(a) " " "

(b) " " "

(c) " " "

" " "

Mad 63 1 C 386

by the Judicial Committee, affirming the judgment of the Madras High Court, that the judgment sued on was not given on the merits of the case and that the suit was not maintainable. It has also been held by the same tribunal that a judgment on an award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits of the case" (d). A foreign judgment passed on default of appearance of the defendant duly served with summons on the allegations contained in the plaint without any trial on evidence, is not one passed "on the merits of the case," and a suit cannot be brought on such judgment in any Court in British India (e), but it is otherwise if a decree, though *ex parte*, is passed after hearing evidence adduced by the plaintiff (f). Where a suit in a foreign Court is adjourned for settlement, and it is agreed between the parties that if the suit is not settled judgment should be passed for the plaintiff, and there being no settlement the plaintiff appears on the adjourned date but the defendant does not appear and judgment is passed for the plaintiff according to the agreement, the judgment is one on the merits of the case, and a suit can be brought on such a judgment in a Court in British India (g). It cannot be said of a judgment that it was not given on the merits merely because it proceeds on a wrong view as to the burden of proof or the legal liability of a party (h).

Clause (c)—The mistake must be *apparent on the face of the proceedings*. In England it has been held that a mere mistake as to English law will not vitiate a foreign judgment, even though the mistake may appear on the face of the proceedings (i). In an old Madras case (j) this clause was referred to, where a foreign Court had exercised jurisdiction contrary to the principles of International Law, but such a case would now fall under clause (a).

Clause (d)—The expression "natural justice" in this clause refers rather to the form of procedure than to the merits of the particular case. The mere fact that a foreign judgment is wrong in law does not make it one opposed to natural justice. There must be something in the procedure anterior to the judgment which is repugnant to natural justice (l). Thus a foreign judgment obtained without notice of the suit to the defendant is contrary to natural justice, and a suit on such judgment is not maintainable in a British Indian Court (l). So also a judgment based on a third review after two applications for review had been refused (m), or a judgment against a minor defendant for whom no guardian *ad litem* had been appointed (n). But notice served on an agent empowered to sue and defend suits in the foreign Court is sufficient (o). As to sufficiency of notice, if the foreign Court has held service of the notice to be sufficient, it must be taken to be correct in the absence of evidence to the contrary (p).

Clause (e)—All judgments whether domestic or foreign are void if obtained by fraud. In the case of domestic judgments the fraud must be extrinsic to the matter tried but apparently this rule does not apply to foreign judgments (q).

(d) *Oppenheim & Co v Mahomed Haneef*
(1922) 49 I A 174 45 Mad 496, 74 I C
616 (22) A PC 120

(e) *M v M* (1907) 50

(f) *M v M* (1907) 50

(g) *M v M* (1907) 50

(h) *M v M* (1907) 50

(i) *M v M* (1907) 50

(j) *M v M* (1907) 50

(k) *M v M* (1907) 50

(l) *M v M* (1907) 50

(m) *M v M* (1907) 50

(n) *M v M* (1907) 50

(o) *M v M* (1907) 50

(p) *M v M* (1907) 50

(q) *M v M* (1907) 50

(i) *Godard v Gray* (1870) L R 6 Q B 139

(j) *Hinde v Pennath* (1881) 4 Mad 359

(k) *Rama Shenoi v Hallagma* (1918) 41 Mad 205

45 I C 703

(l) *London Bank v Hormazji* (1871) 8 B H C

200 *London Bank v Govind* (1881) 5

Bom 223 *London Bank v Euryorji*

(1855) 9 Bom 346 *Eduji v Manekji*

(1887) 11 Bom 241 *Bangarusami v*

Balarubramanian (1890) 13 Mad 496

(m) *M v M* (1907) 50

(n) *M v M* (1907) 50

(o) *M v M* (1907) 50

(p) *M v M* (1907) 50

(q) *M v M* (1907) 50

by the Judicial Committee, affirming the judgment of the Madras High Court, that the judgment sued on was not given on the merits of the case and that the suit was not maintainable. It has also been held by the same tribunal that a judgment on an award obtained in England by default cannot be sued on in India, since it is not a judgment "on the merits of the case" (d). A foreign judgment passed on default of appearance of the defendant duly served with summons on the allegations contained in the plaint without any trial on evidence, is not one passed "on the merits of the case," and a suit cannot be brought on such judgment in any Court in British India (e), but it is otherwise if a decree, though *ex parte*, is passed after hearing evidence adduced by the plaintiff (f). Where a suit in a foreign Court is adjourned for settlement, and it is agreed between the parties that if the suit is not settled judgment should be passed for the plaintiff, and there being no settlement the plaintiff appears on the adjourned date but the defendant does not appear and judgment is passed for the plaintiff according to the agreement, the judgment is one on the merits of the case, and a suit can be brought on such a judgment in a Court in British India (g). It cannot be said of a judgment that it was not given on the merits merely because it proceeds on a wrong view as to the burden of proof or the legal liability of a party (h).

Clause (c)—The mistake must be *apparent on the face* of the proceedings. In England it has been held that a mere mistake as to English law will not vitiate a foreign judgment, even though the mistake may appear on the face of the proceedings (i). In an old Madras case (j) this clause was referred to, where a foreign Court had exercised jurisdiction contrary to the principles of International Law, but such a case would now fall under clause (a).

Clause (d) —The expression “ natural justice ” in this clause refers rather to the form of procedure than to the merits of the particular case. The mere fact that a foreign judgment is wrong in law does not make it one opposed to natural justice. There must be something in the procedure anterior to the judgment which is repugnant to natural justice (k). Thus a foreign judgment obtained without notice of the suit to the defendant is contrary to natural justice and a suit on such judgment is not maintainable in a British Indian Court (l). So also a judgment based on a third review after two applications for review had been refused (m), or a judgment against a minor defendant for whom no guardian ad litem had been appointed (n). But notice served on an agent empowered to sue and defend suits in the foreign Court is sufficient (o). As to sufficiency of notice, if the foreign Court has held service of the notice to be sufficient, it must be taken to be correct in the absence of evidence to the contrary (p).

Clause (e)—All judgments whether domestic or foreign are void if obtained by fraud. In the case of domestic judgments the fraud must be extrinsic to the matter tried but apparently this rule does not apply to foreign judgments (g).

- (d) Oppenheim & Co v Mahomed Hanef
(1922) 40 I A 174 45 Mad 496 74 I C

-

- (f) *Cole v Harper* (1910) 41 All 501 50 I C
780 *Meher Singh v Ishar Singh* (1932)
14 Lah 53 140 I C 8* (3) A L 649
(g) *Mahammad v Chintamani* (1929) 52 Mad
603 120 I C 751 (29) A M 469
(h) *Rama Shenu v Hallogna* (1918) 41 Mad
205, 45 I C 703

- (i) *Godard v Gray* (1870) L R 6 Q B 139

- (j) *Hinde v Ponnath* (1881) 4 Mad 350

- (k) *Rama Shenoi v Hallaguna* (1918) 41 Mad 205,
45 I C 703

-
- (l)
- (m)

- (n) *Janoo v Afahamal* (1924) 47 Mad 277, 282
1 (425 (2^d) A & M 355
(p) 47 Mad 277, 282 1 (425 (2^d) A & M 355
supra
(q) *Nairinji Dass v Kundo Lal* (1940) 22 Cal
Nal. 110

Clause (f) — Presumably a foreign judgment for a gambling debt would not be enforced in British India.

Limitation — The period of limitation for a suit on a foreign judgment is six years from the date of the judgment. *see* Limitation Act, 1908, Sch. I, art. 117. The pendency of an appeal in the foreign country will not bar a suit on a foreign judgment (r). But if the appeal results in a decree dismissing the appeal, the appellate decree affords a fresh starting point for limitation (r1).

Whereas in the case of a suit on a contract limitation merely bars the remedy but does not extinguish the right, the judgment of a foreign Court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made (s).

Where the Court of a foreign country holds, applying its own law, that a suit is not barred by the law of limitation, it cannot be said that it has refused to recognize the law of British India because the suit was barred according to the law of British India (t).

14. [S. 13. Expln. VI.] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Presumption as to foreign judgments

See s. 13, cl. (a), and the undermentioned case (u).

PLACE OF SUING.

15. [S. 13.] Every suit shall be instituted in the Court of the lowest grade competent to try it.

Courts in which suits to be instituted

Place of suing — This heading governs sections 15 to 25. Place means place in British India and the heading indicates that the Courts referred to in these sections are in British India, and the immovable property referred to is also in British India. As said by the Lahore High Court these sections "regulate the venue within British India and apply only to those places where the Code is in force. They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance and do not govern claims against persons or things wholly outside their jurisdiction." (v).

Scope and object of the section. — The object of the section in requiring a

| possession under the said Constitution, in (a). Although therefore, as a matter of | |
|--|--------------------------------|
| (r) | All 119, 79 I C 332, (24) A. A |
| (r1) | 161 |
| (s) | (u) |
| (t) | (v) |
| (u) | (v) |

procedure a suit below a certain value ought to be instituted in the Court of the Munsif, the Subordinate Judge has still jurisdiction to try it (x) But also as a matter of procedure, he ought not to entertain the suit, but should return the plaint to the plaintiff to be presented to the Munsif as provided by O 7, r 10 [Code of 1882, s 57] (y) This is explained more fully below

Jurisdiction—The word "competent" used in this section has reference to the jurisdiction of a Court Jurisdiction means the extent of the authority of a Court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary limits of its jurisdiction. Thus a Presidency Small Cause Court has no jurisdiction to try suits in which the amount or value of the subject matter exceeds Rs. 2 000, this is said to be the jurisdiction of a Court as regards its *pecuniary* limits. Nor can it try suits for specific performance of contracts or for an injunction or for a dissolution of partnership, this is said to be the jurisdiction of a Court as regards the *subject matter* of a suit Nor can it try a suit on a cause of action that has arisen beyond the local limits of the original civil jurisdiction of the High Court, this is said to be the local limits of its jurisdiction.

The jurisdiction of a Court may again be *original* or *appellate* In the exercise of its *original* jurisdiction a Court entertains original suits. In the exercise of its *appellate* jurisdiction it entertains appeals The High Courts of Allahabad, Patna and Lahore have no *original* jurisdiction.

Court of lowest grade competent to try a suit—There are in British India a large number of Courts. The High Courts of Calcutta Madras Bombay, Allahabad Patna, Lahore and Rangoon have been established each by a Royal Charter Other Courts in India have been established almost all by local Acts and they are of various grades with different pecuniary limits of jurisdiction

In each of the three presidency towns, there is a High Court and a Small Cause Court, High Courts are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs 100 (z) The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs 2,000 (a) Thus both a High Court and a Presidency Small Cause Court are competent to try a suit say for Rs 500 for damages for breach of contract, but of these two Courts it is the Small Cause Court which is the Court of the lowest grade competent to try the suit The suit therefore shall be instituted in the Small Cause Court as required by the present section. This does not mean that the High Court has no jurisdiction to entertain the suit It has jurisdiction to try the suit, but in order that the High Court may not be overcrowded with suits, the Legislature has established Small Cause Courts and the present section requires that suits which a Small Cause Court is competent to try shall be brought in that Court There are however certain suits which a Small Cause Court is not competent to try such as suits for the recovery or partition of immovable property or for the fore closure or redemption of a mortgage of immovable property or suits for injunction or for specific performance (b) These suits must be brought in the High Court, though the value of the suit may be under Rs 100

Outside the presidency towns there are in each province a number of Courts of different grades established by a Civil Courts Act for each province The Civil Courts

(x) *Malta Mondal v Hari* (1890) 17 Cal 155

Krishnasami v Kanakasabay (1891) 14

Mad 183

(y) *Madhi Lal v Ma. Nar* (1895) 7 All 230

(z) See Cl. 12 of the Letters Patent Appendix II

(a) Presidency Small Cause Courts Act 1882 s 18.

(b) Presidency Small Cause Courts Act, 1882 s. 19

Clause (f) — Presumably a foreign judgment for a gambling debt would not be enforced in British India

Limitation — The period of limitation for a suit on a foreign judgment is six years from the date of the judgment see Limitation Act, 1908, Sch. I, art 117 The pendency of an appeal in the foreign country will not bar a suit on a foreign judgment (r) But if the appeal results in a decree dismissing the appeal, the appellate decree affords a fresh starting point for limitation (r1)

Whereas in the case of a suit on a contract limitation merely bars the remedy but does not extinguish the right, the judgment of a foreign Court is not open to the objection that the suit was barred by the law of limitation applicable in the country where the contract was made (s)

Where the Court of a foreign country holds, applying its own law, that a suit is not barred by the law of limitation, it cannot be said that it has refused to recognize the law of British India because the suit was barred according to the law of British India (t)

14. [S 13. Expln. VI] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction

Presumption as to foreign judgments

See s. 13, cl (a), and the undermentioned case (u)

PLACE OF SUING.

15. [S. 15] Every suit shall be instituted in the Court of the lowest grade competent to try it

Courts in which suits to be instituted

Place of suing.—This heading governs sections 15 to 25 Place means place in British India and the heading indicates that the Courts referred to in these sections are in British India, and the immovable property referred to is also in British India As said by the Lahore High Court these sections regulate the venue within British India and apply only to those places where the Code is in force They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance and do not govern claims against persons or things wholly outside their jurisdiction' (v)

Scope and object of the section.—The object of the section in requiring a suitor to bring his suit in the Court of the lowest grade competent to try it is that Courts

| powers under the Acts constituting them (w) | | | | | Although therefore, as a matter of | | | | | | | |
|---|---|---|---|---|------------------------------------|-----|----|---|---|-----------|---|---|
| (r) | . | . | . | . | AB | 118 | 79 | I | C | 322, (24) | A | A |
| (r) | . | . | . | . | 181 | . | . | . | . | . | . | . |
| (s) | . | . | . | . | (u) | . | . | . | . | . | . | . |
| (t) | . | . | . | . | (v) | . | . | . | . | . | . | . |
| (u) | . | . | . | . | (w) | . | . | . | . | . | . | . |

procedure a suit below a certain value ought to be instituted in the Court of the Munsif, the Subordinate Judge has still *jurisdiction* to try it (x). But also as a matter of *procedure*, he ought not to entertain the suit, but should return the plaint to the plaintiff to be presented to the Munsif as provided by O 7, r 10 [Code of 1882, s 57] (y). This is explained more fully below.

Jurisdiction—The word “competent” used in this section has reference to the jurisdiction of a Court. Jurisdiction means the extent of the authority of a Court to administer justice not only with reference to the subject matter of the suit but also to the local and pecuniary limits of its jurisdiction. Thus a Presidency Small Cause Court has no jurisdiction to try suits in which the amount or value of the subject matter exceeds Rs 2 000, this is said to be the jurisdiction of a Court as regards its *pecuniary* limits. Nor can it try suits for specific performance of contracts or for an injunction or for a dissolution of partnership, this is said to be the jurisdiction of a Court as regards the *subject matter* of a suit. Nor can it try a suit on a cause of action that has arisen beyond the local limits of the original civil jurisdiction of the High Court, this is said to be the local limits of its jurisdiction.

The jurisdiction of a Court may again be original or appellate. In the exercise of its *original* jurisdiction a Court entertains original suits. In the exercise of its *appellate* jurisdiction it entertains appeals. The High Courts of Allahabad, Patna and Lahore have no *original* jurisdiction.

Court of lowest grade competent to try a suit—There are in British India a large number of Courts. The High Courts of Calcutta Madras Bombay, Allahabad, Patna Lahore and Rangoon have been established each by a Royal Charter. Other Courts in India have been established almost all by local Acts and they are of various grades with different pecuniary limits of jurisdiction.

In each of the three presidency towns, there is a High Court and a Small Cause Court, High Courts are empowered in the exercise of their ordinary original civil jurisdiction to try suits of any value except suits falling within the jurisdiction of Presidency Small Cause Courts of which the value does not exceed Rs 100 (z). The pecuniary jurisdiction of Presidency Small Cause Courts is confined to suits of which the value does not exceed Rs. 2 000 (a). Thus both a High Court and a Presidency Small Cause Court are competent to try a suit, say for Rs 500 for damages for breach of contract, but of these two Courts it is the Small Cause Court which is the Court of the lowest grade competent to try the suit. The suit therefore shall be instituted in the Small Cause Court as required by the present section. This does not mean that the High Court has no jurisdiction to entertain the suit. It *has* jurisdiction to try the suit, but in order that the High Court may not be overcrowded with suits, the Legislature has established Small Cause Courts and the present section requires that suits which a Small Cause Court is competent to try shall be brought in that Court. There are however, certain suits which a Small Cause Court is not competent to try such as suits for the recovery or partition of immovable property or for the foreclosure or redemption of a mortgage of immovable property or suits for injunction or for specific performance (b). These suits must be brought in the High Court, though the value of the suit may be under Rs 100.

Outside the presidency towns there are in each province a number of Courts of different grades established by a Civil Courts Act for each province. The Civil Courts

(x) *Matra Mondal v Hari* (1890) 17 Cal 155
Arushanazami v Kanakasabai (1891) 14
 Mad 163
 (y) *Nalini Lal v Ma. Aor* (1885) 7 All 30
 (z) See Cl. 1st of the Letters Patent Appendix II

(a) Presidency Small Cause Courts Act 1882
 s. 12.
 (b) Presidency Small Cause Courts Act, 1882,
 s. 19

in the mofussil of Bombay, Madras and Calcutta are divided into three classes as shown in the following table —

| Bombay Presidency Act 14 of 1869 | Madras Presidency Act 3 of 1873 | Bengal, N W P, and Assam Act 12 of 1887 |
|--|------------------------------------|--|
| 1 District Courts | District Courts. | District Courts. |
| 2 Courts of Subordinate Judges of the first class | Subordinate Judges Courts | Subordinate Judges' Courts. |
| 3 Courts of Subordinate Judges of the second class | District Munsifs Courts | Munsifs Courts |

The jurisdiction of District Judges and Subordinate Judges, except Subordinate Judges of the second class in the Bombay Presidency, extends to all original suits, what ever may be the value of the suit But a District Court is a Court of superior grade to a Subordinate Judge's Court, for a District Court is the principal Court of original civil jurisdiction in the district and it is also the Court of appeal from decrees and orders in certain suits passed by other Courts in the district including Courts of Subordinate Judges. The jurisdiction of a Subordinate Judge of the second class in the Bombay Presidency extends to all original suits of which the value does not exceed Rs 5,000. The jurisdiction of a District Munsif in the Madras Presidency extends to all original suits (not otherwise exempted from his cognizance) of which the value does not exceed Rs 2,500. The jurisdiction of a Munsif in Bengal, North Western Provinces and Assam extends to all original suits of which the value does not exceed Rs 1,000.

Both a Subordinate Judge and a Munsif have jurisdiction to try a suit, say, to recover Rs 500 for rent. But of these two Courts it is the Munsif's Court that is "the Court of the lowest grade competent to try the suit. The suit therefore "shall" be instituted in the Munsif's Court as required by the present section.

As to Civil Courts in the Central Provinces see Act 16 of 1885 in Oudh, Act 13 of 1879, in Jhansi, Act 18 of 1867. As to Provincial Small Cause Courts see Act 9 of 1887.

Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade—Suppose that a suit which under the provisions of this section ought to have been instituted in a Munsif's Court is brought in the Court of a Subordinate Judge, and the Subordinate Judge, instead of returning the *plaint* under O 7, r 10, *tries* the suit notwithstanding objection taken by the defendant, and that a decree is passed against the defendant. Is the decree a nullity? No, for the Subordinate Judge has jurisdiction to try the suit. It is a case of *irregularity*, not affecting the jurisdiction of the Court within the meaning of s 99 below (c). As to cases where a suit is by reason of *over valuation* brought in a Court of higher grade, see notes below, "Over valuation and under valuation."

Where a suit which ought to have been instituted in a Court of higher grade is instituted in a Court of lower grade—In such a case the Court of lower grade ought to return the *plaint* to the plaintiff to be presented to the Court of higher grade [O 7, r 10]. If this is not done, and the suit is heard by the Court of lower grade, the decree is one passed without jurisdiction.

(c) See *Nadhi Lal v Mathur Hussain* (1885) 7 A.L.J. 230 and *Maitra Mondal v Hari* (1890) 17 Cal 155 both cases of *over valuation*

but decided without reference to the Suits Valuation Act 1887

This is a case of *want of jurisdiction* as distinguished from a mere *irregularity* within the meaning of s 99 below (d) As to cases where a suit is by reason of *under valuation* brought in a Court of lower grade, see notes below, "Over valuation and under valuation."

Principles regulating pecuniary jurisdiction—It is the *plaintiff's valuation* in his *plaint* which fixes the jurisdiction of the Court, and not the amount which may be found and *decreed* by the Court (e) Thus where in a suit for accounts the plaintiff values his claim at less than Rs 5 000 which is the maximum pecuniary jurisdiction of the Court in which the suit is filed and the amount found due on taking the accounts exceeds Rs 5 000 the Court has power to pass a decree for that amount (f) But jurisdiction may be destroyed if the plaint is so amended as to exceed the pecuniary limits of the Court in which the suit is instituted (g)

Over valuation and under valuation—Although it is the value put by the *plaintiff* on his suit that *prima facie* determines jurisdiction, it does not follow that a plaintiff is at liberty to assign any arbitrary value to the suit and thus be free to choose the Court in which he should bring the suit (h) Cases do occur in which a plaintiff over values his suit or he under values it The over valuation or under valuation may be erroneous, or it may be done intentionally by the plaintiff for the purpose of bringing the suit in a Court different from that in which it would be if it were properly valued. If the over valuation or under valuation is patent on the face of the plaint, it is the duty of the Court to which the plaint is presented to return it to the plaintiff to be presented to the proper Court under O 7, r 10 If it is not patent on the face of the plaint, but objection is taken by the defendant that it is over valued or under valued, the Court may require the plaintiff to show that the suit has been properly valued if there are *prima facie* grounds for believing that the suit has not been properly valued (i) but not otherwise (j)

Suppose that a suit has been over valued or under valued so that it is brought in a Court whose grade is higher or lower than that of the Court which would have been competent to try it if the suit were properly valued Is the decree liable to be set aside or reversed by the appellate Court? No not unless (1) the objection as to jurisdiction by reason of over valuation or under valuation was taken by the defendant in the Court of first instance at or before the hearing at which issues were framed or (2) the over valuation or under valuation is found by the appellate Court to have prejudicially affected the disposal of the suit on the merits (k), and it matters not whether the over valuation or under valuation was erroneous or intentional (l) See Suits Valuation Act, 1887 s 11

The High Court of Calcutta has held that where a suit is under valued with the result that the *appeal* from the decree in the suit is heard and decided by a District Court instead of by a High Court, the decree of the District Court is one passed by a Court without jurisdiction and therefore a nullity This happens in cases where a suit of which the true value exceeds Rs 5 000 is valued at less than Rs 5 000 A brings a suit against B for possession of immovable property in the Court of a Subordinate

(d) See *Matra Mondal v Hara* (1890) 17 Cal 155, 160 a case of over valuation but decided without reference to the Suits Valuation Act 1887

(e) *Lakshman v Babaji* (1883) 8 Bom 31.

(f) " " " "

(g) " " " "

(h) " " " "

31 Bom 73 "8 *Raj Krishna v B pu* (1912) 40 Cal 245 249 17 I C 162

(i) *Appa Rao v Sobhanadri* (1901) 24 Mad 158 *Hamidunissa v Gopal* (1897) 24 Cal 661 667

(j) *Koti Pujari v Manjaya* (1898) 21 Mad 271

(k) *Shoo Devi v Tulsi* (1893) 15 All 378 380 *Laman v Secretary of State* (1901) 24 Mad 427 *Jose Antonio v Francisco* (1910) 35 Bom 24 71 C 950

(l) *Hamidunissa v Gopal* (1897) 24 Cal 661 *Krishnasami v Annasabai* (1891) 14 Mad 183

15

Judge The real value of the suit exceeds Rs 5,000, but the suit is valued at Rs 2,100 only. A decree is passed in the suit for A. B files an appeal in the District Court, but the appeal is dismissed. According to the Calcutta decisions, the decree of the District Court is a nullity as being one passed without jurisdiction. The reason given is that the true value of the suit being more than Rs 5,000, the proper forum of appeal if the suit had been properly valued, would have been the High Court, and not the District Court, and the result of the under valuation was to oust the jurisdiction of the High Court as the Court of Appeal (m).

Where the subject matter of a suit does not admit of being satisfactorily valued—In some suits the subject matter is not capable of being estimated at a money value, e.g., suits for restitution of conjugal rights, suits to remove a karnavan (n), suits to direct registration of a document under the Registration Act 1908, s 77 (o) etc. The court fee in such suits is Rs 10 as provided by the Court Fees Act 1870, Sch II art 17, cl vi. There is a distinction, however, between valuation for the purpose of jurisdiction and valuation for the purpose of ascertaining court fee (p). The subject now under consideration is valuation for purposes of jurisdiction.

In cases where the subject matter is not capable of being estimated at a money value it is provided by s 9 of the Suits Valuation Act, 1887, that the value of the suit for purposes of jurisdiction is what the High Court may specify by rules made under that section. Where no rules are made, the High Courts of Allahabad and Calcutta have said that the safest and the most convenient course is to treat the valuation made by the plaintiff as *prima facie* the true valuation, but subject to correction by the Court if the defective valuation has been due to an improper motive, and the Court must decide what should be considered to be the proper value (q). The cases in which the above rule was laid down were suits for restitution of conjugal rights. In a recent case however the High Court of Madras said that though the rule adopted by the High Courts of Allahabad and Calcutta might be appropriate in suits for restitution of conjugal rights it was not so in suits which affected property and that the best rule in such cases was to value the suit according to the value of the property liable to be affected thereby (r). Thus a suit to compel registration of an instrument whether the instrument be registrable compulsorily (e.g., an instrument of gift) or voluntarily (e.g., a will) is valued in Madras according to the value of the property that would be affected by the suit (s), and a suit to set aside an instrument, according to the value of the plaintiff's interest in the instrument (t). The Madras High Court has also held that though the court fee on a suit for the removal of a karnavan is only Rs 10, it does not follow that a District Munsif has jurisdiction to try such a suit where the value of the tarvad property exceeds the pecuniary limits of the jurisdiction of the Munsif's Court (u), and that a Munsif has no jurisdiction to entertain a suit to set aside an adoption, if the value of the property, which would be lost to the adopted son if the adoption were set aside exceeds the pecuniary jurisdiction of that Court (v). The High Courts of Allahabad and Calcutta would probably not agree. In fact, the High Court of Allahabad has held that the value for the purposes of jurisdiction, of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plant

(m) *Rajalakshmi v Kalyani* (1911) 38 Cal 632 660 663 121 C 464

(n) *Gorindan Nambiar v Krishnan Nambiar* (1882) 4 Mad 146

(o) *Saravanthu v Alagium* (1907) 12 Mad L J 83 *Ramu Aiyar v Sankara Aiyar* (1903) 31 Mad 89

(p) *Dayaram v Girdandas* (1907) 31 Bom 73

(q) *Zur Hussain Khan v Khurshid Jan* (1906) 28 All 845 *Jan Mahomed v Jafar* (1907) 31 Cal 352

(r) *Ramu Aiyar v Sankara Aiyar* (1908) 31 Mad 89

(s) *Ramkrishnam v Bhagamma* (1890) 13 Mad 68 (dec of gift), *Ramu Aiyar v Sankara Aiyar* (1903) 31 Mad 89

(t) *Kanaran v Komappan* (1891) 14 Mad 169 *Parathay v Sankaran* (1892) 15 Mad 234

(u) *Krishna v Ramam* (1888) 11 Mad 266

(v) *Keshava v Lakshminarayana* (1883) 6 Mad 192

by the plaintiff (w) But whichever view be correct it is certain since the enactment of the Suits Valuation Act (VII of 1887) (s. 11) that when once a suit of this class is decided on its merits by the lower Court the decision will not be reversed in appeal on the ground of want of jurisdiction, unless the cognizance of the suit by that Court has prejudicially affected its disposal on the merits.

16. [S 16] Subject to the pecuniary or other limitations prescribed by any law, suits—

Suits where a trustee to be subject instituted matter

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate

Provided that a suit to obtain relief respecting, or compensation for wrong to immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain

Explanation—In this section “property” means property situate in British India

Alterations in the section—The words with or without rent or profits in cl (a) are new The word sale in cl (c) has been newly added.

Subject to the pecuniary or other limitations prescribed by law—The pecuniary limitations have been referred to in the notes on sec 15 Instances of other limitations are suits under sec 9¹ or suits in Bombay against Government or an officer of Government in his official capacity (x) which can only be filed in a High Court or a District Court

(w) *Shao Dens Fam v Tulsht Fam* (1894) 15 All 3 3 | (x) *Bomb Civil Courts Act 1869* sec 32.

16

Chartered High Courts.—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s 120). The High Courts of Calcutta, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon are Chartered High Courts, each having been established by a royal charter. The nature and extent of the jurisdiction of these Courts is defined by the charter for each of these Courts. The High Courts of Allahabad, Patna and Lahore have no original civil jurisdiction. The original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay is defined by clause 12 of the charter which empowers them to try suits "for land or other immovable property, if such land or property be situated wholly within the local limits of the ordinary original civil jurisdiction or, in case leave of the Court shall have been first obtained, in part within such limits". There have been many conflicting decisions as to the meaning of the expression "suits for land or other immovable property" in the Letters Patent, but the more specific and detailed provisions of this section leave no scope for uncertainty.

Scope of the section.—As already stated this is one of a group of sections which refer to Courts in British India and to immovable property situate in British India. This is specially expressed in the Explanation lest the proviso be construed as giving a *mofussil* Court jurisdiction in respect of immovable property out of British India, for British Indian Courts have no such jurisdiction (y). It specifies the Court in which suits relating to immovable property and suits for the recovery of movable property actually under *distrain* or *attachment* are to be instituted. Section 19 indicates the Courts in which suits for compensation for wrong done to the person or to movable property are to be instituted. Section 20 is a general section.

Clause (a) suits for recovery of immovable property.—A suit for the recovery of immovable property situate in Bombay must be instituted in a Court in Bombay having jurisdiction to entertain the suit. The Small Cause Court in Bombay has no jurisdiction to try such suit (z). The suit must therefore be brought in the High Court of Bombay. Hence it is that the section commences with the words "subject to the pecuniary or other limitations prescribed by any law". The insertion of the words "with or without rent or profits" is intended to remove any difficulty there may be where the defendant does not reside within the local limits of the Courts within whose jurisdiction the property is situate.

Clause (b) suit for partition of immovable property.—For cases where the property is in the jurisdiction of different Courts, see sec 17 post. If part of the property is outside British India, the Court will deal with the property in British India while declining jurisdiction as to the rest (a). The Lahore High Court has recently held that a British Court can in a partition suit deal with property situate in a Native State (b). But this is incorrect.

Clause (c) suit for foreclosure, sale or redemption.—A mortgagor certain immovable property to B to secure payment of money lent to him by B. Here A is the mortgagor and B is the mortgagee. If A does not repay the loan on the due date, B may institute a suit against A for sale of the mortgaged property, so that the mortgage debt may be paid out of the sale proceeds of the property, or he may sue for foreclosure of the mortgage. The decree in a foreclosure suit provides that if the mortgagor fails to pay the amount that may be found due to the mortgagee within a time specified by the Court (generally six months), the mortgagor shall be absolutely debarred of all right to redeem the property (c). If A offers payment of the mortgage-debt to B, but B disputes the amount and refuses to reconvey A may sue B for redemption of the mortgage.

(y) *Krishnan v Gajanan* (1909) 33 Bom 373
21 C. 489
(z) See Presidency Small Cause Courts Act,
1882 s 19
Punchanan v Shib Chandar (1897) 14 Cal
835 (a case under clause 12 of the Letters

Patent)
(b) *Ram Kishan v Ranshan* (1923) 77 I C
532 (23) A I 551
(c) Transfer of Property Act, 1932 ss 88, 87,
now O 34, rr 2, 3

and the Court will pass a decree ordering an account to be taken of what will be due to *B*, and directing that upon *A* paying to *B* the amount so due, *B* shall reconvey the property to *A* (d) Suits for foreclosure, sale or redemption must be instituted in the Court within the local limits of whose jurisdiction the mortgaged property is situate

A Court cannot declare a charge on property wholly outside its jurisdiction and if it does a purchaser under such a decree would be in no better position than a purchaser under a money decree (e)

Clause (d). suits for the determination of any other right to or interest in immovable property—There is no definition of immovable property in the Code “Immovable property” is defined in the General Clauses Act, 1897, s. 3, cl (25), as including land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. Trees, standing on land are immovable property (f) But once the trees are severed from the land, they become movable property. Growing crops are movable property (see s. 2, cl. 13). Land includes water and a right of fishery in an enclosed water is immovable property (g). Benefits to arise out of land include incorporeal hereditaments such as a right of ferry (h) also pensions and allowances charged upon land and rents. Thus a *hat* is immovable property (i) and so is the life interest of a widow in the rents and profits of her husband’s estate (j) “Immovable property,” as stated above, includes “benefits to arise out of land.” Rent that *has already accrued due* is movable property, for it is a benefit which *has arisen out of land*, but rent that *is to accrue due* is immovable property, for it is a benefit to arise out of land. Hence a suit for *arrears of rent* is governed not by the provisions of this section, but by those of s. 20, and it may be instituted in any one of the Courts specified in that section, although in such suit the plaintiff’s *title* to the property of which the rent is claimed may incidentally come in question (l) But a suit for a *declaration* of the plaintiff’s right to rent where such right is denied comes under cl. (d) of the present section, and must be instituted in the Court within the local limits of whose jurisdiction the property is situate (l) So also a suit for rent and ejection under sec. 66 of the Bengal Tenancy Act (m) A suit to recover a share of the *sale proceeds* of land which *have already been realized* is a suit for money governed by the provisions of s. 20 (n) But a suit by a vendor of land for the recovery of *unpaid purchase money* against the buyer who *refuses to complete the purchase*, is a suit “for the determination of any right to or interest in immovable property” within the meaning of cl. (d) (o) A suit by a mortgagee to recover the mortgage debt from the mortgagor *personally* is a suit for debt governed by the provisions of s. 20 but if in addition to the claim against the mortgagor personally the mortgagee seeks to recover the mortgage debt by *sale of the mortgaged property*, the suit will come under cl. (c) of the present section (p) A suit for maintenance is governed by the provisions of s. 20, but if in addition to the claim for maintenance the plaintiff claims that she is entitled to a *charge on immovable property* in the hands of the defendant, the case is one within cl. (d) of this section (q) A suit for dissolution of partnership with the usual ancillary reliefs is not a suit within cl. (d) merely because part of the partnership assets consists of a factory (r)

(d) Transfer of Property Act, ss. 92-93 now O. 34 rr. 7-8

(e) *Gudri Lal v Jagannath* (1886) 8 All. 117

(f) *Sakharam v Fudram* (1895) 19 Bom. 207

Rapu v Dhond (1892) 16 Bom. 353

Umed Khan v Daulat Ram (1883) 5 All. 564

(g) *Shibu Haidar v Gupi Sundari* (1897) 24 Cal. 442

(h) *Fudram v Shibu Haidar* (1907) 34 Cal. 442

(i) “

(j) “

(k) “

27 C. W. N. 542 77 I. C. 253, (d) A. 1 619

(l) *Keshav v Finayak* (1899) 28 Ind. 1

(m) *Aunja v Manindra* (19 3) 71 Cal. 11

77 I. C. 253 (23) A. U. 619

(n) *Penkata v Krishnasami* (1905) 32 Cal. 11

Ahmad v Abdul Wahid (1907) 34 Cal. 11

(o) *Mafura v Kola* (1905) 32 Cal. 11

(p) *See Fudram v Shibu Haidar* (1907) 34 Cal. 442

(q) *Susbar v Laxmibai* (1911) 38 Cal. 11

1 C. 945

(r) *Durga Das v Jalappa* (1913) 39 Cal. 11

513 50 I. C. 164 (r) A. 1

S. 16

Income and mesne profits of land situate outside British India—A suit will lie in a Court of British India to establish a right to a share in income derived from grants of land situated outside British India but received by the defendant within the local limits of a British Indian Court (s). Similarly a suit to recover mesne profits of land situate outside British India of which the defendant was in wrongful possession but of which he subsequently delivered possession to the plaintiff may be instituted in a Court in British India (t). Both these cases fall under s. 10 below.

Clause (e) wrong to immovable property—This refers to torts affecting immovable property such as trespass (u) nuisance infringement of easements, etc.

Clause (f) movable property actually under distraint or attachment—Movable property under attachment constitutes an exception to the general rule that movables follow the person (v). The exception is probably founded on the fact that when such property is under attachment its locality is fixed. The Code follows this rule for the sake of convenience of judicial administration (w). The clause applies to Courts in British India but when movables are under attachment by a foreign Court and the defendant is resident in British India and is able to get the attachment removed it has been held that he can be ordered in execution of a personal decree to recover the property (x).

Proviso to the section—The last paragraph of the section provides that suits to obtain relief respecting or compensation for wrong to immovable property, may be instituted at the plaintiff's option either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business or personally works for gain provided—

- (1) the property is held by or on behalf of the defendant,
- (2) the relief sought can be entirely obtained through the personal obedience of the defendant (y) and
- (3) the property is situate in and not beyond British India (z).

The proviso does not apply when the property is in the possession of the plaintiff (a). As the plaintiff has the option of suing in the local jurisdiction the scope of the proviso is more limited than in the rule of English Equity.

Equity acts in personam—This proviso is an application though in a highly modified form of the maxim *Equity acts in personam*. When it is said that *Equity acts in personam* what is meant is that the Court of Equity in England (now the Chancery Division of the High Court of Justice) has jurisdiction to entertain certain suits [suits in *dis* (a) (b) and (c) of the present section being entirely excluded] respecting immovable property though the property may be situate abroad if the relief sought can be obtained through the personal obedience of the defendant. The personal obedience of the defendant can be secured only if the defendant resides within the local limits of the jurisdiction of the Court or carries on business within those limits. For in the one case the person of the defendant being within the jurisdiction and in the other his personal property the Court may if he does not comply with the judgment direct the arrest of the defendant and commit him to jail or order that his goods be attached until he complies

| | |
|-------|---|
| (s) — | I C 279 |
| (t) — | (y) Westlake & Private International Law p 55 |
| (u) — | Mahdeo v. Jamchandra & prs Aruna |
| (v) — | Challa v. Mathiala (1917) 23 Mad L. J |
| (w) — | 879 171 L 758 |
| (x) — | (z) Krishnaji v. Gajanan (1909) 33 Bom 373 |
| (y) — | "I C 489 |
| (z) — | (a) Crisp v. Watson (1893) 20 Cal. 689 |

17

the other in district F. The Court in district X has jurisdiction under the section to order the sale not only of the property in district X, but also of the property in district F and to effect execution of its decree the property in district F (a). A is not allowed to bring two suits—one in the Court of district X and the other in the Court of district F. He may bring only one suit in either Court and it matters not if the properties are several, one in each district, or one property extending over two or more districts (c). The same rule applies to suits for partition (p) and to suits for the recovery of immovable property (q). A can sue in any Court in which any part of the immovable property is situate and he has the right to select his own forum (r). through this right may be controlled by the Court of appeal or the High Court, see secs. 22 and 23 below. But no partition can be made of property situate outside British India (s).

A bona fide compromise will not direct the Court of jurisdiction over jurisdiction has property vested in it. A sues B in a Court in district X to recover possession of two properties—one situate in district X and the other in district F. The suit is compromised as regards the property situate in district X. This does not take away the jurisdiction of the Court in district X to proceed with the suit as regards the property situate in district F unless it be shown that the compromise was a mere contrivance to defeat the power of the rule of procedure as to local jurisdiction (t).

May be instituted.—Cases are conflicting as to whether plaintiff sues in respect of a part of a property in one district only is barred from suing as to the other part or the rest of the property in another district in the jurisdiction of another Court. But the better opinion is that there is no bar and that the section is permissive (u). Thus if A succeeds at law to two properties, one in district X and the other in district F, A may sue in the Court of district X for the recovery of both properties. But if A sues in the Court of district X for the recovery of the property in that district only he will not be barred from suing subsequently in the Court of district F for the recovery of the property in that district.

Section 17 does not apply if the cause of action as to the property without the local limits of jurisdiction is different.—The plaintiff filed a suit in an Oudh Court to recover one immovable property within its jurisdiction and two immovable properties situate in the Punjab without jurisdiction. The plaintiff claimed to be entitled to these three properties under a will. He also joined in the suit a prayer to be declared mutawalli of a wakf of another property situate in the Punjab called the Khalikabad estate. The plaintiff had a right to include the first two Punjab properties in the Oudh suit but as to the other Punjab property the Privy Council said: 'There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the wakf he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from those which found the proceedings in respect of the other three properties. Their Lordships are unable to find any justification for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such jurisdiction

(a) *Mansukh v. Sadi* (1877) 14 Cal. 661. *Copp. Mohan v. Dowlah* (1878) 19 Cal. 13. *Talwar v. Sadi Chander* (1894) 1 Cal. 625.

(c) *Chandroo Chander v. Amarnath* (1877) 5 Cal. 13.

(p) *Khat v. Ismail* (1889) 12 Mad. 380.

(q) *Kulra Jan v. Ram Das* (1898) 30 All. 560.

(r) *Patterson Piliav v. Venu Parichan* (1898) 19 Mad. 677. *Ramdas v. Fitchiah* (1903) 3 Cal. 144, 150.

(s) *Ramacharya v. Ramacharya* (1894) 14 Bom. 302.

(t) *Khatav v. Ismail* (1889) 12 Mad. 380. *Kulra Jan v. Ram Das* (1898) 30 All. 560.

(u) *Sahib Das v. Ram Das* (1887) 3 Mad. H. C. R. 376 (decided under the Act of 1859 where leave of a superior Court was required). *Nihal Singh v. Narnau* (1881) F. R. 162. *Hari Narayan v. Narayan* (1883) 1 Bom. 222. *Chitra Jammal v. Kharamandere* (1885) 2 W. R. 148.

cannot in their Lordships judgment be found in a 17, Civil Procedure Code upon which the respondent relied (r)

In a case already cited (u) the Allahabad High Court applied the section when the plaintiff was dispossessed of property in one district in June and property in another district in August but the dispossessions were by the same person and part of the same contest of right

Immovable property within the jurisdiction of different Courts—As already stated the immovable property to which this section refers must be situated in British India. Courts in British India have no jurisdiction over property situate outside British India (x). When a mortgagee sued for sale in the Court of the Sub judge of Satara, on a mortgage of properties situate in Satara Belgaum and Kolhapur, the Court had jurisdiction to deal with the Satara property and with the Belgaum property situate in the jurisdiction of another Court in British India but not with the Kolhapur property situate outside British India (y). The Court will deal with property in British India if the suit is for partition while declining jurisdiction as to the rest (z). So also if part of the property is in a Scheduled District outside the local limits of the jurisdiction of the Court and outside the local extent of the Code (a)

Execution—When the Court has power to pass a decree as to immovable property in a different jurisdiction it has also power to execute it. See note under sec 38 Jurisdiction of Court executing a decree

Courts—Courts in this section mean Courts to which the Code applies (b)

Sec 16A (1) (b) to Chartered High Courts

enotestos 16 Chartered

18. [S 16A] (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is

Place of institution of suit where local limits of jurisdiction of Courts are uncertain

ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction

(2) Where a statement has not been recorded under sub section (1), and an objection is taken before an appellate or

(r) *Nisar Ali v Mohamad Ali* (1932) 53 I A 268 269 7 Luck. 34 137 I C 530 (3) A PC 172

(u) *Harchand v Lal Bahadur* (1894) 16 All 353

(z) *Krushna v Gajanan* (1909) 33 Bom 373 2 I C 499

(y) *Sultanah v Ilyas Narsing* (1930) 57 I A

194 54 Bom 495 176 I C 417 (30) A PC 188

(c) *Punchanan v Shib Chandra* (1887) 14 Cal 936 *Balaram v Lamchandra* (1898) 20 Bom 922

(a) *Setruckeria v Maharaja of Jeypur* (1919) 46 I A 151 47 Mad 613 51 I C 185

(b) *Setruckeria v Maharaja of Jeypur* supra

revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice

Uncertainty of local limits of jurisdiction—The uncertainty which the Legislature had in view was the alteration of boundaries by fluvial action (c) The absence of a notification of the boundaries of a district was held to create a reasonable uncertainty (d)

And there has been a consequent failure of justice —These words are new They have been added in order still further to restrict the taking of technical objections as to jurisdiction *Alla Ditta v Abdul Qadir* (e) is an instance of an objection to jurisdiction being disallowed although no statement was recorded as required by sub sec (1)

19. [S. 18.] Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts

Suits for compensation for wrongs to person or movables

Illustrations

(a) *A*, residing in Delhi, beats *B* in Calcutta *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B* *B* may sue *A* either in Calcutta or in Delhi.

Scope of Section—Section 16 refers to suits for immovable property which have to be filed in the local jurisdiction Section 20 refers to personal actions such as action in tort or contract, where jurisdiction depends upon the residence of the defendant or the accrual of the cause of action. Section 20 overlaps this section which gives an option where the cause of action accrues in the jurisdiction of one Court and the defendant resides in the jurisdiction of another Court The section is limited to torts in British India and to defendants residing in British India (f) It excludes suits for an injunction and suits in respect of torts committed outside British India Such suits fall, where the defendant is resident in British India, not under this section but under section 20

Wrong—Wrong means a tort or actionable wrong, i.e., an act which is legally wrongful as prejudicially affecting a legal right of the plaintiff (g) But it must be a tort

(c) See Mr Scoble's speech—Legislative Council 10th March 1888

(d) *Shibu Halder v Oupi Sundari* (1897) 24

(Cal) 449
(1901) 1 IL 18

(f) See *Gorindan Nair v Achutha Menon* (1916) 39 Mad 433 439 281 C 394

(g) *Templdon v Laurie* (1900) 2 Rom L R 244 249

affecting the plaintiff a person, or his reputation as in the illustrations, or his movable property, for torts affecting immovable property such as trespass or nuisance or infringement of easements fall under section 16 (c)

The plaintiff may sue either where the defendant resides or the wrong was committed (A) A wrong may however consist of a series of acts and it is sometimes not easy to specify the place where it was committed. Thus in a case from Burma (1) the defendant at Pyapon wrongfully obtained a magistrate's order for the seizure of plaintiff's boats at Rangoon and it was held that the Rangoon Court had jurisdiction as the wrong was done at Rangoon.

Suits against Government—The word "resides" refers only to natural persons. The words "carries on business" refer to commercial business. The section therefore does not apply to suits against the Secretary of State for damages for a tort where the tort is committed outside the jurisdiction. Such suits can only lie in the Court of the place where the tort is committed (J)

20. [S. 17.] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

Other suits to be instituted where defendants reside or cause of action arises

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence

(A) *Haveli Shah v. Pauda Aham* (19 6) 31 C W

N 174 96 I C 847 (1906) A C 88

(1) *Ma Myit v. Shwe Tha* (1917) 3 L. B. R. 164

(J) *Gorindarajulu v. Secretary of State* (1927)

50 Mad 449 105 I C 576, (27) A M

6-9

Explanation II—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides, but in each of these cases, if the non resident defendant objects, the suit cannot proceed without the leave of the Court.

Alterations in the Section—The words "every suit" have been substituted for the words "all other suits" in the Code of 1882. The words "wholly or in part" in cl (c) are new. Explanation III to s 17 of the Code of 1882, which related to causes of action in cases of contracts, has been omitted in view of the addition of the words "wholly or in part" in cl (c). See notes below "Cause of action in suits on contracts."

Subject to the limitations aforesaid—The limitations are the pecuniary and other limitations referred to in s 16. See note under the same heading below that section. The former section was a residuary section referring to "all other suits" and as such was held to be subject to s 19 (k). The present section overlaps section 19 and is subject to section 16 and by implication to section 15.

Chartered High Courts—This section does not apply to Chartered High Courts in the exercise of their original civil jurisdiction (see s. 120).

Scope of the section—This is a general section embracing all personal actions. At common law actions are either personal or real. Personal actions are also called transitory because they may occur anywhere, such as actions for tort to person or to movable property or suits on contract. Real actions are actions against the res or property and are called local because they must be brought in the *forum rei sitæ*, that is the place where the immovable property is situate. An action may also be a mixed action being partly real and partly personal. Torts to immovable property such as trespass and nuisance are mixed actions and are referred to in s 16 (e). Otherwise s 16 deals with real and local actions while secs 19 and 20 deal with personal or transitory actions.

The limitations mentioned in this section exclude the real and mixed actions of s 16 and confine the section to personal actions. The plaintiff has the option of suing either (1) where the cause of action has accrued or (2) in the *forum* of the defendant, *i.e.*, where the defendant resides, or carries on business or personally works for gain (f). This alternative is shown in the illustrations which are taken from two old cases, the first from *Winter v Way* (m) and the second from *DeSouza v Coles* (n).

"Actually and voluntarily resides"—As to personal actions, residence will give jurisdiction even when the cause of action has arisen outside British India. Thus

| | |
|---|---------------------------------|
| (k) <i>Fazlur Rahman v Durgata Nath</i> (1903) 30 Cal 453 | (m) (1863) 1 Mad II C 200 |
| (l) <i>Hutcheon v Syed Fara</i> (1896) 19 Mad 477 | (n) (1869) 3 Mad. II C 384, 397 |

a partner was entitled to sue in the Court of Bulsar for the dissolution of a partnership commenced and carried on in foreign territory because the defendant partner at the time of the institution of the suit resided in Bulsar (o). And a suit for arrears of rent of lands in a Native State may be filed in a British Indian Court in the jurisdiction of which the defendant resides, for rent that has already accrued due constitutes a personal claim (p). On the other hand if the cause of action has arisen in the jurisdiction, a British Indian Court may entertain a suit against a non resident foreigner. See note below "Suit against a non resident foreigner."

The word "actually" excludes domicile or constructive residence, while on the other hand compulsory residence does not confer jurisdiction. Under the Code of 1859 a man was held to reside at a place where he was lawfully confined, but the word voluntarily renders these cases obsolete.

The word "resides" is construed according to the supposed intention of the Legislature (q), and even in this Code it is used sometimes in a more restrictive and sometimes in a more extended sense, see s. 136, O 3, r 2, and O 25, r 1. However there appears to be no distinction between the meaning of the word "resides" in secs 16, 19, and 20 and of the word "dwells" in cl 12 of the Letters Patent (r). Therefore cases decided on the latter word may be considered authorities on the construction of the former.

"Dwells" within the meaning of clause 12 of Letters Patent.—The dwelling or residence must be of a more or less permanent character. It must be of such a nature as to show that the High Court in which a defendant is sued is his natural *forum* (s). Therefore when the defendant has a permanent dwelling at one place, he cannot be said to "dwell" at a place where he has lodged for a temporary purpose only, *e.g.*, to defend a suit brought against him (t), or for a change while on leave (u).

Every person is deemed in law to have a dwelling or place of residence, and so if he has no permanent place of residence, he will be deemed to 'dwell' where he is actually staying at the time. Thus where a defendant, who was Political Agent at Kolhapur residing in a Government building there sold his furniture and other effects and left Kolhapur on a year's furlough, and while en route to England stayed in Bombay for three days before sailing he was held to dwell in Bombay so as to give jurisdiction to the High Court in a suit instituted against him during his stay in Bombay (v). And in a Calcutta case, a racing man, who had come to Calcutta for a month for racing, was held to dwell in Calcutta for he had no other residence at the time when the suit was instituted against him (w).

On the other hand a person may have more than one permanent place of residence at the same time. If so he will be deemed to 'dwell' in any one of the places where he is actually staying for the time being, and he may be sued in that place. In *Orde v Skinner* (x) the defendant, who had a dwelling place at Mussoorie, was held under the circumstances of the case to have another dwelling place at Bilaspur. Similarly where a defendant spent his time alternately in Calcutta and the mufassal, he could be sued in Calcutta where he was residing at the time of institution of the suit (y). But a person

(o) *Ismailji v Ismail* (1921) 45 Bom 1228
63 I C 959, (21) A II 460

(p) *Bhuyal v Nanheju* (1897) 19 All 450

(q) *Ramchandra v Keshav* (1881) 6 Bom 100
Goswami v Govardhanlalji (1890) 14 Bom 541

(r) *Mahomed v Laldin* (1879) 3 Bom 227 229
Goswami v Govardhanlalji (1890) 14 Bom 541 547

(s) *Goswami v Govardhanlalji* (1890) 14 Bom 541 552 s c in app (1894) 18 Bom 290
and in app to 1 C (1894) 18 Bom 294

But see *Srinivasa v Venkata* (1906) 29 Mad 239 274 275 and s c on appeal (1911) 38 I A 129 139

(t) *Emrulloli v Add* (1864) 2 Hyd 119
(u) *Aarajji v Wallace* (1863) 1 Bom H C 113
Kusun Sing v Sturt (1870) 5 Mad H C 471

(v) *Fernandez v Wray* (1901) 25 Bom 176
(w) *Morris v Baumgarten* (1865) Coryton, 152.
Maheve v Tallock (1872) 4 N W P H C R 25

(x) (1881) 3 All 91 7 I A 196

(y) *Uladiney v Kelly* (1864) Coryton, 24

20

who has been living and carrying on business in Bombay for twenty years cannot be said to be residing at Ahmedabad because he has a family house at Ahmedabad which he visits occasionally, in such a case Ahmedabad cannot be said to be one of his places of residence (z) Where an Acharya (Hindu head priest), who had his permanent place of residence at Nathdwara where he had been installed on the gadi in 1879, came to Bombay for the first time in April 1889 at the invitation of his devotees and stayed in a house which he had purchased in 1888 for occasional residence and exchanged visits with his followers it was held in a suit brought against him in Bombay in May 1889 that he did not dwell in Bombay (a) Where a person who was domiciled and resided in Mysore left his house in charge of a servant, and hired a house in Madras to which he brought his wife and family, and apprenticed himself for a year to a Vakil in Madras it was held in a suit brought against him in Madras some months after his residence there that inasmuch as he had taken up his abode in Madras, meaning to remain there for several months, and was actually living there when the suit was instituted, he dwelled in Madras within the meaning of cl 12 of the Letters Patent (b)

'Carries on business' —These words also occur in cl 12 of the Letters Patent, and the decisions under that clause apply equally to cases arising under ss 16, 19 and 20. The word business is used in a restricted sense (c) and is limited to commercial business. The expression carries on business is intended to relate to business in which a man may contract debts and is liable to be sued by persons having business transactions with him (d) A Hindu priest who receives offerings from his followers cannot be said to carry on business, although the offerings are on such a large scale that he employs servants to collect and keep an account of them (e) A zemindari business has been held not to be the kind of business contemplated by this section (f) The phrase 'carries on business or personally works for gain' is inapplicable to the Secretary of State for India for whatever income is obtained by Government is held for the benefit of the Indian Exchequer (g) A person may carry on business at a place where he has no office or regular establishment. Thus a person residing in the mufassal who goes once or twice a week from the mufassal to a friend's house in Calcutta and does business there will be said to "carry on business in Calcutta" (h) The business need not be carried on personally (i) The phrase "carries on business" is used as distinct from the phrase "personally works for gain". It does not involve actual presence or personal effort and a man may carry on business in a place through an agent or through a manager or by his servants without having ever gone there. It means having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control if not over the actual method of working, at any rate upon the existence of the business (j) But it is necessary that the following three conditions should concur, namely,—

(1) The agent must be a *special agent* who attends *exclusively* to the business of the principal and carries it on in the name of the principal, and not a *general agent* who does business for any one that pays him. Thus a trader in the mufassal, who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to 'carry on business'

(z) *Ugar Chand v Surajmal* (1000) 2 Bom L R 605 *Gurandatta Mal v Ram Das* (1916) 1 R no 112 p 343 38 I C 62

(a) *Goswami v Govardhanlalji* (1890) 14 Bom 541

(b) *Srinivasa v Venkata* (1911) 34 Mad 257 38 I A 129, 11 I C 447, in app from 23 Mad 239

(c) *Daya Narain v Secretary of State* (1887) 14 Cal 256 273 *Govindrajulu v Secretary of State* (1917) 50 Mad 449, 105 I C 576, (27) A M 689

(d) *Goswami v Govardhanlalji* (1890) 14 Bom 541

(e) *Goswami v Govardhanlalji* (1890) 14 Bom 541

(f) *Abin Chander v Buroda* (1875) 19 W R 341 *Anonymous case* (1875) 23 W R 223

(g) *Daya Narain v Secretary of State* (1887) 14 Cal 256 273 *Govindrajulu v Secretary of State* (1917) 50 Mad 449, 105 I C 576, (27) A M 689

(h) *Greschner v Collins* (1864) 2 Hyde 70

(i) *Muthaya v Allan* (1882) 4 Mad 209

(j) *Kirpa Ram v Mangal Sen* (1921) 19 All L J 698, 65 I C 93 (22) A A 367

Cause of action — Cause of action " means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court (2) It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree (a) Everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action (b) It is in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit (c) It has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour (d) The cause of action must be antecedent to the institution of the suit (e) So when the plaintiff filed his suit for ejectment fifteen days before he was entitled to possession he failed for want of a cause of action (f)

Cause of action in suits on contracts — The corresponding section of the Code of 1882 merely referred to the place where the cause of action arose. It was not clear whether this meant the whole cause of action or any part of the cause of action. The section was therefore amended by section 7 of Act 7 of 1888 which added an Explanation as to the significance of the term when applied to contracts. That Explanation was as follows —

Explanation III — In suits arising out of contract the cause of action arises within the meaning of this section at any of the following places, namely —

- (1) the place where the contract was made,
- (2) the place where the contract was to be performed or performance thereof completed,
- (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable

This Explanation made it clear that in suits on contracts cause of action meant the whole or any part of the cause of action but it was still not clear that it meant the same in other suits (g) In the present Code the words wholly or in part have been inserted after the word cause of action which makes it plain that all suits may be instituted where the cause of action arises wholly or in part (h). Explanation III has been omitted as no longer necessary but it is nevertheless a correct statement of what is still the law (i)

In a suit for damages for breach of contract the cause of action consists of the making of the contract and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed and the breach occurred (j) Thus if a contract is made in Poona to be performed in Poona the whole

- (a) *Cook v Gill* (1873) 8 C P 107 London
Bombay Bank v Dabre (1880) 5 B 1
 4 *Varayan v Secretary of State* (1880)
 30 Bom 50 *Alexander Brault v Madra*
Krishna (1932) 60 Cal 918 145 L 455
 (33) A C 706
- (a) *Paul v Brown* (1888) 14 B D 109
 131 *Murti v Bhojlam* (1883) 16 All
 165 (P B) *Sahay Bibi v Shah Muhammad*
mod (1890) 13s All 131 *Muhammad*
Zakaria v Muhammad Hafiz (191) 59
 All 506 511 41 L C 233
- (b) *Read v Brown* (1888) 22 Q B D 123
- (c) *Dhanjushaw v Florde* (1887) 11
Mfug v Mandal (1905) 33 Bur
Jayashamath v Gobindnatham (1
 Cal 451
- (d) *Chand Kaur v Parbat Singh* (182
 Vol 102, 15 I A 126

- (e) *Mahant Gobind v Rani Deendrabai*
 (1919) 4 Pat L J 387 293 5 I C 31
Gulnar Sing v Kalyan Chand (1893) 15 All
 399
- (f) *Banko Behari v Pokha Ram* (1903) 25
 All 43
- (h) *Sai Ram v Chala Mel* (1912) 34 All 49
 11 I C 71
- (i) *Sita Ram v Ram Chandra* (1918) F R 28
 44 I C 86
- (j) *Dhanjushaw v Florde* (1887) 11 Bom 649
 65
 1 *Sugarchand* (1876)
Boon v Serrata (1876)
 21 256 *Kamputab v*
 5 Bom 93 *Deoben v*
 19 Co (1897) 21 Bom
 31 *Askur* (1904) 47

cause of action arises in Poona and the suit for breach can only be filed in the Poona Court. But if the contract is made in Poona to be performed in Belgaum, the suit for its breach can be filed either in the Poona or the Belgaum Court. No leave of the Court is required in respect of a suit where part of the cause of action arises out of jurisdiction as in the case of High Court suits governed by clause 12 of the Letters Patent. But if the suit is for damages for breach of contract to ship goods to Calcutta and the goods are rejected at Calcutta the rejection is part of the cause of action and the suit can be filed in the High Court at Calcutta with leave under cl. 12 of the Letters Patent (l).

The making of a contract is part of the cause of action and a suit on a contract can always be filed at the place where it was made (f). The determination of the place where it was made is part of the law of contract. A contract by correspondence is made at the place where the letter of acceptance is posted (m), and if acceptance is by performance of a condition, the suit may be instituted at the place where the condition is performed (n).

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or its performance completed (o). The usual case is that of a contract for sale of goods and a suit on such a contract may be filed at the place where the goods were deliverable or the price payable (p). Thus if goods for delivery at Allahabad are sold according to sample and paid for in Bombay, the buyer may sue in Allahabad if the goods prove not to be of sample quality (q). When a buyer at Kasganj ordered dyes from a seller at Delhi, but after paying for and opening the parcel found it to contain only clay, he was entitled to sue for damages at Kasganj (r). If not otherwise provided by the contract goods sold are deliverable at the place where they are sold, or if not ready, at the place of manufacture. If they are sent by common carrier at seller's risk the contract is performed at the place where they are delivered to the buyer, or if at buyer's risk, at the place where they are delivered to the carrier (s). In the case of a contract for Bombay, the place of performance is Bombay (t).

The place of performance is generally expressed in the contract and if not so expressed it may be inferred from the nature of the act. Thus a contract to repair a house must be performed where the house is situate, and an agreement to register a mortgage must be performed at the place where the mortgage is to be registered. The place of performance is neither

visions of sections 48 and 49 of the Contract Act. Thus in *Lleuchellin v Chund Lal* the Court said that looking to the ordinary course of business it was the intention of the parties that payment should be made at plaintiff's place of business. In *Sreenath Roy v Gally Das* (x) a suit for breach of an agreement to mortgage premises outside Calcutta was held to lie in Calcutta as the plaintiff's place of business was

(g)

(h)

- (m) *Kamsetti v Katha* (1904) 27 Mad 355
 (n) *Sularam v Thompson* (1905) 5 Cal 884
 (o) *Gopikrishna v Vithomul* (1874) 13 Beng LR 461
 22 W R 79. *Chandulal v Mahipultr* (1870) 5 Bom II C 33 A C. *Premji v Ghulam* (1908) P R 36. *Bhattacharya v Chennore Woolen Mills* (1911) 16 C W. N. S. 5, 13 I C 943. *Champallal v*

- Sector Tea Co* (1872) 1 I C 335 (33) A E 1.
 (p) *Lleuchellin v Chund Lal*
Sheo Charan v To
 308 39 I C 524
Sizing Materials
 56 I C 192, 40 C 192.
 (q) *Sheo Charan v To*
 39 I C 524
 (r) *Ram Lal v Elan*
 59 I C 2.
 (s) *Winter v Way*
 (t) *Benaim & Co*
 (u) *Sami v Lope*
 (r) *Dhunjia v*
Mahomed
 2, 21 I C
 (w) (1872) 1 I C
 (x) (1872) 1 I C

by the intention of the parties (l) The amount due on a balance struck at foot of an account is payable at the place where the balance was struck although the transactions which were the subject of the account took place elsewhere (m) In *Luchmee Chund v Zoraiear Mul* (n) an account was taken and balance struck on dissolution of a partnership business at Muttra and the Privy Council held that although the partnership agreement had been entered into at Rutlam, the suit for the balance was properly instituted at Muttra as that was the place where the balance was struck and the amount became due and payable. On the other hand the mere fact that a cheque is sent in payment from a particular place will not alter the locality of the suit (o) It is the general agency with liability to account and refund the balance, that is the cause of action, and the fact that a particular collection is made by the agent at a different place will not give jurisdiction to sue at that place (p) If under a contract for the sale of goods the price is payable at the seller's place of business, but the buyer failing to pay the seller sends his man to the buyer's residence and the buyer pays at his residence the buyer cannot in a suit for compensation for inferiority of the goods take advantage of that fact and sue in the Court of the place where he resides (q) The fact that the creditor is described in a promissory note made at K as resident of A does not make A the place of payment so as to give jurisdiction to the Court at K. No place of performance being fixed the question, as stated above, is one of intention to be gathered from the contract and the surrounding circumstances (r)

The debtor must find his creditor—Under the English law if a place is appointed for the performance of a contract, it is the duty of the creditor to attend at the place named to receive payment, but if no place is appointed the debtor is bound to find the creditor and tender him the money, in other words, there is an implied promise to pay *inter alia* where the creditor resides or carries on business. Under the Indian law as enacted in sec 49 of the Indian Contract Act 1872, where no place is fixed for the performance of a promise, whether the promise is to deliver goods or to pay money (s) it is the duty of the debtor to apply to the creditor to appoint a reasonable place for the performance of the promise and to perform it at such place. But what if the debtor does not apply to the creditor to appoint a place? In such a case it has been held in some cases (t) that the common law rule applies and there is an implied promise to pay the creditor wherever he might be, and in some (u) that there is no such duty and no implied promise arises. The point arose in a recent case before the Judicial Committee (v) and it was held that where no application has been made by the debtor to appoint a place for the performance of the promise the place of performance is to be determined with reference to the intention of the parties and that in so doing regard should be had to the fact that the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him. Their Lordships said. Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that sec 49 of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contracts itself or from the necessities

(l) *Dhunjisha v Fforde* (1887) 11 Bom 649

IC 693.

(m) *Haimraj v Ram Bux* (1866) 1 Agra 115

(n) (1860) 8 M.J.A. 291 (a case under Beng Reg 2 of 1803)

(o) *Sohan Singh v Riddick* (1900) 65 IC 865 (A.L. 164)

(p) *Shah Sankalchand v Ambalal* (1930) 54 Bom 19 199 IC 556, (30) A.B. 150

(q) *Damra Shah v Jalai Mal* (1901) 2 Lah. L.J. 555 64 IC 357

(r) *Paman v Gopalachari* (1902) 31 Mad 3.

(s) *Somiram v R D Tata & Co* (1927) 54 I.A. 265 271 5 Rang 451 457 10 IC 610 (27) A.I.C. 156. The dicta to the contrary in *Tata Lam v Daulat Lam* (1904) 48 All 465 at pp 467 468 8 IC 661 (C) A.A. 50 are erroneous

(t) *Dhunjisha v Fforde* (1887) 11 Bom 649 656 *Mofdal v Surajmal* (1906) 30 I.A. 167 171 *Gokul Das v Nathu* (1906) 45 All 310 92 IC 49 (1906) A.A. 477

(u) *Kadamal v Surajmal* (1907) 9 Bom I.R. 903 909-910 *Laman v Gopalachari* (1900) 31 Mad 223

(v) *Somiram v R D Tata & Co* (1927) 54 I.A. 265 5 Rang 451 17 I.A. 611 (27) A.I.C. 156 disapproving *Surajmal v Luchadappa* (1901) 17 Las L.J. 172

of the case involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him'. The common law rule, however, applies only when the creditor is within the realm. It cannot extend further than it does in England and a debtor in a Native State is not bound to find and pay a creditor in British India (w)

Negotiable Instruments—The cause of action in a suit on a negotiable instrument arises wherever any one of the facts the proof of which is essential to plaintiff's case occurs. Thus a suit may be filed at the place where the bill was drawn, or where it was accepted or dishonoured or where it was payable. A suit may be instituted at the place where a hundi was drawn (x). Where a promissory note was signed by the defendant at Secunderabad and delivered to the plaintiff at Madras, the Madras Court had jurisdiction as delivery was necessary to complete the plaintiff's title (y). If the promissory note is drawn in the jurisdiction of the Court, the suit may be filed there, although the promisee is described in the note as resident of another place (z). But a promissory note is presumed to have been drawn at the place where it purports to have been executed (a). If a hundi was neither drawn nor payable in Bombay, it cannot be sued on in the Bombay High Court although it was for the balance of an account of Bombay transactions (b). A hundi may be sued on at the place where it was dishonoured (c) or where it was payable (d). A suit on a promissory note executed at Vizianagram and payable at Secunderabad or Madras is maintainable in the High Court of Madras (e). A promissory note not expressly payable at Delhi was delivered to the payee there and it was presumed to be payable there so as to give jurisdiction to the Delhi Court (f).

The endorsee of a hundi may sue his endorser at the place of endorsement (g), and so may the assignee of a promissory note (h). The Calcutta High Court has held that an endorsee may sue the drawer and acceptor at the place of endorsement. For when D drew a hundi at Benares on his firm at Bombay in favour of B P & Co, a firm at Calcutta, and the hundi was endorsed by B P & Co to P in Calcutta, part of the cause of action was held to arise in Calcutta where the endorsement was made and P could sue in the Calcutta High Court after obtaining leave under clause 12 of the Charter (i). But the case is different when the drawer of a hundi raises money by negotiating his own hundi. A seller of goods drew hundis outside Madras on the buyer firm in Madras and negotiated them outside Madras. The Madras firm paid the endorsee and was entitled to sue the drawer in Madras to recover moneys overpaid as the amount of the hundi was in excess of what was due for the price of the goods (j). The over payment in Madras was part of the cause of action, but the payment received by the drawer from his endorsee could not be treated as a payment towards the contract. The negotiation by the drawer was only a provisional method of realizing the money from persons who were willing to accept the hundi for a small profit and take the trouble of getting paid. The High Court of Calcutta has held that if P accepts and pays a hundi in Calcutta for the accommodation of D in Cawnpore and D fails to pay, part of the cause of action arises in Calcutta (k).

- (w)
 (x)
 (y) *Ali v. Ali* 392
 (z) *Ali v. Ali* 392
 (a) *Ali v. Ali* 392
 (b) *Ali v. Ali* 392
 (c) *Ali v. Ali* 392
 (d) *Ali v. Ali* 392
 (e) *Ali v. Ali* 392
 (f) *Ali v. Ali* 392
 (g) *Ali v. Ali* 392
 (h) *Ali v. Ali* 392
 (i) *Ali v. Ali* 392
 (j) *Ali v. Ali* 392
 (k) *Ali v. Ali* 392
- (170) (32) A. 12 disson
 20 Bom 104 Mad 259
 1323 55 bc p. 11 2
 1 J 570, 24 J 205 292
 (a) *Surji Mull v. Hutton* (1801)
 (f) *Muhammad v. Muhammad* (1801)
 31 J 698
 (g) *Muganand v. Mufchand* (1873) 9 J
 11 C 270
 (h) *Munappa v. Munappa* (1916) 31 Mad 1 J
 6 J 1 C 681
 (i) *Naphoonath v. Gobindnarrain* (1805) 22 Ca
 451
 (j) *Zannuami v. Demodar* (1924) 47 Mad 403
 70 J C 800 (1) A 11 464
 (k) *Ramchander v. Ganapatram* (1920) 47 Ca
 583 30 J C 539

Partnership—A suit for the dissolution of partnership and for accounts may be instituted either where the contracts of partnership was entered into (i) or where the business of the partnership was carried on (m) and if the business was carried on in two places the suit may be filed at either place (n) If the partnership has been dissolved and the accounts taken and balance struck, a suit for the balance will lie at the place where the balance was struck (o) The fact that a partnership owns immovable property does not make a suit for the dissolution of partnership and for accounts a suit for immovable property (p)

Cause of action in other suits—In an administration suit the undertaking to administer is part of the cause of action (q) The grant of probate or letters of administration is part of the cause of action in a suit for a legacy or for a distributive share in the estate of an intestate or in a suit for the administration of the estate of the deceased testator or intestate (r) In a contract of bailment the payment of the bailee's charges is part of the performance of the contract (s) and part of the cause of action also accrues at the place where the goods bailed are stored (t) A suit for a breach of a contract of betrothal may be filed where the breach takes place (u) and in case of a contract to marry at the place where the marriage was to have been celebrated (v) A suit for damages for misrepresentation will lie at the place where the misrepresentation was made (w) or for wrongful arrest at the place of arrest (x) or for death caused by negligence at the place where the death took place (y) or for libel at the place of publication (z) The cause of action in a suit to set aside a forged will arises at the place where the will was published (a) or if plaintiff's interest in any property is prejudicially affected by the will the suit may be filed at the place where that property is situate (b) In a suit to set aside a deed of release executed in Calcutta of plaintiff's interest in property in Bombay it was said that the cause of action did not arise wholly in Calcutta but included the effect of the release on the Bombay property (c) In a contract of insurance of goods made in Rangoon and providing for payment at Rangoon the Rangoon High Court held that the cause of action is at Rangoon and not at the place where the goods were destroyed or damaged (d) But the Bombay High Court has dissented from this case on the ground that the destruction or damage of the goods is part of the cause of action and in the case of a life assurance has held that part of the cause of action arises at the place where the death occurs (e) A suit for restitution of conjugal rights may be brought in the Court of the place where the husband resides, or it may be brought in the Court of the place where the wife resides (f) A suit by a guardian for the custody of his ward removed by the defendant from Allahabad to Lahore may be brought in the Court at Lahore or it may be brought in the Court at Allahabad (g) A suit for damages for infringement of a trade mark may be brought in the Court of the place where the defendant resides or in the Court of the place where the

(i) *Durga Das v Jai Narain* (1917) 41 All 513
513 50 IC 156 *Jagan v Ganda Mal*
(1897) P R 62 *Jaganandan v Krishna*

(m)

(n)

(o)

(p) *Durga Das v Jai Narain* (1917) 41 All 513
50 IC 156

(q) *Srinivasa v Venkata* (1906) 29 Mad 259 259

(r) *Re Fuller* (1854) 2 E & B 573

(s) *Boreck v Mandelstan* (1906) P R 70

(t) *Ganesh Prasad v Bansidhar* (1917) 15 All LJ 513 41 IC 904

(u) *Bhag Singh v Labh Singh* (1916) T.R. 93

37 IC 114

(v) *Mathura Prasad v Satya Narayan* (1922)

65 IC 812

(w) *Bengal Coal Co v Elgin Cotton Co* (1870)
2 N W P 13

(x)

(y)

(z)

(a)

(b)

(c)

(d)

A.R. 2

(e) *Light of Asia Insurance Co., Ltd v Bai*

Chanchal (1937) 31 Bom L.R. 815 140

IC 96 (3) A.B. 39° *Punjab Mutual*

Hindu Family Relief Fund v Sardars

(1918) P.R. 98 45 IC 900

(f) *Lalagar v Bai Surai* (1894) 18 Bom 316

(g) *Sarat Chandra v Forman* (1890) 12 All 213

question whether that or some other place is the place of business of the company is in each case a pure question of fact to be determined by the course of business and trading (w). *P. & A. Co. v. The Eastern* (1880) 11 B.L.R. 100. Offices in fifty different jurisdictions and it is by the course of business that the place of business is determined in respect of a cause of action arising there (x).

Suit against non resident foreigners. The cause of action may arise against a non resident foreigner on a cause of action which arose within the territory (y). As already stated the Court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction, but a foreigner who has accrued abroad (z). A foreigner is not exempt from the jurisdiction of Indian Courts (a). If a foreigner resides or himself carries on business or works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts. But what if a foreigner does not reside or carry on business or personally work for gain, in British India, and

- (1) the cause of action arises within the local limits of a British Court?
- (2) the cause of action arises without British India but the foreigner carries on business through his agent within the local limits of a British Court?

As to case (1), it is settled that a non resident foreigner who carries on business in a protected Native State, may be sued in the Court of British India if the cause of action arises within the jurisdiction of such Court (b). Thus if A, a native of the State of Sangli and residing at Sangli, borrows money from B at P. & A. Co., and fails to recover the money in the Kolgaum Court, for the cause of action arises there.

As to case (2), the High Court of Bombay in one case held that where the cause of action arose in Bombay, it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business through an agent in Bombay (c). But that decision was disapproved in the later case of *Thyagaraj v. Kassar* (d). The point arose in a later case before the Privy Council, but it was not open (e). The Madras High Court has held that the expression "carrying on business" in cl. 12 of the Letters Patent includes carrying on business through an agent in India by foreigners living outside jurisdiction (f).

21. [New.] No objection as to the place of business of the defendant may be allowed by any appellate Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where the objection was taken at or before such settlement, and unless there has been a manifest and inequitable failure of justice.

Objections to jurisdiction

(w) *De Beers Consolidated Mines, Ltd v. Howe* [1906] A.C. 455 Halsbury, vol. v, p. 15 art. 6.

(x) *Bank of Bengal v. Sarat Chandra* (1910) 4 Pat. L.J. 141 49 I.C. 943.

(y) "The cause of action may arise within the territory of the Court."

(z) "A foreigner who has accrued abroad."

(a) "A foreigner is not exempt from the jurisdiction of Indian Courts."

(b) "If a foreigner resides or himself carries on business or works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts."

(c) "The High Court of Bombay in one case held that where the cause of action arose in Bombay, it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business through an agent in Bombay."

(d) "But that decision was disapproved in the later case of Thyagaraj v. Kassar."

(e) "The point arose in a later case before the Privy Council, but it was not open."

(f) "The Madras High Court has held that the expression 'carrying on business' in cl. 12 of the Letters Patent includes carrying on business through an agent in India by foreigners living outside jurisdiction."

(1903) 26 M.L.J. 241 81 I.A. 241 11 B.L.R. 100.

(v) *Shankar* (1901) 25 B.L.R. 100.

(w) *Yentala* (1911) 35 I.A. 111 44 B.L.R. 257 11 I.C. 447, aff'd 22 M.L.J. 257.

(x) *Kesari v. Khimji* (1900) 12 B.L.R. 100.

(y) (1893) 17 Bom. 66. (a case under the Presidency Small Causes Act, 1882, s. 18).

(z) *Annamalai v. Murugasa* (1901) 25 M.L.J. 30 31 A. 220 (a case under s. 17 of the Act of 1882 corresponding with s. 17 of the present Code).

(1) *Janoo v. Bhatu* (1907) 45 Mad. 17 78 I.C. 752 (4) A.M. 154, dismissed from 12 Bom. 507, and followed 11 B.L.R. 662 supra.

question whether that or some other place is the principal place of business of the company is in each case a pure question of fact to be determined upon a scrutiny of the course of business and trading (w). But a Company may have subordinate or branch offices in fifty different jurisdictions and it may be sued in any one of such jurisdictions in respect of a cause of action arising there (x).

Suit against non resident foreigners—The Court has no jurisdiction in a suit against a non resident foreigner on a cause of action which arose wholly without British territory (y). As already stated the Court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction in respect of a cause of action that has accrued abroad (z). A foreigner is not exempt from the jurisdiction of British Indian Courts (a). If a foreigner resides, or himself carries on business, or personally works for gain, in British India, it is clear that he is amenable to the jurisdiction of British Indian Courts. But what if a foreigner does not reside, or does not himself carry on business or personally work for gain, in British India, and

- (1) the cause of action arises within the local limits of a British Indian Court, or
- (2) the cause of action arises without British India but the foreigner carries on business through his agent within the local limits of a British Indian Court?

As to case (1), it is settled that a non resident foreigner, who is a subject of a protected Native State, may be sued in the Court of British India, if the cause of action arises within the jurisdiction of such Court (b). Thus if A, a subject of the Native State of Sangli and residing at Sangli, borrows money from B at Belgaum, B may sue A for recovery of the money in the Belgaum Court, for the cause of action arises at Belgaum.

As to case (2), the High Court of Bombay in one case held that where no part of the cause of action arose in Bombay, it had no jurisdiction to entertain a suit against a foreigner who did not reside in Bombay, but carried on business through an agent in Bombay (c). But that decision was disapproved in the later case of *Girdhar v Kassigar* (d). The point arose in a later case before the Privy Council, but it was left open (e). The Madras High Court has held that the expression "carrying on business" in cl. 12 of the Letters Patent includes carrying on business through an agent in British India by foreigners living outside jurisdiction (f).

21. [New.] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice

Objections to Jurisdiction

- (w) *De Beers Consolidated Mines, Ltd v Hoots* [1906] A C 435 Halsbury, vol 1, p 15 art 6
- (x) *Bank of Bengal v Sarat Chandra* (1910) 4 Pat L J 141 48 IC 943
- (y) *Bhamboe v Ram Narain* (1928) 9 Lah 435 109 IC 28, (24) A L 297
- (z) *Imaulji v Imaul* (1921) 45 Bom 1228 63 IC 959 (21) A B 480 *Bhupal v Samheya* (1927) 19 All 450
- (a) *Smith v Indian Textile Co* (1927) 49 All 669 101 IC 673 (27) A A 413
- (b) *Ram Paris v Pralhadji* (1896) 20 B 11 133 *Girdhar v Kassigar* (1893) 17 B 101 662 *Zadepalla v Narah Saevl* (1904) 23 Mad 62 *Annamalai v Alurugasa*

- (1907) 26 Mad 544 93 IC 270 *Imamji v Shankar* (1911) 33 B 11 64 *Samheya v Imaulji* (1911) 33 B 11 3 34 B 11 137 11 IC 447 *Imamji v Samheya* 130
- (c) *Kassigar v Alimji* (1888) 12 L M 537
- (d) (1903) 17 B 11 61 [A case under the Letters Patent Small Cause Courts Act, 1884 s 18]
- (e) *Annamalai v Alurugasa* (1907) 26 Mad 544 93 IC 270 [a case under s 17 of the Civil Procedure Code corresponding with s 20 of the present Code]
- (f) *Janes v Rat Aji* (1923) 45 B 11 13 4 76 B 11 759, (24) A B 134, *decided from 12 Bom 807, and 11 B 11 1 602 supra*

This section is new It proceeds on the lines of the Suits Valuation Act, 1887, s 11

Chartered High Courts—This section does not apply to Chartered High Courts in the exercise of their original jurisdiction (g)

Meaning of "jurisdiction"—"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted and may be extended or restricted by the like means If no restriction or limit is imposed the jurisdiction is said to be unlimited ' (h)

A limitation may be (1) as to the subject matter, (2) as to person, (3) as to the pecuniary value of the suit, or (4) as to place or it may partake of two or more of these characteristics (i)

(1) *Subject matter*—Subject matter depends upon the nature of the cause of action and the relief prayed for Thus a Presidency Small Cause Court has no jurisdiction to entertain certain suits such as suits for the recovery or partition of immovable property suits for the foreclosure or redemption of a mortgage of immovable property, suits for compensation for defamation, suits for dissolution of partnership, etc, see the Presidency Small Cause Courts Act 15 of 1882, s 19 These and certain other suits are also excepted from the cognizance of a Provincial Small Cause Court, see Provincial Small Cause Courts Act 9 of 1887, s 15 If a Presidency Small Cause Court or a Provincial Small Cause Court entertains a suit which is excluded from its cognizance, its decree is a nullity See also Bombay Civil Courts Act 14 of 1869, s 28 A, and Bengal, N W P, and Assam Civil Courts Act 12 of 1887, s 23

(2) *Person*—The general rule as stated by Garth, C J, in *Olin v Lavezso* (j) is that civil Courts here as in England have jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction Independent foreign sovereigns are exempt but may submit themselves to jurisdiction by appearance to a writ (k) As to Princes, Chiefs and Ambassadors, see sec 86

(3) *Pecuniary value*—Throughout British India there are Courts of different grades having jurisdiction in suits of different amounts in different local areas These have been set forth in the notes to sec 15 where the principles regulating pecuniary jurisdiction are also discussed A suit may be over valued and instituted in a Court of a higher grade or it may be under valued and instituted in a Court of a lower grade, but section 11 of the Suits Valuation Act 7 of 1887 now provides that an objection on this ground shall not be entertained by an Appellate or Revisional Court unless, (1) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or (2) the Appellate or Revisional Court is satisfied that the over valuation or under valuation has prejudicially affected the disposal of the suit on its merits (l)

(4) *Place of suing*—This phrase may refer to territorial jurisdiction in its wider sense as where the suit is not cognizable by a British Indian Court being for instance a suit for partition of land outside British India, or in its narrower sense of the local venue in British India for suits cognizable by British Indian Courts The words are used in this section in this latter sense with reference to the local venue for which rules have

(g) *Manindra Chandra v Lal Mohan* (1920) 56 Cal 940 190 I C 577, (-) A C 358
(h) *Halsbury* 2nd Ed vol 8, art 1176 p 531
Hriday Nath v Ramchandra (1921) 43 Cal 134 145 149 Cal I C 806 (211 A C 34,
Amruts v Jala Arishna (1887) 11 Bom 444, 450
(i) *See Vishnu v Krishnarao* (1887) 11 Bom 133 170

(j) (1884) 10 Cal 878 882
(k) *Mighell v Sultan of Johore* (1893) 1 Q B 149
(l) *See Jose Antonio v Francisco* (1910) 35 Bom 24 7 I C 950 *Raj Lakshmi v Karyayani* (1910) 35 Cal 634 666-672 12 I C 464 *Raghappa v Shidappa* (1910) 40 I A 24, 43 Bom 507, 60 I C 280

been enacted in the preceding sections 15 to 20 (m) These sections, it will be observed, occur under the heading "Place of suing"

Waiver of objection to jurisdiction—It is a fundamental rule that a judgment of a Court without jurisdiction is a nullity (n) "Where, by reason of any limitation imposed by statute, charter, or commission, a Court is *without jurisdiction* to entertain any particular action or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the Court nor can consent give a Court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled Where a limited Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing (o) The general rule therefore is that consent cannot give jurisdiction, and want of jurisdiction cannot be waived There is an apparent conflict in the reported cases on this subject owing to the failure to keep clearly in view the distinction between want of jurisdiction and irregularity in the exercise of jurisdiction, or to use the phrase of Mookerjee J, irregularity in the assumption of jurisdiction (p) The leading case on the subject is *Ledgard v Bull* (q) decided by the Privy Council in 1886 The suit was for damages and an injunction for infringement of a patent Under the Patents and Designs Act such a suit can only be brought in a District Court, but it was brought in the Court of a Subordinate Judge who had no jurisdiction to entertain it The suit was eventually transferred from the Subordinate Judge's Court to the District Court, and there heard and decided The defendant contended that an order for transfer of a suit from one Court to another under s 24 could not be made unless the suit had been brought in a Court having jurisdiction, but this contention was overruled. The same view was taken by the High Court on appeal The Judicial Committee held that the suit having been instituted in a Court which had no jurisdiction, no order of transfer could be made, but that the District Court being competent to entertain and try the suit if it were competently brought, the defendant could waive the objection to the irregularities of its institution, but that he had not done so, and the decree of the District Court could not therefore stand and it ought to have been set aside by the High Court Lord Watson in delivering the judgment of the Board said —

"The District Judge was perfectly *competent to entertain* and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit [But] when the Judge has *no inherent jurisdiction* over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him But there are numerous authorities which establish that when in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit"

The principles laid down in *Ledgard v Bull* were reiterated by their Lordships of the Privy Council in *Meenakshi Naidu v Subramania Sastri* (r) That was a case in which the High Court of Madras had entertained an appeal from an adjudication from which no appeal was provided for by any enactment Their Lordships held that the decree of

(m) *Bhambo v Ram Varan* (1928) 9 Lah 455,
109 I C 28 (28) A I 297
(n) *Rajalakshmi v Kalyayani* (1913) 38 Cal 639,
12 I C 464
(o) Halsbury 2nd Ed vol 8 art 1178 p 539
(p) *Gurdeo Singh v Chandrika* (1909) 36 Cal.
193 1 I C 913

(q) (1887) 13 I A 134 9 All. 191 See also
Pishnu v Krishnarao (1887) 11 Bom
153 159
(r) (1887) 14 I.A. 160, 11 Mad 26, *Jeranchod*
v. Dakore Temple Committee (1925) 27
Bom. L. R. 872, 876, 87 I C 315, (25)
A. P.C. 155

These two cases illustrate the distinction between want of jurisdiction and irregular exercise or assumption of jurisdiction. Irregular exercise or assumption may be waived as it might have been in *Ledgard v Bull*, and if a Court erroneously assumes jurisdiction to try a suit over which it has inherent jurisdiction its decree may be set aside but it cannot be treated as a nullity (s). But when the Court is not competent to entertain or try the suit there is a want of inherent jurisdiction which cannot be waived. But here again there are certain exceptions. If the Court has no jurisdiction owing to some privilege attaching to a party, the party may waive that privilege. Thus a defendant may waive his status as an agriculturist. Another exception is in the case of pecuniary jurisdiction enacted in section 11 of the Suits Valuation Act 7 of 1887. A third exception is this section as to the place of suing or the local venue of suits within the cognizance of British Indian Courts.

On the other hand when the suit is one within the cognizance of British Indian Courts and the want of jurisdiction is only as to local venue under sections 15 to 20

(c) (1018) M W N 378 45 I C 779

(u) *Gora Chand v Irfanulla Aumar* (10-6) 53
Cal 166 80 IC 685 (25) A C 407 (5 J)
dissented from as to the powers of a Court
in execution in *Nathan v Samson* (103)
D Kang 490, 133 IC 65 (32) A R 252
See note 'Proof of Jurisdiction' in
commentary on O 21, r 7

the defect may be waived under this section. Thus if the defendant resides in the jurisdiction of Court A and he is sued in Court B on the allegation that he resides in its jurisdiction, he cannot raise this objection for the first time in appeal (x), nor can he in a subsequent suit set aside the decree as a nullity (y). If a suit on a mortgage of land in the jurisdiction of Court B is instituted in Court A, contrary to the provisions of section 16, and the defendant does not object, the decree is not a nullity (z). So also when the territorial jurisdiction of the Court is altered by a notification during the pendency of the suit (a).

"Objection as to place of suing" when to be taken.—The general rule is that an objection to jurisdiction may be taken at any stage of the proceedings provided there are materials on the record to sustain it (b). It may be taken for the first time in appeal or in second appeal (c), or in revision (d), or after remand in second appeal (e), or in appeal to the Privy Council provided the objection is patent on the face of the proceedings (f). This section which is framed on the analogy of section 11 of the Suits Valuation Act is an exception to this general rule.

The section does not refer to the Court of first instance and in the Court of first instance the objection may be taken at any time before the final judgment (g). But under the section a Court of Appeal or Revision will not entertain the objection unless it has been taken at the earliest possible opportunity in the Court of first instance, and if issues have been settled, at or before the settlement of issues. Even then the Court of Appeal or Revision will not allow the objection unless there has been a failure of justice. If the objection is raised for the first time in appeal or revision it is excluded by the terms of the section (h). But in a case where a Court of Small Causes set aside an ex parte decree, although the application should have been made to the Munsiff of another Court, the objection was entertained in revision on the ground that it referred not only to the place of suing but to the nature of the Court itself (i).

Section 21 and execution proceedings.—The waiver extends to execution proceedings and the judgment debtor cannot object to the validity of the decree in execution proceedings. In *Zamindar of Ettiyapuram v Chidambaram* (j) Wallis, J., said "The effect of the section in my opinion is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree of the original Court. The ordinary way of questioning a decree passed without jurisdiction is on appeal or revision, and if this is forbidden, a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing." But it is difficult where after the passing of a preliminary mortgage decree, the Court which passes it ceases to have territorial jurisdiction over any of the mortgaged properties. In such a case failure on the part of the mortgagor to object to the passing of the final decree, precludes him from disputing the validity of the decree, but not from objecting to the jurisdiction of the Court to order a sale (k).

(x) *Ratti Ram v Kundan Lal* (1914) P R 87, 26 I C 543.

(y) *Annamalai v Sambantra* (1910) 37 Mad L J 349, 53 I C 463.

(z) *Zamindar of Ettiyapuram v Chidambaram* (1920) 43 Mad 675 (P B) 58 I C 871.

(a) *Chokkalinga v Velayudha* (1924) 47 Mad L J 449, 87 I C 152, (25) A M 117. *Jamani v Narayanram* (1924) 47 Mad L J 192, 87 I C 341, (24) A M 697. *Diruppal v Ketho Prasad* (1928) 7 Pat 216, 108 I C 321, (28) A P 324 (alteration of jurisdiction by dissolution).

(b) *Pamani v Narayanram* (1924) 47 Mad L J 192, 87 I C 341, (24) A M 697.

(c) See (1920) 43 Mad. 675, 58 I C 871, *supra*.

(d) *Nadhi Lal v Mazhar Hussain* (1884) 7 All 230.

(e) *Sayad Nyamtula v Nana* (1881) 11 I C 424. *Velayudam v Arumudhi* (1911) 13 Mad 273.

(f) *Bibi Ladis v Bibi Iqbal* (1883) 14 I C 401.

(g) *Maha Prasad v Ramani Malin* (1914) 41 I A 197, 204, 42 Cal 116. *451. Ramani v Kishan* (1911) 1 A 72, 51 Cal 361, 83 I C 441, 1 A PC 95.

(h) *Keshav v Vinayak* (1895) 23 I C 44.

(i) *Ducaria Das v Pyara Lal* (1911) 14 A 947, 132 I C 35, (30) A. M. 814.

(j) (1920) 43 Mad. 675, 48 (P B) 58 I C 871. See also *Gomatam v. Kumanth* (1917) 27 Mad. 118.

(k) *Sivas Ramia v Raja of Jeypore* (1927) 54 Mad. 882, 103 I C. 245, (27) A. M. 667.

When a Court executing a decree transferred to it attached and sold properties after territorial jurisdiction had been withdrawn from it, the Madras High Court held that the judgment debtor's failure to object estopped him from questioning the validity of the sale, but that there was no estoppel against a subsequent purchaser of the same property at a sale held in execution of a decree passed against the same judgment debtor in another suit, for the estoppel of the judgment debtor did not operate against such purchaser (l). The same Court has also held that if a Court continues to execute a decree against immovable property after territorial jurisdiction has been withdrawn from it, the judgment debtor's failure to object will preclude him from raising the point in appeal (m).

Section 21 and new suit—The Madras (n) and Lahore (o) High Courts have held that if the defendant does not object to jurisdiction and a decree is passed against him he cannot in a subsequent suit set aside the decree for want of jurisdiction. But the Allahabad High Court considers that it is not legitimate to extend the bar of s. 21 beyond the limits provided by the section, and that in such a case the plaintiff is entitled to maintain an independent suit for the avoidance of the decree (p). In a Calcutta case (q) a landlord filed a suit for rent and ejectment under sec 66 of the Bengal Tenancy Act and obtained a decree in execution of which the tenure was sold and purchased by himself. The land was situate in the jurisdiction of another Court but the defendant had raised no objection. When the landlord went to take possession the tenant defendant filed a suit for a declaration that the decree had been passed and the sale held without jurisdiction. It was contended for the landlord that the sale was validated by section 21, but this contention was overruled. Mookerjee, J., said that section 21 is an exception to the well established rule that where a Court has no inherent jurisdiction over the subject matter of the suit its decree is a nullity, even though the parties may have consented to jurisdiction of the Court. This exception cannot obviously be so interpreted as to have a wider application than what is justified by its terms. It is impossible for us to hold that section 21 debars the defendant from questioning the validity of the execution sale which is the root of the title of the plaintiff. In the view taken by the learned judge the decree was validated by section 21 but the execution sale was a nullity. It is submitted however that the view taken by the Madras and Lahore High Courts is correct that when once the objection to jurisdiction is waived, under section 21, it is waived for all purposes.

Unless there has been a consequent failure of justice"—Even though
 "failure
 the
 appellate Court must go into the merits of the case and form an opinion upon the justice or otherwise of the decision of the 1st Court (s).

Remand—There is no question of territorial jurisdiction when a suit is remanded by a Court of Appeal, for jurisdiction then depends entirely upon the order of remand (t).

(l) *Veerappa v Ramsami* (1920) 43 Mad 135
 53 I C 579

(m) *Id*

(n) *Id*

(o) *Id*

(p) *Id*

(q) *Id*

(r) *Id*

(s) *Id*

(t) *Id*

(u) *Id*

(v) *Id*

(w) *Id*

(x) *Id*

(p) *Id*

(q) *Id*

(r) *Id*

(s) *Id*

(t) *Id*

(u) *Id*

(v) *Id*

(w) *Id*

(x) *Id*

(y) *Id*

(z) *Id*

(aa) *Id*

(ab) *Id*

(n) *Annamalai v Sambasiva* (1919) 37 Mad 1 J
 249 53 I C 403

(o) *Chokkalingam v Vela*
Subba (1924) 47 Mad L J 448, 87 I C
 152 (1925) A M 117

(p) *Parthasarathy Das v Radha Kishan* (1929) 11

(r) *Bhai Singh v Lakh Singh* (1919) F R 92,
 27 I C 114

(s) *Lachman v Virji* (1921) 19 All L J
 305, 62 I C 300 (21) A A 56.

(t) *Uthman v Nana* (1931) 44 Mad L J 239,
 72 I C 314, (23) A M 351

22. [S 22] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any) shall determine in which of the several Courts having jurisdiction the suit shall proceed

Power to transfer suits which may be instituted in more than one Court

Transfer where plaintiff has a choice of Courts—The power of transfer given by this section is not a general power as in section 24. It is limited to cases in sections 16 and 20 where plaintiff has the option to sue in more Courts than one (u). Prima facie plaintiff as *arbitrarius litis* has the right to select his own forum (v). That right is controlled by the power of transfer, but it is a right that ought not lightly to be interfered with (u).

Grounds of transfer—See note to section 24 under the same heading

Notice—The provisions of this section as to notice and time of application are mandatory (x). Notice must be given before application and to co-defendants as well as to the plaintiff

Stay of suit—Section 20 of the Code of 1882 provided for stay of proceedings in order to compel the plaintiff to take his case to another Court. This has been omitted as sufficient provision has been made by the power of transfer in sections 22 to 24. But the Court has an inherent jurisdiction to stay any suit which is an abuse of its process. Whether the institution of the suit in a particular Court is an abuse of the process of that Court is a question of fact. In a suit filed in the Bombay High Court the fact that both the parties and the witnesses of the defendants were residents of Wardha in the Central Provinces was held not to justify an order for the stay of the suit (y). The High Court has also power to stay a suit in another Court. See note under O 39 r 1.

23. [Ss 22, 23, 24] (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court

To what Court application lies

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court

- (u) *Jurnal Chandra v. Dhore Krato* (1914) 1 All L J 284; 41 C 318. *Naf v. al Engineer v. Co v. Jation* (1931) 1 C 68 (3) A L 222.
- (v) *Khatiya v. Turuk* (1931) 9 Cal 20.
- (w) *Amul v. Ambani* (1931) 10 Cal L J 208 31 C 53.
- (x) *Gulab Chand v. Kher Singh* (1911) 1 P 11

- 35 I C 616. *Shre Dutt v. Mohi Jam* (1931) 10 Cal L J 93 88 I C 531 (25) A L 3-4.
- (y) *Geffert v. Luckchand* (1889) 13 Bom 178. *Hindustan Assurance Ltd v. Jai Mohan* (1914) 2 Mad L J 645 22 I C 42. *Sh. v. Kanhaya* (1912) P 1 16-54 1 C 335.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

Chartered High Courts—Sections 22 and 23 do not apply to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (z)

Subordinate Courts—Subordination of Court is regulated by sec 3. A Court of subordinate Judge is subordinate to the District Court no matter what the forum of appeal may be in the particular case for the transfer of which application is made (a)

Different High Courts—If suits between the same parties are instituted in Courts subordinate to different High Courts, either High Court can transfer the suit from the Court which is subordinate to it (b). A Judge on the Original Side of the High Court is not a Court subordinate to the High Court and a Bench of the High Court cannot entertain an application for the transfer of a suit from him to another Court (c)

24. [S 25] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice the High Court or the District Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same, or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn

(1) *Mahabadi Chandra v. Lal Mohan* (1911) 50 Cal 11, 101 C 5. (1911) 50 Cal 11, 101 C 5.

(a) *Imadul v. Fulsom* (1901) 30 Cal 11, 22 Cal 11, 22 Cal 11.

(b) *Lanka v. S. Ramul v. M. S. Ramul* (1906) 25 Cal 511, 101 Cal 511.

(1917) 111 Cal 27, 20 Cal 100, 1 C 154.

(c) *Hussain Mahomed v. S. A. M. Manna* (1907) 45 Cal 11, 71 Cal 100, 2 C 331, 1 C 154. *Hussain Mahomed v. S. A. M. Manna* (1907) 45 Cal 11, 71 Cal 100, 2 C 331, 1 C 154.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes

Alterations in the section—These have been noted in their appropriate places in the commentary below

Chartered High Courts—This section applies to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (*d*)

Form—For form of notice of application, see App H, form no 2

Jurisdiction—An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been in the first instance brought in a Court that has jurisdiction to try it. But if, after the transfer is made, the parties without objection join issue and go to trial upon the merits, the order of transfer cannot subsequently be impeached (*e*). The same rule applies to appeals (*f*). See note "Waiver of objection to jurisdiction" under sec 21. Conversely a suit cannot be transferred to a Court which has not jurisdiction (other than territorial jurisdiction) to try it (*g*). Thus a High Court cannot transfer to a District Court an insolvency petition presented to it under the Presidency-towns Insolvency Act (*h*). Nor can a District Court transfer a suit from one subordinate Court to another subordinate Court which has been newly created and empowered to try subsequently instituted suits (*i*). But it is not necessary that the Court to which a suit is transferred, should have concurrent territorial jurisdiction and a High Court or District Court may transfer a suit from one subordinate Court to another subordinate Court which has pecuniary jurisdiction although it may not have territorial jurisdiction to try the suit (*j*).

General power of transfer—This section gives a general power of transfer of all suits, appeals and other proceedings and is not limited like section 22 to suits in which the plaintiff has the option of suing in more than one Court. It may be exercised at any stage of the proceeding and even suo motu without an application (*j*1).

Grounds of transfer.—As stated in the notes on section 22 the plaintiff as arbiter litis or dominus litis has the right to choose his own forum or rather any forum the law allows him. This right is subject to control under sections 22 to 24. The burden lies on the applicant to make out a strong case for a transfer. A mere balance of convenience in favour of proceedings in another Court is not a sufficient ground (*k*), though it is a relevant consideration (*l*). As a general rule the Court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular Court for the purpose of working injustice (*m*). What the Court has to consider is whether the applicant has made out

(d) *Mahindra Chandra v Lal Mohan* (1879) 56 Cal 945, 954 120 I C 577 (2) A C 324

(e) *Lejard v Bull* (1887) 9 All 191 13 I A 134 *Leary Lal v Komal Kulkare* (1880) 8 Cal 30

(f) *Lam Narain v Parmeswar* (1898) 25 Cal 31 143 I C (3) A A C 64

(g) *Kushore Lal v Balkrishan* (1932) 54 All 874 143 I C (3) A A C 64 dissenting from *Jammal v Dulan* (1923) 51 Cal L J 585 57 I C 5.

(h) *Srinivasa v (1904) 11 Ind Jur* (115) 35 Mad 47 21 I C 1

(i) *Pathak v Laljee* (1918) 11 W N 211 45 I C 13

(j) *Kushore Lal v Balkrishan* (1932) 54 All 874 143 I C (3) A A C 64

(j1) *Alibabul Fark v Farkhan* (1933) 14 Cal 146 I C 26 (3) A I C 1

(k) *Le Narain v Parmeswar* (1898) 25 Cal 31 143 I C (3) A A C 64

(l) *Tula Ram v Harwan Das* (1883) 5 All 60

(m) *Pathak v Laljee* (1918) 11 W N 211 45 I C 13

(n) *Le Narain v Parmeswar* (1898) 25 Cal 31 143 I C (3) A A C 64

(o) *Pathak v Laljee* (1918) 11 W N 211 45 I C 13

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate

Chartered High Courts—Sections 22 and 23 do not apply to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (z)

Subordinate Courts—Subordination of Courts is regulated by sec 3. A Court of a subordinate Judge is subordinate to the District Court no matter what the forum of appeal may be in the particular case for the transfer of which application is made (a)

Different High Courts—If suits between the same parties are instituted in Courts subordinate to different High Courts either High Court can transfer the suit from the Court which is subordinate to it (b). A Judge on the Original Side of the High Court is not a Court subordinate to the High Court and a Bench of the High Court cannot entertain an application for the transfer of a suit from him to another Court (c)

24. [S 25] (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard or of its own motion without such notice, the High Court or the District Court may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same, or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn

(c) *Mahendra Chandra v. Lal Mohan* (10 B 19) Cal 911 924 3 O 1 C 577 (—) A C 304

(a) *Imal v. Kulkarni* (1901) 10 Cal L J 204 31 C 274

(i) *Bankat v. Parul v. Maheswar Das* (1904) Cal 511 *Sabbabhai v. Chhatul*

(11) 71 Cal Bom 26 20-30 100 I C 151 (—) A B 19

(c) *Hawal Mahomed v. Shaha Memon* (1917) 45 Cal 1 J 71 100 B C 331 (—) A C 20 *Hindustan Assurance Ltd v. Ind Mulraj* (1914) 27 M 1 L J 645 27 I C 455

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes

Alterations in the section—These have been noted in their appropriate places in the commentary below

Chartered High Courts—This section applies to Chartered High Courts in the exercise of their ordinary original civil jurisdiction (d)

Form—For form of notice of application, see App H form no 2

Jurisdiction—An order for the transfer of a suit from one Court to another cannot be made under this section unless the suit has been in the first instance brought in a Court that has jurisdiction to try it. But if, after the transfer is made, the parties without objection join issue and go to trial upon the merits, the order of transfer cannot subsequently be impeached (e). The same rule applies to appeals (f). See note Waiver of objection to jurisdiction under sec 21. Conversely a suit cannot be transferred to a Court which has not jurisdiction (other than territorial jurisdiction) to try it (g). Thus a High Court cannot transfer to a District Court an insolvency petition presented to it under the Presidency towns Insolvency Act (h). Nor can a District Court transfer a suit from one subordinate Court to another subordinate Court which has been newly created and empowered to try subsequently instituted suits (i). But it is not necessary that the Court to which a suit is transferred should have concurrent territorial jurisdiction and a High Court or District Court may transfer a suit from one subordinate Court to another subordinate Court which has pecuniary jurisdiction although it may not have territorial jurisdiction to try the suit (j).

General power of transfer—This section gives a general power of transfer of all suits, appeals and other proceedings and is not limited like section 22 to suits in which the plaintiff has the option of suing in more than one Court. It may be exercised at any stage of the proceeding and even suo motu without an application (j1).

Grounds of transfer—As stated in the notes on section 22 the plaintiff as arbiter litis or dominus litis has the right to choose his own forum or rather any forum the law allows him. This right is subject to control under sections 22 to 24. The burden lies on the applicant to make out a strong case for a transfer. A mere balance of convenience in favour of proceedings in another Court is not a sufficient ground (k) though it is a relevant consideration (l). As a general rule the Court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular Court for the purpose of working injustice (m). What the Court has to consider is whether the applicant has made out

(d) *Mahendra Chandra v. Lal Mohan* (1935) 50 Cal. 940 954 120 I C 57 (3) A A 834

(e) *Lal and v. B. H. (188)* 9 All. 191 13 I A 134. *Leary Lal v. Fomal Kulkarni* (1880) 6 Cal. 30

(f) *Jam Naraia v. Parmessar* (1895) 5 (2) 33

(g) *Kushore Lal v. Lall Khan* (1935) 54 All. 84 143 I C 5 (3) A A C O d. sent. from *Jan Lal v. G. Han* (1930) 51st L J 588 57 I C 5

(h) *Srinivasa v. (1911) 1 Ass. free* (1915) 34

(i) *1st Lal Mohan v. Lal Spermual* (1915) 31 W. N. 41 45 I C 13

(j) *1st Lal Mohan v. Lal Spermual* (1915) 31 W. N. 41 45 I C 13

(j) *Fustore Lal v. Bilkulani* (1935) 54 All. 84 143 I C 5 (3) A A 834

(j1) *Allahabad Bank v. Jaga Jagan* (1935) 14 1st 79 146 I C 57 (3) A A 161

(k) *Le Nort v. Settler ent* (1891) 1 (1) 47 403 404 50 I C 5

(l) *Tula Jagan v. Har, an Das* (1887) 5 All. 60

(m) *Abba Lal v. Maqul* (1916) 14 All. 1 J 24 3 I C 13. *Inayatullah v. Nisar* (1914) 44 All. 65 I C 70 (3) A A 65

(m) *Le Norton v. Settlement* (1907) 1 (1) 47 41 42nd Mad. L J 645 27 I C 455

a case to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction (n) Where in a suit for partition instituted in the Court of 24 Pargunnahs the parties were residents of Calcutta and the major portion of the immovable property was also situate in Calcutta, the suit was transferred to the original side of the High Court of Calcutta on the ground principally of convenience (o) In a suit to set aside certain deeds of gift executed by a deceased person whose heir the plaintiff claimed to be on the ground that the deceased was not of a sound mind and that the deeds were procured by undue influence, the High Court of Allahabad ordered the suit to be transferred to the Court of the place where the deeds were executed on the ground that the witnesses were residents of that place and that the defence must turn upon local evidence (p) Another ground of transfer is a pecuniary or other personal interest in the presiding Judge (q) or a reasonable apprehension of the litigant that he will not get a fair trial (r)

Notice—No notice is necessary if the Court acts *suo motu* If an application is made notice must be given by the Court and not by the party as in sec 22 The provision as to notice is imperative, and an order for transfer made without notice will be set aside (s) and so will an *ex parte* decree made by a Court to which the suit has been transferred without notice to the defendant (t) On the other hand the Madras High Court treats the matter of notice as one of practice and procedure and holds that notice may be waived (u) and that want of notice is an irregularity which does not invalidate the order of transfer (v)

"At any stage"—These words and the substitution of the word "pending" for "instituted" settle a doubt as to whether a suit could be transferred or withdrawn after the hearing had commenced The High Courts of Bombay, Madras, and Allahabad held that a suit could be transferred or withdrawn at any stage even after the hearing had commenced, and even in the course of *execution proceedings* (w) On the other hand the Calcutta High Court held that there was no power to interfere after the hearing had commenced and no power to transfer an execution proceeding (x) It is now clear that the former view is correct

"Pending before it"—Under the corresponding section of the Code of 1882 it was held that a District Judge had no power to transfer to a subordinate Court a suit pending before himself (y) Clause (a) confers this power on District Courts and High Courts

District Court—District Court in this section means a Court of *unlimited* pecuniary jurisdiction An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is *limited* (z)

Clause (a). "Court subordinate to it"—A decree for dissolution of marriage under the Indian Divorce Act 4 of 1869, made by the Divisional Judge of Nagpur, is subject to confirmation by the High Court of Bombay, but after the Bombay High Court has confirmed the decree, an application for alimony must be made to the Court at Nagpur The Bombay High Court cannot entertain it, nor can it transfer the application to the

(n) *Tula Ram v Harjagan Das* (1883) 5 All 82

(o) " " " " " " " "

(p) " " " " " " " "

(q) " " " " " " " "

(r) " " " " " " " "

(s) " " " " " " " "

(t) " " " " " " " "

(u) *Chandram v Chittur Mal* (1925) 84 I C

234 (23) A L 444

(v) *Sankumani v Haran* (1890) 13 Mad 211

(w) *Bellary Iron Co v Venkata* (1911) 21 Mad

L J 8-3 B I C 7

(x) " " " " " " " "

" " " " " " " "

" " " " " " " "

" " " " " " " "

" " " " " " " "

(y) *Ashari Mohan v Gul Mahomed* (1884) 13

Cal 177

(z) *Sankham v Changanam* (1880) 13 Bom 654

(z) *Haji Umar v Chastaji* (1910) 34 Bom 411

6 I C 518

Nagpur Court for that Court is not subordinate to it (a) A senior Subordinate Judge in the Punjab cannot transfer a case from his Court to that of a junior Subordinate Judge, for the latter is not subordinate to him (b)

Clause (a): "Suit."—The High Court of Allahabad has held that the word "suit" is not limited to proceedings in execution (c). This is no doubt correct for an

The words "dispose of" have been added evidently with reference to miscellaneous proceedings.

Clause (b) . " Other proceedings."—The words "other proceedings" include an insolvency petition (d), but not a proceeding under sec 476 of the Code of Criminal Procedure (e) The Madras High Court has held that a District Court has power under this clause to withdraw to its own file proceedings in execution transmitted by it to a subordinate Court (f)

Competent Court.—The Court to which a suit is transferred must possess pecuniary jurisdiction but it is not necessary that it should have territorial jurisdiction (g) The Chief Court of Oudh has held that it is not necessary that the transferee Court should have territorial jurisdiction, and that competence means intrinsic competence and refers to the subject matter of the case and its pecuniary value (g1) If a suit pending in a Small Cause Court is transferred to a Subordinate Judge's Court it must be within the pecuniary limits of the jurisdiction of the Subordinate Judge. If the Subordinate Judge is invested with Small Cause Court powers, it matters not that those powers fall short of the value of the suit Thus has been decided by the Bombay High Court (h) dissenting from a Madras decision which made the competency of the Court depend upon its Small Cause Court powers (i)

Illustration

A suit for Rs 900 is pending in the Small Cause Court at Ahmedabad Application is made to transfer it to the Court of the second class Sub judge at Ahmedabad whose jurisdiction extends to Rs 5,000, but who is invested with Small Cause Court powers up to Rs 300 The High Court has power to make the transfer, for the suit is within the pecuniary jurisdiction of the second class Sub judge *Parshotumdas v Bhagubhai* (1932) 56 Bom 387, 139 I C 194, ('32) A B 486.

Again the competency of the Court is not affected by the circumstance that the Small Cause Court has under sec 16 of the Provincial Small Cause Courts Act preferential jurisdiction, and a suit may be transferred from a Small Cause Court to the Court of a Subordinate Judge having jurisdiction within the same local limits (j) But the High Court has no power to transfer an insolvency petition made under the Provincial Insolvency Act, 1920, and pending before a Subordinate Judge to the Judge of the High Court exercising insolvency jurisdiction (k)

Re-transfer.—Clause (b) (iii) gives power to re transfer a suit to the Court from which it was withdrawn. There was no such power in the Code of 1882 and the cases in foot note (l) are obsolete

- (a) *Wallace v Wallace* (1916) 40 Bom 109, 31 I C 331
- (b) *Kishan Lal v Jas Lal* (1920) 1 Lah 158, 32 I C 352
- (c) *Mukhammad v Tikamchand* (1925) 47 All 57, 25 I C 746, (25) A A 76
- (d) *Nasaratun v Kharshidji* (1898) 22 Bom 770
- (e) *Jameshar v Laidhari* (1927) 49 All 160, 101 I C 247 (27) A A 469
- (f) *Elappayya v Subrahmanyam* (1916) 39 Mad 485, 31 I C 119
- (g) *Kishore Lal v Ba Kishan* (1932) 54 All 824, 143 I C 5 (32) A A 660 resulting from a contrary opinion expressed in *Pam Das*

(g1)

(h)

(i)

(j)

(k)

(l)

a case to justify it in closing the doors of the Court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction (n) Where in a suit for partition instituted in the Court of 24 Pergunnahs the parties were residents of Calcutta and the major portion of the immovable property was also situate in Calcutta, the suit was transferred to the original side of the High Court of Calcutta on the ground principally of convenience (o) In a suit to set aside certain deeds of gift executed by a deceased person whose heir the plaintiff claimed to be on the ground that the deceased was not of a sound mind and that the deeds were procured by undue influence, the High Court of Allahabad ordered the suit to be transferred to the Court of the place where the deeds were executed on the ground that the witnesses were residents of that place and that the defence must turn upon local evidence (p) Another ground of transfer is a pecuniary or other personal interest in the presiding Judge (q) or a reasonable apprehension of the litigant that he will not get a fair trial (r)

Notice—No notice is necessary if the Court acts *suo motu*. If an application is made notice must be given by the Court and not by the party as in sec 22. The provision as to notice is imperative, and an order for transfer made without notice will be set aside (s) and so will an *ex parte* decree made by a Court to which the suit has been transferred without notice to the defendant (t) On the other hand the Madras High Court treats the matter of notice as one of practice and procedure and holds that notice may be waived (u) and that want of notice is an irregularity which does not invalidate the order of transfer (v)

"At any stage"—These words and the substitution of the word "pending" for instituted settle a doubt as to whether a suit could be transferred or withdrawn after the hearing had commenced. The High Courts of Bombay, Madras, and Allahabad held that a suit could be transferred or withdrawn at any stage even after the hearing had commenced, and even in the course of execution proceedings (w) On the other hand the Calcutta High Court held that there was no power to interfere after the hearing had commenced and no power to transfer an execution proceeding (x) It is now clear that the former view is correct.

"Pending before it"—Under the corresponding section of the Code of 1892 it was held that a District Judge had no power to transfer to a subordinate Court a suit pending before himself (y) Clause (a) confers this power on District Courts and High Courts.

District Court—District Court in this section means a Court of unlimited pecuniary jurisdiction. An order of transfer under this section cannot therefore be made by an Assistant Judge whose pecuniary jurisdiction is limited (z)

Clause (a). "Court subordinate to it"—A decree for dissolution of marriage under the Indian Divorce Act 4 of 1869, made by the Divisional Judge of Nagpur, is subject to confirmation by the High Court of Bombay, but after the Bombay High Court has confirmed the decree, an application for alimony must be made to the Court at Nagpur. The Bombay High Court cannot entertain it, nor can it transfer the application to the

| | |
|---|---|
| (n) <i>Tula Ram v Harjivan Das</i> (1883) 5 All 60 62 | 239 (23) A I 444 |
| (o) | (u) <i>Sankumani v Hoan</i> (1890) 13 Mad 211 |
| (p) | (v) <i>Bellary Free Co v Jenista</i> (1911) 21 Mad L J 829 81 C 7 |
| (q) | (w) |
| (r) | (x) |
| (s) | 7 All 342 |
| (t) | (y) <i>Ashori Mahan v Cal Mahomet</i> (1888) 15 Cal 177 |
| (u) | (z) <i>Nikharam v Gangaram</i> (1893) 13 Bom 654 |
| (v) <i>1 C 500</i> | (2) <i>Ifiji Umar v Cucka Iji</i> (1910) 34 Bom 411 |
| (w) <i>Ganpatrao v Gijir</i> (1925) 84 I C | 61 C 518 |

Nagpur Court for that Court is not subordinate to it (a) A senior Subordinate Judge in the Punjab cannot transfer a case from his Court to that of a junior Subordinate Judge, for the latter is not subordinate to him (b)

Clause (a). "Suit."—The High Court of Allahabad has held that the word 'suit' in this clause includes proceedings in execution (c) This is no doubt correct for an execution proceeding is a proceeding in a suit, and would therefore not be included in the expression "other proceeding" which must therefore have the same meaning as 'all proceedings in any Court of civil justice' in section 141 See note on that section The words 'dispose of' have been added evidently with reference to miscellaneous proceedings.

Clause (b). "Other proceedings"—The words "other proceedings" include an insolvency petition (d), but not a proceeding under sec 476 of the Code of Criminal Procedure (e) The Madras High Court has held that a District Court has power under this clause to withdraw to its own file proceedings in execution transmitted by it to a subordinate Court (f)

Competent Court—The Court to which a suit is transferred must possess pecuniary jurisdiction but it is not necessary that it should have territorial jurisdiction (g) The Chief Court of Oudh has held that it is not necessary that the transferee Court should have territorial jurisdiction, and that competence means intrinsic competence and refers to the subject matter of the case and its pecuniary value (g1) If a suit pending in a Small Cause Court is transferred to a Subordinate Judge's Court it must be within the pecuniary limits of the jurisdiction of the Subordinate Judge If the Subordinate Judge is invested with Small Cause Court powers, it matters not that those powers fall short of the value of the suit This has been decided by the Bombay High Court (h) dissenting from a Madras decision which made the competency of the Court depend upon its Small Cause Court powers (i)

Illustration

A suit for Rs 900 is pending in the Small Cause Court at Ahmedabad Application is made to transfer it to the Court of the second class Sub judge at Ahmedabad whose jurisdiction extends to Rs 5000, but who is invested with Small Cause Court powers up to Rs 300 The High Court has power to make the transfer, for the suit is within the pecuniary jurisdiction of the second class Sub judge *Parshotumdas v Bhagubhai* (1932) 56 Bom. 387, 139 I C 194, (1932) A B 486

Again the competency of the Court is not affected by the circumstance that the Small Cause Court has under sec 16 of the Provincial Small Cause Courts Act preferential jurisdiction, and a suit may be transferred from a Small Cause Court to the Court of a Subordinate Judge having jurisdiction within the same local limits (j) But the High Court has no power to transfer an insolvency petition made under the Provincial Insolvency Act, 1920, and pending before a Subordinate Judge to the Judge of the High Court exercising insolvency jurisdiction (k)

Re transfer—Clause (b) (iii) gives power to re transfer a suit to the Court from which it was withdrawn There was no such power in the Code of 1882 and the cases in foot note (l) are obsolete

(a) *Wallace v Wallace* (1916) 40 Bom 109 31 I C 331

(b) *Kishan Lal v Jat Lal* (1920) 1 Lah 158 32 I C 352

(c) *Muhammad v Tsamchand* (1905) 47 All 57 85 I C 746 (25) A A 276

(d) *Nasrattani v Akarshedi* (1908) 22 Bom 220

(e) *Pamessar v Pakdari* (1927) 49 All 460 101 I C 247 (27) A A 469

(f) *Vellappa v Subrahmanyam* (1916) 39 Mad 485 21 I C 119

(g) *Kishore Lal v Ra Kishan* (1933) 54 All 624 143 I C 75 (32) A A 600 resting from a contrary opinion expressed in *Pam Daa*

(g1)

(h)

(i)

(j)

(k)

(l)

(m)

(n)

(o)

(p)

(1) *Gurukul v Sadashree* (1929) 52 Mad 57, (28) A M 1091 see also *In the matter of Omer Ahmad Bros* (1926) 4 Rang 554, 100 L C 265 (27) A R 107
(2) *Amir v Pralad* (1902) 24 All 204, *Vandana v Kenney* (1902) 24 All 356

Sub section (4) Court of Small Causes—The High Courts of Allahabad (m), Madras (n), and Patna (o) and latterly also the High Courts of Bombay (p) and Calcutta (q), are agreed that the expression "Court of Small Causes" in sub sec (4) includes a Court vested with the powers of a Court of Small Causes. The High Courts of Bombay (r), and Calcutta (s), at one time held that it was restricted to a Court established under Act 9 of 1887 but those decisions are no longer law.

The provisions of sub section (4) do not constitute the Court to which the suit is transferred a Small Cause Court (t). It derives jurisdiction to try the suit as a Small Cause suit from sec 24 (4) (u), and is deemed to be a Small Cause Court for the purposes of the suit (v) with the result that its procedure in the trial of the suit is governed by the provisions of Act 9 of 1887 (w) and no appeal lies if there is no appeal under that Act (x). The procedure will be that of a Small Cause Court even though the District Judge transferring the suit directs it to be tried as a regular suit, for he has no jurisdiction to give such a direction (y). The decree will not operate as *res judicata* in a suit which the Small Cause Court had no jurisdiction to entertain (z). The same principles apply where on the retirement or transfer of a Subordinate Judge having Small Cause Court powers, the suit is transferred by order of the District Judge to another Judge not invested with Small Cause Court jurisdiction, and no appeal will lie from a decree passed by the latter Judge (a). But if no order of transfers is made, and if on the transfer of a *munsiff* vested with Small Cause Court powers his successor, who is not so invested, takes cognizance of the suit under sec 35 of the Provincial Small Cause Courts Act and tries it as a regular suit, an appeal will lie (b).

Transfer of suit from Presidency Small Cause Court to High Court—See notes to cl 13 of the Letters Patent.

Power of Court to stay suit pending before it—See notes to sec 22 under the same head.

Power of High Court to stay suit pending in another Court.—See note to O 39, r 1, under the same head.

25. [Ss. 20-21] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is

Power of Governor General in Council to transfer suit

satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court

| | | | |
|-----|--|-----|--|
| (m) | | (n) | <i>Tarshobindas v. Bhagobhai</i> (1932) 56 Lon 337, 131 I C 191 (32) A B 406 |
| | | (r) | <i>Sankarappa v. Padmanabha</i> (1915) 38 Mad 25, 17 I C 45 |
| (o) | | (s) | |
| (p) | | (t) | |
| (q) | | (u) | |
| (r) | | (v) | |
| (s) | | (w) | |
| (t) | | (x) | |
| (u) | | (y) | |
| (v) | | (z) | |
| (w) | | (a) | |
| (x) | | (b) | |
| (y) | | | |
| (z) | | | |
| (a) | | | |
| (b) | | | |

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

The object of this section is to empower the Governor General in Council to transfer cases from one High Court to another under certain circumstances. The section proceeds on the analogy of sec. 527 of the Code of Criminal Procedure 1898.

INSTITUTION OF SUITS

26. [S 48] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Institution of suits

Suit—A proceeding that does not commence with a plaint is not a suit (c). The word suit ordinarily means and apart from some context must be taken to mean a civil proceeding instituted by a plaint (c1). The essential provisions as to procedure in suits is enacted in sections 6 to 30 A. Details have been relegated to the rules of procedure in the first Schedule. For institution of suits see O 4 r 1.

Changes introduced by the section—The words "or in such other manner as may be prescribed" are new. No other manner of instituting suits has hitherto been prescribed.

SUMMONS AND DISCOVERY

27. [S 64] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summons to defendant

Issue and service of summons—See O 5 below.

28. [S 85] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

Service of summons where defendant resides in another province

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

See note to O 5 r 23.

29. [S 650A] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts.

Service of foreign summonses

(c) *Indra v. Venkata dora* (1891) 14 Mad. 100; *Indra v. Venkata dora* (1891) 14 Mad. 100; *Indra v. Venkata dora* (1891) 14 Mad. 100.

(c1) *Indra v. Venkata dora* (1891) 14 Mad. 100; *Indra v. Venkata dora* (1891) 14 Mad. 100; *Indra v. Venkata dora* (1891) 14 Mad. 100.

Sub section (4) Court of Small Causes—The High Courts of Allahabad (m), Madras (n) and Patna (o) and latterly also the High Courts of Bombay (p) and Calcutta (q) are agreed that the expression 'Court of Small Causes' in sub sec (4) includes a Court vested with the powers of a Court of Small Causes. The High Courts of Bombay (r) and Calcutta (s) at one time held that it was restricted to a Court established under Act 9 of 1887 but those decisions are no longer law.

The provisions of sub section (4) do not constitute the Court to which the suit is transferred a Small Cause Court (t). It derives jurisdiction to try the suit as a Small Cause suit from sec 24 (4) (u) and is deemed to be a Small Cause Court for the purposes of the suit (t) with the result that its procedure in the trial of the suit is governed by the provisions of Act 9 of 1887 (u) and no appeal lies if there is no appeal under that Act (x). The procedure will be that of a Small Cause Court even though the District Judge transferring the suit directs it to be tried as a regular suit, for he has no jurisdiction to give such a direction (y). The decree will not operate as res judicata in a suit which the Small Cause Court had no jurisdiction to entertain (z). The same principles apply where on the retirement or transfer of a Subordinate Judge having Small Cause Court powers the suit is transferred by order of the District Judge to another Judge not invested with Small Cause Court jurisdiction and no appeal will lie from a decree passed by the latter Judge (a). But if no order of transfer is made and if on the transfer of a magistrate vested with Small Cause Court powers his successor, who is not so invested, takes cognizance of the suit under sec 35 of the Provincial Small Cause Courts Act and tries it as a regular suit, an appeal will lie (b).

Transfer of suit from Presidency Small Cause Court to High Court—See notes to cl 13 of the Letters Patent

Power of Court to stay suit pending before it—See notes to sec 23 under the same head

Power of High Court to stay suit pending in another Court—See note to O 39 r 1, under the same head

25. [Ss. 20-21] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection he shall make a report to the Governor-General in Council, who may, by notification in the *Gazette of India*, transfer such suit, appeal or proceeding to any other High Court

Power of Governor General in Council to transfer suit

- | | | | | | |
|-----|--------|---|---|-----|---|
| (m) | " | " | " | () | <i>Parshoti ndas v. Bhagubhai</i> (1932) 56 Bom 34 133 I C 121 (J) A B 4nd |
| | | | | () | <i>Sankaranna v. Jagat Ram</i> (1915) 34 Mad 25 1st I C 45 |
| | | | | (n) | " |
| (w) | | | | (z) | |
| (o) | | | | () | <i>Sankhram v. Jagannatha Chetna</i> |
| (p) | | | | () | <i>Dhire Lal v. Hargis Lal</i> (1914) 14 All L J 853 26 I C 26 |
| (q) | 11 1 1 | | | (u) | <i>Kalcher v. Datt Mishra</i> and (1923) 5 All 24 1st Chhara v. Jethva Lal (1928) 50 All 810 215 I C 1st (J) A 4 50 |
| (r) | " | | | (b) | <i>Bhaji v. Bhat</i> (193) 54 All 1st 133 I C 332 (31) A A 4 11 |
| (s) | " | | | | |
| (t) | " | | | | |

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case

The object of this section is to empower the Governor General in Council to transfer cases from one High Court to another under certain circumstances. The section proceeds on the analogy of sec 527 of the Code of Criminal Procedure, 1898

INSTITUTION OF SUITS

26. [S 48] Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed

Institution of suits

Suit — A proceeding that does not commence with a plaint is not a suit (c). The word suit ordinarily means, and apart from some context, must be taken to mean a civil proceeding instituted by a plaint (c1). The essential provisions as to procedure in suits is enacted in sections 26 to 35 A. Details have been relegated to the rules of procedure in the first Schedule. For institution of suits, see O 4, r 1

Changes introduced by the section — The words "or in such other manner as may be prescribed" are new. No other manner of instituting suits has hitherto been prescribed

SUMMONS AND DISCOVERY

27. [S 64] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed

Summons to defendant

served in manner prescribed

Issue and service of summons — See O 5 below

28. [S 85] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province

Service of summons where defendant resides in another province

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

See note to O 5 r 23

29. [S. 650A.] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts

Service of foreign summons

(c) *Teak* v. *Teak* (1891) 18 M.L.J. 111
 250 *Upadhyaya* v. *Teak* (1891) 18 M.L.J. 111
 23 (a) *J. Ram* v. *K. Raju* v. *J. Ram* (1891) 18 M.L.J. 111

(c1) *Hansraj* v. *Om* (1891) 18 M.L.J. 111
 13 54 All 106 (33) A.L.J. 63

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts

By notification—For notifications issued under this section see General Statutory Rules and Orders

30. [New] Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

Power to order discovery and the like

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence,

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid,

(c) order any fact to be proved by affidavit

Delivery and answering of interrogatories—See O 11 below

Admission of documents and facts—See O 12 below

Discovery and inspection—See O 11 below

Production impounding and return of documents—See O 13 below

Summonses to persons to give evidence—See O 16 below

Proof of facts by affidavits—See O 19 below

31. [New] The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects

Summonses to witnesses

32. [New] The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

Penalty for default

(a) issue a warrant for his arrest,

(b) attach and sell his property,

(c) impose a fine upon him not exceeding five hundred rupees ;

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

See O 16, rr 10 13, r 17, and r 21

"To whom a summons has been issued"—This section applies only if a summons has been issued. It does not apply where a person is merely ordered to produce a document (d)

JUDGMENT AND DECREE.

33. [S 198.] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment and decree

See O 20, r 1

On such judgment a decree shall follow—Under this section it is imperative that a decree shall follow the judgment and as it is the duty of the Court to comply with the provisions of the law, the Court's failure to prepare a decree should not deprive a party of his right of appeal. The appeal should not be dismissed and the appellant should be allowed time to move the lower Court to prepare a decree (e)

INTEREST.

34. [S. 209.] (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit

Interest

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie

Scope of the section—This section applies only where the decree is for the payment of money. It does not apply when the decree is for the enforcement of a mortgage or charge. See notes below under the head Interest in suits for enforcement

(d) *Kumar Jamesheer v. Jans J. Knath* (1 N. 3141) 51 Ind. L. J. 506, 55 S. L. C. 521
(e) *Manoharlal v. Nanak Chand* (1919) P. R. no 66 p. 165 22 I. C. 479

of mortgage." There is no analogy between interest awarded under this section and mesne profits (f)

The three divisions of interest—Interest that may be awarded to a plaintiff in a suit for money may be divided into three heads, according to the *period* for which it is allowed, namely—

- (1) interest accrued due *prior to the institution of the suit* on the principal sum adjudged (as distinguished from the principal sum claimed),
- (2) additional interest on the principal sum adjudged, from the *date of the suit* to the *date of the decree*, 'at such rate as the Court deems reasonable',
- (3) further interest on the aggregate sum adjudged, i.e., the principal sum *plus* interest, from the *date of the decree* (i) to the *date of payment* or (ii) to such earlier date as the Court thinks fit, "at such rate as the Court deems reasonable"

Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (g) It applies only to the second and third heads

I Interest prior to the date of suit.—Interest antecedent to suit is not a matter of procedure but a brief note on the subject will not be out of place The law on the subject may be considered under the following two heads

- (1) where there is a stipulation for the payment of interest at a fixed rate,
- (2) where there is no stipulation at all for the payment of interest

1 If there is a stipulation for the rate of interest, the Court must allow that rate up to the date of the suit, however high it may be [Usury Laws Repeal Act 28 of 1855, s 2], subject to the two following exceptions (1) if the rate is penal, the Court may award interest at such rate as it deems reasonable [Indian Contract Act, 1872, s 74], and (2) even if the rate is not penal, the Court may reduce it if the interest is excessive and the transaction was substantially unfair [Usurious Loans Act 10 of 1918, s 3]

2 If there is no express stipulation for payment of interest, the plaintiff is not entitled to interest except in the following cases —

(i) *Mercantile usage*—Where it is allowed by mercantile usage (h), but such usage must be pleaded and proved (i)

(ii) *Statutory right to interest.*—Interest is payable where a right to it, or an authority for its allowance or payment, is conferred by statute Section 80 of the Negotiable Instruments Act 26 of 1881 provides that when no rate of interest is specified in a promissory note or bill of exchange, the Court shall, notwithstanding any agreement relating to interest between the parties, award interest at the rate of 6 per cent per annum from the date on which the amount claimed became due and payable Similarly the Interest Act 32 of 1839 enacts that where there is no stipulation to pay interest, but the amount claimed is a sum certain (as distinguished from unascertained damages), and is payable at a certain time by virtue of some "written instrument," the Court (j) may allow interest at a rate not exceeding the current rate of interest from the date on which

| | |
|--|---|
| <p>(f) (g) (h)</p> | <p>M I A 260 (Calcutta) (i) <i>Dwarath v Dwarchand</i> (1930) 32 Bom L R 404 125 I C 911, (30) A. B. 444 (j) This does not apply to an executing Court <i>Hojarth Shipping Co., Ltd v Mutsu Busan Kaisha Ltd</i> (1926) 53 Cal 733, 68 I C 238, (26) A C 1119</p> |
|--|---|

the amount became payable If no time is fixed for the payment of the amount, the Court may award interest at the rate aforesaid from the time the creditor demands payment in writing intimating to the debtor that interest will be claimed from the date of such demand up to the date of payment The provisions of the Interest Act 32 of 1839 are in the main a reproduction of the provisions of Lord Tenterden's Act [3 and 4 Wm 4, c 42, s 48] The House of Lords in *London, Chatham and Dover Railway Co v South Eastern Railway Co* (1), the modern leading case on interest held that the 'sum certain' within the meaning of that Act must be a certain sum which is one absolutely and in all events due and not a mere provisional payment to be made by one party to the other

(m) *Implied agreement*—Where an agreement to pay interest can be implied from the course of dealing between the parties (l)

In the *London, Chatham and Dover Railway Company's* case, the House of Lords held that interest cannot be given by way of damages for detention of a debt

II Interest from date of suit to date of decree.—The rate of interest from the date of the suit to the date of the decree is in the discretion of the Court (m), and this discretion is not excluded even if a fixed rate is mentioned in the contract as payable up to realization' (n) But though the rate of interest for the aforesaid period is discretionary, the Court should, in the exercise of that discretion, award interest at the contract rate, unless it would be inequitable to do so (o) The Court may under this head award interest in a suit for money, although interest is not specifically asked for in the plaint (p) [see O 7, r. 7]

It is well established that no interest can be allowed on damages for any period prior to the suit (q), but there is a conflict of decisions whether interest can be allowed under this section on damages from the date of the suit, it being held in some cases that it can be allowed (r), and in some that it cannot be allowed (s)

Where the High Court has refused to exercise its discretionary power to allow interest from date of suit, the Judicial Committee as a rule will not interfere (t)

III Interest from date of decree to date of payment.—The rate of interest from the date of the decree to the date of payment is also in the discretion of the Court The plaintiff getting the security of a decree has his interest reduced in the generality of cases" (u) Where the rate of interest charged and decreed was 24 per cent the Lahore High Court refused to allow interest after decree (v) If the Court awards interest from the date of the decree but no rate is specified, the decree holder will be entitled to interest at the Court rate, which is usually 6 per cent (w) But if no such interest is awarded by the decree, it will be deemed to have been refused (x), see sub sec (2) In a case decided by the Privy Council in 1878 it was held that when the decree is silent about future interest it cannot be recovered in execution proceedings

(l) (1833) A C 429 See Halsbury, Vol 21, 1 p 37 39

(m) " "

(n) " "

(o) " "

(p) " "

(q) " "

(r) " "

(s) " "

(t) " "

(u) " "

(v) " "

(w) " "

(x) " "

(q) *Framis v Commissioner of Customs* (1870) 7 Bom R C A C 89

(r) " "

(s) " "

(t) " "

(u) " "

(v) " "

(w) " "

(x) " "

(y) " "

(z) " "

(aa) " "

(ab) " "

(ac) " "

to the contrary in *Jamachandra v Deru* (1880) 12 Mad 485 is no longer law
(o) *Orde v Skinner* (1880) 3 All 91 100, 107, 71 A 106 210 11
(q) *Ispahani v Harphel* (1921) 2 Lah 256 64 I C 846 (21) 41 1 See also *La a Chhay mal Dey v Lr 55 Jan Lal* (1880) 22 I A 109 *Chattralwaj v Ambarsinh* (1931) 55 I am Co (31) A B 542 *Jarashram v Secretary of State* (1932) 34 I am L R 124, 130 I C 200 (20) A B 319

(y) *181 130 Jan v 11 Jan C 1000, 1001 A PC 80*
(z) *Umra Chund v Fatima* (1931) 18 Cal 164, 180 171 A 201
(aa) *Bulaki v Parycha* (1920) 109 I C 416 (28) A L 811
(ab) *Fani Lal v Ichari* (1971) 7 B L P 419 30
(ac) *Amli v Sridhar* (1923) 45 Mal L J 607, 75 I C 366 (24) A M 102 [decree silent as to interest on costs see s 35 (3)].

but the decree holder may by suit recover damages for the detention of the decretal amount (y) That was a case under the Code of 1839 Sec 193 of that Code which relates to interest did not contain any such provision as is contained in subsec (2) of the present section This provision was first introduced by Act 7 of 1888 However in cases decided under the present Code the Calcutta High Court allows interest by way of damages for wrongful detention of money due irrespective of the provisions of the Interest Act ()

Illustration of the above rules—*A* lends Rs 5000 to *B* to be repaid with interest at the rate of 18 per cent per annum. In a suit by *A* to recover the amount of the loan with interest at the rate aforesaid it is contended on behalf of *B* that the rate of interest is penal (Contract Act s 74) The Court finds that the rate of interest is not penal nor is the transaction substantially unfair Hence—

- (1) as regards interest [on Rs 5000] from the date of the loan to the date of the suit the Court *must* allow it at the contract rate that is at the rate of 18 per cent per annum. Usury Laws Repeal Act s. 2
- (2) as regards interest [on Rs 5000] from the date of the suit to the date of the decree the Court *may* allow it at the contract rate that is at the rate of 18 per cent per annum or it may in its discretion allow it at a lower rate or may disallow it altogether
- (3) as regards interest from the date of the decree to the date of payment on the aggregate sum adjudged [i.e. Rs 5000 plus the interest adjudged under the above two heads] the Court may allow interest at such rate as it deems reasonable This rate is usually 6 per cent As to interest on costs see s 30 cl (3)

Interest in mortgage suits—The law on the subject is now codified in O 34 r 11 The rate of interest in mortgage suits is determined by O 34 and not by this section (1)

Rule of damdupat—This is a rule of Hindu law according to which interest exceeding the amount of the principal sum cannot be recovered at any one time This rule is in force in the Bombay Presidency (a) including Sind (b) and in Berar (c) and in the presidency town of Calcutta (d) but it is not recognised outside that town (e) It is also not recognised in the Madras Presidency (f) The meaning of the rule is that interest must not exceed the principal so if a Hindu lends Rs 500 to another Hindu and the loan is not repaid till the interest amounts to Rs 600 the lender is not entitled to recover more than Rs 500 for principal and Rs 500 for interest But the Court may under this section award further interest to the lender from the date of the suit though the aggregate interest may thereby exceed Rs 500 The reason is that the rule of damdupat ceases to operate from the date of the suit (g) But this is entirely in the discretion of the Court (h) It has been held by the High Court of Madras that the rule of damdupat does not apply where interest is claimed under a mortgage governed by the Transfer of Property Act 1882 (i) A different view has been taken by

(y) *Seth Gopal Das v. Murl and Zalim* (18 8)

(2) *A* 3 Cal 61 51 A 9

(21) " " " " " " " " " " " "

(a) " " " " " " " " " " " "

(b) " " " " " " " " " " " "

(c) " " " " " " " " " " " "

(d) " " " " " " " " " " " "

(e) " " " " " " " " " " " "

(f) " " " " " " " " " " " "

(g) *Abdulla Chunder v. Poonce Chunder* (188) 14

Cal 781

(c) *Het Narain v. Pandey* (1883) 12 C L R 590

(f) *Anna v. Raghunath* (18 1) 6 M H C 400

(g) *Dhondhat v. Lary* (1794) 2 Bom 86 *Hari Lal Jhalli* in the matter of (1900) 23 Cal 1769

(h) " " " " " " " " " " " "

(i) " " " " " " " " " " " "

() " " " " " " " " " " " "

() " " " " " " " " " " " "

() " " " " " " " " " " " "

() " " " " " " " " " " " "

the High Court of Bombay (j) and Calcutta (k). The rule of *dampasit* does not apply where the mortgagee has been placed in possession and is accountable for the rents and profits received by him as against the interest due (l). See Mulla's Hindu Law, Chapter 29.

COSTS

35. [Ss 218-221 Jud Act, 1890, s 5, R. S. C., O 55, r 1]

Costs

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

Subject to such conditions and limitations as may be prescribed. Prescribed means by rules contained in, or made under the Act, see sec 2 (10) and (18). The following rules contain express provision as to costs—O 11 r 3 (costs of interrogatories), O 12 r 2 (proof of documents), O 21, r 72 (3) (application to set aside a sale), O 23, r 1 (3) (withdrawal of suit), O 24 r 4 (costs on payment into Court), O 12, rr 4 & 5 (next friends and guardians), O 33, rr 10 11 & 16 (pauper suits), O 35 r 1 (inter pleader suits), O 34 (mortgage suits). But nothing in the rules as to pauper suits limits the discretion of the Court under sec 35 to apportion costs (m). If a suit has been referred to arbitration and the award makes no provision as to costs the Court may make an order as to costs of the arbitration under Sch. II para 13 and may also make an order as to costs of the proceedings in Court with reference to the arbitration; but it is debarred by para 13 of Sch. II from making an order as to the costs of the suit prior to the reference (n).

The provisions of any law.—The discretion to award costs is limited by certain enactments e.g., the Presidency Small Cause Courts Act 15 of 1882 sec 22 (1); the Land Acquisition Act I of 1894 sec 27 (p).

Costs as penalty.—Costs cannot be imposed as a penalty besides the costs of suit (q). It is not according to law to give to a party by way of damages the costs as between attorney and client of the litigation in which the damages are

(j) *Jeevanbai v. Manorudas* (1911) 35 Bom 179.

8 I C 612.

(k) *Kunja Lal v. Nartamba* (1915) 4 Cal. 86.

31 I C 6.

(l) *Sundaravati v. Javarant* (1900) 24 Bom 114.

(m) *Jetha v. Gulrai* (1884) 8 Bom 511.

(n) *H. v. Goya* (1913) 54 All 1136 I C.

83 (3) A A 143.

(o) *Manmatha v. An. Zafer* (1901) 56 Cal.

44 116 I C 36 (2) A C 26.

(p) *Inspector Collector Salatie v. Inamdar* (1913) 53 I C 114 I C 33 (2) A B 63.

(q) *H. L. Mait v. Larter* (1881) 17 C D 22.

recovered (r) The object of awarding cost is to indemnify a party against the expense of successfully vindicating his rights in Court (s) The section does not confer any disciplinary jurisdiction, and a legal practitioner cannot be ordered, personally to pay the costs of an application which is an abuse of the process of the Court (t) But a solicitor who purports to act for a non-existent party is personally liable to pay costs (u) As to compensatory costs in cases of false or vexatious claims or defences, see sec 35A below

"Costs of and incident to suits"—This expression includes not only costs of suits, but costs of applications in suits. If there has been an invalid reference to arbitration out of Court, the Court cannot make an order for costs incurred before the arbitrator as they are not costs of the suit (v) As to costs of applications, the Court may make an order directing either party to pay the costs of the other, or it may make no order as to costs or it may reserve costs or make costs, costs in the cause

Costs of this suit—The expression "costs of this suit" means all costs incurred in the suit. Therefore if one of the defendants is ordered to pay plaintiff's "costs of the suit" and no qualifying words are added the costs include costs which the plaintiff has incurred by impleading another defendant against whom the suit has been dismissed with costs (x)

The general order for costs of the suit does not displace a specific order for costs made on an application (y) If it is intended to supersede previous interlocutory orders for costs, that fact should be stated in the final decree (y) The practice of the Calcutta High Court is that orders for costs made by the Court of appeal during the progress of the suit are taxed forthwith and execution levied therefor, but interlocutory orders in the original Court await taxation at the final termination of the suit (z) In a consent decree, if the order as to costs is intended to supersede previous interlocutory orders as to costs, that fact should be stated specifically as one of the terms of the agreement, that the parties have agreed to abandon the rights which had already accrued to them under the previous orders of the Court (a) If the order is 'costs reserved' those costs remain to be dealt with at the hearing. If the order is 'costs costs in the cause,' the Bombay High Court at one time held that the Court had a discretion to deal with those costs in any manner it thought fit (b), in other words, costs costs in the cause stood on the same footing as costs reserved except that in the case of costs costs in the cause if nothing was said about those costs in the final judgment they were taken to be included in the costs of the suit (c) But these decisions are no longer law and it has now been held that where the costs of an application are made costs in the cause, the party to whom the costs of the suit are awarded is entitled as a matter of course to the costs of the application (d) If the order is 'costs to abide the result' the Court has a discretion to apportion costs at the hearing, but if the order is "costs to follow the event" or "costs to abide and follow the result" the Court has no discretion and the successful party is entitled to his costs (e)

Costs to be in the discretion of the Court—The section provides that the costs of suits and applications shall be in the discretion of the Court. Such discretion must be a judicial discretion to be exercised on legal principles, not by chance,

(r) *Cockburn v Edcards* (1881) 18 C D 449

(s) *Mahindra v Iswari* (1900) 48 Cal 427, 441

(t) *Charlton v Eastman* (1903) 52

(u) AIL 619 125 I C 477 (30) A A 2 5

(v)

(w)

(x)

Cal 797, 10 I A 113

(y) *Kedarnath v Johormull* (1930) 57 Cal 469

151 C 404 (30) A C 465

(z) *Kedarnath v Johormull supra*

(a) *Kedarnath v Johormull supra*

(b) *Templeton v Lurie* (1901) 25 Bom 230

(c) *Joshi v Teja* (1914) 46 Bom L R 282

80 I C 263, (24) A D 398

(d) *American Trading Co v Bird & Co* (1926)

50 Lom 430 97 I C 131 (26) A D 596

(e) *Godarathi v Godarathi* (1915) 33 Mad 470,

29 I C 203

medley, nor by caprice nor in temper (f) In the exercise of this discretion the Court is not confined to the consideration of the conduct of the parties in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation (g) The discretion conferred upon the Court by this section is very wide (h) Thus the Court may order the costs to be paid by the parties in definite proportions, or it may order one party to pay to the other a fixed sum in lieu of taxed costs (i) Similarly it may disallow costs to a successful plaintiff, as where the rate of interest claimed by the plaintiff and allowed to him under the Usury Laws Repeal Act (j) is usurious (k), or it may make a successful plaintiff pay the whole costs of the other side (l) It may also allow the expenses of witness though not summoned through the Court (m) But though the discretion conferred upon the Courts by this section is wide, it is a judicial discretion, and must be exercised on fixed principles, that is according to the rules of reason and justice not according to private opinion (n) or benevolence (o) or even sympathy (p) Where there are no materials before the Court on which it can exercise its discretion, it is not justified in depriving a successful party of his costs (q) The following are the leading rules on the subject —

1 *Costs shall follow the event*—The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him (r) The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation (s) A refusal to go to arbitration is no ground for refusing costs (t), nor is the fact that the plaintiff brought his action without previous notice to the defendant (u) When an offer of compromise is made which the Court considers proper for acceptance but it refused the Court as a general rule relieves the party making the offer from payment of costs incurred after the date of the offer but an offer which the Court considers insufficient is no bar to a plaintiff's right to costs (v) In an account suit costs generally follow the result of the account unless the defendant has falsely denied his liability to account (w) But if the right to claim partition is wrongly disputed the disputing party will be made liable for costs unnecessarily incurred (x) An assignee of a decree made respondent without his consent, but who actively supports the decree under appeal, will be made liable for costs of the appeal

(f) *Huzley v West London Ex Ry* (1886) 17 Q B D 373 376 *Justain Hull v Jauhl* (1910) 4 C W N 352 357 58 I C 4 1

(g) *Bhugobati v Malomet* (1903) 7 C W N 647 *Uperdra v Basar* (1904) 9 C W N 29 99 86 I C 3 1 (3) A C 563

(h) As to discretion of taxing master see *Nadarukh v Banath* (1911) 23 Bom L R 854 63 I C 37 (1) A B 87

(i) 1

(j) "

(k) "

(l) "

(m) "

(n) "

(o) "

(p) "

(q) "

(r) *Jerningham v Jervis* (1853) 4 K B 29 231

(s) *Cecil v Carr* (1853) 4 K B 29 231

(t) *Chandam v Morola* (1884) 13 B M 474

(u) *Kuppuswami v Zamindar of Asahar*

(1904) 97 Mad 341 *Cooper v Wt Hngha n* (1880) 15 Ch D 501 *Ideshar v Manroop* (1885) 13 I A 31 (successful plaintiff) *Monahur v Ramana th* (1888) 3 Cal 484 *Bh banesari v Leonon* (1880) 12 Cal 18 12 I A 137 (successful defendant) *Foster v Farq har* (1883) 1 Q B 564 *Huzley v West Lo n Extension P J Co* (1889) 14 App Cas 63

(v) *Bartock v Farnsey Urban District Council*

(w) "

(x) "

(y) *Jenness v Day and Martin* (1887) 55 L T 161

(z) *Harinath v Krishna* (1888) 14 Cal 147 13 I A 123 *Hvam v Lenal Stone Co* (1910) 4 C W N 352 357 58 I C 4 1

(1) *Epina v Kari v Promotha Na A* (1903) 9 I A 123 123 I C 129 (3) A P 2 6

(2) *Satya Kumar v Satya Kurlal* (1910) 19 Cal L J 503 31 C 247

but not of the lower Court (y) A successful party is not to be deprived of his costs merely because the suit proceeds *ex parte* (z) A successful defendant cannot be deprived of his costs merely because he refused before the filing of the suit to disclose the evidence by which he proposed to substantiate his defence (a) It has been held to be a good reason for depriving a successful respondent of his costs that the appeal was filed on the strength of a decision which was overruled after the filing of the appeal (b)

It has been held by the House of Lords that the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but where the action involves *separate issues*, whether arising under different causes of action or under one cause of action, the word "event" should be read distributively and the costs of any particular issue should go to the party who succeeds upon it. An issue, in this sense, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part. A sued B for 164*l* for the price of 34 bags of goat hair sold to B. B, by his defence, pleaded (1) that the goods were not according to sample and were consequently worth 24*l* less, (2) that there was an overcharge on the bags for 2*l* and (3) payment into Court of the balance. B succeeded on the first issue but failed on the second. The Court of first instance gave judgment for A for 2*l* beyond the amount paid into Court with costs. On appeal it was held by the House of Lords, reversing the decision of the Court of Appeal, that the issue as to quality (1st issue) was an 'event' within the meaning of the expression 'the cost shall follow the event', and that B was entitled to the costs of that issue (c)

2 Where a party successfully enforces a legal right and in no way misconducts himself, he is entitled to costs as of right (d). But if he acts oppressively he may be deprived of his costs though successful (e)

3 The fact that a successful defendant has set up the Gaming Act as an answer to the plaintiff's claim is not a good cause for depriving him of his costs (f). Nor is the fact that he has pleaded the Statute of Limitations (g)

4 If a plaintiff substantially succeeds, he is entitled to his costs, though he may not have got the precise form of relief he wanted (h) and even though the damages awarded to him have been reduced (i)

5 If a plaintiff recovers a less (but not a trifling less) amount than he claimed in the Plaint, his costs should be apportioned according to the amount recovered and not to the sum claimed (j). As to the rule in the Privy Council see the undernoted case (k). The proper mode of apportionment is to calculate the amount of the costs of the suit as laid and then divide the entire sum between the parties according as they have respectively succeeded or failed (l)

| | | |
|-----|-------------|--|
| (j) | " " " " " " | (C A) <i>Luximbat v Padhobai</i> (1918) |
| (z) | " " " " " " | 47 Bom 347 47 I C 762 |
| (a) | " " " " " " | (e) <i>Parkinson v College of Ambulance</i> (19 5) |
| (b) | " " " " " " | 2 K B 1 17 |
| (c) | " " " " " " | (f) <i>Gravelle v Firth</i> [1903] 72 L J K B 152 |
| (d) | " " " " " " | (C A) " " " " " " |
| | " " " " " " | (g) " " " " " " |
| | " " " " " " | (h) " " " " " " |
| | " " " " " " | (i) " " " " " " |
| | " " " " " " | (j) " " " " " " |
| | " " " " " " | (k) <i>Grish Chunder v Soshi Shikharisear</i> (1900) |
| | " " " " " " | 27 Cal 951 27 I A 110 |
| | " " " " " " | (l) <i>Leclie v Joy Gobindo</i> (1881) 7 CLR 114 |

6 Where a plaintiff succeeds on part of his claim, but fails on the most important and expensive heads of controversy, he may be made to pay the whole costs of the suit to the defendant (m)

7 Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs (n) A successful party will be deprived of the costs of issues which he has unnecessarily raised (o)

8 A successful party ought not to be deprived of part of his costs because some of his witnesses were guilty of exaggeration (p)

9 A person wrongfully made a party should get his costs (q)

10 Where both the parties advanced pleas far in excess of their legal rights each party will be made to bear his own costs (r)

11 Separate costs should not be allowed to defendants if the defence is common to all, or their interests are the same (s)

12 Where two defendants join in defending an action, and judgment is entered for one and against the other, the successful defendant is prima facie entitled to receive from the plaintiff half the costs incurred in the joint defence (t)

13 Where two plaintiffs join in one action, claiming for separate and distinct causes of action, and judgment is entered in favour of one plaintiff and against the other, the successful plaintiff is entitled to recover from the defendant the whole of his general costs of the action, and the defendant is entitled to recover from the unsuccessful plaintiff the costs occasioned by his joinder as plaintiff (u)

14 Where the decree of the lower Court is confirmed by the appellate Court the mere fact that the grounds upon which the confirmation proceeds are not the same as the ratio decidendi of the Court below is no ground for departing from the rule that, the costs shall follow the event (v)

15 Where a third party with no sufficient reason appears and defends an action separately, he must bear the costs of so doing, even though the plaintiff is unsuccessful in the action (w)

15A *Costs in a partition suit*—It is a general rule that up to the passing of a preliminary decree in a partition suit each party will bear his own costs unless there are exceptional circumstances such as unnecessary costs incurred by a frivolous defence (x)

16 *Costs in an administration suit*—See Williams on Executors 12th ed., vol 2, p 1304 *et seq* Ingpen on Executors 2nd ed p 352 *et seq* Daniell's Chancery Practice, 8th ed., p 1075, and the undermentioned case (y)

- | | | | | | | |
|-----|--|---|---|---|---|---|
| (m) | " | " | " | " | " | (f) <i>Peasmont v Senior</i> (1903) 1 K. B. 28* |
| (n) | " | " | " | " | " | (u) <i>Isacount Gort v Porney</i> (1846) 17 Q. B. D. 625 |
| (o) | " | " | " | " | " | (v) <i>Peck v Gurney</i> (1873) J. R. 6 H. L. 377 413 414 But see <i>Fischer v Kama</i> & <i>Nicker</i> (1876) 8 M. L. A. 170 |
| (p) | " | " | " | " | " | (w) <i>Sowendra Mohun v Murardal</i> (1870) 24 C. W. N. 888 59 I. C. 541 |
| (q) | T. 13. | " | " | " | " | (x) <i>Diddar (Shi Khen v Bhawani Sahas</i> (1907) 34 Cal. 170 <i>Neta Kumar v Neta Anupal</i> (1909) 10 Cal. L. J. 263 2 I. C. 247 <i>Amala Prasad v Ford</i> (1915) 42 Cal. 451 24 I. C. 446 <i>B. pin Eckari v Iva</i> <i>Pranodha N. A.</i> (1911) 9 Ind. 773, 125 I. C. 171 (31) A. I. 336 |
| (r) | " | " | " | " | " | (y) <i>National Insurance Co., Ltd v Nessim</i> (1921) 55 Cal. 447 452, 119 I. C. 21 (22) A. C. 677 |
| (s) | <i>Francisco v Iba</i> (1904) 17 W. I. 184 (costs on defence) <i>Kassila v J. Karre</i> (1871) 17 W. R. 70 (separate interest) <i>Sah Mathan Lall v Shree K. Shen</i> (1875) 12 M. L. A. 157 | | | | | |

- 17 *Costs in a partnership suit*—See Lindley on Partnership, 9th ed, pp 627 629
 18 *Costs of mortgagee*—See Fisher on Mortgage, 7th ed, p 752 *et seq*
 19 *Costs of trustee*—See Lewin on Trusts, 13th ed, p 1310 *et seq*
 20 *Costs of proceedings in Probate Court*—See Ingpen on Executors, 2nd ed, pp 97 99

Co defendants—The Court may order one defendant to pay the costs of another defendant (z) In a suit against a partnership of several partners some of whom admitted and some of whom denied the partnership, those who denied were ordered to pay the costs of those who admitted (a)

Discretion not to be delegated—The discretion given to the Court under this section cannot be delegated to the Taxing Officer (b)

Costs against person not a party to suit—Under the Code of 1882 it was held that an order for costs cannot be made against a person who is not a party to the suit (c) The decision, however, turned upon the phrase 'party to the suit' which is omitted in the present section A Full Bench of the Allahabad High Court has observed that the omission is significant and that the present section has a wider scope (d) But, apart from cases where a next friend has been made liable for costs, there is no reported decision in which an order has been made for costs against a person not a party to the suit Persons interested on whose behalf a suit is brought under O 1, r 8, cannot be ordered to pay costs (e) As regards an action for costs against a third person on the ground that he was the mover of and had an interest in the suit it has been held by the Privy Council that such an action cannot be maintained in the absence of malice and want of probable cause (f)

"Out of what property"—The Court is not bound to order costs to be paid out of the estate Such an order is generally made in favour of trustees and in probate suits when the difficulty of construction is caused by the testator (g)

Costs where relief is claimed against defendants in the alternative—See note under the same head to O 1, r 3

No separate suit for costs—Where a Court has jurisdiction to deal with the question of costs, no separate suit will lie to recover costs, but where it has no jurisdiction to order costs, and costs are incurred they may be made the subject of consideration as to damages in a subsequent suit (h)

Sub section (2).—If the Court does not abide by the rule that costs should follow the event, it should record its reasons (i)

Costs disallowed when delay arises in appeals to the Privy Council—The Privy Council have said that litigants should use all speed to bring their cases to trial and make this injunction effectual by disallowing costs in case of delay in appeals to the Privy Council (j)

() *Tamby v South British Insurance Co*
(1917) 118 L R 1 351 C 88

(a) *Jurjat Chunder v Rongchand* (1881) 8 Cal 811

(b) " " " " " " " "

(c) " " " " " " " "

(d) " " " " " " " "

(e) " " " " " " " "

(f) *I am Coommar Coondoo v Chunder Kanto*
Mooljee (1878) 2 Cal 233 4 I A 23

(g) *Indar Kuar v Jajal* (1889) 15 Cal 725

15 I A 127, *Pe Taramoni Dass* (1900)
29 Cal 553

(h) *Maharam Das v Ajudhia* (1886) 8 All 452

(i) " " " " " " " "

(j) " " " " " " " "

" " " " " " " "

" " " " " " " "

" " " " " " " "

" " " " " " " "

" " " " " " " "

Sub section (3).—The Court may allow interest on costs, but if the decree is silent as to interest, it cannot be given in execution (4)

Whether an appeal lies for costs only.—Decisions of a Court of law fall into three classes, namely—

I Decrees [Every decree is appealable (s 96)]

II Appealable orders [s 104]

III Non appealable orders [s 105]

I It is settled that an appeal lies for costs only when the costs are awarded by a 'decree' of the order as to costs involves a question of principle, but it is not settled whether such an appeal lies if no question of principle is involved—A decree contains—

(1) a decision on the rights of parties, hereinafter called item No 1—and

(2) a direction as to costs, hereinafter called item No 2

A party, while appealing from item No 1 or any part thereof, may appeal also from item No 2 He may at the hearing abandon the appeal from item No 1 and may proceed with the appeal from item No 2 (1) But can he appeal from item No 2 alone without appealing from item No 1? In other words, does an appeal lie on a matter of costs only?

All the High Courts are agreed that such an appeal does lie—

(1) where the order as to costs involves a matter of principle (m), as where a formal party to a suit against whom no relief is claimed is made to pay the costs of the suit (n), or

(2) where there has been no real exercise of discretion in making the order as to costs. This may happen when a successful party is deprived of his costs (o) or is made to pay the costs of the losing party (p) If the discretion was exercised in fact, the appellate Court would not interfere merely because it would itself have exercised the discretion differently (q),

(3) where the order as to costs proceeds upon a misapprehension of fact or law (r)

For brevity's sake we shall describe all the three cases as cases where a question of "principle" is involved We may therefore say that it is settled law that an appeal lies for costs only where the order as to costs involves a question of principle But it is not settled whether an appeal lies for costs only, where no question of principle is involved It has been held by the High Court of Calcutta that no appeal lies on a question of costs unless there is a question of principle involved (s) On the other hand, it has been held by the High Court of Bombay that an appeal will lie for costs only whether the order as to costs involves a question of principle or not (t) The ground of the Bombay decisions is that every decree being appealable, any part of it is appealable, though it be the part

(k) *Forester v Secretary of State* (1871) 3 Cal

161 41 A 13

(l) *Landro v Bhatia* (1892) 16 Bom 241

(m) C 21 21 21 21 21 21 21 21 21 21

(n) " " " " " " " " " "

(o) " " " " " " " " " "

(p) " " " " " " " " " "

(q) " " " " " " " " " "

(r) " " " " " " " " " "

(s) " " " " " " " " " "

(t) *Civil Service Co-operative Society v General*

Stram Naryojot Company (1903) 2 K B

750 *Hestry v Crook* (1905) 1 K B 24

Lalman v Chulmani (1911) 41 All

251 41 I C 21 Assistant Collector

Sailett v Damodar Das (1929) 53 Bom

178 114 I C 337 (1931) A B 63 *Lall*

Prasad v Murali Lal (1931) 6 Luck 378

123 I C 165 (31) A O 9

(p) *Mushangan v Moari* (1886) 12 Cal 271

Padhey Sham v Bihari Lal (1914) 41

All 554 45 I C 4

(q) *Parshram v Dorabji* (1900) 2 Bom L R

254

(r) *Janarddas v Bai Kasi* (1892) 16 Bom 676

Justain Hall v Jauil (1912) 24 C W N

352 54 I C 421

(s) *Umash Chandra v Babudis* (1929) 47 Cal 67

56 I C 334 *Junwari Lal v Drup Nath*

(1886) 12 Cal 177 See also *Amiral*

Hossain v Akbarunnissa (1911) 24 Cal

36

(t) *Janarddas v Bai Kasi* (1892) 16 Bom 676

Kushal v Yumachand (1887) 22 Bom

164

relating to costs, whether there is a matter of principle involved or not. But even according to the Bombay decisions, though an appeal may lie for costs only, the appellate Court will not as a rule vary or set aside the order of the lower Court as to costs, unless there is a principle involved and the principle has been violated.

Does a *second* appeal lie on a matter of costs only? It has been held that it does, provided there is a question of law or principle involved (u), see s. 100, cl. (a).

II *Appeal from a direction as to costs contained in an 'appealable order'*—The

s. 104 see s. 104 (2)

III *Appeal from a direction as to costs contained in a "non appealable order"*—Since no appeal lies from a non appealable order, no appeal can lie from a direction as to costs contained in such order. Thus if an order is made adjourning the hearing of a suit and one of the parties is directed to pay the costs occasioned by the application for adjournment he cannot appeal from the direction as to costs, for an order adjourning the hearing of a suit is not an appealable order, it not being included in s. 104 (1) below (v).

Letters Patent appeal—An order as to costs is not a 'judgment' within the meaning of clause 15 of the Letters Patent, and is not appealable as such (x).

Costs against Secretary of State—The Secretary of State is in an unsuccessful litigation liable to pay costs like any other unsuccessful party (y).

Matrimonial causes—It is customary in the Divorce Division of the Calcutta High Court to direct a respondent husband to secure the costs of a petitioner's wife. But if the parties are members of the Jewish community and the cause is tried in the original civil jurisdiction of the High Court and neither clause 35 of the Letters Patent nor the Divorce Act applies, then s. 35 of the Code will not justify such an order (z).

Suit for contribution towards costs—A defendant is not entitled as against a co defendant to contribution in respect of costs to which both are liable unless there be some equity existing between him and the co defendant (a).

Review of taxation—The Court will always interfere and entertain a review of taxation where a question of principle is involved, but the Court is generally unwilling to interfere where it is a question whether the master exercised his discretion properly, or if it is only a question of the amount to be allowed (b). But the discretion of the master is not final even on a question of quantum for he is not at liberty to lay down a scale for *discretionary charges which are out of all proportion to the work done* (c). If any point of principle is to be taken upon a review of taxation the point of principle must have been properly raised in writing delivered to the other party and carried in to the taxing master, and this is a condition precedent to the right to apply for a review to the Judge in Chambers (d).

| | | |
|-----|--|--|
| (u) | | (y) <i>Secretary of State v. Lown Karan</i> (1930) 5 Pat. L. J. 3, 1 2, 7 56 I. C. 507 |
| (v) | | (z) <i>Sam el v. Samuel</i> (1330) 5 C. 1 1089 |
| (w) | | (a) <i>Mulla S. ngh v. Jagan ath</i> (1910) 32 All. 1, 7 I. C. 539 (30) A. C. 508 |
| (x) | | (b) |
| (y) | | (c) |
| (z) | | (d) |

In taxation between party and party only those costs are allowed which are strictly necessary for the purpose of the prosecution of the litigation, while in taxation between attorney and client a party is allowed as many of the charges which he would have been compelled to pay to his own solicitor as being costs of the suit which fair justice to the other party would permit. If a solicitor incurs unusual or extraordinary expenses in excess of what would be allowed in taxation between party and party without express authority from his client such costs may be disallowed in taxation between attorney and client. In taxation between attorney and client separate counsel for two sets of defendants will be disallowed if the defences were not diverse or if there was a reasonable probability of there being a substantial difference between the defences (e) Rule 546 of the Bombay High Court Rules which disallows costs not necessary or proper for the attainment of justice or defending the rights of the party refers to party and party costs (f) Rule 559 of the same rules provides that in case the solicitor's bill is reduced in taxation by a sixth the solicitor shall pay all costs whatever attending the taxation. This is a penalty for an exaggerated bill of costs, but the Court has a discretion in exceptional cases to make a different order (g)

35A. (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the

Compensatory costs in respect of false or vexatious claims or defences

objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 and not being a Court constituted under that Act are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees

(c) *Coralliam v. J. m. Shaw* (133) 57 Lom 501 14-11-33 33 A 1 13

501 14-11-33 (27) A 1 13 (133) 57 Lom 501 14-11-33

(f) *Parasharam v. T. a. Indur* 11 1 (12) 5

(g) (133) 57 Lom 501 14-11-33

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence

This section was added into the Code by Act 9 of 1922. The section does not come into operation until the Local Government has, with the previous sanction of the Governor General in Council, by notification in the local Official Gazette, directed that the Act shall come into force in the Province on such date as may be specified in the notification.

The section provides for payment of costs by way of compensation in cases of false or vexatious claims and defences. See notes to s 30. Costs as penalty on p 141 above

Party—The section introduces the word party which has been omitted in s 30. But an order for compensatory costs has been made against a next friend (7)

Appeal—An order awarding compensation under this section is appealable under section 104 (ff). But an Appellate Court cannot make an order when the original Court has refused to do so. See proviso to O 41 r 33

PART II.

Execution.

GENERAL

36. [New] The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the

Application to orders

execution of orders

Execution—Execution is the enforcement by the process of the Court of its own decrees. The main rules of procedure are enacted in this part of the Code and minor rules are relegated to O 21. These provisions apply to decrees which are capable of execution. There is no question of execution in regard to decrees that are purely declaratory.

that of the superior Court, and it is the latter decree alone that can be executed (1). If the Appellate Court is of the opinion that the decree of the original Court is not capable of execution, it may set it aside and substitute its own decree, which alone can be executed (2).

Appellate Court and the decree to be executed is that of the original Court. This would also seem to be the case when the appeal is summarily dismissed without notice to the respondent, but the cases are conflicting (3). But when the appeal is heard O 41 r 32, requires that the judgment should confirm, vary or reverse the decree from which the appeal is preferred (4) and the decree capable of execution is the decree of the Court of Appeal (5). When the decree of the Court of first instance is confirmed by the High Court and the latter decree by the Privy Council, the decree capable of execution is the decree of the Privy Council (6).

The question which decree should be executed arises in the following cases—

(a) **Amendment**—The only decree that can be amended is the decree that has to be executed. If the Court of Appeal confirms, varies or reverses the decree of the lower Court, the decree of the Appellate Court is the only decree that can be amended (7).

(i) *Jowad Hissa v. Chandan Singh* (1860) 53 1 A 10, 200 6 Lat 24, 24 28 1 C 499 (1860) A 1 C 93 adn 2 (1862) 1

(ii)

(iii)

(iv) *Kal mudin v. Kal mudin* (1844) 51 Cal 715 251 C 2 (1844) A 1 C 53

(v) *For the Court* (1831) 15 Bom 370

(vi) *Jagan v. Jagan* (1841) 21 Bom 548 1 C 200
Muniam v. Muniam (1841) 24 Cal 703
Muniam v. Muniam (1841) 24 Cal 703
 253 1 C 200
 253 1 C 200

(p) *Kaulash Chandra v. Gurya* (1912) 39 Cal 35 25 330 141 C 299

(q) *Shorah v. Brudman* (1844) 4 All 376 (F B)
Luchun v. Kuchun (1844) 8 Cal 218
Do lat v. Bhulandas (1846) 11 Bom 1
Muhammad v. Muhammad (1849) 11 All 267 (F B)
Nourang Lal v. Lal (1891) 13 All 344
Sakhalehand v. Lalchand (1894) 18 Bom 263
Manarika man v. Unniappan (1844) 15 Mad 170
Nanchand v. Latha (1844) 19 Bom 254
Satree v. Sakhalal (1914) 33 Bom 173 261 C 254

(r) *Thup Indar v. Bhoji* (1901) 23 All 15 25 1 A 209

(s) *Shorah v. Brudman* (1844) 4 All 376
Muhammad v. Muhammad (1844) 11 All 267
Sakhalehand v. Sakhalal (1893) 18 Bom 548
Sakuravyangar v. Sakuravyangar (1845) 18 Mad 214
Abbas Khan v. Nourani Dasi (1910) 11 C L J 153 5 1 C 261
Prin Narain v. Tripal (1910) 32 All 295 371 A 70 61 C 663

(b) *Limitation*—Time runs from the date of the decree capable of execution, and

(c) *Time for payment fixed by the decree*—When a time is fixed for payment by the decree of the lower Court, as in a decree for redemption, and the decree is affirmed on appeal, the decree capable of execution is the appellate decree. Nevertheless, the time for the performance of the condition is not extended (i) Thus in *Ghanshyamlal v. Ram Narain* (w) the suit was on a bond in which interest was stipulated at 30 per cent. and the decree of the first Court said that if the defendant deposited the money within three months of date of the decree he would be liable only for interest at 12 per cent. This was confirmed on appeal by the High Court and the Privy Council but the defendant was not allowed an extension of time till three months after the decree of the Privy Council. On the other hand in *Noor Ali v. Koni Meah* (x) a rent decree rendered a tenant liable to ejectment if the rent was not paid within 15 days. This was confirmed on appeal and it was held that he would be protected from ejectment if he paid within 15 days of the appellate decree. In a more recent case Mookerjee, J., said that the balance of judicial opinion is in favour of the view that when time is fixed by the decree of the lower Court for the payment of money, and the decree is confirmed on appeal, time runs from the date of the decree of the Appellate Court (y). It is submitted that the correct view is that the appellate decree, not being complete in itself, must be construed with reference to the decree of the lower Court and that time is not extended. The Appellate Court can however by its decree alter the time of payment, and should so frame its decree as to make it clear whether or not it intends to do so (z).

(d) *Mesne profits*—Mesne profits can be ordered from the date of institution of the suit until the expiry of three years from the date of the decree. This means the decree capable of execution, so that if the decree is confirmed on appeal three years run from the date of the appellate decree (a). But though the decree to be executed is the appellate decree, yet the terms of it must be ascertained by reference to the decree of the lower Court. Therefore when the original decree gave mesne profits from the date of its decree till the date of delivery of possession and was affirmed by the Privy Council, and the plaintiff got possession subsequent to the latter decree, he was entitled to mesne profits from the date of the original decree (b).

(ii) *The decree to be executed must be a subsisting decree*—A obtains a decree against B and C. B subsequently sues A to set aside the decree on the ground of fraud, and the decree is set aside as against him. A cannot execute the decree as against B for the decree does not subsist as against B. But he may execute the decree as against C for the decree is a subsisting decree as against C (c).

| | |
|-----|---|
| (i) | ing from <i>Satwaji v. Sakhardal</i> (1914) 33 Bom 175 28 I C 754 <i>Sukhrum Das</i> |
| | (w) |
| | (x) |
| | (y) |
| (u) | (z) |
| (r) | (a) |
| | (b) <i>Nand Kumar v. Bidas Pam</i> (1918) 3 Pat L. J. 116, 43 I C 855 |
| | (c) <i>Parupali v. Nando Lal</i> (1903) 30 Cal 718 <i>Chettiaid v. Kunhi Kora</i> (1906) 23 Mad 175 |

(iii) *The decree to be executed must be a decree of which execution is not barred by the law of limitation.*—See Limitation Act, 1908, arts 182 and 183, and see notes to sec 48 below

Execution of orders—The term “order” is defined in sec 2, cl 14, as the formal expression of any decision of a civil Court which is not a decree. An order under sec 34 of the Guardians and Wards Act 8 of 1890 directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is not an ‘order’ within the meaning of sec 2, cl 14, and it cannot be enforced against the ward after he has attained majority and the guardian has been discharged (d). But an order made after the dismissal of a partition suit directing the plaintiff to deposit in Court a certain sum of money as remuneration for work done by the Commissioners of partition, is an order within the meaning of sec 2, cl 14, and it may be executed as a decree (e).

Merger of decree—As to merger of decree of the first Court in the decree of the Appellate Court see *Gajraj v. Sirami Nath* (f) where all the cases are reviewed. See also notes to O 9, r 13, ‘Hearing of application after disposal of appeal’.

37. [S. 649, 2nd para.] The expression “Court which passed a decree,” or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

Definition of Court which passed a decree

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit

Changes introduced in the section—This section differs from the corresponding section 649 of the Code of 1852 in that the expression ‘the Court of first instance in clause (a) has been substituted for the expression ‘the Court which passed the decree against which the appeal was preferred’. As to the effect of this alteration see notes below

“Court which passed a decree”—Section 35 indicates the Courts by which decrees may be executed. A decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. It may also be executed by the Court to which it is transferred under sec 24 above (g). The present section explains the meaning of the expression ‘Court which passed a decree’.

(d) *Tarathammal v. Ch. Lalajaya* (1918) 41 Mad 241 41 1 1 341

(e) *Chandra Kumar v. Kusum Kumar* (1952 141 267 241 1 1 24 1 25) 1 1 1 1

(f) (1917) 33 All 15 26 1 1 2

(g) See *Muhammad v. Talam Chand* (1925) 47 All 27 28 25 1 1 24 1 25) A A 26

The expression 'Court which passed a decree' includes not only the Court which actually passed the decree but the Courts mentioned in clauses (a) and (b) of the present section. The following rules are deducible from this section and section 38 —

1 Where the decree to be executed is a decree of a Court of first instance, the proper Court to execute it is the Court of first instance

2 Where the decree to be executed is a decree passed by a Court of first appeal the proper Court to execute it is also the Court of first instance

3 Where the decree to be executed is a decree passed by the High Court in second appeal then also the proper Court to execute it is the Court of first instance. Thus where a suit is instituted in the Court of a Subordinate Judge and an appeal from the decree is preferred to the District Court, and a second appeal is preferred to the High Court, the proper Court to execute the decree of the High Court is the Court of first instance that is the Court of the Subordinate Judge. Under the Code of 1902, sec. 649 para. 2 of which the present section is in the main a reproduction, the proper Court to execute the decree would be the District Court, the expression there used being 'the Court which passed the decree against which the appeal was preferred.' As a matter of practice however the Court of intermediate appeal never executed decrees passed by the High Court in second appeal. The substitution of the expression 'Court of first instance' in clause (a) of the present section for the expression 'Court which passed the decree against which the appeal was preferred' gives legislative recognition to the practice followed by the Courts when the present Code was enacted.

4 Where the Court of first instance has ceased to exist the only Court that can execute the decree is the Court which at the time of making the application for execution would have jurisdiction to try the suit in which the decree was passed. The application for execution must be made to that Court. But if the application is to execute the decree by the attachment and sale of immovable property not situate within its jurisdiction, the Court must nevertheless entertain the application, and then transfer the application to the Court having territorial jurisdiction. Thus in *Sreenath v Priyanath* (A), a rent decree was passed by the 3rd Munsiff's Court at Bhanga. That Court was then abolished and became the Court of the 2nd Munsiff at Gopalgunje. The rent suit fell within the pecuniary limits of the 2nd Munsiff at Gopalgunje and therefore the Court at Gopalgunje was the Court which passed the decree under sec. 37 (b). The application to execute the decree was therefore made to the Gopalgunje Court. But the application was to execute the decree by the attachment and sale of immovable property, not within the jurisdiction of the Gopalgunje Court but within the jurisdiction of the 1st Munsiff's Court at Bhanga. Nevertheless it was held that the Gopalgunje Court had jurisdiction to entertain the application, but that it should not itself order the sale of property outside its jurisdiction but should transfer the application to the Bhanga Court for making and executing the order for sale. Mitter, J. said that the Gopalgunje Court did not function merely as a sort of post office for receiving and transmitting the application but that it could determine questions as to the executability of the decree. A Court vested with the powers of a Court of Small Causes ceases to exist as a Court of Small Causes when those powers are withdrawn (i). A Court does not cease to exist merely because its head quarters are removed to another place or because the local limits (j) or the pecuniary limits of its jurisdiction (k) are altered.

5 Where the Court of first instance has ceased to have jurisdiction to execute the decree — In this case the Court of execution is the Court which at the time of the application

(A) (1931) 54 Cal. 83. 132 I. C. 143 (31)

A. C. 31

(i) *Pran Nath v. Feroz v. Idinaraaya* (1909)

19 M. L. J. 443

(j) *Latchman v. Moddun Mohan* (1891) 6 Cal. 513 514

(k) *Iwara Jemad v. Farhat Hussain* (1917) 2 Pat. L. J. 113 39 I. C. 63

would have jurisdiction to entertain the suit in which the decree was passed. But the jurisdiction of the original Court is not entirely excluded. A decree is passed by Court X directing the sale of immovable property within its jurisdiction. After the decree and before the application in execution for sale, the property directed to be sold is transferred by the Local Government's notification from the jurisdiction of Court X to the jurisdiction of Court Y. Has Court X jurisdiction to entertain the application for execution and to order the sale of the property? According to the Calcutta decisions, both Court X and Court Y have jurisdiction to entertain the application, but if the application is made to Court X, it should not itself make an order for the sale of the property, but transfer the application to Court Y for making and executing the order for sale (l). The Madras decisions have not been consistent. In a case of 1907 it was held that Court X has jurisdiction to entertain an application for execution, but the question whether it could itself order the sale of the property was not decided (m). In a case of 1914 it was said that Court X has no jurisdiction to entertain the application (n), but this was overruled in a Full Bench decision in 1919. Wallis C.J., observed that the power of sending the decree to another Court was sufficient to meet the case. The learned Chief Justice construed sec. 150 as conferring upon Court Y jurisdiction to entertain the application for execution, but was of opinion that the section could not be construed as taking away from Court X the power which it had according to the unbroken current of authorities of entertaining the application (o). In a case decided in 1927 it was said that Court X has power to entertain the application for transmission to Court Y but has no power to sell the property (p). In 1932 a Full Bench of the Madras High Court distinguished notifications which effect a change of jurisdiction in the future from those which effect a transfer of past business, and held that sec. 150 only applied to the latter. If the notification only effects a change of jurisdiction for the future, Court Y which passed the decree has jurisdiction to entertain the application and to execute the decree, though the decree holder may as a matter of convenience apply to Court X to transfer the decree for execution to Court Y (q). But a Court to which a decree is transferred for execution has no jurisdiction to order either the attachment or sale of immovable property, if at the time of the order such Court had no territorial jurisdiction over the property (r).

Cl (b) "Ceased to have jurisdiction to execute"—A Court does not cease to have jurisdiction to execute its decree, because it is abolished and re-established (s) or merely because its business is transferred by the District Judge under the Act constituting it to another Court (t) or because the area in which the judgment debtor resides is transferred from its jurisdiction to that of another Court (u). Where an order was made by the High Court of Calcutta rejecting a petition for leave to appeal to the Privy Council and directing the petitioner to pay the respondent's costs but the order was silent as to the Court by which it was to be executed it was held that the circumstance that the High Court on its appellate side does not in practice execute its own decrees and orders did not make that Court, as regard the execution of the order, a Court that

(l) *Lalchman v. Mallan Mohun* (1881) 6 Cal. 513; *Iremcham v. Mohlady* (1890) 17 Cal. 333 [H. B.]; *Jalar v. Jamuna Deb* (1901) 28 Cal. 238; *Udt. Narain v. Mathura Prasad* (1908) 35 Cal. 14. The case of *Kala Lado v. Dur Nath* (1928) 25 Cal. 315, which is sometimes cited in the commentaries on this case, is, in fact, a misreading of the case, in that case an order was made by the District Judge of Calcutta in which the jurisdiction of the Court was held to be transferred from the District Judge to the District Judge of Calcutta. See 25 Cal. 238.

(m) *Lalchman v. Mallan Mohun* (1881) 6 Cal. 513.

(n) *S. S. S. v. Jamuna Prasad* (1914) 5 Mad. 42.

(o) *Devi Nandan v. Muthuram* (1911) 40 M. J. 821; 832; 833; 835; 842; 53 I. C. 11; *Muthuram v. Jayaram* (1913) 45 Mad. L. J. 10; 31 C. 125; (4) A. M. J.

(p) *Srinivasan v. Panna of Jeppur* (1927) 24 M. J. 82; 133 I. C. 245; (2) A. M. J.

(q) *Janner v. Muthuram* (1925) 52 Mad. 81; 133 I. C. 255; (3) A. M. J. 11.

(r) *Veerappa v. Jamuna Prasad* (1921) 42 Mad. 170; 33 C. 50.

(s) *Khalil v. Harjari* (1911) 4 Pat. 82; 1 C. 128; (1) A. M. J.

(t) *Kal. Jalar v. Lado Nath* (1928) 25 Cal. 315; *Ju. Nath v. Shumanam* (1931) 6 Pat. L. J. 34; 47 I. C. 487; (21) A. J. 157.

(u) *Mu. Kharaj v. Jalar Prasad* (1923) 45 Mad. L. J. 10; 31 C. 125; (24) A. M. J.

8

What decrees may be executed — See note under the same head to sec 36 on p 151 above

COURTS BY WHICH DECREES MAY BE EXECUTED.

Court by which decree
may be executed

Court which passed a decree—See notes to sec. 37 on p. 153 under the same heading

Court to which it is sent for execution—This would be under sections 39 and 40

Jurisdiction of Court executing a decree—The following are the leading rules relating to the jurisdiction of Courts executing decrees —

RULE I—No court can execute a decree in which the subject matter of the suit or of the application for execution is properly situate "entirely outside the local limits of its jurisdiction—Territorial jurisdiction in other words, is a condition precedent to a Court executing a decree (a)

Exception 1—The Court which passed a decree for the enforcement of a mortgage of immovable property has power in execution of its decree to order the sale of such property, though it may be situate beyond the local limits of its jurisdiction—A sues B in a Court in district X on a mortgage of two properties, one situate in district X and the other in district Y. A decree is passed for the sale of both the properties. The Court in district X having jurisdiction to entertain the suit in respect of the property situate in district X (a) has also jurisdiction to sell that property in execution of its decree, though the property is situate beyond its jurisdiction. It is not bound to send the decree for execution as regards the property in district Y to the Court of that district under sec 39(c), but it may do so (b). In the latter case the decree as regards the property in district Y may be executed by the Court of district Y (c). See also notes to sec 17.

- (r) *Harra Pershad v. Bkpendro* (1881) 6 Cal 401
(uc) *Bando v. Varsingrao* (1914) 39 Bom 66
51 C 408
(x) *Tekatasani v. Ask v. Sirani Mudali* (1919)
4 Mad 461, 464 31 I C 16
(j) *Abi s. Nattar v. Mohan Mohan* (1933)
3 C W N 679 (33) A C 684
(i) *Cakkha v. Abi I* (1893) 17 Bom 16
(a) *Irem Chand v. Mokhdun Ders* (1840) 17 Cal 64
(b) 1933 *Begg Dunlop & Co v. Jagannath* (1911) 33 Cal 104 11 I C 417
Amulka v. Manikgan Loan Office (1917)

- (b) 57 Cal 67 106 I C 43 (29) A C 818
Greenath v Priyanath (1931) 58 Cal 83.
 13¹ I C 149 (31) A C 312
- (c) *Ali Fath v Sullan Singh* (1918) P R
 no 43 p 152 46 I C 9 *Jagernath*
v Dip Pani (1835) ²² Cal 871

Exception II—Where 'after the passing of a decree' in a "suit for the enforcement of a mortgage" the whole of the immovable property included therein falls, by transfer of jurisdiction, within the local limits of the jurisdiction of another Court, the application for execution of the decree, according to the Calcutta rulings may be made either to the Court which passed the decree (though the property is no longer within its jurisdiction), or to the Court within the local limits of whose jurisdiction the immovable property falls by such transfer, but where the application is made to the former Court, it should not itself order the property to be sold, but should transfer it to the latter Court for passing and executing the order for sale (d) See note to s 37 "Court which passed the decree," rule 5, p 154

Exception III—The salary of public officer or of a servant of a Railway company or local authority may be attached by a Court though the disbursing officer may not be within the local limits of the Court's jurisdiction See O 21, r 48, and notes thereto

RULE II—Where a decree has been passed for the payment of money, and the decree holder applies for attachment and sale of immovable property (belonging to the judgment debtor) which forms one estate a part whereof is situated within the local limits of the jurisdiction of the Court executing the decree and part beyond such limits, the Court executing the decree has the power to attach and sell the whole estate including the portion situated beyond the local limits of its jurisdiction See O 21, r 3, and notes thereto

RULE III—Whether a Court to which a decree has been sent for execution under s 39 has jurisdiction to execute the decree, if the amount of the decree exceeds the limits of the pecuniary jurisdiction of the Court? There is a conflict of decision as to whether the Court of execution is restricted to the pecuniary limits of its jurisdiction To put the question in a concrete form, if a decree for Rs 7,000 is sent for execution to a Court whose pecuniary jurisdiction does not exceed Rs 5,000, can the latter Court execute the decree? Yes, according to Madras (e) No, according to Calcutta (f), Bombay (g) and Patna (h)

RULE IV—Where the decree sought to be executed is passed by a competent Court, the Court will not be deemed to be incompetent to execute the decree merely because by reason of the amount of interest or mesne profits ascertained for a period subsequent to the institution of the suit, the pecuniary limits of the jurisdiction of such Court are exceeded—A obtains a decree against B for Rs 4,000 and interest in a Court of which the pecuniary jurisdiction is limited to Rs 5,000 A then applies to the Court for execution At the date of the application for execution, the total amount of the decree by reason of accumulation of interest exceeds Rs 5,000 The Court has jurisdiction to execute the decree All the Courts are agreed on the point (i), for if the Court had jurisdiction at the time of the institution of the suit, incidental causes such as the accumulation of profits or interest or a rise in price will not affect its jurisdiction See notes to s 6

RULE V—A Court to which execution of a decree is transferred has no jurisdiction to order either the attachment or sale of immovable property in execution, if at the time of the order such Court had no territorial jurisdiction over the property (j)

(f) *Latchman v Maddan* (1881) 6 Cal 513

(c) " " " "

(f) *Durga v Umatare* (1889) 16 Cal 465 *Gokul v Sukh* (1889) 16 Cal 457 *Shamsundar v Anath Pandhu* (1910) 37 Cal 574

(g) *Siddheshwar v Harshar* (1888) 12 Bom 155

(h) *Amrit Lal v Murlidhar* (1900) 1 Pat 651, 67 IC 538 (22) 41 Ind

(i) *Lodiyadhar v Munindra Nath* (1935) 53 Cal 14 53 IC 206 (1935) 41 Cal 106 (1935)

overruling in effect *Bhupendra v Jurna* (1910) 43 Cal 650 8 IC 34 and *Bai Kunda v Mohananda* (1919) 24 CW 347 58 IC 170 *Sundarshan Das v Jam* (1911) 33 All 97 7 IC 343 *Trolya v Appachi* (1900) 25 Mad 543 *Kannayya v Venkata* (1917) 40 Mad 1 33 IC 433 *Shah Mohammed v Mhabad* (1917) 2 Pat LJ 394 41 IC 251 *Dinanath v*

(j)

Powers of executing Court—Court executing a decree cannot go behind the decree—A Court executing a decree cannot go behind the decree. It must take the decree as it stands (k). It has no power to entertain any objection as to the validity of the decree (l) or that it was obtained by fraud (m) or as to the legality or correctness of the decree (n) e.g., an objection that the decree sought to be executed was passed against a wrong person (o) or that it was passed against a lunatic or a minor not properly represented (p). The reason is that a decree, though it may not be according to law is binding and conclusive between the parties until it is set aside either in appeal or revision (q). For the same reason the Court executing a decree cannot alter, vary or add to the terms of the decree (r) even by consent of parties (s). A Full Bench of the Calcutta High Court has held that when a decree is made by a Court which apparently had not jurisdiction to make it the executing Court is entitled to refuse to execute it (t). That High Court has construed the word 'apparently' to mean that the decree appears on the face of it to have been passed by a Court which had not jurisdiction (u). Accordingly when a Court passed a decree in terms of an award under the Arbitration Act 1899 the Calcutta High Court held that the Court of execution was entitled to refuse to execute it but as such awards are under s. 15 of that Act enforceable as decrees the High Court directed the application to be treated as an application to execute the award (v).

A Full Bench of the Mangalore High Court has expressed emphatic dissent from the Calcutta decision and holds that it is against public policy and good sense that the validity of the decree should be questioned by the executing Court (w).

In a case in which an application was made to execute a final decree after the preliminary decree on which it rested had been set aside on appeal a Division Bench of the Calcutta High Court held that as the final decree was superseded the Court of execution had power to determine whether the decree was a valid and operative decree and to refuse to execute it if it was no longer operative (x). This was approved by a Full Bench of the Calcutta High Court (y). Rankin C.J. observed that this case had not been considered in the previous Full Bench case (z).

But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the record is a nullity and

(1) *Jaipal v. Jam Ban* (1889) 5 All 53

(1) C

(l) *Gopal v. Jomdar* (1904) 27 M.L. 118
Jaipal v. Thiraj (1905) 8 Mad.
Farditta v. Sabapathi (1900) 30
 M.D. 66 *Ladbur v. Chattri* (1899) 21
 All. 7

(m) *Sullind v. Bhatnagar* (1885) 9 Mad. 80 *Dhan*
Lam v. Jhamesar (1890) 3 C.L. 633

(n) *Chhot v. Farshar* (1900) 6 C.W. 798
Chhot v. Farshar (1900) 7 Cal. 901 90 *IA* 119 124
Jaipal v. Lateer Lartap (1900) 11 All.
 W. 280

(o) *Itatalla v. Upendra* (1904) 40 Cal. L.J.

(p)

(q)

(s) *Kankal v. The Court of Wards* (1891)
 16 V.R. 270 *Deb v. Gopal Rasad*
 (1891) 3 All. 585

(t) *Gora Chand v. Profila* (1906) 33 C.L. 100
 8 J.L.C. 685 (3) A.C. 9

(u) *Anabala v. S. v. K. v. S.* (1903) 34 Cal.
 L.J. 533 137 I.C. 35 (3) A.C. 32 *at*
Cl. v. Bhat (1903) 10 Cal. 114
 I.C. 60 (33) A.C. 80

(v) *Pabla v. J. Anandamalan* (1931) 58 Cal.
 1018 136 I.C. 466 (3) A.C. 9

(w) 73

(x)

(y)

(z)

it cannot be executed against his estate (a) As to whether a decree passed by a Court which has irregularly assumed jurisdiction can be executed, see notes to s 21 section 21 and execution proceedings" As to the powers of a Court to which a decree is transferred for execution, see notes to sec 42 and O 21, r 7

Construction of decree by executing Court—If the decree is free from ambiguity the Court of execution is bound to execute it whether it be right or wrong (b) But though a Court executing a decree cannot go behind the decree, it is quite competent to construe the decree where the terms of the decree are ambiguous, and to ascertain its precise meaning, for unless this is done the decree cannot be executed If the decree creates a charge on property in which the judgment debtor had a widow's estate, the executing Court has jurisdiction to inquire if the charge continued after the widow's death and if it could be enforced against the property in the hands of her legal representative (c) The construction of a decree must be governed by the pleadings and the judgment (d) And the Court should, if possible, put such a construction upon the decree as would make it in accordance with law (e) When a particular construction has been put upon a decree in a former execution proceeding it is not open to the Court in a subsequent application to treat that construction as erroneous See note to s 11, "Orders in execution proceedings," on p 87 above

39. [S. 223 2nd, and 3rd paras.] (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

Transfer of decree

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(a) *Junglu Lal v. Ladd & Lam* (1919) 4 Pat LJ 240 50 IC 533, *Jup Narain v. Jamayer* (1874) 3 CLR 10, *Narendra v. Copal* (1911) 17 Cal LJ 634 2011 506 *Imdad Ali v. Jagan Lal* (1835) 17 All 478 *Iadha Prasad v. Lal Sahib* (1931) 33 All 53 17 IA 150 *Janardhan v. Jamchandra* (1901) 26 Bom 317 *Issawannah v. Lallu* (1909) 11 Bom LR 1070 4 IC 137 *Sutramaia v. Lakhinatha* (1915) 34 Mad 622 31 IC 198
(b) *Tirbhu v. Poo Singh* (1899) 20 All 317 *Chand v. Tithan Singh* (1901) 25 Cal 353 23 IA 57

(c) *Meenambal v. Aburubammal* (1930) 53 Mad 730 125 IC 533 (30) AJL 688
(d) *Pam Kirpal v. Poo Kauri* (1984) 6 All 263 275 11 IA 37 *Kali Krishna v. Secretary of State* (1893) 16 Cal 173 153 15 IA 186, *Statejit v. Dorebhai* (1902) 19 Cal 159 18 IA 165 *Lachmi v. Jwala* (1891) 18 All 344, *Sahital v. Jamallal* (1904) 18 Bom 542
(e) *Amolok v. Lachmi* (1897) 19 All 174, *Estar v. Idt Naru* (1890) 21 All 361 *Ladha Krishna v. Collector of Javapur* (1901) 23 All 220 226 23 IA 28

41. [S. 283, 4th para.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Certify—The Court of execution must certify the result of the execution to the Court which passed the decree and transferred it for execution. When the certificate is sent the transferee Court ceases to have a right of the execution proceeding, until then the decree rests in the transferee Court (r). The Court is not bound to certify failure of execution if the decree holder wishes to make another attempt (u). The Oudh Court has held that though the transferee Court ceases after certification to have jurisdiction further to execute the decree it has power to decide an objection taken before it in respect of anything done in the course of the execution proceedings taken by it (x). Mere notification of payments made on account of the decree to the Court which passed the decree does not amount to a certification under this section (y). In a Bombay case it was said that the section only means that the Court of execution should keep the Court which passed the decree informed of what has happened in the execution (z). This is incorrect, for the certificate is a very important step, it is a formality which has the effect of determining the jurisdiction of the transferee Court and is only sent after complete failure to execute or after the Court has executed as far as it can (a).

42. [S. 228] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court executing transferred decree—The Court executing a transferred decree has the same powers as if the decree had been passed by itself. Successive execution applications must be made to the transferee Court and its jurisdiction continues until (1) the execution proceeding is withdrawn from it or (2) it has certified under s. 41 execution or execution as far as possible, or failure to execute (b). The mere striking off or rejection of an execution application for some informality in the application does not terminate the jurisdiction of the transferee Court to execute the decree or render it necessary to send a certificate to the transferor Court (c). If

(c) *Abda Begum v. Musaffar* (1898) 20 All

(u)

(x)

(y)

L.R. 453, 74 I.C. 149 (23) A.B. 296
(r) *Mansoor v. Fachu* (1931) 76 I.C. 549, (23) A.B. 371
(a) (1924) 28 Bom. L.R. 345, *supra*
(b) *Munorath Das v. Ambika* (1910) 13 W.N. 633 I.C. 57 *Fachu v. Ganesh* (1925) 50 Bom. L.R. 453, 74 I.C. 149, (23) A.B. 296 *Shrinagappa v. Shidmalappa* (1924) 26 Bom. L.R. 245, 80 I.C. 752, (24) A.B. 353 *Mahomed v. Chhabra* (1926) 5 Pat. 294, 94 I.C. 38 (26) A.P. 274. *Arghun v. Madan Mohan* (1932) 11 Pat. 513, 139 I.C. 843, (32) A.P. 256
(c) *Abda Begum v. Musaffar* (1898) 20 All 129

it cannot be executed against his estate (a) As to whether a decree passed by a Court which has irregularly assumed jurisdiction can be executed see notes to s 21 section 21 and execution proceedings As to the powers of a Court to which a decree is transferred for execution see notes to sec 42 and O 21, r 7

Construction of decree by executing Court—If the decree is free from ambiguity the Court of execution is bound to execute it whether it be right or wrong (b) But though a Court executing a decree cannot go behind the decree it is quite competent to construe the decree where the terms of the decree are ambiguous and to ascertain its precise meaning for unless this is done the decree cannot be executed If the decree creates a charge on property in which the judgment debtor had a widow's estate the executing Court has jurisdiction to inquire if the charge continued after the widow's death and if it could be enforced against the property in the hands of her legal representative (c) The construction of a decree must be governed by the pleadings and the judgment (d) And the Court should if possible, put such a construction upon the decree as would make it in accordance with law (e) When a particular construction has been put upon a decree in a former execution proceeding it is not open to the Court in a subsequent application to treat that construction as erroneous See note to s 11 Orders in execution proceedings on p 87 above

39. [S 223 2nd, and 3rd paras] (1) The Court which passed a decree may, on the application of the decree holder, send it for execution to another Court,—

Transfer of decree

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(a) *J.*

(c) *Meenambal v. Meenambal* (193) 53 Mad 13 151 C 532 (30) A.M. 643

(d) *Iam Kripal v. Papp Kuar* (1884) 6 All 272 275 111 A 37 *Kali Krishna v. Secretary of State* (1889) 16 Cal 13 143, 15 14 186 *Jaganjit v. Narajit* (1891) 19 Cal 150 141 A 165 *Lachmi v. Jura* (1892) 18 All 344 *Sahai v. Jamalial* (1894) 18 Bom 342

(e) *Imoak v. Lachmi* (1897) 19 All 174 *Fakir v. Jit Narain* (1899) 21 All 261 *Latha Kishan v. Collector of Jaunpur* (1891) 23 A.L.J. 206 141 A 23

(f) 1 *Tha v. Jagan Singh* (1896) 10 All 307 *Lalant v. Tolhan Singh* (1901) 28 Cal 353 351 A 5

Powers of executing Court—Court executing a decree cannot go behind the decree—A Court executing a decree cannot go behind the decree. It must take the decree as it stands (1). It has no power to entertain any objection as to the validity of the decree (2) or that it was obtained by fraud (3) or as to the legality or correctness of the decree (4) e.g., an objection that the decree sought to be executed was passed against a wrong person (5) or that it was passed against a lunatic or a minor not properly represented (6). The reason is that a decree, though it may not be according to law, is binding and conclusive between the parties until it is set aside either in appeal or revision (7). For the same reason the Court executing a decree cannot alter, vary or add to the terms of the decree (8) even by consent of parties (9). A Full Bench of the Calcutta High Court has held that when a decree is made by a Court which 'apparently' had not jurisdiction to make it, the executing Court is entitled to refuse to execute it (10). That High Court has construed the word 'apparently' to mean that the decree appears on the face of it to have been passed by a Court which had not jurisdiction (11). Accordingly when a Court passed a decree in terms of an award under the Arbitration Act, 1899, the Calcutta High Court held that the Court of execution was entitled to refuse to execute it, but as such awards are under s. 15 of that Act enforceable as decrees, the High Court directed the application to be treated as an application to execute the award (12).

A Full Bench of the Rangpoor High Court has expressed emphatic dissent from the Calcutta decision and holds that it is against public policy and good sense that the validity of the decree should be questioned by the executing Court (13).

In a case in which an application was made to execute a final decree after the preliminary decree on which it rested had been set aside on appeal, a Division Bench of the Calcutta High Court held that as the final decree was superseded the Court of execution had power to determine whether the decree was a valid and operative decree and to refuse to execute it if it was no longer operative (14). This was approved by a Full Bench of the Calcutta High Court (15). Rankin, C.J., observed that this case had not been considered in the previous Full Bench case (16).

But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the record is a nullity, and

(1) *Law phid v. Law Laron* (1873) 5 All. 53.

(2) *Law phid v. Law Laron* (1873) 5 All. 53.

(3) *Sudhindra v. Eulian* (1886) 9 Ind. 60; *Dhans* *Law v. Lichmeswar* (1870) 23 Cal. 693.

(4) *C. v. C.*

(5) *C. v. C.*

(6) *C. v. C.*

(7) *C. v. C.*

(8) *Law phid v. Law Laron* (1873) 5 All. 53.

(9) *Kandua Lal v. The Court of Wards* (1871) 16 W. R. 270; *Debi Lal v. Gopal Prasad* (1831) 5 All. 562.

(10) *Gora Chandra v. Prof. D.* (1926) 53 Cal. 160, 83 I.C. 645 (25) A.C. 667.

(11) *Arvola v. Sural Kumar* (1932) 54 Cal. 133 53 I.C. 375 (32) A.C. 340; *Cal. v. Chandra v. Bhikari* (1932) 54 Cal. 191 132 I.C. 60 (33) A.C. 80.

(12) *Palandra v. Anandraman* (1931) 58 Cal. 1018 136 I.C. 166 (32) A.C. 9.

(13) *Nathan v. Harrison* (1932) 9 Rang. 480 135 I.C. 65 (31) A.C. 252 F.B.

(14) *Praja Narain v. Pasanta* (1913) 17 C.W.D. 808 19 I.C. 639.

(15) *Talbot v. Aldis* (1927) 57 Cal. 1015, 13 I.C. 700 (23) A.C. 683 F.B.

(16) *Gora Chand v. Trifulla*, *supra*.

it cannot be executed against his estate (a) As to whether a decree passed by a Court which has irregularly assumed jurisdiction can be executed see notes to s 21 section 21 and execution proceedings As to the powers of a Court to which a decree is transferred for execution see notes to sec 42 and O 21, r 7

Construction of decree by executing Court—If the decree is free from ambiguity the Court of execution is bound to execute it whether it be right or wrong (b) But though a Court executing a decree cannot go behind the decree it is quite competent to construe the decree where the terms of the decree are ambiguous and to ascertain its precise meaning for unless this is done the decree cannot be executed If the decree creates a charge on property in which the judgment debtor had a widow's estate the executing Court has jurisdiction to inquire if the charge continued after the widow's death and if it could be enforced against the property in the hands of her legal representative (c) The construction of a decree must be governed by the pleadings and the judgment (d) And the Court should if possible, put such a construction upon the decree as would make it in accordance with law (e) When a particular construction has been put upon a decree in a former execution proceeding it is not open to the Court in a subsequent application to treat that construction as erroneous See note to s 11, Orders in execution proceedings on p 87 above

39. [S 223 2nd, and 3rd paras] (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court.—

Transfer of decree

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(a) _____

(c) *Meenambal v. Ibuvudammal* (193) 53 Mad
30 195 I C 53 (3) A.M. 644

(d) *Pam Kopal v. Puy Kuar* (1984) 6 11
25 11 1 3 Kols Ar st
of State (1984) 16 11
1-6 Jany 1
15 14 1
18 11
1.00

(c) $\text{Im}(\text{mat } v)$
 $v \text{ (d i v)}$
 A show v
 All map

(2) *I stak v Tup Angk* (187) 00 All 32"
I stak v Tolkan S Angk (1 x 1) 28 Cal
 553 - 814 5"

Powers of executing Court—Court executing a decree cannot go behind the decree—A Court executing a decree cannot go behind the decree. It must take the decree as it stands (1). It has no power to entertain any objection as to the validity of the decree (2) or that it was obtained by fraud (3) or as to the legality or correctness of the decree (4) e.g. an objection that the decree ought to be executed was passed against a wrong person (5) or that it was passed against a minor or a minor not properly represented (6). The reason is that a decree though it may not be according to law is binding and conclusive between the parties until it is set aside either in appeal or revision (7). For the same reason the Court executing a decree cannot alter or vary or add to the terms of the decree (8) even by insertion of part (9). A Full Bench of the Calcutta High Court has held that when a decree is made by a Court which apparently has no jurisdiction to make it the executing Court is entitled to refuse to execute it (10). That High Court has construed the word "apparently" to mean that the decree appears on the face of it to have been passed by a Court which had no jurisdiction (11). Accordingly when a Court passed a decree in terms of an award under the Arbitration Act 18— the Calcutta High Court held that the Court of execution was entitled to refuse to execute it but as such awards are under the Act enforceable as decrees the High Court directed the application to be treated as an application to execute the award (12).

A Full Bench of the Patna High Court has expressed dissent from the Calcutta decision and holds that it is against public policy and good sense that the validity of the decree should be questioned by the executing Court (13).

In a case in which an application was made to execute a final decree after the preliminary decree on which it rested had been set aside on appeal a Division Bench of the Calcutta High Court held that as the final decree was suspended the Court of execution had power to determine whether the decree was a valid and operative decree and to refuse to execute it if it was no longer operative (14). This was approved by a Full Bench of the Calcutta High Court (15). Rankin C.J. observed that this case had not been considered in the previous Full Bench case (16).

But a decree passed against a person who was dead at the date of the decree without bringing his legal representative on the record is a nullity and

(1) *Ja phal v Jan Eanan* (1883) 5 All 53

(1) *Idant v Tolkan Singh* (1901) 23 Cal 353
 11 A 300 *Purser v Secret y of India*
 (1883) 3 Cal 161 4 IA 13 *Hu ro v*
u t (1883) 8 Cal 31 9 IA 1 *Ish ngr*
v Ch das a (1883) 13 Com 111

(1) *Gonnan v Jomadar* (1904) 27 Mad 118
Tangamf Th r ja (1905) 25 Mad
I n a r a n a n (1905) 30
 Mad *L l d h u r v Ch a b h j* (1899) 21
 All 2

(2)

(2) *Hanah Lal v The Court of Wards* (1811)
 16 A 1 275 *D b I a v Golol I a ad*
 (1831) 3 All 52

(3) *Gon Chandra v Profila* (1906) 53 Cal 166
 82 IC 682 (3) A C 6

(4) *Amalabala v Srat P a a* (193) 54 Cal
 L J 53 13 IC 38 (3) A C 340 *at*
(I a a B f l i (193) 60 Cal 191 14
 IC 60 (33) A C 82

(5) *Pab d a v J anend amola* (1931) 53 Cal
 1018 136 IC 466 (3) A C 9

(6) *Nal v Santon* (193) 9 Ran 480 133
 IC 62 (31) A R 25 F B

(7) *Ug a n a v Pasanta* (1919) 17 C W
 863 19 IC 630

(8) *Ta bol v Abdul Az* (1907) 57 Cal 1013
 13 IC 302 (9) A C 689 F B

(9) *Ga C land l oful a s pra*

(10) *A d a n l a v I pend a* (1904) 40 Cal L J
 34 84 IC 99 () A C 203

(11) *Fa pada v Ha* (1917) 44 C 1 607 35
 IC 86 *Lal a e Ba k v Gh l m* (1904)
 5 Lal 54 3 IC 460 (4) A L 448

Jal ch a n v B b h (1913) 60 C 1 191
 14 IC 60 (33) A C 82

(12) *J p m n a I r a P atapa* (1906) 19 Mad
 249 3 IA 3 32

Clause (b)—If the judgment-debtor's property is out of jurisdiction the Court which passed the decree cannot attach it but must transfer the decree to the Court within whose local limits the property may be (m)

Clause (c)—As stated in rule 1 under sec 38 territorial jurisdiction is a condition precedent to a Court executing a decree. If the decree directs the sale of immovable property within the territorial limits of the jurisdiction of another Court it must be sent to that Court for execution. There is an exception to this in the case of a decree for the enforcement of a mortgage see exception 1 to Rule 1 under sec 38 above. As to such decrees the Court may either execute the decree itself or send it for execution to the Court having local jurisdiction (n)

Clause (d)—In a Bombay case the Court expressed a doubt whether clause (d) of this section enabled a Subordinate Judge to transfer a decree for execution to a Small Cause Court where the property attached was within the local jurisdiction of the Subordinate Judge (o)

A decree may be executed simultaneously in more places than one—A Court passing a decree has the power to send its decree to more Courts than one for concurrent execution. But this power should be sparingly exercised and when exercised it would be in many cases proper to impose terms on the decree holder that he should not proceed to a sale under all the attachments at once (p)

Appeal—An appeal lies from an order rejecting an application for the transfer of a decree. The reason is that questions relating to the transfer of decrees are questions relating to execution within the meaning of s 47 (q). See s 2 (2)

Madras Village Munsif's Court Act I of 1889—This Act is a complete code of procedure by itself and the provisions of the Civil Procedure Code cannot be imported into it except to the extent provided by the Amending Act 2 of 1920 (r)

Award—An award filed under s 11 of the Indian Arbitration Act 9 of 1899 is enforceable under s 15 of the Act as if it were a decree of the Court. It may therefore be transferred for execution as a decree under this section to another Court (s). So also an award made under rules framed under s 43 of the Co operative Societies Act 2 of 1912 (t)

40. [New] Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province

Transfer of decree to Court in another Province

Executed in such manner as may be prescribed by rules in force in that province.—The manner of execution is that of the Court which executes the decree but as to whether execution of the decree is barred by limitation or not it is the law governing the Court which passed the decree that applies (u)

- (m) *Bank of Bengal v. Sarat* (1919) 4 Pat. L.J. 141 45 I.C. 943. *Hari Das v. National Insurance Co.* (1932) 52 Cal. 199 136 I.C. 533 (3rd) A.O. 213
- (n) *Kerick v. Vith v. Tuladhar* (1888) 15 Cal. 667
- (o) *Krishna v. Eshw* (1894) 18 Bom. 61
- (p) *Sarada Prasad v. Lucknow* (1877) 14 M.J. A 579. *Krishna v. Eshw* (1888) 12 Cal. 687. *Deb v. Chowdhury* (1907) 8 Rang. 397 104 I.C. 133, (1907) A.R. 253. *Dwarka v. Imperial Bank of India*

- (1909) 56 Cal. 1176 (1909) A.C. 579
- (q) *Bhabani Chandra v. Pratap Chandra* (1904) 8 C.W. 55
- (r) *Sankar v. Achuthan* (1903) 46 Mad. 734 73 I.C. 92, (1903) A.M. 651
- (s) *Sital v. Clement Robson & Co.* (1901) 43 All. 394 61 I.C. 401 (1901) A.A. 197
- (t) *Krishna v. Mahadeo* (1907) 46 Bom. 125 64 I.C. 337, (1907) A.B. 377
- (u) *Tincoori v. Debendra Nath* (1890) 17 Cal. 421 497. *Sree Krishna v. Alumba* (1913) 36 Mad. 108, 31 I.C. 635

- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Alterations in the section—The words "of competent jurisdiction" in sub sec (2) are new

The Court which passed a decree—See notes to s 37 under the same head on page 153 above

Another Court—The Court to which the decree is sent for execution must be a Court in British India (f) Decrees cannot be sent to Courts outside British India except in the case for which section 45 makes special provision (g)

Jurisdiction of Court executing a decree—See notes under the same head to s 38, on p 156 above

Transfer of decree for execution.—A decree passed by one Court may be sent for execution to another Court either on the application of the decree holder on one of the grounds stated in this section, or by the Court which passed it of its own motion. When a decree is sent by the Court which passed it for execution to another Court, the Court sending the decree must send a copy of the decree and other documents mentioned in O 21, r 6, to the Court by which the decree is to be executed. The latter Court must, on receiving the copy of the decree and the other documents cause the same to be filed (O 21, r 7). A mere application to transfer a decree is not an application for execution (h), and this is particularly so in Chartered High Courts where decrees are transferred by ministerial order (i). The decree holder who has applied for execution to the Court which passed the decree need not make a fresh application to the transferee Court (j). When he has not applied to the Court which passed the decree he must apply to the transferee Court for execution (O 21, r 10). The Court executing a decree sent to it for execution has the same powers in executing such decree as if it had been passed by itself (s 42).

Clause (a)—This clause provides for transfer of the decree if the judgment-debtor is resident in the jurisdiction of another Court. The power of the Court under this clause to transfer a decree is not confined to the case where execution is sought against the person of the judgment debtor. The decree holder is not bound to state in the application for transfer the mode in which the decree is to be executed. If he satisfies the Court that the judgment debtor resides in the jurisdiction of another Court, he may ask for transferring the decree to that Court without stating anything more in his application (k). If the judgment debtor's garnishee is resident in another jurisdiction, the decree must be transferred there to serve a prohibitory order upon him (l).

(f) *Kasturehand v Parata* (1887) 12 Bom 230
 (g) *Ratan v Akhatoo* (1902) 29 Cal 400 *Terre Leel v Perumal* (1917) 40 Mad 1009
 42 IC 204
 (h) *Khetpal v Tulam Singh* (1912) 34 All 396
 14 IC 172
 (i) *Bank of Behar v Vora n Das* (1927) 54 IA 1
 1 J 54 Cal 500 101 IC 24 (-) A FC

73 *Chittur v S n h v. Sait Samari* (1916)
 43 Cal 203 36 IC 602
 (j) *A. B. Dutt v Taraprasanna* (1903) 2 Pat
 903 74 IC 753 (24) A P 120
 (k) *Diarka Nath v Imperial Bank of India*
 (1922) 56 Cal 1176 (-) A C 59
 (l) *Begg Dinoo & Co v Jagannath* (1910)
 33 Cal 104 11 IC 417

Clause (b) —If the judgment debtor's property is out of jurisdiction the Court which passed the decree cannot attach it, but must transfer the decree to the Court within whose local limits the property may be (m)

Clause (c) —As stated in rule 1 under sec 38 territorial jurisdiction is a condition precedent to a Court executing a decree. If the decree directs the sale of immovable property within the territorial limits of the jurisdiction of another Court, it must be sent to that Court for execution. There is an exception to this in the case of a decree for the enforcement of a mortgage, see exception 1 to Rule 1 under sec 38 above. As to such decrees the Court may either execute the decree itself or send it for execution to the Court having local jurisdiction (n)

Clause (d) —In a Bombay case, the Court expressed a doubt whether clause (d) of this section enabled a Subordinate Judge to transfer a decree for execution to a Small Cause Court, where the property attached was within the local jurisdiction of the Subordinate Judge (o)

A decree may be executed simultaneously in more places than one — A Court passing a decree has the power to send its decree to more Courts than one for concurrent execution. But this power should be sparingly exercised, and, when exercised, it would be in many cases proper to impose terms on the decree holder that he should not proceed to a sale under all the attachments at once (p)

Appeal.—An appeal lies from an order rejecting an application for the transfer of a decree. The reason is that questions relating to the transfer of decrees are questions relating to "execution" within the meaning of s 47 (q). See s 2 (2)

Madras Village Munsif's Court Act I of 1889 —This Act is a complete code of procedure by itself, and the provisions of the Civil Procedure Code cannot be imported into it except to the extent provided by the Amending Act 2 of 1920 (r)

Award.—An award filed under s 11 of the Indian Arbitration Act 9 of 1899 is enforceable under s 15 of the Act "as if it were a decree of the Court". It may therefore be transferred for execution as a decree under this section to another Court (s). So also an award made under rules framed under s 43 of the Co operative Societies Act 2 of 1912 (t)

40. [New] Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province

Transfer of decree to Court in another Province

"Executed in such manner as may be prescribed by rules in force in that province" —The manner of execution is that of the Court which executes the decree, but as to whether execution of the decree is barred by limitation or not it is the law governing the Court which passed the decree that applies (u)

- (m) *Bank of Bengal v Sarat* (1919) 4 Pat L.J. 141, 45 I.C. 943. *Hari Das v National Insurance Co* (1932) 59 Cal. 109, 136 I.C. 533, (32) A.C. 213.
- (n) *Kartick Nath v Tulukdhari* (1888) 15 Cal. 867.
- (o) *Krishna v Bhow* (1894) 18 Bom. 61.
- (p) *Sarada Prasad v Luckmepur* (1872) 14 M.I. A 579. *Krishna Ashore v Loopiall* (1882) 8 Cal. 687. *Deb v Chowdhury* (1927) 8 Rang. 397, 104 I.C. 133, (27) A.B. 253. *Dwarkanath v Imperial Bank of India*

- (1929) 56 Cal. 1176, (29) A.C. 529.
- (q) *Bhabani Charan v Pralop Chandra* (1904) 8 C.W.N. 675.
- (r) *Santhara v Atchuthan* (1923) 46 Mad. 734, 73 I.C. 792, (23) A.M. 651.
- (s) *Sul v Clement Pabon & Co* (1921) 43 All. 324, 61 I.C. 401, (21) A.A. 199.
- (t) *Krishnaji v Mahadeo* (1922) 46 Bom. 129, 64 I.C. 537, (22) A.B. 377.
- (u) *Tincoveri v Debendro Nath Ghose* 17 Cal. 491, 497, *Sree Krishna v. Ghose* (1913) 36 Mad. 108, 11 I.C. 638.

2 **41. [S. 283, 4th para.]** The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Result of execution proceedings to be certified

Certify—The Court of execution must certify the result of the execution to the Court which passed the decree and transferred it for execution. When the certificate is sent the transferee Court ceases to have seizin of the execution proceeding; until then the decree rests in the transferee Court (v). The Court is not bound to certify failure of execution if the decree holder wishes to make another attempt (w). The Oudh Court has held that though the transferee Court ceases after certification to have jurisdiction further to execute the decree, it has power to decide an objection taken before it in respect of anything done in the course of the execution proceedings taken by it (z). Mere notification of payments made on account of the decree to the Court which passed the decree does not amount to a certification under this section (y). In a Bombay case it was said that the section only means that the Court of execution should keep the Court which passed the decree informed of what has happened in the execution (z). This is incorrect, for the certificate is a very important step, it is a formality which has the effect of determining the jurisdiction of the transferee Court and is only sent after complete failure to execute or after the Court has executed as far as it can (a).

42. [S. 228.] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstruct-

Powers of Court in executing transferred decree

ing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court executing transferred decree—The Court executing a transferred decree has the same powers as if the decree had been passed by itself. Successive execution applications must be made to the transferee Court and its jurisdiction continues until (1) the execution proceeding is withdrawn from it or (2) it has certified under s. 41 execution or execution as far as possible, or failure to execute (b). The mere striking off or rejection of an execution application for some informality in the application does not terminate the jurisdiction of the transferee Court to execute the decree or render it necessary to send a certificate to the transferor Court (c). If

(v) *Abda Begum v. Muzaffar* (1898) 20 All

L.R. 453, 74 I.C. 149, (23) A.B. 306
(z) *Maniram v. Pithu* (1923) 76 I.C. 549, (23)

A.B. 371

(a) " " " " " "

(b) " " " " " "

(w)

(x)

(y)

(c)

In a Patna case (e) Court X which passed a decree transferred it for execution to Court Y. An execution application was disposed of by Court Y but no certificate under s. 41 was sent to Court X. Subsequently the decree was confirmed on appeal and a second execution application was presented to Court Y reciting the fact of the confirmation of the decree by the Appellate Court. This was construed as an application to execute the decree of the Appellate Court. It was then objected that the appellate decree had never been transferred for execution. This objection was overruled. It was held that Court X had under s. 37A power to execute the appellate decree, and that as Court Y had all the powers of Court X it retained its jurisdiction to execute the decree even after the appeal.

The transferee Court can decide all questions arising in execution as if it were its own decree (f) and has power under O 21, r 29 to stay execution of the transferred decree (f1)

Limitation on the powers of the transferee Court.—The jurisdiction of the transferee Court is limited to the execution of the decree transferred to it and it cannot transfer the decree for execution to another Court (g). In other respects its powers are limited in the same way as if it were its own decree. It cannot entertain an objection as to the legality or correctness of the decree (h), or that the decree is defective (i), or that it was obtained by fraud (j), or that it directs a sale of property which is not saleable under s. 60 of the Code (k). It cannot alter, vary or add to the terms of the decree, or allow future interest where none is allowed by the decree (l), nor can it question the right of a transferee of a decree whose name is on the record as the person entitled to execute it (m).

The transferee Court has no power to question the jurisdiction of the Court which passed the decree (n). There were conflicting decisions on this point which has now been settled by the omission from O 21, r 7 of the words 'or the jurisdiction of the Court which passed it' which occurred in s 225 of the Code of 1882. The Calcutta High Court has held that when a decree appears on the face of it to have been passed by a Court which had no jurisdiction the Court of execution is entitled to refuse to execute it (o). But the Rangoon High Court, in the case of a transferred decree, has expressed dissent and has held that the validity of a decree cannot be questioned by the executing Court (p).

If the Court which passed the decree has made an order for execution the transferee Court cannot question the legality or propriety of that order (g) It cannot therefore entertain an objection that the execution of the decree was barred by limitation at

| | |
|------|-----|
| (d) | (i) |
| (e) | |
| (f) | (m) |
| | |
| (fj) | (n) |
| (g) | |
| (h) | |
| (i) | |
| (j) | |
| (k) | |
| (l) | |
| (m) | |
| (n) | |
| (o) | |
| (p) | |
| (q) | |
| (r) | |
| (s) | |
| (t) | |
| (u) | |
| (v) | |
| (w) | |
| (x) | |
| (y) | |
| (z) | |

the time when the order for execution was made (r), but if the transferor Court which passed the decree has made no order for execution the Court of execution has power to decide whether execution is barred by limitation (s) or it may stay execution and leave the objection to be decided by the Court which passed the decree (t)

The transferor Court does not altogether surrender control—After transferring a decree to another Court for execution the Court which passed the decree cannot itself execute the decree and an application for execution made to it after the transfer and before a certificate of non-satisfaction under s. 41 has been returned is not even a step in aid of execution so as to save limitation (u). But the Court which passed the decree does not altogether surrender control of the execution proceeding. It has power under O 21 r 26 to make an order for stay of execution. It may withdraw execution by calling back the decree (v) or it may make an order for simultaneous execution by another Court (w). It has moreover jurisdiction to decide an objection as to limitation if referred to it by the transferee Court (x). If the decree is assigned after transfer the assignee must apply for execution to the original Court (y). If after a decree has been transferred for execution the judgment debtor dies the Court which passed the decree is by s. 50 the proper Court to order that execution should proceed against the legal representative. This is however merely a question of procedure and if the transferee Court makes the order that would be only an irregularity which might be waived (z).

43. [S 229] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India

Execution of decrees passed by British Courts in places to which this part does not extend or in foreign territory

This section applies to British Courts in Scheduled Districts and to British Courts in foreign territory. Such Courts may transfer their decrees for execution to Courts in British India to which the Code applies. The Court of the Political Agent Sikkim is a Court referred to in the section and it may transfer its decrees for execution to the Subordinate Judge at Darjeeling (a). The application for execution of a transferred decree must shew that this Court is one referred to in the section (b).

(r)
(s)

(t)
(u)

(v)
(w)

(188) 8 Cal 687 *Deb v Choudhury*
(1927) 5 Rang 397 104 I C 133 (2)
A R 258 *Dwarkanath v Imperial Bank of India* (1929) 56 Cal 1176 ('29)
A C 623
(x) *Sr Hari v Murari* (1886) 12 Cal 257 — "
(y)

(z)
(a)

(b) *Jadab Chandra v Dhananath* (1870) 4 Beng L R 134 13 W R 154

44. [S. 229-B.] The Governor-General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India

Execution of decrees of Courts of Native States. By notification.—For notifications issued under this section, see General Statutory Rules and Orders, Vol I, pp. 622 625, and Vol IV, pp. 682, 683 and 695

Decree of Courts of Native States.—The section uses the words "Native Prince or State" which are more restrictive than the words "foreign Prince or State" in section 43, and therefore does not refer to foreign Courts outside India. But the section does not take Native State decrees out of the category of foreign decrees (c) It empowers a Court in British India to execute a decree transferred from a notified Native State Court, but the British Court is not precluded from refusing execution on the ground that the Native State Court had no jurisdiction to pass the decree (d), or that the decree was obtained by fraud (e) The judgment debtor will have the same defences as if he were sued on the foreign judgment (f) The section was merely intended to alter the procedure for enforcing Native States' decrees (g), and must be construed as subject to the same limitations as are contained in s. 13

Limitation for execution of Native State decree.—The period of limitation for execution of a decree of a Court of a Native State transferred for execution to a Court of British India is not the period prescribed by the law of that State, but that prescribed by the law of British India, that is, three years from the date of the decree [Limitation Act, 1908, Sch. I, art 182] (h)

45. [S. 229-A.] So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the Gazette of India, declared this section to apply.

Execution of decrees in foreign territory. Court established or continued in Native States.—For a list of such Courts, see General Statutory Rules and Orders, Vol I, pp. 633 642, and Vol IV, p. 683

Execution of British decrees in foreign territory.—This is the only section which refers to the execution in foreign territory of decrees of Courts in British India. Such decrees can only be executed in foreign territory by British Courts established there

(c) *Haji Musa v Purmanand* (1891) 15 Bom 216

(d) *Ieerataghara v Muga Sait* (1916) 39 Mad 24 26 I C 287, *Jitappa v Jetti* (1916) 40 Bom 551 36 I C 363 *Shoo Talal v Bhanik* (1931) 53 All 747, (31) A. A. 689

(e) See (1891) 15 Bom 216, *supra*

(f) *Panch Kari v Giridhari Mal* (1925) 30 CWN 785 98 I C 40 (25) A C 955

(g) See (1891) 15 Bom 216 *supra*

(h) *Adabshahi v Dayabhai* (1916) 40 Bom 504, 36 I C 369

the time when the order for execution was made (r); but if the transferor Court which passed the decree has made no order for execution, the Court of execution has power to decide whether execution is barred by limitation (s), or it may stay execution and leave the objection to be decided by the Court which passed the decree (t)

The transferor Court does not altogether surrender control.—After transferring a decree to another Court for execution the Court which passed the decree cannot itself execute the decree, and an application for execution made to it after the transfer and before a certificate of non satisfaction under s. 41 has been returned, is not even a step in aid of execution so as to save limitation (u) But the Court which passed the decree does not altogether surrender control of the execution proceeding It has power under O 21, r 20, to make an order for stay of execution. It may withdraw execution by calling back the decree (v), or it may make an order for simultaneous execution by another Court (w) It has moreover jurisdiction to decide an objection as to limitation if referred to it by the transferee Court (x) If the decree is assigned after transfer the assignee must apply for execution to the original Court (y) If after a decree has been transferred for execution the judgment debtor dies, the Court which passed the decree is by s. 50 the proper Court to order that execution should proceed against the legal representative This is, however, merely a question of procedure and if the transferee Court makes the order, that would be only an irregularity which might be waived (z)

43. [S. 229] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

Execution of decrees passed by British Courts in places to which this part does not extend or in foreign territory

This section applies to British Courts in Scheduled Districts and to British Courts in foreign territory Such Courts may transfer their decrees for execution to Courts in British India to which the Code applies The Court of the Political Agent, Sikkim, is a Court referred to in the section and it may transfer its decrees for execution to the Subordinate Judge at Darjeeling (a) The application for execution of a transferred decree must shew that this Court is one referred to in the section (b)

(r) " " " " " " " " " " " "

(s)

(t)

(u)

(v)

(w)

(1882) 8 Cal 687, *Deb v Chowdhury*
(1927) 5 Rang 397, 104 I C 133 (2")
A R 258 *Dwarikanath v Imperial Bank of India* (1929) 56 Cal 1176, ("29)
A C 529

(x) *Srikari v Murari* (1886) 12 Cal 257

(y) *Framji v Rattanbhai* (1872) 9 Bom H C R 49
Kadir v Habi Baksh (1880) 2 All 283, *Amar Chandra v Gura Prosonno* (1900) 27 Cal 488
Tameshwar v Thakur Prasad (1903) 25 All 443
(1928) 55 I A 227, 3 Luck 314 109 I C

(z) *Jang Bahadur v Bank of Upper India Ltd* 417, (28) A PC 182

(a) *Jamii v Maharaja of Sikkim* (1913) 38 Cal 259, 11 I C 442

(b) *Jadab Chandra v Dinanath* (1870) 4 Beng L R 134, 13 W R 154

44. [S 229-B.] The Governor General in Council may, by notification in the Gazette of India declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India

Execution of decrees of Courts of Native States
By notification — For notifications issued under this section see General Statutory Rules and Orders Vol I pp 622-625 and Vol IV pp 682, 683 and 685

Decree of Courts of Native States — The section uses the words 'Native Prince or State' which are more restrictive than the words 'foreign Prince or State' in section 43 and therefore does not refer to foreign Courts outside India. But the section does not take Native State decrees out of the category of foreign decrees (c). It empowers a Court in British India to execute a decree transferred from a notified Native State Court, but the British Court is not precluded from refusing execution on the ground that the Native State Court had no jurisdiction to pass the decree (d) or that the decree was obtained by fraud (e). The judgment debtor will have the same defences as if he were sued on the foreign judgment (f). The section was merely intended to alter the procedure for enforcing Native States decrees (g) and must be construed as subject to the same limitations as are contained in s. 13.

Limitation for execution of Native State decree — The period of limitation for execution of a decree of a Court of a Native State transferred for execution to a Court of British India is not the period prescribed by the law of that State but that prescribed by the law of British India that is three years from the date of the decree [Limitation Act 1908 Sch I art 182] (h).

45. [S. 229-A] So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the Gazette of India, declared this section to apply

Execution of decrees in foreign territory
Court established or continued in Native States — For a list of such Courts, see General Statutory Rules and Orders Vol I, pp 633-642 and Vol IV, p 683

Execution of British decrees in foreign territory — This is the only section which refers to the execution in foreign territory of decrees of Courts in British India. Such decrees can only be executed in foreign territory by British Courts established there

(c) *Haji Musa v Furmanand* (1891) 15 Bom 216

(d) *Teerathgahra v Muga Sa t* (1916) 39 Mad 24 26 I C 287. *Jappa v Jeerji* (1916) 40 Bom 551. 36 I C 363. *Shao Tahal v Bani* (1931) 53 All 747 (31) A A 689

(e) See (1891) 15 Bom 216 *supra*

(f) *Panch Kari v Girdhari Mal* (1905) 30 C W N 785 93 I C 40 (25) A C 953

(g) See (1891) 15 Bom 216 *supra*

(h) *Nab bhai v Dayabhai* (1916) 40 Bom 504 36 I C 369

and empowered by notification under this section. It is only when the Court in foreign territory is a Court established and continued by the Governor General in Council in the extraterritorial jurisdiction that there is power to provide for the transfer to them of decrees of British Indian Courts for execution, for both in Native States and in other foreign territory execution would be pursuant to the legislative authority or sovereign power of such State or territory (i)

The two previous sections dealt with the converse case of the execution by British Courts of decrees of—

- (a) British Courts in Scheduled Districts, see 43
- (b) British Courts in foreign territory including Native States, see 43
- (c) Foreign Courts in Native States, see 44.

All other decrees of foreign Courts i.e., Courts outside India and Courts of Native States not notified under sec. 44 must be enforced by suit. But as regards foreign Courts in Native States a reciprocal arrangement is sometimes effected by treaty for the execution of their decrees in our Courts and our decrees in their Courts. Such an arrangement was made with Travancore in 1857 and is referred to in the undermentioned case (j)

By notification —For notifications issued under this section see General Statutory Rules and Orders Vol I, pp 618-621

46. [New] (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept

Precepts

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property

Attachment under precept—It was at one time proposed to do away with the system of execution by transfer of decree under sections 30 to 42 and to substitute another system whereby the Court which passed the decree retained complete control and issued precepts to one or more other Courts to carry on execution under its direction. This proposal was abandoned and the system of execution by transfer of decree retained. But the proposal led to the insertion of the present section by which the Court which passed the decree can issue a precept of attachment to endure for two months or pending transfer of decree and application for execution. The object of a precept is to enable a

(i) *I vee Lall e v. Perun al* (1917) 40 Mad 1069 1076 1079 421 C 294

(j) (1917) 40 Mad 1069 *supra*

decree holder to obtain an interim attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. No such attachment however can continue for more than two months except in the two cases mentioned in the section. The effect of the provision is to render re-attachment unnecessary.

The Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby. But it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment. It cannot therefore be said that the Court to which a precept is issued has no jurisdiction to stay execution if the judgment debtor deposits the decretal amount in Court or gives security for payment of the amount (4).

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE

- 47 [S 244] (1) All questions arising between the parties to the suit in which the decree was passed, to the Court executing the decree and not by a separate suit

Questions to be determined by the Court executing decree

Court executing the decree and not by a separate suit

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court

Explanation—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit

Changes introduced in the section—This section corresponds with sec 244 of the Code of 1882 except in the following particulars—

- 1 Sub clauses (a) and (b) of sec 244 which provided for the determination of questions regarding the amount of mesne profits and interest in execution proceedings have been omitted as it was deemed expedient that such questions should be determined by the decree and not in execution. See O 20 r 12
- 2 The words or to the stay of execution thereof which occurred in sec 244 after the words execution discharge or satisfaction of the decree have been omitted in the present section. As to the effect of the omission see notes Stay of execution
- 3 Sub section (2) of the present section is new. It gives legislative recognition to the practice followed by the Courts under the Code of 1882. See notes below under the head Sub section (2) Court may treat suit as an application

(4) *Puran Mal v Dina Nath* (19 6) 8 Lah L J 164 94 I C 119 (26) A L 433

16

and empowered by notification under this section. It is a Court established and continued by the Government of the territory in which the execution of the decrees of British Indian Courts for execution in foreign territory would be pure and simple power of such State or territory (i).

The two previous sections dealt with Courts of decrees of—

- (a) British Courts in India
- (b) British Courts in India
- (c) Foreign Courts

All other decrees of States not in India in Native States of their decrees was made with India

By notification under Statutory Rules and Orders

46. [New] (1) Upon the receipt of the Court whenever it is

other Court which would be competent to attach any property belonging to the debtor specified in the precept

(2) The Court to which a precept is sent to attach the property in the manner prescribed in the attachment of property in execution of a decree

Provided that no attachment under a precept continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property

Attachment under precept—It was at one time proposed to do away with the system of execution by transfer of decree under sections 30 to 40 and to substitute another system whereby the Court which passed the decree retained complete control and issued precepts to one or more other Courts to carry on execution under its direction. This proposal was abandoned and the system of execution by transfer of decree retained. But the proposal led to the insertion of the present section by which the Court which passed the decree can issue a precept of attachment to enure for two months or pending transfer of decree and application for execution. The object of a precept is to enable a

(1) *See* *Leila v. Perumal* (1917) 40 Mad 1069 1076 1079 4 I C 994 | (2) (1917) 40 Mad 1069 *supra*

decree holder to obtain an interim attachment where there is a right to appeal and that he may otherwise be deprived of the fruits of his decree. No such attachment however can continue for more than two months except in the two cases mentioned in the section. The effect of the proviso is to render the attachment unnecessary.

The Court to which a precept is issued derives its authority from that precept and has no power to do anything not authorized thereby. But it must be presumed to have inherent powers to deal with all matters that may incidentally arise in connection with proceedings for attachment. It cannot therefore be said that the Court to which a precept is issued has no jurisdiction to stay execution if the judgment debtor deposits the decretal amount in Court or gives security for payment of the amount (k).

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE

47 [S. 244] (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit

Questions to be determined by the Court executing decree

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a part of a suit and may, if necessary, order payment of any additional court-fees

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court

Explanation—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit

Changes introduced in the section—This section corresponds with sec. 44 of the Code of 1882 except in the following particulars—

1. Sub-clauses (a) and (b) of sec. 244 which provided for the determination of questions regarding the amount of mesne profits and interest in execution proceedings have been omitted as it was deemed expedient that such questions should be determined by the decree and not in execution. See O. 20 r. 12.
2. The words "or to the stay of execution thereof" which occurred in sec. 244 after the words "execution, discharge or satisfaction of the decree" have been omitted in the present section. As to the effect of the omission see notes "Stay of execution".
3. Sub-section (2) of the present section is new. It gives legislative recognition to the practice followed by the Courts under the Code of 1882. See notes below under the head "Sub-section (2) Court may treat suit as an application".

(k) *Puran Mal v. Dina Nath* (1906) 8 Lah. L. J. 184, 94 I. C. 119 (26) A. L. 433

- 4 Under the old sec 244 the Court executing the decree had the *option*, when a question arose as to who was the representative of a party, itself to determine the question or to stay execution until it was determined by a separate suit. Sub section (3) of the present section renders it *obligatory* on the executing Court itself to determine the question, as it was considered inexpedient that separate suits should be instituted for the decision of such a question. See notes below under the head "Sub section (3) Inquiry as to who is the representative of a party."
- 5 The Explanation sets at rest a conflict of judicial decisions noted below in the commentary under the head "Explanation to the section and parties to suit."

To what decrees section applies.—This section has no application when the decree is a nullity, for such a decree is not a decree at all. If the defendant dies after the hearing of the suit is concluded and judgment reserved, the decree is binding on his estate. see O 21, r 6. This is on the principle that *actus curiar nemini fuit injuriæ*, and judgment is entered up *nunc pro tunc* (l). But if the defendant dies before the hearing is concluded and the decree is passed without bringing his legal representative on the record, the decree is a nullity and incapable of execution (m). If an application is made to execute the decree against the legal representative he can challenge the validity of the decree in execution proceedings (n), and if his property is taken in execution he can sue to recover it (o). Nor does the section refer to declaratory decrees, for the rights declared by such decrees can only be enforced by a suit. If a decree has been construed as a declaratory decree, creating new rights and obligations, sec 47 does not apply and it can only be enforced by a suit (p). The section refers only to decrees which are capable of execution. If a decree is capable of execution as to costs no suit will lie for such costs (q).

Section to be construed liberally.—It is settled law in India that no action will lie on an executable judgment, for on such a judgment the only remedy is execution (r). The section is so framed as to prohibit in a separate suit any relief being granted which will interfere with the conduct of execution proceedings by the Court executing the decree (s). The main principle underlying this section is that matters relating to the execution discharge, or satisfaction of a decree and arising between the parties, or their representatives, should be determined in the execution proceeding, and not by separate suit. It matters not whether such question arises before or after the decree has been executed (t). The section provides a cheap and expeditious procedure for the trial of such questions without recourse to a separate suit. The Privy Council referring to the corresponding section of the Act of 1801 said "this enactment was undoubtedly passed for the beneficial purpose of checking needless litigation, and their Lordships do not desire to limit its operation" (u). Again with reference to the Code of 1882 the

(l) C
(m) I

(o) *Bens Prasad v Muktesar* (1899) 21 All

(p)

(q)

(r)

(s)

(t)

(u) *Choudry Wahed v Mast Jumara* (1873) 11 Beng L R 149 155

Privy Council stressed the same point in *Prasanna Kumar v. Kali Das* (r), and said: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244. Following these decisions a wide and liberal construction has always been placed upon the section (r).

On the other hand the conditions which bar a separate suit must not be lost sight of. These conditions refer (1) to the questions, and (2) to the parties. The questions must relate to the execution, discharge, or satisfaction of the decree. The parties must be the parties to the suit or their representatives. If both these conditions are fulfilled the question must be determined in execution proceedings and a separate suit will be barred.

"And not by a suit"—whether objection to execution can be raised by way of defence.—The section provides that all questions arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. The words "and not by a separate suit" have given rise to the question whether if a party to a suit fails to raise an objection to execution in execution proceedings, he may raise it by way of defence in a suit brought against him. In *Bhiram Ali v. Gopi Kanth* (x) the High Court of Calcutta held that he is entitled to raise the objection by way of defence. The ground of the decision was that what is prohibited by the section is the determination of questions relating to execution by a separate suit and not their determination in a separate suit. *Bhiram Ali's* case and the Calcutta cases which followed it have been overruled by a recent Full Bench ruling of the same High Court in *Lalshman Chandra v. Ramdas Mondal* (y). The grounds of the decision are (1) that the words "shall be determined by the Court executing the decree" amount to a direction that the executing Court alone shall determine questions relating to the execution, discharge or satisfaction of the decree, thus giving the Court executing the decree exclusive jurisdiction to determine such questions and (2) that the prohibition conveyed by the words "and not by a separate suit" is a provision in aid of the previous direction. In the Full Bench case the decree was satisfied by an adjustment, but the adjustment was not certified to the Court as required by O. 21, r. 2. The decree holder applied for execution and the judgment-debtor's property was put up for sale and purchased by the decree holder himself. The decree holder afterwards sued the judgment debtor for possession. The judgment-debtor contended that the decree had been satisfied and that the sale was therefore fraudulent and void. It was held that the judgment debtor was precluded by this section from raising this defence. The Full Bench held that it did not make any difference whether the objection was raised by the judgment debtor by a suit of his own or by way of defence in a suit brought against him. Similarly if A obtains a decree against B as legal representative of C, and in execution of the decree property alleged to belong to the estate of C is sold and purchased by P and P sues B for possession, B is precluded by this section from contending that the property belonged to him and that it did not form part of the estate of C (z). *Bhiram Ali's* case has been followed by the High Court of Madras (a). The Madras decisions require reconsideration in the light of the Full Bench ruling referred to above.

(r) (1905) 10 Cal. 228; 200. 10. 7. A. 100. 4-5.

(w)

(x)

(y)

(z) 5 " "

(a)

Prasanna Kumar v. Kali Das 13 J. 131
1 C. 193, *Thatha Naick v. Kousha Iyetti*
(1909) 32 Mad. 242 11 C. 2-1; *Munishi*
China Danesi v. Munishi Iyetti Thatha
(1921) 41 Mad. 13 201, 70 J. 1 207
(21) A. M. 279

Questions relating to execution, discharge or satisfaction—Questions relating to the execution, discharge or satisfaction of the decree arising between the parties to the suit or their representatives are within this section and they must be decided in execution and not by separate suit. The following are examples of such questions—

1 *Property wrongly taken in execution*—If the decree holder takes in execution land not included in the decree, or in excess of the decree, the judgment-debtor must apply under this section for the recovery of such land, and a separate suit for that purpose will not lie (b). The plaintiff obtained a decree against only one of two defendants, but took in execution monies that had been paid by the surety of the other defendant. The Privy Council said that the question was between parties to the suit and related to the satisfaction of the decree and that whatever remedy the aggrieved defendant had, section 47 precluded a suit against the plaintiff (c).

2 *Property taken in execution of decree subsequently amended*—If a mortgagee brings property to sale in execution of a decree for sale, and an error in the mortgage amount is subsequently discovered the judgment debtor claiming a refund of the excess (d), or the decree holder claiming to recover the deficit (e), must apply under this section and a separate suit will not lie.

3 *Property taken in execution of ex parte decree set aside*—If property is realized in execution of an ex parte decree which is afterwards set aside, the judgment-debtor must apply for restitution under this section (f). There is however a conflict of decisions as to whether this case falls under section 144. See note under that section, "Where the decree is varied or reversed".

4 *Injunction granted by decree*—A suit to enforce a permanent injunction granted by a decree is barred by this section. The remedy is by execution (g).

5 *Objections to attachment or sale by parties or their representatives*—See notes below under the same heading.

6 *Adjustment of decree*—The question whether a decree has been paid or adjusted out of Court is one for the Court of execution to decide under this section. If the judgment debtor applies to enter up satisfaction of a decree by a writing in the nature of a compromise and the decree holder objects that the writing was obtained by fraud, the question is one relating to the discharge of the decree to be decided by the Court of execution under this section (h). If the adjustment has not been certified by the judgment debtor within the time allowed by law, and the decree holder proceeds to execute the decree, the dispute no doubt is one relating to the satisfaction of the decree, but it cannot be dealt with either under this or any other section relating to execution, for an uncertified adjustment cannot be recognized by any Court executing the decree (i). See O 21, r 2 (3).

(b)

22 All 79

(c) *Asiratan v Ram Paton* (1901) 5 C W N

627

(f) *Saran v Bhagiran* (1903) 23 All 441,
Sreemirao v Valentine (1920) 44 Bom

70, 57 L C 125

(g) *Sachi Prasad v Amarnath* (1919) 46 Cal

103 45 IC 864

Josef v Moers (1931)

(h)

(i)

(e) 130 L C 481 (S. J. A. J. 20)

(c) *Marrel v Mahmood* (1930) 34 C W N

45 122 L C 11 (30) A FC 86

(d) *Harnam v Harnam* (1905) 27 All 483*Dhan Kunwar v Malhab Singh* (1900)

7. *Agreement not to execute decree*—If the judgment-debtor objects that the decree-holder had prior to the passing of the decree, agreed not to execute it or to execute it only in part, the question is one which according to all the Courts (j), except Calcutta (k) and Rangoon (l), should be determined under this section by the Court of execution. The Calcutta and Rangoon Courts consider that the real question in such a case is whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties, and that such an inquiry is outside the scope of this section for the section presupposes the existence of a decree as to which there is no dispute. The Lahore High Court has held that an objection that the decree holder had agreed prior to the decree that the judgment debtor would not be personally liable cannot be heard by a Court of execution for that would be to alter the terms of the decree (m). In a later case (n) the Madras High Court has said that if the agreement relates to the execution of the decree, the question may be determined under s. 47—but that an agreement which directly strikes at the decree cannot be pleaded in execution and that a compromise prior to the decree which has the effect of reducing the amount for which the decree can be executed cannot be pleaded. The Court, however, admitted that there are cases on the border line predecree arrangements which though in form they relate to execution do in substance modify or totally nullify the decree.

8. *Substituted share*—Where a decree gives a right to possession of a share in an *ijmal* mahal, which has prior to the date of the decree been partitioned under the Estates Partition Act (Beng. Act 5, 1897), the Court in proceedings for execution of the decree has power under this section to put the decree holder in possession of the specific land substituted for his share on partition (o).

9. *Accretion to mortgaged property*—The question whether certain property is an accretion to the mortgaged property is a question to be determined under this section in execution of a decree for redemption obtained by the mortgagor against the mortgagee (p).

10. *Waste committed by judgment-debtor after decree for possession*—The question whether the judgment debtor has committed waste, e.g., cut down trees, after a decree against him for possession, is one to be dealt with under this section, and not by a separate suit (q).

11. *Decree for possession*—Where a decree is passed for possession in a suit for pre-emption conditional on the plaintiff paying a specified sum of money within a time fixed by the Court, and the money is paid, but possession is not delivered to the plaintiff, his only remedy is by an application under this section. A suit for possession is barred under this section (r).

Questions not relating to execution, discharge or satisfaction—If the question that arises between the parties or their representatives does not relate to the

| | | |
|---|---|------------------|
| (j) <i>Laldas v. Kishordas</i> (1898) 22 Bom. 463 | 96 IC 773 (28) A. R. 140 | <i>Moolia v.</i> |
| <i>Rukmani v. Krishnamacharya</i> (1911) | <i>Chartered Bank of India</i> (1907) 5 Rang. | |
| 9 Mad. L. T. 464 8 IC 1071 | 695 107 IC 880 (28) A. R. 30 | |
| <i>Subramania v. Kumaraselu</i> (1916) 39 Mad. | (m) | |
| 541 33 IC 66, <i>Chidambaram v. Krishna</i> | (n) | |
| (1917) 40 Mad. 233 37 IC 836 (B. B.) | (o) | |
| <i>Velu v. Krishnasami</i> (1925) 49 Mad. L. J. | (p) | |
| 277 87 IC 297, (25) A.M. 591 | (q) | |
| <i>Gaura Singh v. Gajadhar Das</i> (1909) 6 All. L. J. | (r) | |
| 403 2 IC 608 | | |
| <i>Ventakarasubba v. Manickammal</i> (1926) 49 Mad. 513 93 IC | | |
| 428 (26) A.M. 582 | | |
| (k) <i>Hasan Ali v. Gauzi Ali</i> (1904) 31 Cal. 179 | | |
| <i>Benode v. Brajendra</i> (1902) 29 Cal. 810 | | |
| <i>Choti Narain v. Mst. Kamalwar</i> (1902) | | |
| 6 C.W. 796 | | |
| (l) <i>Mulla v. Maung Po</i> (1903) 4 Rang. 118 | | |

distribution of assets (d) or between joint degree holders inter se (e) are not within the section.

(2) *Questions between judgment-debtors inter se*—The Allahabad High Court has held that questions between judgment-debtors inter se are not within the section (f). But the Madras High Court has recently held that they are (g) and this has been followed by Patna (h).

(3) Questions between a party and his own representatives are not within the section (i)

When a party is suing or being sued in a representative capacity [see II, Explanation VI and O 1 r 8] all persons whom such party represents are parties. Thus if a decree is passed against a karnavan of a tarwad in his representative capacity all members of the tarwad are parties to the suit (j) in their capacity of members of the tarwad (k). A minor (l) or a lunatic (m) not represented by a proper guardian ad litem is deemed not to be a party to the suit. An objection, however, on this ground cannot be taken in execution proceedings against the minor or lunatic, for an executing Court cannot go behind the decree but the judgment may be attacked in revision or by appeal or by a regular suit (n). A judgment debtor, who objected to a sale of property on the ground that he had acquired a fresh title to it subsequent to the decree, was held not to be a party to the suit in respect of that objection (n). A benamidar is neither a party nor a representative of a party within this section (o).

Explanation to the section and parties to suit.—Under section 244 of the Code of 1882 the High Courts of Allahabad (p) and Calcutta (q) held that a plaintiff whose suit had been dismissed, and a defendant against whom a suit had been dismissed ceased to be parties to the suit. On the other hand it was held by the High Court of Madras (r) and Bombay (s) that such persons continued to be parties to the suit. The Explanation gives effect to the latter view. Objections therefore to attachment or sale by such persons come within this section and not O 21 r 58 (t). In *Krishnappa v Periaswamy* (u) the Madras High Court held that a defendant against whom the suit was dismissed on account of misjoinder is not a party. In *Sannamma v Radhabhaya* (v) the same High Court held that a defendant who had been properly impleaded, but as against whom the suit was dismissed because the plaintiff had abandoned his case as against him is a defendant against whom a suit has been dismissed under s. 47. In *Abdul v Sundara* (w) a Full Bench of the Madras High Court held that a person who is not a proper

- (d) *Kalka v Basant* (1901) 23 All 348 *Shro*
(e) *Iarshad v Nawab Singh* (1910) 3 All
301 51 I C 408
(g) *Rahmudd v Lall Meah* (1902) 29 Cal 696
Ram Pershad v Jagannath (1903) 30
Cal 134
(f) *Ramaswami v Kamesharamma* (1900)
3 Mad 361 (F B)
(a) *Gover v Ignecsur* (1893) 17 Bom 49
(i) *Jamini v Kali Prasad* (1921) 34 Cal L J
477 67 I C 6 (21) A C 242 *Shree*
Kaloo v Bholanath (1923) 6 Pat L J
795 *Musammal Madho v Hazari Mal*
(1929) 8 lat 717 115 I C 69, (29)
A P 141 *Chetty Firm v Teo Le San*
(1927) 5 Rang 393 104 I C 121 (27)
A R 273
() (1917) 40 Mad 964 33 I C 97 followed
in *U Kala v Ma Hari* (1917) 5 Rang
110 101 I C 94 () A R 137
(r) (1918) 41 Mad 418 43 I C 935
(w) (1931) 54 Mad 81 127 I C 803 (30) A M
817 (F B) approving *Krishnappa v*
Pernaseamy (1917) 40 Mad 964 33 I C
297 and overruling *Sethu v Ramaseamy*
(1926) 49 Mad 494 94 I C 506 (26)
A M 494 and *Linga v Lakshmanan*
(19 6) 60 Mad L J 337, 94 I C 123
() A M 687

party to the suit is not a party under s. 47 for the purposes of execution, and that it matters not that the Court, instead of striking out his name under O 1, r. 10(2) has dismissed the suit as against him. A person whose name is struck off the record is a person whom the Court does not regard as a person to be bound by the decree and is therefore not a party under s. 47 (x). The Allahabad High Court has held that an order exempting a defendant from the suit is equivalent to an order dismissing the suit as against him and that if his name is not struck off the record he is a party to the suit for purposes of execution (y).

* **Representatives**.—The term 'representative' in this section includes not only legal representatives in the sense of heirs, executors or administrators but also 'representative in interest' that is, any transferee of the decree holder's interest, or any transferee of the judgment debtor's interest, who, so far as such interest is concerned, is bound by the decree (z). On the other hand, a surety for the performance of a decree is not a representative of a party within the meaning of this section (a). See s. 145 below. It was at one time supposed that a transferee by judicial sale could not be a representative (b), but this view is no longer tenable. It was also said that a 'representative' is a person who succeeds to the rights of any of the parties after suit (c), but this is incorrect for a transferee may be bound by the decree on the doctrine of *lis pendens* (d). Thus when at the time of the purchase the property purchased was under attachment in execution of a decree the purchaser was regarded as a representative of the judgment debtor (e).

Illustration

A in execution of his decree obtained on the 14th March an order for the attachment of the property of B. The attachment was actually effected on the 17th of March. But before this B had obtained an interim order from the Court of appeal for stay a copy of which was received by the Court of execution on the 16th March. The stay order was vacated on the 15th April. C believing that the attachment after the stay order was invalid purchased the property from B on the 27th May. A, however, continued to prosecute his execution proceeding against B and three years later the High Court restored the attachment. Held that as C purchased during the pendency of the execution proceedings he was bound by the order of the High Court on the principle of *lis pendens* and must be regarded as a representative of B. The question of the validity of the attachment is one that falls to be decided by the Court of execution, and it mattered not that the Court was called upon to decide the question formally after the judgment debtor had sold the property. *Tenkatachulapathi v. Tenkalappaya* (1931) 53 Mad. 493 136 I C 306, (32) A M 86.

But the Bombay High Court has held that a purchaser *lite pendente* is not the representative of his vendor (f). A Calcutta case said that to determine whether a particular person is a representative of a party, the two tests to be applied are, first, whether any portion of the interest of the decree holder or of the judgment debtor which was originally vested in one of the parties has by the act of parties or by operation of law vested in the person in question (g).

(x)

(y)

(z)

(a)

has been a devolution of interest whether so far as such interest is concerned that person is bound by the decree (g). A devisee (h), a legatee (i) and a person taking joint property by survivorship (j), have been held to be representatives. The following are illustrations of persons held to be representatives under this section.

(1) A transferee of a decree, or of the interest of any decree holder in a joint decree within the meaning of O. 21, r. 16 is a representative of the decree holder (l). A transferee from such transferee is also a representative of the decree holder (l).

A judgment creditor who attaches a decree held by the judgment debtor against another is a representative of the judgment debtor. I holds a decree against B. C obtains a decree against A, and in execution attaches the decree held by A against B. C is a representative of I in proceedings in execution of A's decree against B (m). See O. 21, r. 53 (3).

(2) A obtains a decree against B for Rs. 5000. B then sells certain property belonging to him to C. C is not a representative of B, for the decree is a simple money decree, and does not relate to the specific property sold to C (n).

(3) A purchaser, lessee, or mortgagee, from a judgment debtor, of property belonging to the judgment debtor and attached in execution of a decree against him, is the representative of the judgment debtor within the meaning of this section, for the property being under attachment at the date of the purchase, lease or mortgage, the purchaser, lessee or mortgagee is bound by the decree so far as the interest transferred to him is concerned (o). See section 64.

(4) *Purchaser of judgment debtor's equity of redemption under a private sale*—A obtains a decree against B for sale of certain property mortgaged to him by B. After the date of the decree, B sells his equity of redemption in the mortgaged property to C. C is a representative of B the judgment debtor for the property having been purchased after it was affected by A's mortgage decree. C is to that extent bound by A's decree. Hence any question relating to the execution of A's decree, and arising between A and C, must be determined by the Court executing A's decree, and not by a separate suit (p). The same procedure would apply even if B had transferred his interest in the property to C during the pendency of the suit and before the passing of the decree (q).

(5) *Purchaser of judgment debtor's equity of redemption at a judicial sale*—A obtains a decree against B for the sale of certain property mortgaged to him by B. Before the property could be sold in execution of A's decree, A, who holds a money decree against B, brings B's equity of redemption in the mortgaged property to sale in execution of his decree, and it is purchased by C. C is a representative of B, the judgment debtor, for the property having been purchased after it was affected by A's mortgage decree, C is to that extent bound by A's decree. Hence any question relating to the execution

(g) *Ajodhya Roy v. Hardwar Roy* (1907) 9 Cal. L. J. 485.

(h) *Bhavani Shanker v. Varanashanker* (1829) 23 Bom. 536.

(i) *Chettiar Firm v. Teo Fe San* (1907) 5 Rang. 393, 104 I. C. 101 (17) A. R. 273.

(j) *Feari Lal v. Chandu Charan* (1906) 11 C. W. N. 163.

(k) *Dwar Bukt v. Fatik* (1830) 26 Cal. 250. *Badrinarain v. Jan Kishen* (1894) 16 All. 483. *Sheo Prasad v. Lal* (1915) 41 Lat. 120, 86 I. C. 564 (15) A. P. 449.

(l) *C. v. C.* (1907) 11 C. W. N. 163.

(m) *C. v. C.* (1907) 11 C. W. N. 163.

(n) *C. v. C.* (1907) 11 C. W. N. 163.

Rashbehary v. Surnomoojee (1881) 7 Cal. 403. *Mt. Bhamphul v. Harbakhsh Singh* (1912) P. R. no. 64 p. 247, 14 I. C. 40 [gift by judgment debtor of his entire property].

(o) *Cur Jaggad v. Ram Lal* (1899) 21 All. 20 (sale). *Mathewson v. Cobardhan* (1901) 28 Cal. 452 (lease). *Jaramananda v. Malabier* (1897) 20 Mad. 374 (mortgage). *Kuppana v. Kumara* (1911) 34 Mad. 450, 71 I. C. 418 (sale). *Varayanaswami v. Seshappier* (1907) 17 Mad. L. J. 321 (mortgage). *Lalji Mal v. Nand Kishore* (1897) 19 All. 339. *Ishar Das v. Farma Nand* (1915) 6 Lah. 544, 93 I. C. 30 (16) A. L. 134 (mortgage).

(p) *Madho Das v. Pamji* (1894) 16 All. 286, 291.

(q) *Shro Varain v. Chundal* (1900) 22 All. 243.

of A's decree, and arising between A and C, must be determined by the Court executing A's decree and not by a separate suit (r)

(6) A purchaser of property from a party to a suit in which an injunction has been granted affecting such property is not a "representative" within the meaning of this section — A obtains a decree against B restraining B by an injunction from obstructing him in the exercise of his right of way to his land over B's land. A then sells his land to C. If B obstructs C in the enjoyment of the right of way, C's proper remedy is by way of suit against B and not in execution under this section. The reason is that an injunction does not run with the land, and C cannot therefore claim the benefit of the decree against B (s). Note that C is not a transferee of the decree, but of the property only. See notes to s. 50, 'Decree for injunction'

(7) The Official Assignee claiming property on behalf of the creditors of an insolvent judgment debtor is not a "representative" of the judgment debtor within the meaning of this section (t). In such a case he is really a third party making a claim though for some purposes he would be entitled as representing the judgment debtor to litigate matters under section 47 (u)

(8) The High Court of Allahabad has held that a purchaser from a judgment-debtor under O 21, r 83 is a "representative" of the judgment debtor within the meaning of this section (v). A obtains a decree against B. In execution of the decree certain property belonging to B is attached and an order is made for the sale thereof. B then obtains a certificate from the Court under O 21, r 83, to sell the property by private sale, and the property is sold to C in pursuance of the certificate. C is a "representative" of B within the meaning of this section.

(9) A purchaser from the judgment debtor of an occupancy holding not transferable by custom is a "representative" of the judgment debtor. If the holding is sold in execution of the decree against the judgment debtor, and he is dispossessed by the auction purchaser, he may apply for possession under this section, and not under O 21, r 100 (w)

(10) A purchaser from a judgment debtor of a portion of a holding is, so far as his interest is concerned, bound by the decree for rent obtained against the judgment debtor under s. 148A of the Bengal Tenancy Act 8 of 1885 and by the sale in execution of that decree. He is therefore, a "representative" of the judgment-debtor, and if he is dispossessed by the auction purchaser, he may apply for possession under this section, but not under O 21, r 100 (x)

Objections to attachment or sale by parties or their representatives — Objections to attachment made by a judgment debtor or his representative must be distinguished from those made by either of them on behalf of a third person. In the former case the objection comes under this section, and a separate suit is barred. The order, however, operates as a decree, and a second appeal lies from it. In the latter case the objection is in effect one by a third person, and it falls under O 21, r 58. The objector may proceed either by an application under O 21, r 58, or by a regular suit. If he proceeds by an application under O 21, r 58, there is no appeal from the order, but he may file a suit as provided by O 21, r 63. Such a suit must be filed within one year from the date of the order.

(r) *Gulzari Lal v Madho Ram* (1904) 26 All 447
Ishan Chunder v Beni Madhub (1897)
 24 Cal 69. *Radha Kishan v Mem*

(s)
 (t)

(u)

(v)

(w)

(x)

If the judgment-debtor objects that the property is not liable to attachment or sale (y) or that the decree holder in connivance with a Court person has misappropriated part of the property attached (z) the objection is by the judgment debtor on his own behalf and it must be decided by the executing Court under this section. Similarly if property is attached as property of a deceased judgment debtor in the hands of his legal representative and the latter objects that it is not property of the deceased, but his own property the case falls under this section for the legal representative is not setting up a *jus tertii* (a). But if the objection is made by the judgment-debtor or his representative not on his own behalf but on account of a third party as trustee (b) or as agent of an idol (c) or on the ground that the property is *wakf* (d) the objection is under O 21 r 58 and not under this section.

Objections to attachment or sale by third parties—If the objection to attachment is made by a third party he may proceed either under O 21, r 58 or by a regular suit (e) and the claim cannot be dealt with under this section (f). See notes above.

Objection to attachment or sale by parties or their representatives—

Execution purchaser—We now proceed to consider cases where property of the judgment-debtor has been sold in execution of the decree and questions in which the auction purchaser is concerned arise *subsequent* to the sale. These questions fall into two classes according to the parties between whom they arise—

A—Questions between the decree holder on the one hand and the judgment debtor on the other hand, the auction purchaser being only interested in the result

B—Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand

A Questions between the decree holder on the one hand and the judgment-debtor on the other, the execution purchaser being only interested in the result—

These questions being essentially questions *between parties to the suit* fall within this section (g). It is well settled that *as between the judgment debtor and the decree holder* an objection [to the sale in execution] can only be taken in execution and sec 244 (now sec 47) prohibits a suit by a party or his representatives against an auction purchaser to raise a question which as between the judgment-debtor and the decree holder must have been determined under that section (h). The fact that the

(y) *Trimbak v Gorinda* (1890) 19 Bom 39

(z) *Gajadhar v Babu Arjun* (1916) 1 Pat L J 558 36 I C 280

(a) *Sethchand v Durga* (1890) 10 All 313
Ianchanun v Babu Bibi (1890) 17 Cal 711
Kali Charan v Jewat (1906) 28 AU 51
Pengapayyan v Karimpanakal (1903) 96 Mad 501
Madhusudan v Gobinda (1900) 97 Cal 34
Murugaya v Hayat Sahab (1899) 23 Bom 937
Gokul Singh v Kissen (1910) 34 Bom 546
71 I C 457
Umeshananda v Mohendra (1911) 14 Cal L J 337 111 I C 930
Ayo Koer v Gorak Nath (1914) 19 C W N 517
71 I C 31
Dulla v Shub Lal (1917) 39 All 47 36 I C 281
Bhagwant Ram v Nizam Din (1911) 3 Lah L J 406 63 I C 83 (21) A L 173
Arunachellam v Maung San Ngice (1914) Rang 168 83 I C 550 (4) A R 33
Jahar Das v Jarna Nand (1915) 6 Lah 544 93 I C 30 (96) A L 134
Mfay v Mfay (1917) 5 Rang 65 107 I C 858 (98) A R 99
Saida v Tajend (1919) 48

Cal L J 551
Maria v Pana (1909) 30 Bom I R 1447 (28) A B 534

(b) *Mangaya v Hajat Sahab* (1899) 23 Bom 937
Budrudin v Abdul Rahim (1908) 31 Mad 15
Indomati v Joqashar (1906) 98 All 644
Roop Lal v Bekani (1890) 15 Cal 437

(c) *Kartrick Chandra v Ashutosh* (1912) 39 Cal 298 12 I C 163
Upendra Nath v Kusum (1915) 40 Cal 440 27 I C 38
Contra Shah Naim v Gurdhari (1917) 2 Luck 145 100 I C 464 (27) A O 190

(d)

(e)

(f)

(g)

108
Nadarmuni v Teerabhadra (1911) 31 Mad 417 418 81 C 429
Gokul Singh v Kissen Singh (1910) 34 Bom 546 71 C 457
Mohan Singh v Punchnan (1907) 53 Cal 83 99 I C 180 (97) A C 100

an auction purchaser, who was not a party to the suit, is interested in the result, does not prevent the question being one *between the parties*. These questions therefore must be determined by the Court executing the decree, and not by a separate suit. The leading case on the subject is *Prosunno Kumar v. Kali Das* (i) where their Lordships of the Privy Council said: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244 [now s. 47] and that, when a question has arisen as to the *execution, discharge, or satisfaction* of a decree *between the parties to the suit* in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section." In *Prosunno Kumar* a case a suit was brought by the judgment debtor against his co-sharers and against the judgment-creditor and the auction purchaser to set aside a sale in execution on the ground of fraud. The fraud alleged was that the judgment-creditor had obtained a decree against the judgment debtor and his co-sharers and in execution of the decree attached the whole of the zamindari which belonged to the judgment debtor and his co-sharers; that thereafter the judgment debtor paid his quota of the judgment debt and it was arranged with the judgment creditor that the judgment-debtor's share should be exempted from sale; that pursuant to the arrangement the judgment creditor

share to be attached and sold. The Privy Council held that the plaintiff's remedy was by an application under this section, and the question being one relating to the execution, discharge or satisfaction of the decree, a separate suit to set aside the sale was barred under this section.

Illustration

A judgment debtor may seek to set aside an execution sale—

- [1] on deposit under O 21, r 89,
- [2] for material irregularity under O 21, r 90,
- [3] for fraud under O 21, r 90,
- [4] for other reasons,

[1] As to case (1), see note under O 21, r 89 below, "Appeal."

[(2) (3)] As to cases (2) and (3), see notes under O 21, r 90 below, "Suit to set aside sale on ground of material irregularity," "Fraud in publishing or conducting sale," "Application to set aside sale on other grounds," and "Appeal."

[4] A judgment debtor may seek to set aside a sale on grounds other than those mentioned above. A judgment debtor seeking to set aside a sale on any of the following grounds must proceed by an application under this section and not by a separate suit—that the sale is illegal or a nullity for want of notice under O 21 r 22 (j), that the judgment debtor has been adjudged insolvent and the decree gives no charge upon the land (k), that the property is not liable to attachment and sale (l),

(i)

Charan (1924) 47 Mad 388 80 I C 97
(24) A M 431

(k) *Anotherama v. Vittal* (1916) 30 Mad L J
611 34 I C 829

(l) *Ram Gopal v. Khulsi Ram* (1884) 6 All 448
Basti Ram v. Fetti (1886) 8 All 146
Durga Charan v. Kali Prosanna (1899)
26 Cal 727

(j)

that the sale is in contravention of O. 34, r. 14 (m), that the sale was not warranted by the terms of the decree (n), that the property sold did not belong to the judgment-debtor (o), that the decree holder had purchased without leave of the Court (p), that the decree had been adjusted (q), that the sale is invalid having been held after a stay order (r), that the decree holder's own property was sold by mistake instead of that of the judgment-debtor (s).

B Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand —

One class of cases arising under this head is where the decree holder himself is the purchaser and the judgment-debtor claims to *set aside the sale in execution*. In such a case the judgment-debtor must proceed by an application under this section and not by a separate suit (f).

Another class of cases arising between the auction purchaser on the one hand and the judgment-debtor on the other is where the auction purchaser seeks to recover possession of the property purchased by him. The question that arises in such cases is whether the Court purchaser must proceed by an application under this section coupled with O 21, r 95, or whether he is entitled to bring a separate suit for possession? This depends on who is the purchaser, for the property may be purchased by the decree holder himself with the leave of the Court under O 21, r 72, or it may be purchased by a stranger.

First, where the decree holder himself is the purchaser—Whether the decree holder purchaser must proceed by an application depends upon—(1) whether for the purpose of recovering possession of the property he is to be regarded as a ‘party’ to the suit within the meaning of s. 47, or whether he has ceased to be a party to the suit by reason of his purchase, and (2) whether the question as to delivery of possession is a question relating to ‘the execution, discharge or satisfaction of the decree’ within the meaning of s. 47. Upon these points there is a conflict of decisions.

According to the view taken by the High Court of Madras (u), and by a Full Bench of the High Court of Calcutta (1), the decree holder retains his character of a "party" to the suit though he is also the purchaser, and the question as to delivery of possession is a question relating to 'the execution, discharge or satisfaction of the decree' within the meaning of s 47. The two conditions laid down by the section are therefore satisfied, and a separate suit for possession is barred under s 47. But in a case where a tenancy was sold in execution of a decree for rent, and the auction purchaser decree holder was obstructed in taking possession by a person who claimed to be a landlord, the Calcutta High Court held that s 47 did not apply although the rival landlord had been joined as a party to the rent suit (vi). The High Court of Madras has also applied sec 47 to an application by a purchaser from a decree holder purchaser, resisted by the judgment debtor in obtaining possession, the reason given

| | | |
|-----|--|--|
| (m) | | (u) |
| (n) | | (v) |
| (o) | | (w) |
| (p) | <i>Genu v Saktharam</i> (1898) 22 Bom 271 <i>Durga v Balwant</i> (1901) 3 All 478 <i>Sivaramachari v Venkata</i> (1893) 16 Mad | |
| (q) | | |
| (r) | | |
| (s) | | |
| (t) | | |
| | | (v1) <i>Najibani v Golam</i> (1933) 60 Cal 140 |

being in one case (1c), that a purchaser from a decree holder who has purchased at a Court sale is a 'representative' of the decree holder, and in another (1) that he is a "representative" of the judgment-debtor, within the meaning of this section. In two of the cases cited above, however, the Madras Court observed that if this question had not already been settled by previous decisions of that Court, they would be disposed to hold that proceedings for obtaining possession could not be regarded as those 'relating to the execution, discharge or satisfaction of the decree' within the meaning of this section (y). In a recent Full Bench case it seems to have been assumed that such proceedings related to the execution of the decree (z).

According to the other view, which is the view taken by a Full Bench of each of the High Courts of Allahabad (a) Patna (b), and Bombay (c), and in recent cases by the High Court of Lahore (d), and Rangoon (e) a decree holder purchaser stands on the same footing as a purchaser who is a *stranger*, so that he may proceed either by an application under O 21 r 95, or by a separate suit for possession. This view proceeds on the ground that sec 47 does not apply either because the question as to delivery of possession is not one relating to the 'execution, discharge or satisfaction' of the decree or because a decree holder after he becomes purchaser of the property can no longer be said to be a party to the suit. The Oudh Court has held (f) that though the decree holder purchaser is a party to the suit, yet the question is not one under section 47 because the act of placing the purchaser in possession does not involve the decision of a question relating to the execution, discharge, or satisfaction of the decree. The cases in which it has been held that an auction purchaser, even if he is the decree holder, is not a party to the suit, require reconsideration in view of the ruling of the Judicial Committee that such an auction purchaser is a party to the suit (g).

These two divergent views lead to different results —

- (1) According to the first view, that is, the view taken by the High Courts of Madras and Calcutta a decree holder purchaser, who seeks to recover possession from the judgment-debtor of the property purchased by him at the auction sale, can proceed only by an application under O 21, r 95, which raises a question under sec 47 such application must be made within 3 years from the date on which the sale becomes absolute [Limitation Act, Ch. I, art 181]. According to the latter view, that is the view taken by the High Courts of Allahabad, Patna Bombay and Lahore and the Chief Court of Oudh, he may proceed by an application under O 21, r 95. Such an application, according to that view, does not raise a question under sec 47, therefore if he does not proceed by an application, or if he makes the application but it is unsuccessful, he may fall back upon his title and sue for possession. Such suit may be brought within 12 years from the date

(1c) *Sandhu v Hussain* (1905) 98 Mad 87
(2) *Venudra Mishra v Maya Pandan* (1920) 43
Mad 107 198 54 IC 209

(y)

(z)

(a)

(b)

array (1931) 10 Pat 670 133 F C 337,
(31) A P 231 F 2.

(c) *Hargorind v Ehdar* (1924) 48 Bom 550,
83 IC 930 (24) A B 490 overruling
Sadashiv v Varayan (1911) 35 Bom 452
11 IC 981 *Lakshman v Gorind* (24) 28
Bom L.R. 843 86 IC 503 (24) A B 5
Huralal v Panchandra (1930) 54 Bom
479 125 IC 703 (30) A B 375

(d) *Chottha Ram v Karmon Bai* (1918) P R. no
8 p 34 41 IC 169 *Nurul Ali v Sakina*
Legam (1919) P R. no 121 p 312 53 IC
460 See also *Bau Lal v Durga* (1920)

1 Lah 134 56 IC 254

(e) *Martin v Hashim* (1930) 8 Rang 162, 196
IC 209 (30) A B. 61

(f) *Gaya Baksh v Kwar Rajendra* (1928) 3 Luck
180 110 IC 83 (28) 4 O 199 (F R.)

(g) See *Ganapathy v Krishnamachariar* (1918)
45 I A 54 60 41 Mad. 403 411
41 IC 855

when the sale becomes absolute [Limitation Act, 1908 Sch. I, art. 138] so that even if the time for an application under O 21 r 95, has expired he may proceed by way of suit.

- (2) According to the other view, the application for delivery of possession falls under sec. 47, and the order made on the application amounts to a decree [a. 2 (2)] and is appealable as such. According to the latter view, sec. 47 does not apply to the case, and the application is entirely one under O 21, r 95, and no appeal lies from an order made upon such application.

If the decree holder purchaser is obstructed in obtaining possession by a stranger claiming bona fide to be in possession on his own account the question is not within the purview of sec. 47 but O 21, r 99 applies and the decree holder's remedy is by suit under O 21, r 103 (A). Similarly if the decree holder purchaser is obstructed in obtaining possession by the judgment-debtor and a stranger to the suit the case does not come within sec. 47 and he may bring a suit for possession against them (i).

When a decree holder at a Court sale obtained possession of land in excess of what was included in the mortgage and the decree, the Allahabad High Court held the judgment-debtor's suit to recover the excess was not barred, as the auction purchaser was not the representative of the decree holder (although he was the same person) (j).

Secondly where the purchaser is a stranger—Where a stranger auction purchaser seeks to recover possession from the judgment debtor two questions arise (1) whether the purchaser is a representative of either party to the suit and (2) whether the question of possession is one relating to the execution, discharge, or satisfaction of the decree. The second question has already been discussed with reference to the decree holder purchaser and the conflict of decisions on the subject has been noted. With reference to the first question the case does not fall under the section if the stranger auction purchaser is a representative of the judgment debtor for then the question would be between a party and his own representative. But it would fall under the section if he were a representative of the decree holder. Again the case would not come under the section if he was a representative of neither. The decisions on all these points are very conflicting. The High Court of Bombay has consistently held that an auction purchaser who is a stranger is not the representative of either party to the suit (k). The High Courts of Calcutta (l) and Allahabad (m) have held that he is not the representative of the decree-holder but that he is the representative of the judgment debtor. In Madras there is a hopeless conflict of opinion. The conflict was sought to be set at rest by a reference to a Full Bench in *Veyandramuthu v. Maya Nadan* (n) but it cannot be said that the object was attained. Oldfield, J., and Sheshagiri Ayyar J., held that a stranger purchaser at a sale in execution of a money decree was a representative of the judgment debtor, but not of the decree holder, while Abdur Rahim A.C.J., held that whether he was to be regarded as a representative of the one or the other depended upon the nature of the question raised and the right set up by the contesting party. The preponderance of authority in Madras seems to be in favour of the view that a purchaser at a sale in execution of a money decree who is a stranger is the representative of the judgment debtor and not of the decree holder with reference to questions relating to the execution discharge or satisfaction of the decree. Madras

(h) *Dierpalchandra v. Jeeban* (1931) 58 Cal 608 133 I.C. 335 (31) A.C. 574

(i) *Goba v. Sakharani* (1920) 44 Bom 977 59 I.C. 360

(j) *Bulaki Das v. Kesri* (1908) 50 All 686 (28) A.A. 363

(k) *Mayanlal v. Doshi Mulji* (1901) 25 Bom 631 635 *Gokulnag v. Ananag* (1910) 34 Bom 546 7 I.C. 457 *Rai Mani v. Jan*

ehdlat (19 3) 25 Bom L.R. 147 70 I.C. 256 (23) A.B. 214

(l) *Ishan Chunder v. Beni Madhub* (1896) 24 Cal 6 [F.B.]

(m) *G. Izari Lal v. Madho Ram* (1904) 26 All 447 [F.B.] *Ananti Kunwari v. Afudhua Nath* (1908) 30 All 379 383 384

(n) (1920) 43 Mad 107 54 I.C. 209

cases cited in footnote (o) decided that a stranger purchaser is not the representative of the decree holder, while those in footnote (p) decided that he is. Madras cases cited in footnote (q) decided that a stranger purchaser is the representative of the judgment debtor, while those cited in footnote (r) decided that he is not. In later decisions the Madras High Court has construed *Veyindramuthu's* case as extending the application of sec 47, and that it matters not whether the person actually raising the question in a particular case is a representative of a party but that a c 47 applies if the question is one relating to the execution of a decree and is one of a nature in which the parties to the suit are adversely interested (s). The High Court of Lahore has expressed the view that a stranger purchaser is not the representative of the judgment debtor (t). The Oudh Court has adopted the view taken by Ablur Rahim, A C J. (u). It is worth while noticing in this connection the observations of the Privy Council in the undermentioned case (v).

All the High Courts (w), except the High Court of Madras, seem to hold that where an auction purchaser who is a stranger is refused in obtaining possession by the judgment debtor of the property purchased by him in execution, he may apply for delivery of possession under O 21, r 95, or he may bring a regular suit for possession. The provisions of sec 47 do not apply either because he is not the 'representative' of the decree holder or because the question as to delivery of possession is not one relating to the execution, discharge or satisfaction of the decree within the meaning of the section. The period of limitation for an application under O 21, r 95, is 3 years from the date when the sale becomes absolute [Limitation Act, 1908, Sch I, art 181] and that for a suit is 12 years from the same date (*ibid*, art 138). He is entitled to bring the suit without making any application under O 21, r 95, and he may sue even after an unsuccessful application. The High Court of Bombay has held that an auction purchaser, even though a benamidar for the decree holder, is a *stranger* for the purposes of this rule (x). In Madras the Full Bench decision in *Veyindramuthu v Maya Nadan* (y), has been taken as an authority for the proposition that an auction purchaser, though he be a stranger, must proceed by an application under sec 47, and that he is not entitled to bring a regular suit for possession. In the Order of Reference it was assumed that the question as to delivery of possession related to 'the execution, discharge or satisfaction of the decree within the meaning of sec 47'. The judgments of the learned Judges seem to have been influenced by the observations of the Privy Council in *Prosunno Kumar's* case as to the cheap and speedy disposal of objections to execution sales. These observations are appropriate when the question is really between the parties to the suit and the auction purchaser is only an interested spectator, but they are altogether irrelevant when the question is between a judgment debtor and a stranger purchaser at an auction sale. The scope of the section is expressly limited to questions between parties to the suit

- | | |
|--|--|
| <p>(o) <i>Jainaulabddin v Krishna</i> (1921) 41 Mad L J 1-0 67 IC 200 (21) A M 420 <i>Sornamuthu v Muthukrishnan</i> (1933) 65 Mad L J 253 143 IC 854 (33) A M 598</p> <p>(p) <i>Hukam Chand v Ganan Ram</i> (1919) Punj Rec n 12 p 25 19 IC 140</p> <p>(q) <i>Paramananda v Mahabber</i> (1897) 20 Mad 378 <i>Sivarama v Somasundara</i> (1905) 28 Mad 119 <i>Kuppana v Kumara</i> (1911) 34 Mad 450 <i>Veyindramuthu v Maya Nadan</i> (1920) 43 Mad 107 128 7 IC 418 54 IC 209 (per Oldfield J) <i>supra</i></p> <p>(r) <i>Nadammun v Veerabhadra</i> (1910) 34 Mad 417 421, 8 IC 429 <i>Arasavee v Sokalinga</i> (1916) 1 Mad W N 287 33 IC 84</p> | <p>(s) <i>Jainaulabddin v Krishna</i> (1921) 41 Mad L J 1-0 67 IC 200 (21) A M 420 <i>Sornamuthu v Muthukrishnan</i> (1933) 65 Mad L J 253 143 IC 854 (33) A M 598</p> <p>(t) <i>Hukam Chand v Ganan Ram</i> (1919) Punj Rec n 12 p 25 19 IC 140</p> <p>(u) <i>Narotam v Sirlaj</i> (1928) 3 Luck 71-116 IC 49 (28) A O 442</p> <p>(v) <i>Raghubar Singh v Jai Indra Bahadur Singh</i> (1919) 48 IA 228 236-237, 42 All 158, 166-167, 55 IC 650</p> <p>(w) (1920) 43 Mad 107, 54 IC 209</p> <p>(x) (1920) 43 Mad 107, 54 IC 209</p> |
|--|--|

and their representatives and the observations of the Privy Council do not and cannot extend the section beyond those limits. It is high time that the section was amended and the conflict set at rest.

Besides cases under O. 21, r. 95, questions relating to execution may arise in other ways. The High Court of Allahabad has held that where property not included in the mortgage deed or in the mortgage decree is sold and delivered to a stranger purchaser in execution, the judgment debtor is entitled to bring a suit against the auction purchaser for recovery of the property and that the provisions of sec. 47 do not apply to the case (a). But the Madras High Court following the construction put upon the Full Bench decision in *Legindramuthu v. Maya Nadan*, has held that such a case comes within sec. 47, and that a regular suit is barred (a). A Full Bench of the Allahabad High Court has held that an auction purchaser under a decree which has been, after confirmation of the sale, set aside as a result of a separate suit, is entitled to apply under sec. 47 for recovery of the purchase money from the decree-holder (b).

Sub-sec. (3). Inquiry as to who is the representative of a party.—The question whether a person is a legal representative of a party so that execution should proceed against him is one to be decided by the Court in execution (c). The Court no longer has the option of staying the execution proceeding until the matter is settled by suit. This sub section is ancillary to sub section (1) and is limited to questions relating to the execution, discharge and satisfaction of a decree, and does not apply to the determination of a question between rival representatives of one party (d). The same rule applies when the question arises in execution proceedings as to whether a certain person is a transferee of a decree, for a transferee of a decree is, as stated above, a "representative" of a party within the meaning of this section. An order determining whether a person is or is not the representative of a party is a decree [see sec. 2, cl. (2)], and is therefore appealable (e).

If the transferee of a decree dies pending execution, the executing Court has power under this section to inquire whether the transferee was merely a benamidar for another and to allow the real owner to execute the decree (f).

Stay of execution.—The words "or to the stay of execution thereof" which occurred in sec. 244 after the words "execution, discharge or satisfaction of the decree" have been omitted in the present section. There are two possible views as regards the omission of these words. The one is that the words omitted may have been regarded as superfluous, for a plea that the execution of a decree may be stayed is equivalent to the plea that the decree should not be executed, and it is thus a question relating to the execution of the decree (g). The other view is that those words having been deliberately omitted by the Legislature in the present section, questions relating to the stay of execution are no longer within the section and no appeal lies from

(a) *Muna Lal v. Collector of Shahjahanpur* (1923) 45 All. 96, 74 I.C. 995, (—3) A.A. 470. Cf. *Imtiyaz un nissa v. Chutian Lal* (1925) 47 All. 304, 84 I.C. 746, (25) A.A. 236. See also *Nagabhaita v. Nagappa* (1923) 46 Bom. 914, 67 I.C. 857, (23) A.B. 62 (judgment-debtor estopped as he had not objected to the sale).

(a) *Jainulabdin v. Krishna* (1921) 41 Mad. L. J. 120, 63 I.C. 290, (21) A.M. 420.

(b) *Bundeshri Prasad v. Badal Singh* (1923) 45 All. 369, 74 I.C. 873, (23) A.A. 394.

(c) *Mt. Muna Koer v. Durga Prasad* (1917) 2 Lat. L. J. 192, 39 I.C. 172. *Bibu Lal v. Janak* (1920) 48 All. 423, 34 I.C. 424, (20) A.A. 691.

(d) *Tenubai v. Damodar* (1933) 57 Bom. 641, 146 I.C. 336, (33) A.B. 396. *Mayanlal v. Doshi, Mufji* (1901) 20 Bom. 631.

(e) *Badri Nardyan v. Jas. Kishen* (1894) 16 All. 483. *Krishnama v. Appasami* (1902) 25 Mad. 545. *Ganga Das v. Fokub Ali* (1900) 27 Cal. 670. *Ahem Singh v. Raghunath* (1925) 47 All. 365, 86 I.C. 1048, (25) A.A. 578.

(f) *Kritam v. Janaliramayya* (1928) 51 Mad. 219, 105 I.C. 405, (27) A.M. 903.

(g)

orders determining such questions (A) The Lahore High Court after a consideration of all the authorities has taken the former view (i) It holds that an order staying execution is one relating to the execution of the decree, in the same way that an order dismissing an application for execution as time barred does so relate The only difference being that in the one case execution is temporarily suspended while in the other it is prohibited It further holds that a stay order is appealable and is a decree under sec 2 (2) as it conclusively determines the very important right of the decree holder to reap forthwith the fruits of his decree

An order made at the instance of an interim receiver under sec 52 of the Provincial Insolvency Act, 1920, stopping a sale does not fall under this section No appeal lies from such an order and it can only be corrected in revision (j)

Sub section (2) Court may treat suit as an application—This sub-section is new It gives legislative recognition to the practice followed by the Courts under the repealed Code It enables the Court to treat an application under this section as a suit or a suit as an application If an application is brought the Court may treat the application as a suit, but it must dispose of the matter itself and must not refer the parties to a separate suit (k) If a suit is brought for the determination of a question which falls under this section the Court has a discretion either to dismiss the suit or to treat the plaint as an application under this section, and dispose of it accordingly, provided the Court in which the suit is brought has jurisdiction to execute the decree (l), and the execution of the decree is not barred at the date of the suit (m) The power, however, is discretionary (n) and no appeal lies from an order under this sub section (o) If the

and not jurisdiction (sec 99), but it will not do so unless the Court which passed the decree had jurisdiction to execute the original decree (p) and the suit was filed within the period of limitation prescribed for applications under this section, namely, the period prescribed by art 181 of the Limitation Act, 1908 (q) In a case where a party instead of applying under this section filed a suit which he prosecuted to second appeal, the High Court of Allahabad in the exercise of its discretion refused to treat the plaint as an application (r)

In a recent Allahabad case a minor objected in execution proceedings that he had not been represented by a guardian ad litem in the suit and the Court of execution refused to entertain the objection as one affecting the validity of the decree, on appeal

| | | |
|-----|---------|-----------------------------------|
| (A) | 101 103 | <i>Shreedhal v Bhawani</i> (1907) |
| (i) | (m) | |
| (j) | (n) | 103 40 I C 864 |
| (k) | (o) | |
| (l) | (p) | |
| (m) | (q) | |
| (n) | | |
| (o) | | |
| (p) | | |
| (q) | | |
| (r) | | |
| (s) | | |
| (t) | | |
| (u) | | |
| (v) | | |
| (w) | | |
| (x) | | |
| (y) | | |
| (z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |
| (L) | | |
| (M) | | |
| (N) | | |
| (O) | | |
| (P) | | |
| (Q) | | |
| (R) | | |
| (S) | | |
| (T) | | |
| (U) | | |
| (V) | | |
| (W) | | |
| (X) | | |
| (Y) | | |
| (Z) | | |
| (A) | | |
| (B) | | |
| (C) | | |
| (D) | | |
| (E) | | |
| (F) | | |
| (G) | | |
| (H) | | |
| (I) | | |
| (J) | | |
| (K) | | |

from the order the High Court of Allahabad treated the proceeding as a suit and made a declaration that the decree was not binding on the minor (s)

Where a sale is sought to be set aside on the ground that the "decree" was obtained by fraud —It has been stated above that the procedure for setting aside a sale on the ground of fraud in purchasing or conducting the sale is by an application under O 21, r 90, and not by a separate suit. But an execution sale may also be challenged on the ground that the decree on which it is founded is itself tainted with fraud, and in this case, the remedy is by a regular suit. The following are the leading cases on the subject —

1 A suit will lie to set aside a decree and the sale held in execution of the decree where both the decree and sale are impeached on the ground of fraud (t). The reason is that the question of the validity of a decree can only be determined by a regular suit. See notes above, "Questions not relating to execution discharge or satisfaction" p 171

2 I obtains an ex parte decree against B. In execution of the decree a certain property belonging to B is sold and purchased by C. The decree is then set aside under O 9, r 13. B thereafter sues A and C to set aside the sale, challenging not only the sale, but also the decree, on the ground of fraud. The suit is not barred under this section, B is entitled to show that the decree was obtained by fraud, and this can only be done in a regular suit (u).

Appeal —Sec 2 (2) provides that the determination of any question under sec 47 is a decree unless it is appealable as an order. A determination under O 21 r 90 is appealable as an order under O 43, r 1 (j). Such a determination when it is between the parties to the suit or their representatives falls under sec 47, but is nevertheless subject to one appeal only as an order under sec 104. The same observation applies to a decision under O 21, r 72 which also is appealable as an order under O 43, r 1 (j). Similarly a decision under O 21 r 34 is appealable as an order under O 43, r 1 (i) and is subject to one appeal only. All other decisions in execution under section 47 are decrees and subject to first and second appeal.

As regards appeal therefore orders in execution proceedings may be divided into three classes —

- (1) Orders under this section which are decrees and subject to first and second appeal
- (2) Orders which whether they fall under this section or not are declared to be orders under O 43, r 1, and are subject to one appeal only
- (3) Non appealable orders, generally of an interlocutory nature

Attempts are frequently made on behalf of appellants to shew that orders in execu-

(s) *Daulat Singh v Maharaj Raja Ramji* (1906) 48 All 362 93 IC 36 (26) A.A. 387

(t) " "

(u) *Ram Varain v Shew Bhunjan* (1900) 27 Cal 197 *Debendra Nath v Prasanna*

(v) " "

(w) *Bhubon Mohun v Nunda Lal* (1899) 26 Cal 304 *Uma Kant v Dino Nath* (1901) 28 Cal 4

(x) *Pampada v Kanai Rai* (1906) 44 C L. J 167 98 IC 206 (26) AC 1219

Interlocutory orders in execution proceedings.—A party is not bound to prefer an appeal from every order in execution proceedings though the order is appealable. Whether the order be appealable or not, it may be challenged by the party aggrieved in his appeal against the final order which determines the rights of the parties (v)

An order in execution proceedings which is merely processual or interlocutory does not come within the section. It must be an order determining the rights and liabilities of the parties with reference to the relief granted by the decree, and not merely an incidental order made with reference to the conduct of the proceedings (z). See note "Section 47 Execution proceeding" under sec 2, and note "Appeal" under O 21, r 66

Limitation—An application under this section to set aside a sale in execution of a decree must be made within 30 days from the date of the sale. [Limitation Act, 1908, Sch I, art 166] But if the sale is void, as where no notice is given as required by O 21, r 22, it is not necessary to apply to the Court to set aside the sale, hence the article applicable in such a case is the residuary art 181 which provides a period of 3 years from the date when the right to apply accrues, and not art 166 (a). An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment debtor is governed by art 166 and must be made within 30 days from the date of sale (b).

LIMIT OF TIME FOR EXECUTION.

48. [S. 230, 3rd and 4th paras.] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

- (y) *Chandrabala v Prabodh* (1909) 36 Cal 472 21 C 338
 (z) *Jogodishury v Kaulash* (1897) 24 Cal 725
730 Srinagani v Subrahmanya (1904) 27 Mad 259
Deoki v Bansi Singh (1912) 16 C W N 124 10 I C 371
Mukhtar v Musqarab (1912) 34 All 530 15 I C 50
Srinubash v Kesho Prasad (1911) 38 Cal 754 9 I C 862
Saraswati v Golap Das (1913) 41 Cal 160 20 I C 72
Panch v Afans (1912) 16 C W N 970 17 I C 88
Hussain Bhai v Beltue Shah (1924) 48 All 713 737 740 83 I C 1033 (24) A A

- 808 *Sardani v Ram Kattan* (1902) 29 Cal 1
 2 Lab L J 398 58 I C 603
Saurendra Nath v Mrutunjay (1900) 5 Pat L J 270 56 I C 452
Padayachi v R M K M S Chinnaja (1927) 5 Rang 534 104 I C 324 (27) A R 317—(See also (1907) 5 Rang 611)
 (a) *Pajjapala v Ramanujaharuar* (1904) 47 Mad 288 80 I C 92 (24) A M 431 [F B], *Manmatha Nath v Lachmi* (1928) 55 Cal 96 105 I C 65 (28) A C 60
 (b) *Satish Chandra v Nishi Chandra* (1919) 46 Cal 975 54 I C 431

(2) Nothing in this section shall be deemed—

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or
- (b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

Changes made in the section.— This section corresponds with the third and fourth paras of s 230 of the Code of 1882 which were as follows —

“ Where an application to execute a decree *for the payment of money or delivery of other property* has been made *under this section and granted*, no subsequent application to execute the same decree shall be *granted* after the expiration of twelve years from any of the following dates (namely) —

- (a) the date of the decree sought to be enforced *or of the decree (if any) on appeal affirming the same*, or
- (b) where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve years where the judgment debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ”

The following alterations have been made —

- (1) Section 230 applied only to decrees “ for the payment of money or delivery of other property ” The present section applies to all decrees except decrees granting an injunction
- (2) Section 230 applied only where an application for execution had been made “ under this section and granted ” The words “ under this section ” as also the words “ and granted ” have been omitted in the present section The result is that the rule of limitation contained in this section applies whether the previous application for execution was made under a former Code or the present Code, and whether the application was granted or not See note below, “ Orders on applications for execution ”
- (3) The words “ or the decree (if any) on appeal affirming the same ” in sec 230, cl (a), have been omitted See note below ‘ Date of decree ’
- (4) The words “ or at recurring periods ” in sub section (1), cl (b), are new They are intended to give effect to certain decisions under s 230 of the Code of 1882 See notes below, “ Date of default ”
- (5) Clause (b) of sub section (2) is new It gives effect to certain decisions under s 230 of the Code of 1882 See notes below, ‘ Successive applications for execution of decrees of Chartered High Courts ’

8 Interlocutory orders in execution proceedings—A party is not bound to prefer an appeal from every order in execution proceedings though the order is appealable. Whether the order be appealable or not, it may be challenged by the party aggrieved in his appeal against the final order which determines the rights of the parties (y)

An order in execution proceedings which is merely processual or interlocutory does not come within the section. It must be an order determining the rights and liabilities of the parties with reference to the relief granted by the decree, and not merely an incidental order made with reference to the conduct of the proceedings (z). See note

Section 47 Execution proceeding under sec 2, and note "Appeal" under O 21, r 66

Limitation—An application under this section to set aside a sale in execution of a decree must be made within 30 days from the date of the sale [Limitation Act, 1908, Sch I, art 166]. But if the sale is void, as where no notice is given as required by O 21, r 22 it is not necessary to apply to the Court to set aside the sale, hence the article applicable in such a case is the residuary art 181 which provides a period of 3 years from the date when the right to apply accrues, and not art 166 (a). An application under this section by a representative of a judgment debtor to set aside a sale on the ground that the property sold belongs to him and not to the deceased judgment debtor is governed by art 166 and must be made within 30 days from the date of sale (b)

LIMIT OF TIME FOR EXECUTION

48. [S. 230, 3rd and 4th paras.] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

Execution barred in certain cases

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

(y) *Chandrabala v Prabodh* (1909) 36 Cal 422
21 C 338

(z) J

808 *Sardani v Ram Rattan* (1970)
148 L J 398 58 I C 603 *Saurendra Nath v Mritunjay* (1970) 5 Pat J J 270
50 I C 452 *Padajachi v R M A M S Chinnaya* (1927) 5 Rang 534 104 I C 34 (27) A R 317—[See also (1977) 5 Rang 611]

(a)

(b)

(2) Nothing in this section shall be deemed

(a) to preclude the Court from ordering the execution of a decree upon an application for execution, where the judgment-debtor has by fraud prevented the execution of the decree, within twelve years immediately before the date of the application.

(b) to limit or otherwise affect the operation of section 180 of the second schedule to the Indian Act, 1877.

Changes made in the section. The word "where" is changed to "whereas" and the word "debtor" is changed to "debtor or his estate".

"Whereas a judgment-debtor has by fraud prevented the execution of a decree, within twelve years immediately before the date of the application."

(a) the date of the application for execution of the decree.

(b) where the decree is a decree for the payment of money or the delivery of a thing, the date of the decree, and the date of the application for execution of the decree.

Nothing in this section shall be deemed to preclude the execution of a decree after the expiration of the said term of twelve years, where the judgment-debtor has by fraud prevented the execution of the decree, within twelve years immediately before the date of the application.

The following alterations have been made:

(1) Section 230 applied to the payment of money or the delivery of a thing. In present section applied to all decrees except decrees granting an injunction.

(2) Section 230 applied only where a decree for execution has been made under the Code of 1882. The word "where" in the present section is also the word "and" and has been inserted in the present section. The result is that the rule of limitation is retained in the present section whether the present application for execution was made under the Code or the present Code and whether the application was granted or not. See note below. Orders of application for execution.

(3) The words "or the decree (if any) on appeal affirming the same" are omitted. See note below. Date of decree.

(4) The words "or at the expiration of" in sub-section (1) are new. They are inserted to give effect to certain decisions under section 230 of the Code of 1882. See notes below. Date of decree.

(5) Clause (1) of sub-section (2) is new. It gives effect to certain decisions under section 230 of the Code of 1882. See notes below. Successor application for execution of decrees of Chartered H. C. courts.

Successive applications for execution of decrees of Courts other than Chartered High Courts—This section deals with the maximum limit of time for execution, it does not prescribe the period within which each application for execution is to be made (c)

As explained in the next paragraph, sub section 2 (b) has the effect of excluding Chartered High Courts from the operation of the section. The section only applies to Courts other than Chartered High Courts

A decree holder is entitled to present in succession *any number* of applications for executions of the same decree (d), and the Court has no power to refuse execution, unless—

- (i) the application is barred by virtue of general principles of law analogous to those of *res judicata*, or
- (ii) the application is barred under art 182 of the Limitation Act, 1908, or
- (iii) the execution of the decree is barred under the present section (e), though the application for execution may not be barred under (i) or (ii) above

(i)—If the first application for execution is dismissed after a hearing on the merits the Court will not, having regard to the general principles of law analogous to those of *res judicata* entertain a subsequent application for execution of the same decree (f) See notes to s 11, "Orders in execution proceedings, etc," p 87 above

(ii)—The general effect of art 182 of the Limitation Act, 1908 is to require the first application for execution of a decree of a Court other than a Chartered High Court to be made within three years of the decree and each successive application to be made within three years of the date of the last application, or since the amendment of the Article by Act 9 of 1927, from the date of the final order passed on the last application. The decree is thus kept alive for any time within the time limit for execution prescribed by this section

(iii)—This section fixes an outside period after which execution of a decree cannot be allowed even though the application may not be barred by the rule of *res judicata* or by art 182 of the Limitation Act (g). A obtains a decree against B for Rs 1,000 on 1st January 1910 and applies for execution of the decree within three years from the date of the decree. Further applications are made for execution of the same decree each within a period of three years from the date of the next preceding application and the last of these is made in December 1921. A then makes a fresh application for execution on 1st January 1924. No order can be made for execution of the decree for though the application is not barred under the Limitation Act, execution is barred under this section as it is made more than twelve years after the date of the decree. Under sec 230 of the Code of 1882 it was necessary to inquire if a previous application for execution was granted. This is no longer necessary. See note below 'Order on application for execution'. The twelve years period for execution is calculated from the date of decree or from the date of default in respect of any payment or delivery to be made under the decree. See note below "Terminus a quo for limitation"

Successive applications for execution of decrees of Chartered High Courts—The holder of a decree of a Chartered High Court passed in the exercise of its ordinary original civil jurisdiction is entitled to present in succession *any number* of applications

(d) *Surajman v Anjore* (1924) 46 All 73 75, 79 IC 605 (24) A A 263
 (d) *Thakur Prasad v Fakirullah* (1895) 17 All 106 111 112 22 I A 44 See also O 21 r 11 and Limitation Act, art 182
 Cl (4)

(e) *Dhonkal v Phakkar* (1893) 15 All 84 100
 (f) See *Dhonkal v Phakkar* (1893) 15 All 84
 (g) *Balaram v Maruti* (1915) 39 Bom 256 28 I C 478 *Bussessar v Jasoda Lal* (1913) 40 Cal 704 19 I C 391

for execution of the decree and the Court is bound to entertain them, unless the application is barred—

- (i) by virtue of general principles of law analogous to those of *res judicata*, or
- (ii) under art 180 of the Limitation Act, 1877 [now art 183 of the Limitation Act, 1908], that being the article which applies to decrees of Chartered High Courts.

There is no bar under this section because it does not limit or otherwise affect the operation of art 183 of the Limitation Act, 1908, as it does that of art 182. In other words, the twelve years rule does not apply to decrees passed by Chartered High Courts. Art. 183 of the Limitation Act permits a revivor in the case of decrees of Chartered High Courts in the exercise of ordinary original civil jurisdiction, or of orders of His Majesty in Council. This was inconsistent with section 230 of the Code of 1882, and so that section was held to be independent of the corresponding article 180 of the Limitation Act, 1877 (a). These decisions have now been given statutory authority by subsec 2(b). The twelve years rule therefore does not apply to decrees passed by a Chartered High Court in its original civil jurisdiction. Such decrees may be kept alive for any number of years and so may orders in Council made in Privy Council appeals (i). Decrees of Chartered High Courts in the exercise of their Appellate Civil jurisdiction are not within article 183 of the Limitation Act, 1908 (j).

Orders on applications for execution.—An application for execution may either be—

- (1) *granted*, or
- (2) *refused*—
 - (a) in circumstances operating as a bar to future execution, as where it is refused on the ground that it is barred on the principle of *res judicata* or barred by the law of limitation, or
 - (b) in circumstances not operating as a bar to future execution as where it is refused on the ground that it is not in accordance with law [O 21, r 17] (k), or
- (3) *withdrawn* by the applicant—
 - (a) in circumstances operating as a bar to future execution as where the withdrawal was with the object of abandoning execution, or
 - (b) in circumstances not operating as a bar to future execution (l).

Under sec 230 of the Code of 1882, the twelve years' limitation imposed by that section applied only if one at least of the previous applications was *granted* by the Court but not otherwise. Under the present section it matters not whether the previous applications have been granted or refused or withdrawn. All that the section now

"Fresh application"—The phrase "fresh application" has been substituted for "subsequent application" to make it clear that the application referred to in this section is a *substantive* application for execution and not merely an *ancillary* application made with the object of moving the Court to proceed in the matter

- | | |
|---|--|
| <p>(A) <i>Moyabhai v Tribhuvandas</i> (1882) 6 Bom 208 <i>Ganapathi v Balarundara</i> (1884) Mad 541 <i>Jogendra v Sham Das</i> (1909) 38 Cal 543 547 1 I C 163</p> | <p>(i) <i>Dhoni Lal v Ihalhar</i> (1893) 15 All 84, 100</p> |
| <p>(C) <i>Futeh Narain v Chundrabai</i> (1893) 20 Cal 551</p> | <p>(j) <i>Thakur Prasad v Fakirullah</i> (1895) 17 All 106, 110, 111, 22 I A 44, <i>Chinaman v Balshastri</i> (1892) 16 Bom 294 301, <i>Santarna v Arulanandam</i> (1898) 21 Mad 261, <i>Rahim Ali v Phul Chand</i> (1896) 18 All 482, 486</p> |
| <p>(f) <i>Krishto Finkur v Burrodaraunt</i> (1872) 14 M I A 465</p> | |

of a substantive application already on the file (i) Thus where property has been attached on an application for execution, an application for *sale* of the attached property is not a fresh application to execute the decree within the meaning of this section (n) Similarly where a warrant issued for the arrest of a judgment debtor on an application for execution is returned with the remark that the judgment debtor could not be found, a subsequent application for the arrest of the judgment debtor is not a fresh application to execute the decree within the meaning of this section, but is merely an incidental application to carry on proceedings already commenced (o) On the same principle it has been held that an application to revive execution proceedings which have not terminated is not a fresh application within the meaning of this section (p) Thus when in execution of a decree for maintenance, a decree holder was put in possession of property chargeable with his maintenance but was some years later dispossessed on technical grounds, a subsequent application for execution was treated as an application to revive the original execution proceeding (q) An application by the legal representatives of a decree holder for execution on his death pending execution proceedings is not a fresh application (r) Nor is it a fresh application when the decree holder applies to continue execution proceedings against the legal representatives of a deceased judgment debtor (s) But an application for attachment of property cannot be treated as a continuation of a previous application for arrest (t), nor an application for attachment of other property, not included in the previous application for attachment (u)

An application to transfer a decree to another Court for execution is not an application for execution within the meaning of this section Such an application, though made within twelve years from the date of the decree, will not entitle the decree holder to execution if the application for execution to the Court to which the decree is transferred is made after the expiration of twelve years (v)

Terminus a quo for limitation.—The period of limitation within which a decree may be executed is twelve years from—

- (a) the date of the decree, or
- (b) the date of default in respect of the payment of money or the delivery of property when such payment or delivery has been ordered to be made at a certain date or at recurring periods, either by the decree or by any subsequent order

Date of decree—The decree capable of execution is the decree of the Court of first instance until appeal and after that the decree of the Court of last instance, see note 'What decree may be executed' under sec 36 above If the decree is that of a Court

(m) .

(n) *Choudhri Paroosh Ram v Kali* (1890) 17 Cal 53

(o) *Jit Mal v Jwala Prasad* (1899) 21 All 155

(p) .

(q) .

(r) .

- 184
- (s) *Shankar v Hirulal* (1931) 33 Bom L R 808 134 I C 730 (31) A R 425, *Venkatalakshamma v Seshaagari* (1931) 60 Mad L J 678 131 I C 610 (31) A ML 303
- (t) *Mewa Lal v Ahmed* (1912) 9 All L J 17 131 C 909
- (u) *Syamala Devi v Subbaya* (1927) 52 Mad L J 127 100 I C 100 102 I C 107

(v)

of first instance the period runs from the date of the decree. If there is a preliminary decree and a final decree the two must be read together and the date is the date of the final decree (w). If the decree to be executed is an appellate decree the period runs from the date of the appellate decree whether it affirms, sets aside or modifies the original decree (x), but not if no appeal lies (y) or if the appeal is dismissed for default (z). The words 'or of the decree (if any) on appeal affirming the same' in sec 230 of the last Code have been omitted as misleading being open to the construction that where the original decree was *modified* or *set aside* on appeal the period of twelve years was to run from the date of the *original decree*. Where a decree is passed in favour of the plaintiff against the defendant, and part of the decree is appealed from and the rest is not, the period of 12 years prescribed by this section runs from the date of the *appellate decree* both as regards the application to execute the portion appealed from and the portion not appealed from. The reason is that there is only one decree that can be executed, and that is the decree of the appellate Court (a). Where a decree is passed not jointly, but severally against two or more defendants, and one of the defendants appeals from the decree, the period of 12 years as against the other defendants is to be computed from the date of the *original decree* (b), while as against the appellant defendant it is to be computed from the date of the appellate decree. Where a second appeal is preferred to the High Court from a decree passed in first appeal, and an order is made by the High Court declaring the appeal before it to have abated, the period of twelve years under this section runs from the date of that order, and not from the date on which the decree was passed in first appeal (c). The twelve years rule was applied to applications for order absolute under section 89 of the Transfer of Property Act (d). Under O 34, r 5, however, such applications are not execution applications, and the order absolute is now the decree absolute or the final decree and time runs from its date however informally it may be drawn up (e).

Amendment of decree does not extend the period—Under article 182 (4) of the Limitation Act, 1908, if the decree has been amended the period of limitation runs from the date of the amended decree. There is no such provision in this section and an amendment of the decree does not extend the period of twelve years (f).

Date of default—The date of decree is not always the starting point for limitation. When the decree or any subsequent order directs payment of money or delivery of property at a certain date or at recurring periods, the twelve years run from the date of default. The words "recurring periods" have been inserted to give effect to decisions (g) which read these words into sec 230 of the Code of 1882. Therefore if the decree is for annual or monthly payments or for payment by instalments, time runs from the date of default as to each instalment (h). Thus if a decree dated the 1st January 1913 directs payment to be made annually, the first payment will fall due on the 1st January 1914, the second on the 1st January 1915, and so on, and the decree holder will be at liberty to execute for each instalment as it falls due and the period of twelve years will run for

- | | |
|---|--|
| (v) <i>Shiba Durga v Gopi</i> (1915) 23 C L J 573 33 I C 180 | 13 All 1 |
| (x) <i>Mahomed Mehdi v Mohini Kanta</i> (1907) 34 Cal 874 | (c) <i>Muhammad Razi v Karbala</i> (1910) 32 All 136, 5 I C 473 |
| (y) <i>Sahu Vandlal v Sahu Dharam</i> (1926) 49 All 377 94 I C 961 (26) A A 440 distinguishing <i>Rup Narain v Sheo</i> <i>Prakash</i> (1921) 43 All 405 61 I C 129, (21) A A 134 | (d) <i>Muhammad v Abdul Karim</i> (1916) 39 Mad 544 20 I C 237 |
| (z) <i>Ram Adin v Pam Lot</i> (1918) 47 I C 125 | (e) <i>Hayatunnessa v Achana Khatun</i> (1923) 50 Cal 743 74 I C 1017 (24) A C 131 |
| (a) " | (f) <i>Faqir Chand v Kundan Singh</i> (1932) 54 All 6-2 134 I C 93 (32) A A 351 |
| (b) " | (g) <i>Lakshmidas v Madhavrar</i> (1888) 12 Bom 65 <i>Kaveri v Venkamma</i> (1891) 14 Mad 236 <i>Kamarudin v Fari Lal</i> (1892) P R 13 |
| | (h) <i>Banarsi Das v Pamzan</i> (1923) 73 I C 671, (23) A L 381 |

the first from the 1st January 1914, and for the second from the 1st January 1915 and so on. But if the decree provides that on default of payment of any one instalment the whole amount shall become payable at once, the decree on such default ceases to be an instalment decree, the decree holder cannot execute for each instalment and the twelve years period runs for the whole amount from the date of default (i)

By a decree dated 17th November 1897 the defendant is directed *inter alia* to pay Rs 6,000 *forthwith* to the plaintiff. On 28th January 1899 the decree is amended in some other respects. Several applications for executions are made and the decree is thus kept alive. On 2nd December 1909, that is, more than 12 years after the date of the original decree, but within 12 years from the date of the amended decree, the plaintiff applies for execution. The sum of Rs 6,000 being directed by the original decree to be paid *forthwith*, the period of 12 years is to be computed from the date of the original decree, and the application is barred so far as it relates to that sum (j)

Combined mortgage decree.—In *Khulna Loan Co v Jnanendranath* (l) the decree was a combined mortgage decree against person and property which directed that in default of payment within a definite time the property should be sold and that if the proceeds of the sale were insufficient the balance should be realised from the mortgagor personally. The Privy Council approved the decision of the Calcutta High Court that the period of twelve years for enforcing the personal remedy runs from the date of the decree and not from the date of the sale of the mortgaged property. This was followed in a Madras case (l), but the Court said that 'if an order was passed after the property had been sold that for the balance other properties of the mortgagors should be proceeded against the present application would be in time, but no such order was passed and therefore the application is barred by sec 48 of the Civil Procedure Code'. In an earlier case, however, the Madras High Court had construed such a decree as being properly speaking two decrees and that the period of twelve years under sec 48 for the decree against the other properties of the mortgagor runs from the date when the mortgaged properties are sold and the sale proceeds are found insufficient (m)

Decree directing mesne profits to be ascertained in execution.—In a case where the decree directed mesne profits to be ascertained in execution the Madras High Court felt constrained by the decision of the Privy Council in *Khulna Loan Co v Jnanendranath* (n) to hold that the period of twelve years under this section runs from the date of the decree and not from the time when the mesne profits are ascertained (o). The Court while yielding to the authority of the Privy Council decision was inclined to take the view suggested by another decision of the Privy Council with reference to article 182 of the Limitation Act that the period would not begin to run until the decree was in such a form as to render it capable of being enforced (p)

Decree directing maintenance to be ascertained in execution.—In the case of a decree directing mesne profits to be ascertained in execution Patkar, J, said 'I think the decree passed by the High Court was not an executable decree until the amount of the maintenance was determined and therefore section 48 would have no application until the amount was determined' (q). The learned Judge distinguished *Khulna Loan Co v Jnanendranath* (r) for the reason that the mortgage decree was probably an executable decree for the payment of money, and approved of a previous decision of the

(i) *Gulabrao v Mogin* (1925) 27 Bom L R 461 87 I C 769 (25) A B 326

(j) *Narasimrao v Dando* (1918) 42 Bom 309, 46 I C 107, with facts slightly modified

(k) (1917) 22 C W N 145, 45 I C 436 (P C.)

(l) *Sivaminatha v Thiagarajaswami* (1927) 50 Mad 5 92 I C 846 (26) A M 954

(m) *Aiyasami v Venkatachela* (1917) 40 Mad 1 39 37 I C 741

(n) (1917) 22 C W N 145 45 I C 436 (P C.)

(o) *Dakshinamurthy v Vedamurthy* (1927) 53 Mad L J 440 103 I C 311, (27) A M 842

(p) " " " " " "

(q) " " " " " "

(r) " " " " " "

Bombay High Court that section 48 relates to a decree which is executable at that date in respect of the application made (a)

Decree directing recovery from one party on failure to recover from another.—Where a decree for the payment of money is passed against *A* and *B* and the decree directs that the plaintiff should in the first instance recover the decretal amount from *A* and that he should proceed against *B* only on failure to recover the amount from *A* the period of twelve years under this section runs from the date of the decree and not from the time when *A* fails to pay the decretal amount (i)

"Any subsequent order."—The subsequent order must be an order in the suit in which the decree is made. In *Paya Kartyanand v. Prithvi Chand* (u) *A* obtained a money decree on the 1st April 1914 and kept the decree alive by a series of applications for execution. In January 1920 a receiver was appointed of the property of the judgment-debtor in another suit which was in the nature of an administration suit. On the 31st January 1920 the decree holder applied in that suit and obtained an order for periodical payment to him by the receiver. There still remained a balance due to the decree-holder, and after several infructuous applications for execution, he applied for execution against the judgment debtor's surety on the 13th July 1927. This was more than 12 years after the date of the decree, but it was contended that the order on the receiver of the 31st January 1920 was a subsequent order which gave a fresh period to the decree holder. The Privy Council repelled this contention saying: "Their Lordships are of opinion that on the true construction of the section, the subsequent order must be an order in the suit in which the decree is made and an order which directs payment by the debtor or the surety of money in respect of the judgment debt. The order of 31st January 1920 satisfies none of these conditions."

As an execution proceeding is a continuation of a suit and as an order directing payment by a surety would ordinarily be made in execution proceedings, it would appear that an order made by a Court in execution may be a subsequent order under s. 48 (1) (b). This was the view taken by the Bombay High Court (t). But other High Courts have held that the subsequent order must be an order of the Court which passed the decree and acting as such Court and not an order of a Court executing a decree (w). Thus the Allahabad High Court has held that an order under O 20, r. 11 (2), postponing payment or directing payment by instalments is a subsequent order within the meaning of the section, but not an order by the Court of execution granting time for payment (x).

When a decree for maintenance directed the amount of maintenance to be ascertained in execution the Bombay High Court held that the order fixing the amount of maintenance was a subsequent order which gave a fresh starting point for limitation (y). On the other hand the Madras High Court has held that when a decree for mesne profits directed the mesne profits to be ascertained in execution, the order fixing the amount of mesne profits was not a subsequent order under this section (z).

Can a compromise, effected in execution proceedings, be enforced by execution as superseding the decree?—A money decree was passed on the 17th December 1913 and in the course of execution proceedings a compromise was effected on the 16th September 1922 under which the decree holder remitted part of the decretal amount

(a) *Narhar v. Krishnaji* (1912) 36 Bom. 364 15 I C 82.

(i) *Naicob Shera ul Malik v. Amir ul Umm* (1920) 48 Mad. 846 91 I C 537 (20) A M 20.

(u) (1933) 60 I A 43 12 Pat. 135 141 I C 760 (33) A M 5.

(t) *Apte v. Tirmal* (1920) 49 Bom. 635 88 I C 949 (25) A B 593.

(w) *Jurawan v. Mahabir* (1918) 40 All. 198 44

I C 24. *Baj Nath v. Jam Jharoo* (1927) 43 All. 503 515 104 I C 116 (27) A A 165. *Gubari in v. Bish Nath* (1921) 58 I C 393. *Juran Lish v. M Chinn Hug* (1923) 31 I C 794 (31) A L 678.

(x) *Jurawan v. Mahabir supra*.

(y) *Chomara v. Traya* (1931) 33 Bom. L. R. 1042 134 I C 1153 (31) A B 492.

(z) *Dakshinamurthy v. Vedamurthy* (1927) 53 Mad. L. J. 410 103 I C 311, (27) A M 842.

and agreed to accept payment by instalments with a proviso that in default of one instalment the decree holder would be entitled to realise the amount in execution. Application for execution was made on the 8th November 1926 within three years of due date for the payment of instalments. The application was more than twelve years from the date of the decree of 1913 but it was held that the application was within time as an application to execute the substituted decree of 1922. The usual procedure for enforcing the compromise agreement would be by suit but the Calcutta High Court held following the case of *Pisani v Attorney General of Gibraltar* (a) that when there is no inherent want of jurisdiction in a Court in the subject matter before it or with regard to the person the parties by agreement may arrange their own procedure and may give jurisdiction to the Court to adopt that procedure (b). On the other hand a Full Bench of the Allahabad High Court has dissented from the Calcutta High Court and has held that an agreement in compromise of a decree cannot be entertained in execution (c). The grounds of dissent are that a decree if altered by consent of parties cannot be executed (d) that the function of a Court of execution is to execute the decree as it stands and that O 23 r 4, makes the provisions of O 23 r 3 as to compromise of suits inapplicable to execution proceedings. According to the Allahabad High Court the twelve year period in section 48 cannot be extended by a compromise in the course of execution proceedings.

Fresh application presented after the expiration of twelve years —

These words make it quite clear that all that the section requires is the presenting of the fresh application within twelve years from the date of the decree. The order on the fresh application may be made after the expiration of twelve years. The section does not preclude the Court from making an order for execution after the expiration of twelve years if the application was presented within that period. In fact, it was so held by the High Court of Madras under the corresponding section of the Code of 1882 (e). See notes above, Fresh application.

Decree not being a decree granting an injunction — The operation of the twelve years rule laid down in this section is now extended to all decrees except decrees granting an injunction. Under s 230 of the Code of 1882, the rule was confined to decrees for the payment of money and decrees for the delivery of other property. Under that section the question was raised whether a mortgage decree was a decree for the payment of money, and the decisions were not uniform. The present section applies to money decrees as well as mortgage decrees in fact to all decrees except decrees granting an injunction (f).

Whether section retrospective — A obtains a mortgage decree against B in 1900, that is before the present Code came into force. A applies for execution of the decree from time to time and the last of such applications is made in 1914 that is more than 1 year after the date of the decree. Is execution of the decree barred under this section regard being had to the fact that the old section did not apply to mortgage decrees though the present section does? All the High Courts are now agreed that it is barred as the section applies to mortgage-decrees and the law of limitation applicable to a suit or proceeding is that in force at the date of its institution (g).

(a) (1874) 5 P. C. 516 followed in *Sadasana Pillai v Ramalinga* (1885) 11 A. 219 15 E. L. R. 383

(b) *Hridayanathan v Khogendravath* (1930) 57 Cal 789 (29) A. C. 687

(c)

(d)

(e)

Pat. L. J. 103 41 I. C. 560

(f) *Balaram v Varuthi* (1914) 39 Bom. 256 23 I. C. 478

(g) " " " " " "

Fraud—'Fraud' or 'force' on the part of a judgment debtor at any stage of the execution gives a new starting point for the period of limitation (h). The word "fraud" in this section should not be narrowly interpreted (i). The fraud dealt with by this section is such as prevents the execution of the decree within twelve years and judges ought to take a broad view of conduct deliberately adopted by judgment debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them (j). Locking up the house so as to prevent attachment of movable property (k), or evading arrest by any contrivance, or dishonestly evading payment by eluding service of warrant (l) is "fraud" within the meaning of this section. But the mere fact that there has been a prolongation of execution proceedings due in part to frivolous objections raised by the judgment debtor does not constitute fraud (m). A fictitious transfer of his property made by a judgment-debtor to defeat or delay execution is fraud (n). If the judgment debtor presents an application to set aside a decree passed *ex parte* against him with the sole object of delaying execution proceedings he is guilty of 'fraud' within the meaning of this section (o). But though the Court has the power to grant execution after the expiration of twelve years from the date of the decree on the ground of fraud or force on the part of the judgment debtor, the Court should not use that power unless it is satisfied that the decree holder on his part had been diligent in proceeding with execution since the date of the decree (p). It is doubtful whether the fraud of one of several judgment-debtors keeps the decree alive against all of them (q).

Limitation Act, section 4 is applicable—When the twelve years period expired on a day on which the Court was closed, the Calcutta High Court applied section 4 of the Limitation Act on the principle that when a party is prevented from doing a thing on a particular day by the act of the Court, he is entitled to do it at the first available opportunity (r).

Limitation Act, section 15 (1) is not applicable—Sec 15 (1) of the Limitation Act, 1908, cannot be applied in computing the period of 12 years prescribed by the present section (s).

Limitation Act, Articles 181 and 182 apply to applications made within the twelve year period—Articles 181 and 182 of the Limitation Act, 1908, exclude applications not provided for by section 48. This means that these Articles refer to applications made within the twelve years' period and not liable to be dismissed under this section (t).

Minority—A decree is passed in August 1897 on behalf of a minor in a suit brought by his guardian for partition and mesne profits. Various applications for execution are made by the minor through his guardian within 3 years of each other. The period of 12 years prescribed by this section expires in August 1909. The minor attains majority in November 1909, and in November 1910 he applies for execution of the decree, and claims an extension of the period on the ground of minority. Is he entitled to any

- | | |
|--|---|
| <p>(h) " " " " " "</p> <p>(i) " " " " " "</p> <p>(j) " " " " " "</p> <p>(k) <i>Bhagya v. Bannasahab</i> (1845) 9 Bom 318 <i>Venkayya v. Bughara</i> (1899) 22 Mad 30</p> <p>(l) <i>Pattikara v. Rangasami</i> (1883) 6 Mad 365 <i>Abdul Khadr v. Ahammed</i> (1910) 35 Mad 670 12 I C 679 <i>Ramanathan v. Mohideen</i> (1924) 47 Mad L J 4-460 I C 731 (24) A M 836</p> <p>(m) <i>Bandhu v. Kayadka</i> (1931) 53 All 419 149</p> | <p>I C 716 (31) A A 134</p> <p>(n) <i>Iswalatchi v. Sivasaunkara</i> (1892) 4 Mad 922</p> <p>(o) <i>Rai Sham Kissen v. Damar Kumari Devi</i> (1906) 11 C W N 410</p> <p>(p) <i>Ibid</i>. But see <i>Abul Khadr v. Ahammed</i> (1911) 35 Mad 670 12 I C 679</p> <p>(q) <i>Abdul Khadr v. Ahammed supra</i></p> <p>(r) <i>Teary Mohin v. Anunla</i> (1891) 18 Cal 631</p> <p>(s) <i>Subbarayan v. Natarajan</i> (1922) 45 Mad 85 O I C 306 (2-4) M 764 <i>Ganesh Lal v. Imtiaz</i> (1931) Luck 49 13-1 C 57 (31) A O 351</p> <p>(t) <i>Annamalai Iyerkar v. Raju I Lal</i> (1911) 54 Mad 306 124 I C 713 (2) A M 995 <i>Faqir Chand v. Kundan Singh</i> (1922) 54 All 62 134 I C 93 (32) A A 31</p> |
|--|---|

extension either under sec 6 of the Limitation Act, 1908, or under any other law? The High Court of Madras answered the quest on in the negative on the ground that sec 6 of the Limitation Act is expressly limited to cases where the limitation is provided in the Limitation Act itself, and that there is no law apart from the said sec 6 under which minority is a ground of exemption from the operation of the law of limitation (u) The High Court of Bombay agrees with the Madras High Court in holding that sec 6 of the Limitation Act applies only to cases dealt with by the Act itself, but differs from that Court in that it holds that the minor is entitled to an extension of the period under the general principle of law that time does not run against a minor (v) The same Court has held that where the decree has been obtained in the first instance by an adult, the fact that the decree on his death passes to an heir who is a minor does not extend the period of 12 years prescribed by the present section (w) The latter case was decided under the Limitation Act for it was said that time having begun to run against the decree holder the subsequent disability of the minor heir was under that Act ineffectual to stop it The Lahore Court does not apply section 6 of the Limitation Act on the ground that sec 48 is enacted for the benefit of the judgment debtor in order that he should not be harassed for ever by execution proceedings (x) The High Court of Allahabad has followed the Madras decision (y)

Where decree transferred for execution—The Court to which a decree is transferred for execution has power to determine whether execution is barred under this section (z)

Execution by Collector—Period of management excluded.—The words “period of limitation” in para 11 (3) of Schedule III to this Code are not confined to periods of limitation prescribed by the Limitation Act The period during which the Collector is acting under that Schedule is excluded in calculating the twelve years period under this section (a)

Provincial Insolvency Act—Period from adjudication to annulment excluded—Section 78 (2) of the Provincial Insolvency Act is not confined to periods of limitation under the Limitation Act If the decretal debt is one provable and proved under that Act and the adjudication is subsequently annulled, the period from the date of the order of adjudication to the date of the order of annulment is excluded in computing the twelve year period under this section (b)

Dekkhan Agriculturists Relief Act 17 of 1879—In computing the period of 12 years provided by this section, the time taken up in procuring a conciliator's certificate as required by the D A R Act is to be excluded (c) A decree for sale on a mortgage passed under that Act does not require to be made absolute, hence the period of 12 years is to be computed from the date of the decree, and not from the date of the order making the decree absolute (d)

TRANSFEREES AND LEGAL REPRESENTATIVES.

49. [S. 233] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have

enforced against the original decree-holder.

(u) *Rangan v Diba* (1914) 37 Mad 186, 18 I C 586

(v) *Mora v Isaaji* (1892) 18 Bom 536 *Ram Krishna v Pamchantra* (1930) 54 Bom 16, 129 I C 428 (30) A B 508

(w) *Phagant v Kaji Muhammad* (1912) 34 Bom 408 15 I C 829

(x) *Jhanta v Mohan Lal* (1894) P R 128

(y) *Irem Nath v Chattrpal* (1915) 37 All 639, 13 All L J 106 27 I C 865

(z) *Nachiamma v Subramonian* (1977) 5 Rang 75 106 I C 807 (28) A B 40

(a) *Sham Karam v Collector of Benares* (19-0) 42 All 118 52 I C 742

(b) *Dhan Dei v Kashmir Bank* (1932) 7 Luck 397 131 I C 878 (23) A G 60

(c) *Shidaya v Satappa* (1918) 42 Bom 367, 45 I C 491

(d) *Hirachand v Aba* (1902) 46 Bom 671 07 I C 153, (22) A B 95

Equity of judgment debtor—This is the same principle as that enacted in sec 132 of the Transfer of Property Act 1882. A right of set-off is an equity, and if the judgment debtor has the right to set off a cross decree under O 21, r 18, he has this right also against the transferee of the decree holder (c). The section applies to all decrees including mortgage decrees (f).

Illustrations

1. I holds a decree against B for Rs 5000. B holds a decree against A for Rs 3000. I transfers his decree to C. C cannot execute the decree against B for more than Rs 2,000 (g).

2. I obtains a decree against B for Rs 5000. B then sues A to recover Rs 2000. Pending B's suit, C obtains a transfer of I's decree with notice of B's suit. A decree is then passed for B in his suit against I. C applies for execution against B of the whole decree for Rs 5000. He is not entitled to execute the decree for more than Rs 3000 as the transfer was taken with notice of B's suit (h).

The second illustration is the case of *Kristo Ramani v Kedarnath* (i) in which it was assumed that the assignee must have notice of the equity. It is submitted, however, that it matters not that the assignee was unaware of the equity provided it was existing at the time of the assignment, see sec 132 of the Transfer of Property Act, 1882, illustration (1) and the case of *Monmohan v Dwarka Nath* (j). In the latter case the Court said "Under section 49 of the Code, the assignee [of a decree] stands in no better position than the assignor and takes it subject to all the equities and defences, subsisting at the time of the assignment, which the judgment debtor could have asserted against it in the hands of the judgment creditor, notwithstanding that the assignee may have had no notice thereof." If the equity is not existing at the time of the assignment there is no right of set off (k).

50. [S. 234] (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Changes in the law—The present section differs from the corresponding section 234 of the Code of 1882, in one respect, viz., that the words fully satisfied have been substituted for the words fully executed. See notes below under the head Before the decree has been fully satisfied.

- (c) *Kaim Ali v Lakhidast* (1868) 1 Benk. 1 R.
3 F. B. *Kristo Ramani v Kedarnath* (1889)
16 Cal 619. *Sanna v Senthosy* (1903) 6
Mad 428.
(f) *Shro Irand v Lall* (1904) 4 Lat. 100 861
C 564 (5) A 1 44.
(g) *Kaim Ali v Lall* (1868) 1 Benk. 1 R.

- 23 F. B.
(h) *Kristo Ramani v Kedarnath* (1889) 16 Cal
619.
(i) (1889) 16 Cal 619.
(j) (1910) 12 C.L.J. 312 71 C 55.
(k) *Nagendra Nath v Haran Chandra* (1933)
3 C.W.N. 53 (34) A.C. 86.

Judgment debtor dies—This refers to natural death and not to civil death. If the judgment debtor becomes a *sanyasi* his son is not his legal representative (l)

Extent of liability of legal representative—This section enables a decree holder to execute his decree against the legal representative of a deceased judgment debtor. The property that can be attached is the property of the judgment debtor found in the hands of the representative, and the property of the representative, from whatever source derived to the extent of that which he has wasted out of the assets come to his hands without satisfying the debts of the deceased (m)

The liability of a legal representative in execution proceedings is confined to the property of the deceased which has actually come to his hands. If the decree holder seeks to make the legal representative answerable also for the property of the deceased which with due diligence on his part would have come to his hands, his proper remedy is by way of suit against the legal representative, and not by proceedings in execution under this section (n)

The extent of the liability of the legal representative is decided by the Court executing the decree and the Court may call for an account of the property of the judgment debtor that has come into the hands of the legal representative. The decree holder must prove in the first instance that some assets have come to the legal representative and the onus is then shifted to the latter to shew how the assets including rents and profits have been applied (o)

A decree holder is entitled under this section to have the amount of the decree paid out of the assets of the deceased in the hands of the legal representative which have not yet been duly disposed of. Hence the legal representative is bound to pay to the decree holder the full amount of the decree though there may be other creditors of the deceased and the assets may not be sufficient to pay them all in full (p)

Legal representative—Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased [see s. 2 cl. (11)]. Thus where a judgment debtor dies and a stranger takes possession of his property, the decree may be executed against the stranger for he is a legal representative within the meaning of this section, see note

Legal representative under sec. 2 (11) (g) A residuary legatee in possession of the judgment debtor's estate is his legal representative although letters of administration have not yet been issued to him (r). The purchaser of the business of a firm against which a decree has been issued is not the legal representative of the firm within the meaning of this section. The decree against the firm cannot therefore be executed against the purchaser (s)

"Before the decree has been fully satisfied."—The corresponding section of the Code of 1882 (s. 234) provided in effect that if a judgment debtor died before the decree had been fully executed the holder of the decree might apply to the Court which passed it to execute the same against the legal representative of the deceased. This gave rise to the question as to when a decree could be said to be 'fully executed'. It was held by the High Court of Madras that a decree could not be said to be fully executed until the property attached was sold, and that if the judgment debtor died

(l) *Madho Rao v. Gur Agraj* (1931) 53 All

(m)

(n)

(o)

(p)

Mad 194

(q) The decision to the contrary in *Chothaklan v. Gorinla* (1893) 12 Mad 186 is no longer law.

(r) *Proranno Chandra v. Kristo* (1877) 4 Cal 342; *Chura Lal v. Osmond* (1903) 30 Cal 1044.

(s) *Harish Chandra v. Chandore Co. Ltd.* (1903) 30 Cal 981; *The Arbuthnot & India Trials Ltd. v. Madhu Chettur* (1908) 21 Mad 404.

before sale his legal representatives ought to be brought on the record, and if the property was sold without the legal representatives being brought on the record the sale was absolutely void (t). On the other hand, it was held by the High Court of Allahabad that once the property was attached the decree was fully executed and that it was not necessary to bring the legal representatives on the record and a sale held in their absence was not void. The latter decisions were based on the ground that once a property was attached, it was in the hands of the law, and the attachment did not abate on the death of the judgment debtor (u). At the same time there were cases in which it was held that omission to bring the legal representatives on the record did not vitiate the sale, but was at most an irregularity within the meaning of sec 311 of the Code of 1882 [now O 21, r 90] (v). It was to remove this conflict of decisions that the word "satisfied" has been substituted in the present section for the word "executed". The effect of this alteration in the language is to supercede the Allahabad decisions in so far as they hold that after attachment it was not necessary to bring the legal representatives on the record, for a decree cannot be said to be fully "satisfied" merely because the property was attached. Under the present section if the judgment debtor dies after attachment, his legal representatives may be brought on the record. At the same time it has been held that omission to bring the legal representatives on the record does not render the sale void, but amounts merely to an irregularity within O 21, r 90, and the sale will not be set aside unless substantial injury is proved (u).

Before the decree has been passed—A decree against a person who has died pending the suit without his legal representatives being brought on the record is a nullity and cannot be executed against the legal representatives (x). But a decree passed by the Privy Council in ignorance of the death of a respondent is not a nullity (y). In such a case it has been held that the decree of the Privy Council may be executed under this section against the property of the judgment debtor in the hands of his legal representatives (z).

"May apply to execute the decree against the legal representative"—Where execution proceedings have been commenced against a judgment debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the judgment debtor in the application for execution already on the files of the Court. It is not necessary to file a fresh application for execution under O 21, r 11 (a). See O 22, r 12. At the same time notice should be given to the legal representative under O 21, r 22. If such notice has been served on the legal representative the order substituting his name can be made *ex parte* (b).

To which Court application should be made—The application to execute the decree against a legal representative of the judgment-debtor should be made to the Court

(t) *Pamasani v. Bagirathi* (1883) 6 Mad 180
(Cross v. Administrator General (1890) 22 Mad 119)

(u) *Shro Prasad v. Hira Lal* (1890) 12 All 440
(F B.) *Abdur Rahman v. Shankar* (1890) 17 All 162
Stewart v. Ajudhia Nath (1884) 6 All 355

(v) *Abu v. Dhondt Bai* (1895) 19 Bom 276
Net Lal v. Sheikh Karreena (1896) 23 Cal 686
Bepin Beharry v. Nari Bhushan (1913) 18 C W N 766 (1 C 93)

(w) *Jayadiah v. Rama Sundari* (1919) 23 C W N 604
51 I C 97
Doragami v. Chitram
Barum (1914) 47 Mad 63
75 I C 46 (4)
A M 131
Taranguni v. Jay Krishna
(1917) 3 C W N 414 (3) A C 2

(x) *Padma Prasad v. Lal Sahib* (1891) 17 I A 150,
13 All 53
Jungla Lal v. Laddu

Pam (1910) 4 Pat L J 240, 50 I C 529
Seahamma v. Venkata (1914) 47 Mad L J 235
80 I C 337 (24) A M 713

(y) *Deonandan v. Janki Singh* (1900) 5 Pat L J 314
319 56 I C 377
Sri Chandra v. Chur v. Meht Shyam (1903) 11 Pat 41
139 I C 397 (32) A 1 261

(z) *Sri Chandra Chur v. Meht Shyam* (1903) 11 Pat 41
139 I C 397 (32) A 1 261

(a) *Pirashattam v. Raju* (1911) 34 I C 41
C 833
Raj v. Raj (1914) 47 All L J 271 (11) A 1
Hiral (1911) 33 I C 112
I C 72 (3) A 1 4

(b) *Narayanan v. N* (1911) 34 I C 775
10 I C 2 (1) A 1 1

- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require.

Simultaneous execution—Simultaneous execution both against the property and person of the judgment debtor is allowed under O 21, r 30. But the Court has discretion under O 21, r 21, to refuse simultaneous execution and to allow the decree holder to avail himself of only one mode of execution at a time. The Privy Council has said that ' the difficulties of a litigant in India begin when he has obtained a decree ' (1), and the Court is not justified in refusing execution against the person on the ground that the decree holder should first proceed against the property (2)

Receiver in execution proceedings.—The appointment of a receiver in execution proceedings is a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law (m). The appointment of a receiver in execution is therefore not a matter of right, and a proper case must be made out to justify the exercise by the Court of its discretion to make the appointment (n). The discretion is regulated by the provisions of O 40, r 1, and clause (a) of that rule has been altered to allow the Court to appoint a receiver after decree (o). The Court must be satisfied that the appointment of a receiver is likely to benefit both the decree holder and the judgment debtor rather than a sale of the attached property, and for this reason a receiver has been appointed to realise an attached decree (p), to realise a debt attached in execution of a decree (q), to collect the rents of an attached property (r), and to realise a decree for maintenance charged upon immovable property (s). Again the Court must be satisfied that the decree is likely to be realised within a reasonable time from the attached properties so that the judgment debtor may not be burdened with property while he is deprived of the enjoyment of it (t)

In *Ma Mya v Ma Mi Aye* (u) a third share of certain promissory notes had to be realised in execution and the Privy Council said that the right method of working out the decree was by the appointment of a receiver. Again in *Hasif Ali v Kernani Bank* (v) the Privy Council upheld the appointment of a receiver to collect the rents and profits of properties which had been settled upon the Nawab of Murshedabad and his lineal descendants by the Murshedabad Act 15 of 1891, although the receiver was liable to be superseded by the Secretary of State in exercise of a power reserved under the Act to apply the rents and profits to the maintenance of the position and dignity of the Nawab.

Court may appoint receiver of property outside its local jurisdiction—The Court may appoint a receiver of property outside the local limits of its territorial jurisdiction. The principle by which the action of a Court in effecting sales in execution is confined to property situate within its territorial jurisdiction is *prima facie* not applicable

- | | |
|--|--|
| <p>(1) <i>Court of Wards v Maharajah Coomarr Lamput</i> (1872) 14 M L A 605, 612 17 W R 150 P C</p> <p>(2) <i>Haryand v Hakim Singh</i> (1926) 6 Lah 544 93 I C 54 (26) A L 110</p> <p>(m) <i>In re Shephard Atkins v Shephard</i> (1859) 43 Ch D 131</p> <p>(n) <i>Pranabhai Nath v H F Low & Co</i> (1930) 57 Cal 964 128 I C 97 (30) A C 502 <i>Hemendra Nath v Iroakash Chandra</i> (1932) 53 Cal 205 137 I C 94 (32) A C 189</p> <p>(o) <i>Shambhu Nath v Ialmi Kund</i> (1932) 7 L C 103 132 I C 343 (31) A O 307 <i>Hemendra Nath v Iroakash Chandra</i> (1932)</p> | <p>59 Cal 205 137 I C 98 (32) A C 189</p> <p>(p) <i>Partap Singh v Delhi and London Bank</i> (1908) 30 All 393</p> <p>(q) <i>Tootsa v Antone</i> (1887) 11 Bom 444</p> <p>(r) <i>Maung Thera v A v Firm</i> (1925) 3 Rang 235 89 I C 794 (25) A R 318</p> <p>(s) <i>Hemangiri Dasari v Kumode Chander</i> (1899) 26 Cal 441</p> <p>(t) <i>Hemendra Nath v Prolash Chandra</i> (1932) 59 Cal 205 137 I C 94 (32) A C 189</p> <p>(u) (1929) 7 Rang 354 117 I C 29, (29) A PC 46</p> <p>(v) (1931) 58 I A 215 59 Cal 1, 132 I C 727 (31) A PC 160</p> |
|--|--|

2 to a sale by a receiver which need not necessarily be a sale by public auction as distinct from private treaty (1c)

Receiver of future maintenance—The Privy Council has held that though a right to future maintenance cannot be attached [s 60 (1) (n)] the Court may in a proper case e.g., where provision is made for the maintenance of the judgment-debtor out of the income of villages appoint a receiver for realizing the rents, and paying thereout to the judgment debtor a sum sufficient for his maintenance and the balance to the decree holder (x) The Bombay High Court doubts whether the property in the Privy Council decision was really covered by the expression 'a right of future maintenance' and holds that property which is at law unattachable cannot be realized by equitable execution (y) The Madras High Court has followed the Privy Council decision and appointed a receiver of future maintenance (z), but in an earlier decision it had held that a receiver could not be appointed as a right of future maintenance cannot be attached (a)

Appeal—I obtains a decree against B By consent of parties C is appointed receiver to take charge of certain properties for the execution of the decree A then applies to the Court for the discharge of C as receiver, but the application is refused The order is one relating to execution within the meaning of sec 47, and is therefore appealable (b)

Clause (e)—This clause does not authorize a Court to read into a decree a supplementary or alternative relief which is not in the decree Thus where a decree in a suit for redemption directs the defendant mortgagee to deliver to the plaintiff mortgagor the documents of title relating to the mortgaged property, but does not provide for an alternative relief, the Court has no power under this clause to award damages in execution (c) This conclusion might have been arrived at on the simple ground that a Court executing a decree has no power to add to the terms of a decree

52. [S. 252] (1) Where a decree is passed against a

Enforcement of decree
against legal representative

party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally

- (1c) *Pramathanath v. H. F. Low & Co* (1930)
57 Cal 984 128 I O 97, (30) A C 50.
(2) *Pajindra Narain v. Sundara Ebi* (1925) 52
I A 280 47 All 384, 87 I C 295, (25)
A FC 176
(3) *Secretary of State v. Bai Bansi* (1933) 57
Bom 507 146 I C 340 (33) A B 350
(4) *Secretary of State v. Venka* (1929) 49 Mad

- 567, 94 I C 234 (26) A M 565
(a) *Palivandiy v. Krishnan* (1917) 40 Mad 302
34 I C 381
(1) *Rameshwar Singh v. Harendra Singh* (1918)
5 Pat L J 513 46 I C 650
(c) *Marath v. Seshi* (1907) 42 Mad L J. 856
70 I C 529 (22) A M 299

Scope of the section—Section 50 provides for the case where a decree has been passed *against a party* and the party dies before the decree is fully satisfied, and the decree is sought to be executed against his legal representative. The present section provides for the case where a *decree is passed against the legal representative* of a deceased person. In the latter case the legal representative is the judgment debtor (d), and if the decree is for the payment of money out of the property of the deceased, the section allows the decree to be executed *against the property of the deceased* in the hands of the legal representative (e). But in so far as the property of the deceased which has come into the hands of the legal representative has not been "duly" applied by him, the decree may be executed *against the legal representative* as if the decree was to that extent passed against him *personally*. An executor or administrator under the Indian Succession Act, 1925, s. 323, is bound to pay the creditors of the deceased "equally and rateably", if he fails to do so, he cannot be said to have applied the assets "duly" within the meaning of this section, and he will be personally liable to the extent to which he has not done so. To ascertain whether the assets have been duly applied the Court of execution may direct an inquiry into the accounts of the executor or administrator (f). The executor or administrator may shew that he is not liable as he has duly applied the property of the deceased which has come into his possession. This is called in English law the plea of *plene administravit*. In an Allahabad case (g) Ashworth, J., differing from Mukerji, J., held that the plea could be raised in the suit itself. If the executor or administrator has paid a legacy and left no assets for the payment to the decree holder, the latter has also his remedy under sec. 361 of the Indian Succession Act, 1925, and may require the legatee to refund. But this remedy must be exercised by suit, and the decree holder cannot in execution of a decree against the executor or administrator attach property which he has parted with to a specific legatee (h).

If the legal representative is the heir of a deceased Hindu or Mahomedan every payment by the heir on account of debts due by the deceased would be a *due* application of the assets, whether the debts were paid rateably or not. There is no analogy between the case of an *executor or administrator* governed by the provisions of the Indian Succession Act and of an *heir* as a legal representative under the Hindu or Mahomedan law (i).

Legal representative—"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued (j). See s. 2 (11) and notes.

As to how far a decree passed against one of several Mahomedan heirs binds the other heirs, see Mulla's Principles of Mahomedan Law, 10th ed., pp. 20-23, and the under noted case (k).

As to the liability of Hindu sons for their father's debts, see s. 53 below.

Out of the property of the deceased—The expression 'property' includes the *income* of immovable property though it cannot be both attached and sold (l).

(d) *Birdichand v. Eudeenath* (1927) 28 Bom L R 1322 93 I C 941 (27) A B 52

(e) See for instance *Champiklal v. Jayachant* (1932) 31 Bom L R 1005 (32) A B 522

(f) *Diu Tole v. Manjy Pr. Hin* (1927) 5 Rang 44, 101 I C 431 (27) A B 127

(g) *Tamiz Bano v. Vand Kurlore* (1927) 49 All 645 101 I C 507 (27) A B 423

(h) *Jaychandrai v. Vishwanthrao* (1931) 58 Cal 170 129 I C 413 (30) A B 762

Greendey Chandri v. Mockintosh (189) 4 Cal 89

(i) *Veerasakumaraj v. Papiah* (1903) 28 Mad 722 *Haji Siboo Sidick v. Ally Mahomed*

(j)

(k)

(l)

Decree against wrong person as heir and legal representative—A decree obtained against an executor or administrator of the estate of a deceased person is a

decree

fore

heir

heir

But

the heirs as legal representatives, and the Court held that as there was no fraud or collusion the estate was bound, although under the will other persons were entitled to represent the estate (a1)

Decree against executor who has not intermeddled or proved.—A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased, unless he has either administered, that is, intermeddled with the estate, or proved the will. Where a decree is obtained against such person, and property belonging to the estate of the deceased is sold in execution of the decree, the sale does not bind the estate (o)

53. [New.] For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

Section of the Code of Civil Procedure, 1908, Chapter IV, Section 53.

- (m) *Kolarambhai v. Madhavi* (1927) 35 W N 834, 108 J C 400, (23) A M 243
- (n) *Kulappa v. Paradarai du* (1910) 34 Mad 72, 3 I L 737, *Gingoraju v. Somanna* (1927) 93 I L 618, (27) A M 197
- (ni) *Mst. Karam Kaur v. Mst. Chandi* (1933) 14 Loh 636, 141 I C 540, (43) A L 386
- (o) *Mohamadu v. Putekey* (1894) A C 437
- (p) *Chunatal v. Bai Mani* (1918) 42 Pcm 504,

- 46 I C 745 approved in *Dinara Das v. Arundha Ashore* (1921) 2 Loh 114, 61 I C 628, (21) A L 34 and *Jayaramath v. Motilal* (1923) 43 All 435, 73 I C 643, (23) A 539
- (q) *Megappa v. Meyappa* (1924) 46 Mad 1, 3 I L 471, 83 I C 985, (24) A M 571
- (r) *Gowah v. Narayan* (1921) 50 Bom 709, 124 I C 601, (31) A B 494

his father which is not tainted by illegality or immorality. Sec. 51 is not limited to the execution of decrees for debt but applies to all decrees. Sec. 53 appears to have been enacted to explain the meaning of the expression 'property of the deceased' which occurs in secs. 50 and 52. If sec. 53 is considered to be not descriptive but limitative and confined to a decree for debt, and if a joint son is not considered to be the legal representative of his father under sec. 50, a decree for possession or a decree other than decree for a debt obtained against a father in a joint Hindu family would not be enforceable in execution against the son who is joint with his father and is brought on the record as his legal representative. In this case the Bombay High Court held that a decree for an injunction passed against a father as manager of a joint Hindu family could be executed against a son who had taken the family property by survivorship. In the previous case (a) such an execution was refused and the son who had taken joint family property by survivorship was held not to be the legal representative of his father, but this case was distinguished on the ground that the decree was against the father personally and not as representing the family. Similarly in the case of money decree—if the decree is against a coparcener personally, it cannot be executed after his death, against another coparcener who has taken the property by survivorship, if he is neither a son nor grandson but a nephew who is under no obligation to pay the debt of the deceased (1).

Decree—The section is not limited to money decrees but applies to all decrees (*u*)

Liability of ancestral property in execution proceedings—Under the Hindu law when a son or grandson takes any ancestral property by survivorship, he is bound to pay out of such property all debts including judgments, of his ancestor not incurred for immoral or illegal purposes. In the case of a decree against a Hindu father there was a conflict of decisions under the Code of 1882 as to the procedure for enforcing this liability. The section is new and settles this question of procedure (v) We proceed to consider the subject under the following four heads —

1 Where a money decree has been passed against the father and the father dies before issue of execution — A and his sons B and C constitute a joint Hindu family owning an ancestral house D obtains a decree against A for Rs 5,000 A dies, and on his death B and C take the ancestral property by survivorship D (whose remedy is not confined to the one third share of the father) (iv) applies for execution of the decree against B and C by attachment and sale of the whole of the family house Is he entitled to do so or must he institute a fresh suit against B and C to recover the debt? According to the procedure prescribed by this Code, D should bring B and C on the record as the legal representatives of A under sec 50, and then apply under that section to the Court which passed the decree to execute it against B and C to the extent of the ancestral property come to their hands The words in sec 50 are to the extent of the property of the deceased which has come to his [legal representative's] hands According to the present section the ancestral property in the hands of B and C being liable under Hindu law for the payment of A's debts, is deemed for the purposes of sec 50, to be the property of the deceased which has come to the hands of B and C as the legal representatives of A If B and C object that the debt in respect of which the decree was passed was tainted with immorality, the question is one relating to the execution of the decree between the decree holder and the representative of the judgment debtor within the meaning of sec 47 and it should be determined by the Court executing the decree (x) This coincides with the view taken

(s) *Chantal v. Pr. Manu* (1918) 42 Bora 504
46 I C 745

(f) *Jagannath v. Mohd. Lal* (1923) 45 All 450
 31 C 924 (Sd) A A 543

(4) *Ganesha v Narayan* (1931) 50 Bom 709
124 I C 231 (31) A B 484 *Messersmith*
v *Messersmith* (1944) 40 Md L J 471

(r) *Stet A Baron A James Macar* (19-1) 6 Pat
1 J 451 62 I C 905 (23) A I 143

(u)

(x)

by the High Courts of Bombay and Calcutta under the Code of 1882 (y) According to the Madras and Allahabad decisions under that Code, a decree against a Hindu father could not be executed against ancestral property in the hands of the sons, even to the extent of the father's interest in the property, and the only remedy of the decree holder was to institute a regular suit against the sons. This view proceeded on the ground that the question whether the debts were tainted with immorality was not one that could be gone into in execution proceedings and that the sons were not the "legal representatives" of their father so far as the ancestral property was concerned within the meaning of sec. 231 of the Code of 1882 (z) These decisions are no longer law

2 If here a money decree has been passed against the father, and the father dies after attachment but before sale of the ancestral property—All the High Courts are agreed that where the father dies after attachment of the ancestral property, the proceedings in execution can be continued against the sons (a) In fact, having regard to the provisions of the present section, a separate suit against the sons would be barred by sec. 47.

3. If here a mortgage decree has been passed against the father, and the father dies before sale of the mortgaged property—Where a decree is obtained against the father for sale of ancestral property mortgaged by him, and he dies before sale, the proceedings in execution may be continued against the sons. But the sons, not being parties to the suit, are entitled to raise in execution proceedings such questions as they could have raised if they had been made parties (b) They can dispute the *factum* of the debt, or they can show that the debt was incurred for immoral purposes and is not therefore binding on the property (c) See notes to O 34, r 1, "Mortgage of joint family property"

4 Where a decree has been passed against the sons in respect of their father's debt for payment of the debt out of the ancestral property—In such a case, the decree-holder may proceed to execute the decree by attachment and sale of the ancestral property come to the hands of the sons. The proceedings would be under sec. 52 The expression "property of the deceased" in that section would be construed in the light of the present section. In fact, sec. 53 is an Explanation to secs 50 and 52, explaining the meaning of the expression "property of the deceased."

It will be seen that, under the present Code, a creditor can follow the property in the hands of the sons or grandsons in execution not only in cases (2), (3) and (4), but also in case (1)

The four heads set forth above refer to decrees for the debt of a deceased ancestor, but as already stated the section is not limited to such decrees, but includes all decrees against a deceased ancestor.

"Debt of a deceased ancestor"—As to debts for which a Hindu son or grandson is liable, see Mulla's Hindu law, 7th ed., sec. 290

54. [S. 652.] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an

Partition of estate or
separation of share

(1)

- (a) *Ravi Varma v. Ramana* (1882) 5 Mad 223, *Arinichitra v. Dorasami* (1888) 22 Mad 413, *Periasami v. Seetharama* (1904) 27 Mad 243 245 (F B), *Chakravarthy v. Senthinela* (1890) 13 Mad 285, *Lachma Sarain v. Kunji Lal* (1894) 16 All 449, *Jagannath v. Bala Ram* (1889) 11 All 802.

(a)

- (b) See *Chander Pershad v. Sham Koer* (1908) 33 Cal 878, *Umapakeswara v. Singaperumal* (1885) 8 Mad 376. See also *Hira Lal v. Irmesher* (1899) 21 All 350.
- (c) See *Ramkrishna v. Vinayak* (1910) 34 Bom 334, 5 L C 907, *Indor Pol v. Jyotsna Bank* (1915) 37 All 214, 28 L C 593.

estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Partition by Collector—This section is a reproduction of sec 263 of the Code of 1882 with a few verbal alterations. Where a decree has been passed for partition or for separate possession of a share of an estate of the description mentioned in this section, the proper authority to effect the partition or to deliver possession of the share is the Collector, the Court has no power to do so (d)

Application of the section—If a decree is for the partition of an undivided estate assessed to the payment of revenue to Government, the section requires that the partition should be carried out by the Collector. In a case decided by a Full Bench of the High Court of Calcutta there was a dictum to the effect that the section only applies to a decree which directs distribution of revenue as well as a division of land (e). There is however nothing in the section which so limits its operation. In *Abdul Razak v Shreenath Ghosh* (f) Rankin, C J, said "It is idle to say that it is open to the plaintiff to insist that it be carried out by a commissioner under the civil Court merely because he has not asked for partition of the revenue. Whether he has asked for partition of the revenue or not, if he has a right to the partition of an undivided estate, his right is to a complete partition and it is certainly the right of any other party to object to an incomplete partition which would leave his interest at the mercy of the plaintiff, if the plaintiff makes default in paying his share."

The section does not apply to the partition of a mouza which is part of a revenue paying estate (g). In such a case the object of the suit is not to have the parent estate divided into several separate estates but only to divide the lands of the mouza among persons who are jointly interested in them (h).

For the separate possession of a share of such an estate—These words refer to the case of a man whose right is to the possession of an aliquot portion or share of the whole estate considered as one. In such a case the partition is made by the Collector, as it is the duty of the Collector to see that the proper share of the revenue is put upon the particular land or share of land (i).

Partition—The term "partition" in this section is not confined to a mere division of the lands in question into the requisite parts but includes the delivery of the shares to their respective allottees (j).

Jurisdiction of Court to control Collector's action—Where a decree relates to an estate of the kind mentioned in this section it should declare the rights of the several parties interested in the property, but should direct the actual partition or separation to be made by the Collector or any gazetted subordinate of the Collector deputed by him in that behalf (k) [see O 20, r 18]. This section places the execution of the decree entirely in the hands of the Collector. But if the Collector contravenes the

- | | |
|--|---|
| (d) | <i>Ghosh</i> (1931) 58 Cal 12, 130 I C 19 |
| (e) | (31) A C 93 |
| (f) | (i) (1933) 56 Mad 443 141 I C 181 (33) 4 M |
| | 259 <i>supra</i> <i>Abd Razak v Shreenath</i> |
| | <i>Ghosh</i> (1931) 54 Cal 12 130 I C 129 |
| (g) <i>Debi Singh v Shro Lal Singh</i> (1889) 16 | (31) A C 93 |
| | (j) <i>Parbhudas v Shankarbhais</i> (1884) 11 Bom |
| | 86 |
| | (k) The provisions of s 42 of the Specific Relief |
| | Act 187 do not constitute a bar to such |
| | a decree. <i>Rupan Lal v Sudh Karan</i> (1919) |
| | 41 All 207 49 I C 26 <i>Arman Singh</i> |
| | <i>v Tulsi Singh</i> (1917) 21st L J 221, 39 |
| (h) | I C 173 |

55

decretal command of the Court, or transgresses the law for the time being in force, relating to partition, his action is subject to the control and correction of the Court which passed the decree and sent it to him for execution (f). In such a case, the aggrieved party should proceed by an application under s. 47, and not by a separate suit (m). Where a Collector has made a partition, there is nothing to prevent him from reversing the partition for mistake or other causes before he has passed final orders and returned the proceedings to the Court (n).

The High Court of Bombay has held that an objection that the Collector has made an unequal partition is no ground for interference by the Court with the order passed by the Collector (o). But in a Madras case, where all the parties objected to a partition effected by the Collector on the ground that it was unequal the Court held that it had power to entertain the objection (p).

"Estate"—The word "estate" is here used in its ordinary sense (q). *Shera* lands, that is lands held under a lease from Government for a fixed period, come within the terms of this section as revenue paying lands (r). But isolated plots of land which fall short of being the share of a co sharer of a mahal do not (s). A *rayatwari* holding has been held not to be an "estate" within the meaning of this section (t).

"Estate assessed to the payment of revenue"—This section refers to estates assessed to revenue in one lump sum for the whole estate and not to estates, like the ordinary paddy land holding in Burma, which are assessed at acre rates (u). A *mouza* is generally part of a revenue paying estate, but is not itself an estate assessed to the payment of revenue (t).

ARREST AND DETENTION.

55. [s. 336.] (1) A judgment-debtor may be arrested

Arrest and detention

in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

| | |
|--|---|
| (f) | (p) <i>Chinna v. Krishnaravanna</i> (1896) 19 Mad 43. |
| | (q) <i>Secretary of State v. Dunlop Lall</i> (1884) 10 Cal 435. |
| | (r) |
| | (s) |
| | (t) |
| (m) | |
| (n) <i>Krishna v. Damodar</i> (1903) 5 Bom L R 645. | (u) |
| (o) <i>Dee Gopal v. Vasudev</i> (1888) 12 Bom 371. | (v) |
| <i>Shrinivas v. Gurunath</i> (1891) 15 Bom 527. | |
| <i>Bhimnagda v. Hanmat</i> (1918) 42 Bom 693, 46 I C 10. | |

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorised to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment debtor is to be found

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officers authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest

Provided, fourthly, that, where the decree in execution of which a judgment debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf

(3) Where a judgment debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he *may* (iv) be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which

he was arrested, the Court *may* (x) release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to civil prison in execution of the decree

See O 21 r 40 [proceedings on appearance of judgment debtor in obedience to notice or after arrest]

Changes introduced by the section—This section corresponds with sec 336 of the Code of 1882 except in the following particulars—

- 1 Any outer door of a dwelling house may now be broken open to effect the arrest of a judgment debtor in execution of a decree. But the dwelling house must be in the occupancy of the judgment debtor. See sub section (1) proviso (2)
- 2 The security under sub sec (4) must not only be for the filing by the judgment debtor of a petition in insolvency, but also for his appearance, when called upon in any proceeding upon the application in insolvency or upon the decree in execution of which he was arrested. See notes below Discharge of surety
- 3 A power has been conferred on the local Government to exempt certain persons from arrest. See sub section (2)

Breaking open of outer door—Under the Code of 1882 the breaking open of any outer door of a dwelling house was strictly prohibited. This prohibition has now been removed to this extent that where a dwelling house is in the occupancy of the judgment debtor and he refuses or prevents access thereto, the officer authorized to make the arrest may break open any outer door of such dwelling house. But this does not authorize him to break open the outer door of a dwelling house merely because the judgment debtor is to be found in that house. The prohibition above referred to as well as the prohibition against entering a dwelling house after sunset for effecting an arrest are to be traced to the maxim of English law that a man's house is his castle. Referring to this maxim Bentham wrote more than a century ago. This poetical expression is certainly no reason for if a man's house be his castle by night why not by day? The course of justice is sometimes interrupted in England by this puerile notion of liberty (y)

Sub section (2)—This sub section is new. It is intended to cover the cases of certain persons or classes of persons whose summary arrest might as in the case of railway servants, be attended with danger or inconvenience to the public

Sub section (4)—Insolvency after order for arrest—If a judgment debtor against whom an order for arrest has been made is adjudicated insolvent without a protection order, the adjudication does not prevent his arrest and the Court of execution must require the judgment debtor to give security under the latter part of sub section (4) that he will appear when called upon in any proceeding in insolvency or upon the decree in execution of which he was arrested (z)

Sub section (4)—Expresses his intention to apply to be declared insolvent. This expression of intention is equivalent to a statement made to the judgment creditor

The word *may* was substituted for *shall* by Act 3 of 1931 (1930) s 113. T. J. J. of Legislation 2nd edn

(z) *M. F. L. A. Fish v. Abdul Majid* (1930) 3 Rang 18. 23 I C 281 (25) A R 302

by the judgment-debtor of an intention to suspend payment of his debts. It is therefore an act of insolvency as defined in sec. 9 of the Presidency Towns Insolvency Act (a).

Sub section (4)—Within one month—The Court has no power to extend the period of one month for applying for a liquidation. Sec. 148 does not apply to such a case (b). The month is introduced into this section by way of defining the obligation of the surety. The intention expressed is an intention to be declared insolvent and not an intention to be declared insolvent at the end of a month provided nothing does turn up (c).

Sub section (4)—Discharge of surety—Under the Code of 1882, the security required was "that the judgment debtor will appear when called upon, and that he will, within one month apply under section 336 to be declared an insolvent. It was held upon the construction of those words that where a security bond provided that the surety would produce the judgment debtor when the Court should direct him to do so, the surety was released from his obligation under the bond when the judgment debtor filed a petition to be declared an insolvent. Neither the withdrawal of the petition nor failure to proceed with the petition, nor even failure on the part of the judgment debtor to appear in Court when the direction to appear was made subsequent to the filing of the petition, was held to affect the surety's discharge (d). And this was so even when a surety undertook that the judgment debtor would appear before the Court when called upon, and would within one month file a petition to be declared an insolvent (e). These decisions are no longer law. Sub section (4) now makes it clear that where a security bond is passed in the terms of that sub section, that is, where a surety undertakes (1) that the judgment debtor will within one month apply to be declared an insolvent, and (2) will appear, when called upon in any proceeding upon the application or upon the decree in execution of which he was arrested, the security will be realized when there is a failure to comply with either condition (f). The surety, however is not released by the mere filing by the judgment debtor of the petition in insolvency: the security continues until a final order is made on the petition (g). A bona fide petition is a sufficient compliance with the condition of the bond. When a bona fide petition was presented within one month but was rejected as not being in proper form and a fresh petition was presented later and the debtor was adjudged insolvent, the surety was discharged (h).

A surety under this section is discharged by the death of the judgment-debtor before breach of either of the two conditions mentioned above (i). But the death of the judgment debtor after the first condition has failed, namely, the undertaking to apply to be declared an insolvent within one month, cannot affect the surety's liability with regard to that condition (j). A surety is also discharged if the execution proceedings are struck off (k), but not if liability had already accrued under the bond by a breach of either of the two conditions before the proceedings were struck off (l). If the Court makes an erroneous order discharging a surety the decree holder may apply for revision of the order, but cannot treat it as a nullity (l).

- | | |
|--|---|
| <p>(a) <i>Kishore v. Netherlands Trading Society</i> (1930) 34 C W N 401 1-8 I C 246 (30) A C 555</p> <p>(b) <i>Varadisha v. Pangachari</i> (1906) 50 Mad L J 477 95 I C 444 (26) A M 689</p> <p>(c) <i>Kishore v. Netherlands Trading Society</i> (1930) 34 C W N 401 1-8 I C 246 (30) A C 555</p> <p>(d) "</p> <p>(e) <i>Danna Mai v. Jamna Das</i> (1903) 15 All 1-3 <i>Imbuchunni v. Lalji</i> (1901) 24 Mad 360</p> | <p>(f) <i>Woriar Commercial Bank v. Raja Maroop</i> (1906) 32 Mad L J 53 101 I C 55 (26) A M 1081</p> <p>(g) <i>Abdul Mustafa</i> (1922) 46 Bom 64 I C 618 (-) A B 310</p> <p>(h) <i>Channappa v. Jellappa</i> (1931) 33 Bom L R 80 134 I C 18 (31) A B 444</p> <p>(i) <i>Ershnan v. Itinan</i> (1901) 24 Mad 637</p> <p>(j) <i>Nab v. Clandra v. Murtunjoy</i> (1914) 41 Cal 50 19 I C 981</p> <p>(k) <i>Maknaji v. Bhula Das</i> (1904) 48 Bom 500 26 I C 257 (24) A B 43</p> <p>(l) <i>Lalji v. Odora</i> (1885) 14 Cal 57</p> <p>(m) <i>Dedhray v. Mahabir</i> (1900) 5 Pat L J 417, 40 O 57 I C 393</p> <p>(n) <i>Nayeshar v. Sudramal</i> (1933) 55 All 542 144 I C 731 (33) A B 32</p> |
|--|---|

Sub sec (4) provides that if the judgment debtor fails to apply or to appear, the Court may either direct the security to be realized or commit the judgment debtor to prison. This is an alternative and not a concurrent remedy. It does not mean that the Court can proceed both against the surety and the judgment-debtor. If the surety is proceeded against and the amount is recovered from him the judgment-debtor cannot be committed to jail in execution. If the judgment-debtor is committed to jail, the position is just the same as if the surety had never come forward (m). But the mere fact that the judgment debtor is rearrested (n), or that a warrant is issued against him is not sufficient of itself to discharge the surety (o).

Realization of security—See sec 145

56. [S. 245A.] Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money

Security for costs.—This section provides that a woman shall not be arrested in execution of a decree for the payment of money. At the same time, if the plaintiff is a woman and her suit is for the payment of money, she may be required to give security for the defendant's costs. See O 23, r 1 (3).

57. [S. 338.] The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Subsistence allowance

See O 21, r 39 [subsistence allowance]

58. [Ss. 341, 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

Detention and release

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and

(b) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(m) *Malanji v. Bhukandas* (1924) 48 Bom 500, 501 C 257, (24) A B 424.
(n) *Chinnappa v. Jellappa* (1931) 33 Bom 1 R 820, 134 I C 718, (31) A B 444.

explaining a dictum in *Malanji v. Bhukandas*, *supra*.

(o) *Malanji v. Bhukandas*, *supra*.

- (ii) on the decree against him being otherwise fully satisfied, or
- (iii) on the request of the person on whose application he has been so detained, or
- (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

Period of detention in jail.—The first part of sub section (1) up to the words "six weeks" corresponds with sec 342 of the Code of 1882. The phraseology of that section, however, has now been altered to make it quite clear that the period of detention shall be (1) six months where the amount of the decree exceeds Rs 50 and (2) six weeks in any other case, and that the Court has no power to fix shorter periods than those prescribed in the section (p).

Re arrest.—The immunity of a judgment debtor from a second arrest depends not only upon his having been *arrested* but upon his having been detained *in jail* under the arrest. Thus where a judgment debtor, while acting as a pleader in Court, was arrested and discharged on the ground that he was exempt from arrest under sec 642 of the Code of 1882 (now sec 135), it was held that he was liable to be re-arrested in execution of the same decree against him (q). Similarly where a judgment debtor was arrested, but was liberated owing to non payment of subsistence money, it was held that he was liable to be re-arrested in execution of the same decree (r). Sub-section (2) refers to release from detention in jail.

Interim protection order.—A is arrested and committed to jail in execution of a decree against him. While in jail he files his petition in insolvency, and obtains an *interim* protection order for one week, and is thereupon released from jail. He then applies for a further protection order, but his application is refused. Is A liable to be re-arrested in execution of the same decree? The Calcutta High Court has held that he is not liable to be re-arrested, on the ground that a judgment debtor once discharged from jail cannot be arrested a second time in execution of the same decree (s). On the other hand the High Court of Bombay has held that A is liable to be re-arrested, as the only cases in which a judgment debtor is exempt from re-arrest are those specified in this section, and that release under an *interim* protection order is not one of them (t). The Calcutta decisions, it is submitted, are not correct.

(p) See *Subudhi v. Singi* (1890) 13 Mad 141.
 (q) *Lajendra v. Chunder Mohan* (1896) 23 Cal 128.
 (r) *Habibul Ishaan v. Fam Salai* (1904) 6 All 17.
 (s) *Bolte Chand, in the matter of* (1893) 20 Cal

874 *Secretary of State v. Judith* (1886) 12 Cal 5.
 (t) *Shamji v. Poonja* (1902) 26 Bom 652.
Suraj Din v. Mahabir Prasad (1911) 33 All 275 8 1 C 743.

Contempt of Court—This section does not apply to cases of imprisonment for contempt of Court (u)

59. [S. 653.] (1) At any time after a warrant for the arrest of a judgment debtor has been issued the Court may cancel it on the ground of his serious illness

Release on ground of illness

(2) Where a judgment debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison

(3) Where a judgment debtor has been committed to the civil prison, he may be released therefrom—

(a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness

(4) A judgment debtor released under this section may be re-arrested but the period of his detention in civil prison shall not in the aggregate exceed that prescribed by section 58

ATTACHMENT

60. [S. 266] (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses, or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory

Property liable to attachment and sale in execution of decree

notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment debtor or by another person in trust for him or on his behalf

Provided that the following particulars shall not be liable to such attachment or sale, namely —

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman
- (b) tools of artizans, and where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ,
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ,
- (d) books of account ,
- (e) a mere right to sue for damages ,
- (f) any right of personal service ,
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Gazette of India by the Governor-General in Council in this behalf, and political pensions ,
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ,
- (i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of —
 - (i) the whole of the salary, where the salary does not exceed forty rupees monthly ,

(ii) forty rupees monthly, where the salary exceeds forty rupees and does not exceed eighty rupees monthly ; and

(iii) one moiety of the salary in any other case

Provided that where the decree-holder is a society registered or deemed to be registered under the Co operative Societies Act, 1912, and the judgment-debtor is a member of the society, the provisions of sub-clauses (i) and (ii) shall be construed as if the word, ' twenty ' were substituted for the word ' forty ' wherever it occurs and the word ' forty ' for the word ' eighty '.

- (j) the pay and allowances of persons to whom the Indian Articles of War apply ,
- (k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ,
- (l) the wages of labourers and domestic servants whether payable in money or in kind ,
- (m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ,
- (n) a right to future maintenance
- (o) any allowance declared by any law passed under the Indian Councils Acts 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree , and,
- (p) where the judgment debtor is a person liable for the payment of land revenue, any movable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue

Explanation —The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment, or sale in execution of decrees for rent of any such house, building, site or land

Changes introduced in previous law—This section corresponds with s 26f of the Code of 1882 except in the following particulars—

- 1 In cl. (a) the words "cooking vessels, beds, and such personal ornaments as in accordance with religious usage cannot be parted with by any woman" have been added. See notes below.
- 2 The latter portion of cl. (b) relating to agricultural produce is new.
- 3 Cl. (c) stood as follows in s 26f of the Code of 1882—The materials of houses and other buildings belonging to and occupied by agriculturists.
- 4 In cl. (g) the words "or payable out of any service family pension fund notified in the Gazette of India by the Governor General in Council in this behalf" have been added.
- 5 Cl. (h) is new. See notes below.
- 6 In cl. (i) the words "or allowances equal to salary" and "while on duty" have been added. See notes below.
- 7 Cl. (k) is new. See notes below.
- 8 In cl. (l) the words "whether payable in money or in kind" are new.
- 9 The alterations in sub-section (2) cl. (a) correspond with the alterations in sub-section (1) cl. (c).

Subsequent amendments of the section—Sub sec. (2) as it originally stood contained a clause (b) which ran thus—(b) to affect the provisions of the Army Act or of any similar law for the time being in force. That clause was repealed by Act 10 of 1914 Sch. II. See notes below. Salary of Army officers.

In clause (1) the word "forty" was substituted for "twenty" and the word "eighty" for "forty" by Act 26 of 1923.

The proviso to clause (1) was added by the Amending Act 20 of 1923.

In execution of a decree—The expression "decree" in this section refers to a money decree and not a mortgage decree for attachment is not necessary in mortgage decrees. The result is that the exemptions from attachment and sale contained in the proviso to this section do not apply to a mortgage decree for sale (c).

Saleable property—Subject to the proviso to sub-section (1) all saleable property which belongs to the judgment debtor may be attached and sold in execution of a decree against him. The equity of redemption of a mortgagor in mortgaged property is saleable property within the meaning of this section and is therefore liable to be attached and sold in execution of a decree against him (c). The share of a partner in a partnership business is saleable property and can be attached and sold in execution of a decree obtained against him by his creditor (x). The right to claim specific performance of a contract to sell land is also attachable and saleable (y). A life interest

(c) *Mubarak v. Khan* (1914) 40 Cal. 492. See also *IC 40 (4) 333* F. 1.

(w) *Jarashram v. Gornil* (1913) 1 Bom. 226.

(x) *Jagat Chander v. Jugar Chander* (1923) 20 Cal. 63. See also *IC 40 (4) 333*.

(y) *F. d. v. Khanna* (1913) 14 Cal. 241.

in trust funds is attachable and saleable in execution of a decree against the life tenant (z) Similarly a vested remainder can be attached and sold in execution of a decree against the remainderman (a)

The word 'saleable' in this section means saleable by auction at a compulsory sale under the orders of the Court. It has no reference to property made non transferable by an agreement between the parties to a transaction. It has accordingly been held that a condition in a permanent lease that the landlord would re enter if the tenant made any transfer of the land demised, does not make the land unsaleable in execution. The lease forbids a sale by the tenant, but does not prevent a sale by the Court (b) Country liquor is "saleable" property within the meaning of this section, though the permission of the Collector may be necessary to the sale under the Abkari Act (c)

Security for performance of duty—Money or other valuable security deposited as security for the due performance of duty by a servant with his master may be attached in execution of a decree against the servant, but the attachment will be subject to the lien which the master has upon the deposit, and the deposit cannot be sold until the same is at the disposal of the servant free from the lien of the master at the expiration of the period of employment (d)

Land assigned for maintenance—Where land was assigned to a Hindu widow for her maintenance with a proviso against alienation, it was held that she had no saleable interest in the usufruct (e)

Non transferable offices—A religious office is not saleable property (f) Similarly the right of managing a temple, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, is not saleable (g) The right to officiate at funeral ceremonies is also not saleable (h) The property of a temple, cannot be sold away from the temple. But there is no objection to the sale of the right, title and interest of the servant of a temple in land belonging to the temple which he holds as remuneration for his service, the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from office for failure to perform the service (i)

Service of a public nature—Land burdened with the performance of a service of a public nature e.g., land held on Swastivachakam service tenure, is inalienable, and cannot be attached (j)

Chota Nagpur Encumbered Estates Act, 1896—Land released from management under the Chota Nagpur Estates Act, 1896 is under s. 12A of that Act inalienable during the lifetime of the holder without the sanction of the Commissioner. Without such sanction it cannot be attached and sold (l)

Restraint upon anticipation—The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution

- | | | | |
|-----|---|-----|---|
| (z) | " | (g) | <i>Durga Bhai v Chanchal</i> (182) 4 All 81 |
| (a) | " | | <i>Pama Parm v Pamannagar</i> (1882) 3 |
| (b) | " | | Msd 89 <i>Pajah Furmah v Ravi Furmah</i> |
| | | | (18 6) 1 Msd 335 4 I.A. 76 <i>Gnan</i> |
| (c) | " | | <i>sambanda Pandara Sannadai v Felu</i> |
| | | | <i>Pandaram</i> (1900) 23 Msd. 271 27 I.A. |
| (d) | " | | 69 <i>Srimati v Patanmani</i> (1897) 1 C.W.N. |
| (e) | " | | 493 <i>Shaulojanund v Prary</i> (1900) 29 |
| | | | Cal. 470 |
| (f) | " | (h) | <i>Jhummun v Dinooath</i> (1871) 16 W.R. 171 |
| | | (i) | " |
| (j) | " | (j) | " |
| | | (k) | " |

of a decree against the separate property of a married woman passed under s. 8 of the Married Women's Property Act, 1874 (f)

Right of residence—The right of a widow under the Hindu law to reside in her husband's family house is a purely personal right and cannot be transferred. Such right cannot be attached in execution as it is not "saleable property" (m). For other kinds of property which cannot be alienated, see Transfer of Property Act, 1882, s. 6.

Burmese Marriage Property—The interests of parties to a Burmese Buddhist marriage in the marriage property is an indeterminate interest and not saleable within the meaning of this section (n).

"Property"—A sues B for partnership accounts. The question of accounts is then referred to arbitration with the consent of the parties. Before the award is made, X, a creditor of A, applies for attachment of the "rights and interest" of A in the award. The attachment cannot be allowed for the expectant claim under an inchoate award is not property within the meaning of this section (o). Money paid into Court as a fine in a criminal case against a judgment debtor is, after the order imposing the fine is set aside, attachable under this section as money belonging to the judgment debtor even before the issue of a refund certificate (p).

The doors and windows of a building cannot be *separately* attached, for they have no separate existence as *property* (q). An unascertained right in unascertained property could not be the subject of attachment (r).

"Disposing power"—A property may not belong to a judgment debtor, and yet he may have a *disposing power* over it exercisable for his own benefit. In such cases the property is liable to attachment and sale subject to the proviso to this section.

Trustee of a charity—A trustee of a religious endowment has no disposing power over the *corpus* of the trust estate exercisable for his own benefit; hence the *corpus* cannot be attached (s).

Life interest—Where under a compromise with a reversioner a Hindu widow was allowed to keep certain property for her life, and she agreed not to alienate it, and on her death the property was to pass to the reversioner, it was held that she had no disposing power over the property (t).

Bonus sanctioned by railway company—A bonus sanctioned by a Railway Company to its servant is virtually a gift which must be completed either by a registered document or by actual payment as required by s. 123 of the Transfer of Property Act. A Railway Company sanctioned a bonus to A, and the amount was forwarded to the District Paymaster of the Company for payment to A. Before the amount was paid to A, it was attached in the hands of the Paymaster by a creditor of A. It was held that the amount could not be attached for the gift was not complete and A had therefore no *disposing power* over the money (u).

Delivery to post office—A sends a cover containing currency notes to the Post Office for delivery to B the addressee. Can the cover be attached while it is still in the Post Office by a creditor of B? It has been held that it can be attached the *transmission*

- | | |
|--|---|
| (f) <i>Goudkoin v Venkatesa</i> (1907) 30 Mad 378 | (r) <i>Bebee Tokat v Darod</i> (1876) 6 M J A 1 |
| (m) <i>Salakshi v Lakshmayee</i> (1908) 31 Mad 500 | (s) <i>Buben Chand v Salir Hussain</i> 41 Cal 323 151 A 1 |
| (n) <i>Ma Jang v Maung Aye Hpan</i> (1922) 5 Rang 48 104 IC 516 (27) A R 274 | (t) <i>Basangonda v Iyappa</i> 111 (11) 41 9 73 IC 106 (21) A 1 |
| (o) <i>Synd Taffur cool v Iughoomath</i> (181) 14 M J A 40 | (u) <i>Janki Das v Iyappa</i> 111 (11) 41 9 73 IC 106 (21) A 1 |
| (p) <i>Harnam Singh v Salg Pam</i> (1912) F R no 61 318 16 IC 774 | |
| (q) <i>Peru v Iomuo</i> (1885) 11 Cal 164 | |

being that the cover is in the *disposing power* of B. "When once the letter has been posted the property in it becomes vested in the addressee" (r)

Auctioneer—An auctioneer has no disposing power over the whole of the sale proceeds of goods sold by him, but only over that portion of it which represents his commission. Hence the whole of the sale proceeds in the hands of an auctioneer cannot be attached in execution of a decree against him, but only so much of it as represents his commission (u)

Life policy—Where a married man effects a policy on his own life, and the policy is expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, then, in cases to which the Married Women's Property Act, 1874, applies, the simple declaration on the face of the policy that the policy is for the benefit of his wife or children amounts to a trust for them, and the policy cannot be attached by his creditors [see s. 6 of the Act]. But in cases to which that Act does not apply, such a declaration is not sufficient to create a trust, and the insured has a disposing power over the policy for his own benefit and the policy may be attached by his creditors, unless it has been assigned as provided by s. 130 of the Transfer of Property Act, 1882, or a trust has been declared in respect thereof as provided by s. 5 of the Indian Trusts Act, 1882. There was a conflict of opinion as to whether s. 5 of the Act applied to Hindus, for it was held by the High Court of Madras that it did (x) and by the High Courts of Bombay (y) and Calcutta (z), that it did not. But the Act has been amended [see Act 13 of 1923] and the provisions of that section are made applicable to policies of insurance effected by Hindus, Muhammadans, Sikhs or Jains in Madras after the 31st day of December, 1913 [being the year of the Madras decision] and in other parts of British India after the 1st day of April 1923 but nothing contained in the Amending Act is to affect any right or liability which has accrued or been incurred under any decree of a competent Court passed before the 1st day of April 1923.

"Debts"—Debts are expressly mentioned in the section and they are liable to attachment and sale. A debt is an *obligation* to pay a *liquidated* (or "specified") sum of money (a). Money that has not yet become due does not constitute a debt, for there is no obligation to pay that which has not yet become due. The word 'debt' in this section means an actually existing debt that is a perfected and absolute debt. Debt which has not become due is not a debt and cannot be attached (b). A sum of money which might, or might not become due or the payment of which depends upon contingencies which may or may not happen is not a debt (c). A money claim that has already become due is a debt, and it may be attached as such, though it may be payable at a future day, but a money claim *accruing due* is not a debt and cannot be attached. The attachment must operate at the time of the attachment and not be anticipatory, so as to fasten on a claim that may ripen into a debt at some future time (d). A mere right to receive profits the profits not having yet accrued due, is not attachable (e).

A debt that is enforceable only by a foreign Court is not liable to attachment under this section (f).

(r) *Narasimhulu v. Adinappa* (1890) 13 Mad 242

(b) " " " "

(c) " " " "

(d) " " " "

(e) " " " "

(f) " " " "

Illustrations

1 A delivers goods to his agent, B, for sale. B sells the goods, and receives the sale proceeds. The sale proceeds in the hands of B constitute a "debt" due to A, and they may therefore be attached while in B's hands in execution of a decree against A. *Madho Das v Ramji* (1894) 16 All 280

2 A is bound under a deed to pay a monthly allowance to B for B's maintenance. C, who holds a decree against B, attaches in August the allowance for September. The attachment is not valid, for the allowance can only be attached as a "debt" and the allowance for September was not a debt due to B at the time of attachment in August. *Haridas v Baroda Kishore* (1900) 27 Cal 38, *Nilkunjo v Hurro* (1878) 3 Cal 414

3 A agrees to sell his property to B for Rs. 2,000 to be paid to A on the execution of the conveyance. The purchase money payable to A is not a "debt" owing to him by B until the conveyance is executed. Hence it cannot be attached before the execution of the conveyance in execution of a decree against A. *Ahmaduddin v Majlis Ras* (1891) 3 All 12. But once the sale is completed, the amount representing the purchase money may be attached in the hands of B, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments. *Harshankar v Baijnath* (1901) 23 All 164. As to attachment of right to claim specific performance, see note above, "Saleable property."

4 Maintenance allowance that has already become due, private pensions that have already become due, and the wages of private servants [other than those mentioned in cl (1)] that have already become due are "debts" within the meaning of this section. *Kasheeshuree v Greesh Chunder* (1866) 6 W R Mis 64 (maintenance), *Bhojrao v Madhub Chunder* (1880) 6 C L R 19 (private pensions), *Ayyavayyar v Virasami* (1898) 21 Mad 393, *Devi Prasad v Lewis* (1908) 31 All 304 (wages of private servants)

5 A agrees to advance Rs. 5,000 to B on a mortgage of B's property. B advances Rs. 3,000 only. C, who holds a decree against B, seeks to attach the balance of Rs. 2,000 payable by A to B as a debt due by A to B. C cannot attach the balance, for it is not a debt due by A to B. It is clear that if A fails to pay the balance, B is not entitled to specific performance, and his only remedy against A is by way of damages for non payment of the balance. *Phul Chund v Chand Mal* (1908) 30 All 232

As to the mode in which a debt may be attached, see O 21, r 46. See also O 21, r 79.

Clause (a) *Cooking vessels*.—This clause should be liberally interpreted. Cooking vessels are not only vessels in which food is actually cooked, but also vessels necessary for cooking operations, such as a *thali* and a *Gagra* (g).

Clause (a) *Ornaments*.—Ornaments on the person of a Hindu wife, forming part of her *stridhan*, cannot be attached in execution of a decree against the husband, even though the Hindu law concedes him a personal right of user (h). The *mangalsutra*, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it, is also exempted from attachment (i).

Clause (b) *Tools of artisans*.—This clause should be liberally interpreted. A soap boiler who practises the art of making soap is an artisan and the paraphernalia of his soap factory are the tools of an artisan (j).

(g) *B. N. Dharani v. Banarsi Lal* (1932) 54 All 399

136 L C 24 (32) A A 344

(h) *Tukaram v. Gunaji* (1871) 8 B H C A C

124

(i) *Appana v. Tangamma* (1885) 9 Bom 106

(j) *B. N. Dharani v. Banarsi Lal* (1932) 54 All 399, 136 L C 24 (32) A A 344

Illustrations

1 A delivers goods to his agent, *B* for sale. *B* sells the goods, and receives the sale proceeds. The sale proceeds in the hands of *B* constitute a debt due to *A* and they may therefore be attached while in *B*'s hands in execution of a decree against *A*. *Madho Das v. Ramji* (1894) 16 All 286

2 *A* is bound under a deed to pay a monthly allowance to *B* for *B*'s maintenance. *C*, who holds a decree against *B*, attaches in August the allowance for September. The attachment is not valid, for the allowance can only be attached as a 'debt' and the allowance for September was not a debt due to *B* at the time of attachment in August. *Haridas v. Barada Kishore* (1900) 27 Cal 38, *Milkunto v. Hurro* (1878) 3 Cal 414

3 *A* agrees to sell his property to *B* for Rs. 2,000 to be paid to *A* on the execution of the conveyance. The purchase money payable to *A* is not a 'debt' owing to him by *B* until the conveyance is executed. Hence it cannot be attached before the execution of the conveyance in execution of a decree against *A*. *Ahmaduddin v. Maylis Ras* (1881) 3 All 12. But once the sale is completed, the amount representing the purchase money may be attached in the hands of *B*, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments. *Harshankar v. Baijnath* (1901) 23 All 164. As to attachment of right to claim specific performance, see note above, "Saleable property."

4 Maintenance allowance that has already become due, private pensions that have already become due, and the wages of private servants [other than those mentioned in cl. (1)] that have already become due are "debts" within the meaning of this section. *Kasheeshuree v. Gresh Chunder* (1866) 6 W. R. M.S. 64 (maintenance), *Bhojrab v. Madhub Chunder* (1880) 6 C. L. P. 19 (private pensions), *Ayyavayyar v. Parasami* (1898) 21 Mad 393, *Devi Prasad v. Lewis* (1908) 31 All 304 (wages of private servants)

5 *A* agrees to advance Rs. 5,000 to *B* on a mortgage of *B*'s property. *B* advances Rs. 3,000 only. *C*, who holds a decree against *B*, seeks to attach the balance of Rs. 2,000 payable by *A* to *B* as a debt due by *A* to *B*. *C* cannot attach the balance, for it is not a debt due by *A* to *B*. It is clear that if *A* fails to pay the balance, *B* is not entitled to specific performance, and his only remedy against *A* is by way of damages for non payment of the balance. *Phul Chund v. Chand Mal* (1908) 30 All 252

As to the mode in which a debt may be attached, see O 21, r 46. See also O 21, r 79

Clause (a) Cooking vessels—This clause should be liberally interpreted. Cooking vessels are not only vessels in which food is actually cooked, but also vessels necessary for cooking operations, such as a *thal* and a *Gagra* (g)

Clause (a) Ornaments—Ornaments on the person of a Hindu wife, forming part of her *stridhan*, cannot be attached in execution of a decree against the husband, even though the Hindu law concedes him a personal right of user (h). The *mangalsutra*, a neck ornament which is worn by a Hindu married woman during the lifetime of her husband without ever removing it, is also exempted from attachment (i)

Clause (b) Tools of artisans—This clause should be liberally interpreted. A soap boiler who practises the art of making soap is an artisan and the paraphernalia of his soap factory are the tools of an artisan (j)

(g) *E. Indreshari v. Banarsi Lal* (1937) 54 All 399
136 I.C. 28 (32) A.A. 344

(h) *Tuleram v. Gunaji* (1811) 8 B.H.C. & C.
129

(i) *Appana v. Tangamma* (1885) 9 Bom 106

(j) *E. Indreshari v. Banarsi Lal* (1932) 54 All.
399, 136 I.C. 28, (32) A.A. 344

Clause (b) Implements of husbandry.—Charraks, kadhais, and planks of timber used by an agriculturist for extracting sugar juice from sugarcane which he has grown on his field and for turning it into jaggery, are implements of husbandry, within the meaning of cl (b), and are exempt from attachment (l)

Clause (c) Houses occupied by agriculturists.—The term "agriculturist" includes persons engaged in cultivating the soil for remuneration although they may have no interest in the soil either as proprietor or tenant (f). It means a small holder who tills the soil and cultivates it and not a large landed proprietor, even though his sole income is from land (m). The Code of 1882 (s. 266) exempted from attachment only the materials of houses occupied by agriculturists. But it was held that even a house occupied by an agriculturist could not be attached provided it was occupied by an agriculturist as such (n) that is to say, it was occupied by him *bona fide* for the purposes of agriculture (o). The burden of proving that it was so occupied lies on the agriculturist debtor, and it must be proved by him in *execution proceedings* (p). The exemption extends after the death of the agriculturist, to his representative occupying the house in good faith as an agriculturist (q). But if by a consent decree an agriculturist agrees in consideration of time being given to him that his house may be attached and sold on default in payment of the decretal amount, the house may be attached and sold on default (r) for the privilege is one that may be waived (s).

If a house occupied by an agriculturist is specifically mortgaged, it is not protected from sale in execution of a decree upon the mortgage. Clause (c) does not prohibit the sale of property specifically mortgaged, though it may be occupied by an agriculturist as such, unless he is prohibited by law from mortgaging or selling it (t).

Clause (e). Right to sue for damages.—"Mesne profits" are in the nature of damages, and the right to sue for mesne profits is a right to sue for "damages." Such a right cannot therefore be attached and sold in execution of a decree against the person entitled to the right. Thus if A is entitled to claim mesne profits from B for wrongful dispossession of his lands, A's right to claim mesne profits from B cannot be attached and sold in execution of a decree against A. If the right is attached and sold and purchased by X, X is not entitled to sue B for the mesne profits, the sale to him being void (u).

Clause (f) Right of personal service.—A *riti* is a right to receive certain emoluments as a reward for personal service, and is therefore exempt from attachment and sale (v). But a priest's share in the *utpat* or net balance of the offerings to a deity may be attached and sold (w). The *birt Maha brahman* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district is a right of personal service and cannot therefore be attached (x). *Jatri bahis* which merely contain the names

- (f) *Lakshman v Narhari* (1923) 25 Bom L R 1211 81 IC 679 (24) A B 294
 (g) *Devare v Balkunt* (1917) 41 Bom 473, 39 IC 619
 (m) *Muthu Venkatarama v Official Receiver* (1920) 40 Mad 227 92 L C 304 (26) A M 350
 (n) *Kadhakasa v Balwant* (1883) 7 Bom 530.

(o)

(p)

(q) (30) A L 1034

(r) *Rudhakasa v Ballant* (1883) 7 Bom 530
Badr, Chandra v Indrajit (1932) 54 All

(t) 736 138 IC 645 (30) A A 504
Uzir v Haralech Das (1909) 24 C W 575
 37 IC 240

(u)

(v)

(w) *Shyam Chand v Land Mortgage Bank* (1863) 9 Cal 695

(x) *Ganesh v Shankar* (1886) 10 Bom 395.
Gorind v Pankajanna (1888) 12 Bom 366
Pajaram v Ganesh (1899) 23 Bom 131

(y) *Degamber v Hari* (1927) 29 Bom L R 102
 100 IC 1008 (2) A B 143

(z) *Durga Prasad v Shambhu* (1919) 41 All 650,
 51 IC 539

and addresses of pilgrims who are clients of the judgment debtor and which are of use to him to perform personal service to the pilgrims are not attachable (y) Gangaputras occupy sites on the bank of the Ganges where they erect wooden platforms for the use of pilgrims who bathe there and from whom they receive offerings. This right to offerings is a right of personal service and cannot be attached; but the right of occupancy of the sites and the wooden platforms are attachable (z) A pal or turn of worship is by custom alienable to persons within a limited circle and is attachable (a).

Clause (g): Gratuities allowed by Government.—The gratuity referred to in this section is a bonus allowed by Government to its servants in consideration of past service. It may be allowed to one who is not a "pensioner," or it may be allowed to a pensioner in addition to his pension. In either case it is exempt from attachment (b).

Stipends payable out of service family pension fund notified in the Gazette of India.—For notifications issued under this clause [i.e., cl (g)], see General Statutory Rules and Orders, vol IV, p. 685

Political pensions.—All pensions of a political nature payable directly by the Government of India are political pensions. A pension which the Government of India has given a guarantee that it will pay by a treaty obligation contracted with another sovereign power is a political pension (c) Arrears of political pension due to a pensioner and lying in the hands of Government at the time of his death do not lose their character of political pension by reason merely of the pensioner's death. The character of the fund remains unchanged so long as it remains unpaid in the hands of Government and it is not liable to attachment in the hands of Government in execution of a decree against the deceased. But once the fund has passed out of the hands of Government into the hands of the legal representative of the deceased, it may be attached like any other portion of the deceased's estate (d)

A grant of a Zamindari by Government as a reward for past services rendered by him to Government is not a pension, but a gift, and may therefore be attached in execution of a decree against the grantee. The word "pension" in this section implies periodical payment for life by Government to a pensioner.

foreign State by an arrangement with the Government of India to a deposed Maharaja (j), are instances of political pensions

Private pensions.—Private pensions, as distinguished from Government pensions, are not exempt from attachment and they may be attached either as "debts" or as "property belonging to the judgment debtor" within the meaning of this section. But they neither constitute "debts" nor "property belonging to the judgment-debtor" until they have become due and payable. Hence they cannot be attached before they have become due and payable. Pensions granted by Railway Companies to their servants are private pensions (k)

| | |
|-----|--|
| (y) | (c) |
| (z) | <i>Lachmi Narain v. Makund</i> (1904) 26 All 617, <i>Naicab Daktar v. Kernani Bank</i> (1931) 55 IA 215 59 Cal 1, 123 IC 727, (31) A PC 160 |
| (a) | (f) <i>Mutugami v. Prince Alogia</i> (1903) 28 Mad 419 |
| (b) | (g) |
| | (h) |
| | (i) |
| (c) | (j) |
| | (k) |
| (d) | IL 19 |

Clause (h): allowances, being less than salary, of a public officer while absent from duty.—This clause is new. The allowances (being less than salary) of a public officer [s 2 (17)] while absent from duty are now wholly exempt from attachment. Under the Code of 1852 it was held, in the absence of any specific provision as to these allowances, that they stood on the same footing as the salary of a public officer while on duty and were exempt from attachment only to the extent to which such salary was exempt, and no more [see cl (i)]. Thus where an officer was on sick leave on half pay which was Rs 150 it was held that the decree holder could attach Rs 75 (l). Under this clause the whole of Rs 150 is exempt from attachment.

Clause (i): salary of public officer while on duty.—The salary of a public officer [s 2 (17)] can be attached only partially, except when it does not exceed Rs 40 monthly in which case the whole of it is exempt from attachment. In view of this exemption it was held that a public officer could not be required to pay into Court a part of his salary as a condition precedent to his being adjudged insolvent (m). The object of the exemption appears to be to enable a public officer to maintain himself and his family in a position suitable to his rank. This exemption did not occur in the Code of 1852, hence the salary of a public officer and of the other persons mentioned in this clause was attachable to the extent of the whole as debt. And since it could only be attached as a "debt," it was not attachable until it had become due (n). Under the Codes of 1877 and 1882, and under the present Code, the salary, to the extent to which it is attachable, may be attached in advance (o). It is no valid reason for refusing the attachment that the attachment, if allowed, would not leave the officer enough to live on (p). As to the salary of Army officers, see notes below under the head "Salary of Army officers." See note above "Amendment of the section."

Salary of private servant.—The salary of a private servant can be attached as a "debt", hence it cannot be attached before it has become due (q).

Clause (j): Indian Articles of war.—The Indian Articles of War apply only to soldiers and followers of the Native Army: see Act V of 1869 as amended by Act XII of 1894. Both these Acts have been repealed by the Indian Army Act 8 of 1911, and the reference to the Indian Articles of War in this clause must be read as referring to Act 8 of 1911. The pay of soldiers and followers of the Indian Army is under that Act exempt from attachment (r).

Clause (k): compulsory deposits in Provident Funds.—The expression "compulsory deposit" is defined in s 2 (a) of the Provident Funds Act 10 of 1925 as being a subscription to, or deposit in, a Provident Fund which, under the rules of the Fund, is not, until the happening of some specified contingency, repayable on demand otherwise than for the purpose of the payment of premium in respect of a policy of life insurance, and includes, etc. By s 3 of the Act it is provided that a compulsory deposit in any Government or Railway Provident Fund shall not be liable to attachment under any decree or order of any Civil Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor. A compulsory deposit cannot be attached so long as it retains the character of compulsory deposit. A deposit which when it was made, was a "compulsory deposit," continues to retain that character so long as it remains in the hands of the Railway Company. It does not lose that character though the employee may have ceased to be in the service of the Company by retirement,

- (f) *Deard v Egerton* (1883) 6 Mad 179
 (m) *Jahar Ali v Mst Musharatan* (1930) 9 Pat 304 125 IC 565, (30) A P 326
 (n) *Teyram v Kuanji* (1870) 7 B H C 4 C 110
 (o) *Deard v Egerton* (1883) 6 Mad 179 *Bhoyrath v Madhub Chunder* (1880) 6 C L R 19

- (p) *Debi Prasad v Lewis* (1918) 40 All 213, 43 IC 984
 (q) *Ayyappa v Iyannami* (1898) 21 Ma 1 394,
Debi Prasad v Lewis (1901) 31 All 304, 1 IC 185
 (r) *Broune v Pearce* (1926) 48 All 73 39 IC 882, (26) A A 122 (2)

resignation or dismissal, and though he may have become entitled in that event to be paid the amount due to his credit in the Provident Fund. But once it is *paid out* by the Company on the happening of any of the above events, it loses the character of "compulsory deposit" and it may be attached in the hands of the party to whom it has been paid (s). The same principle applies to the case of an optional subscriber who cannot under the rules demand payment of his deposits at his option (t).

A sum standing to the credit of a subscriber under a Benefit Fund scheme which the Company may or may not pay in its uncontrolled discretion is not a debt which can be attached (u).

Clause (l) wages of labourers—A "labourer" is a person who earns his daily bread by personal manual labour, or in occupations which require little or no art, skill or previous education. Thus persons who agree to spin cotton and to receive a certain amount of money for a certain quantity of cotton spun by them are labourers, and their wages cannot be attached (v).

Clause (m) expectancy of succession, etc—The interest which a Hindu reversioner has in the immovable property of a deceased Hindu on the death of the deceased's widow, is "an expectancy of succession by survivorship", in other words it is an interest *expectant* on the widow's death to which the reversioner can only succeed if he *survives* the widow (w). The interest in the pre-empted property of a successful pre-emptor who *has not yet paid the pre-emptive price* fixed by his decree is a merely contingent interest which cannot be attached (x), see O 20, r 14. But the interest which a coparcener has in money awarded to him on partition is a vested interest although payment is deferred (y).

Clause (n) right to future maintenance—If A is entitled to a monthly maintenance allowance under an agreement, the allowance cannot be attached until after it has become due (z). It cannot be attached prospectively, that is, before it has become due (a). In other words, *arrears* of maintenance may be attached but not the right to future maintenance. A hereditary grant of an allowance of paddy out of the melwaram of certain land is not a right to future maintenance so as to be exempt from attachment under this section (b). Where a person holds villages under a deed which provides that he is to hold them and receive the profits in lieu of maintenance without power of transfer the interest of such person in the village is a right to future maintenance (c). But an annuity is not a 'right to future maintenance' and it may be attached and sold (d). See note to s 51. 'Receiver of future maintenance'

- | | |
|--|---|
| <p>(s) <i>Peerchand v. B. B. & C. I. Railway</i> (1905) 23 Bom 259. <i>Seth Manna Lal v. Gainsford</i> (1908) 35 Cal 644. <i>Wandrey v. J. J. Watson</i> (1919) 46 Cal 96. 54 I.C. 439. <i>Secretary of State v. Jai Jumar</i> (1923) 50 Cal 347. 77 I.C. 1025. (23) A.C. 585. <i>Dev Jirasad v. Secretary of State</i> (1923) 45 All 554. 74 I.C. 748. (24) A.A. 69. See also <i>Official Assignee of Madras v. Maru Dalgirs</i> (1903) 26 Mad 410 and <i>Naga Lal v. Girdhar Lal</i> (1920) 44 Bom 673. 56 I.C. 420. [insolvency of railway servant]. <i>Gauri Shankar v. R. J. DeCruz</i> (1926) 1 Luck 313. 97 I.C. 63. (27) A.O. 22 [insolvency of railway servant].</p> <p>(t) <i>Jagannath v. Tara</i> (1924) 3 Pat 74. 80 I.C. 424. (28) A.I. 524.</p> <p>(u) <i>Jivan Hanraj v. Irrawaddy Flotilla Co.</i> (1933) 11 Rang 116. 14 I.C. 360. (33) A.R. 23.</p> <p>(v) <i>Jeckan Lal v. Lal</i> (1921) 5 F.R. 13.</p> | <p>(c) <i>Pam Chunder v. Dhurmo</i> (1871) 15 W. 1. F.B. 17. <i>Anandibai v. Rajaram</i> (1898) 22 Bom 984.</p> <p>(z) <i>Corak Singh v. Sidh Gopal</i> (1906) 28 All 393.</p> <p>(y) <i>Alagurusami v. Lakshmanan</i> (1926) 50 Mad L.J. 79. 92 I.C. 1021. (26) A.M. 371.</p> <p>(c) <i>Kasheeshuree v. Gresh Chunder</i> (1866) 6 W.R. 618.</p> <p>(a) .</p> <p>(b) .</p> <p>(c) .</p> <p>(d) .</p> |
|--|---|

Salary of Army Officers — Sub sec (2) of the present section as it stood originally was as follows —

(2) Nothing in this section shall be deemed—

- (a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building site or land, or
- (b) to affect the provisions of the Army Act or of any similar law for the time being in force

The italicized words and letters were replaced by the Repealing and Amending Act 10 of 1914, sch II

It is provided by sec 136 of the Army Act, 1881 [stat 44 and 45 Vict] amended by the Army (Annual) Act of 1893, that the pay of an officer or soldier of His Majesty's Regular Forces serving in India shall be paid to him *without deduction* unless the Legislature in India has directed to the contrary in that behalf. Under section 60 of the Code as it stood before the amendment above referred to, questions arose as to the extent of application of the Army Act. As regards officers in the *British Army*, it was held that they were officers of His Majesty's Regular Forces within the meaning of sec 136 of the Army Act, and that their salary therefore could not be attached at all (e). As regards officers in the *Indian Army*, there was a conflict of decisions. The High Courts of Calcutta and Madras (f) held that an officer in the *Indian Army* was not an officer of His Majesty's Regular Forces within the meaning of sec 136 of the Army Act, and that his salary therefore was liable to be attached to the extent mentioned in s 60 (1) (i). On the other hand it was held by the High Court of Bombay (g) relying on sec 190, sub-s (8) of the said Act, that an officer in the *Indian Army* was an officer of His Majesty's Regular Forces and that his salary therefore could not be attached at all.

Cl (b) of sub-s (2) having been repealed, the question arises whether the salary of an officer of His Majesty's Regular Forces can be attached under this section as salary of a public officer to the extent mentioned in cl (i) of sub-s (1). It has been held by the High Courts of Allahabad (h) and Bombay (i), that it can be so attached. These cases must be distinguished from a Bombay case in which the question was whether the salary of a First Class Warrant Officer could be attached under the provisions of the Code of Civil Procedure in execution of a decree for maintenance obtained against him by his wife. It was held that it could not be attached under the Code. The ground of the decision was that a First Class Warrant Officer was a "soldier" as defined by sec 190 of the Army Act, that under sec 143 of the Act no execution could issue against his pay in respect of the maintenance of his wife but a specified sum might be deducted for such maintenance from his pay, and that an order had already been made for such deduction by the Commander in Chief (j). Similarly sec 144 of the Army Act bars execution against the pay of a First Class Warrant Officer in respect of any decree of a Civil Court (k).

Objection that property not liable to attachment and sale when to be raised — A obtains a decree against B, and applies for execution of the decree by attachment and sale of certain property belonging to B. The property is attached and

(e) *Velchand v Baur hier* (1913) 37 Bom 166,

(f)

(g)

(h) *Day v Ram Chandar* (1917) 39 All 308 39 IC 92 [case of an officer of the Indian

(i)

(j)

(k) *Brown v Hanson* (1933) 30 Bom L R 360 144 I C 897 (33) A B 185 *Edwards v Bhaga* (1933) 30 Bom L R 111 (34) A B 31

sold, and purchased by *C* *B* then applies to the Court to set aside the sale on the ground that the property was not liable to attachment and sale. Can the application be entertained? It has been held that if *B* was a party to the order for sale, or was aware of it and did not appeal against it he is precluded from questioning the propriety of the order after the sale, and he cannot therefore impeach the sale. A judgment debtor who might have raised objection prior to the sale but who has refrained from doing so, and who might have appealed against the order for sale, has no right after the sale has been carried out to prefer an objection that the property sold was not legally saleable (*l*). But if *B* was not aware of the proceedings in attachment of the property, or of the proceedings in connection with the sale thereof, the application to set aside the sale may be entertained even after the sale is confirmed (*m*). The same rule applies where a sale effected by the Collector is sought to be set aside on the ground that the property was not ancestral and therefore could not legally be sold by the Collector (*n*).

61. [New] The Local Government may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

Partial exemption of agricultural produce
 "Be exempted from liability to attachment or sale —These words are wide enough to include agricultural produce which has been hypothecated. See s 60, cl (b)

As to attachment of agricultural produce see O 21, rr 44 45. As to sale of such produce, see O 21, rr 74 75

62. [S. 271] (1) No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling house after sunset and before sunrise.

(2) No outer door of a dwelling house shall be broken open unless such dwelling-house is in the occupancy of the judgment debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling house, he may break open

(l) *Pamchha bar Me ar v. Erchu Bhajot* (1885) — All 641. *Imad v. Jas Ram* (1907) 9 All 61. *Pant Rang v. Krishnaji* (1914) 44 Bom 13. *Dwarkanath v. Tarini Sanjar* (1907) 34 Cal 133. *Lala Ram v. Thakur Prasad* (1915) 40 All 65. 4 IL 94. *Salha Ram v. Aushan v. Singh* (1930) 57 All

10— 1331 C 48 (31) 4 A 11—

(m) *Durga Charan v. Kali Prasanna* (1899) 26 Cal 73—

(n) *Daulat Singh v. Jugal Kishore* (1900) 22 All 108. See s 60 and Sch III to the Code

the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw, and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Changes introduced in the section.—This section corresponds with sec 271 of the Code of 1882 except that the prohibition against breaking open any outer door of a dwelling house has been relaxed where the dwelling house is in the occupancy of the judgment debtor. See note to s 53, "Breaking open of outer door"

"Dwelling house. —A shop or a godown is not a 'dwelling house' within the meaning of this section (o)

63. [S. 285.] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

" introduced in the section.—This section corresponds with sec 285 of the Code of 1882 except in the following particulars —

Words "is under attachment" have been substituted for the words "has been attached" See notes below, under the head "Is under attachment"

(2) is new See notes below

Explanation.—The object of this section is to prevent different attachments and sale of the same property by different Courts, and to prevent confusion in the execution of decrees (p)

Illustration.—A attaches certain property in execution of a decree obtained against him in the Small Causes Court at Surat. The same property is attached by B in execution of a decree obtained against B in the Court of Sessions at Ahmedabad.

(o) *Damodar v Ishrar* (1879) 3 Bom 89

(p) *Ism Narain v Mina* (1898) 25 Cal 40 48

Bykant Nath v Rajendro Narain (1886) 12 Cal 333, 338

of the Subordinate Judge at Surat. The Court of the Subordinate Judge is a Court of higher grade than the Small Causes Court, and it is therefore the proper Court under this section for deciding objections to the attachment, for determining claims made to the property, and for ordering the sale thereof and receiving the sale proceeds (g).

Sub section (2).—This sub section is new It declares in effect that a proceeding in execution shall not be deemed to be invalid merely because it was taken by a Court which, having regard to sub section (1), ought not to have taken it Under the Code of 1882 there was a conflict of decisions on the question whether the rule contained in s. 283 of that Code [now sub sec (1)] was a rule of *procedure* only or whether it affected *jurisdiction* The High Courts of Calcutta (r), Bombay (s), and Madras (t), held that the rule was merely a rule of procedure, and did not oust the jurisdiction of the inferior Court in proceedings in execution of its own decree On the other hand, the High Court of Allahabad held that the section affected jurisdiction, that is to say, it took away the jurisdiction of the inferior Court in the several matters specified in the section (u) The result was that where a sale was effected by a Court of lower grade in a case where it ought to have been effected by a Court of higher grade, the sale, according to the Calcutta Bombay and Madras decisions, was not for that reason invalid, but according to the Allahabad decisions, it was absolutely void as one made without jurisdiction Sub section (2) gives effect to the Calcutta, Bombay and Madras decisions (t)

There is yet another point which may be considered in the form of an illustration. *A* obtains a decree against *B* in the Court of a Subordinate Judge. In execution of the decree certain property belonging to *B* is attached by the Subordinate Judge's Court. *C* obtains a decree against *B* in a District Court. The same property is then attached by the District Court in execution of *C*'s decree. The property is sold by the Subordinate Judge in execution of *A*'s decree although the proper Court to sell the property is the District Court, and it is purchased by *X*. Subsequently the same property is sold by the District Court in execution of *C*'s decree, and it is purchased by *Y*. Which of the two purchasers has the better title? According to the decision of the Calcutta High Court in *Bykant Nath v Rajendro Narain (w)*, *X*, the first purchaser would take an indefeasible title (1) if the sale was held by the Subordinate Judge's Court in ignorance of the attachment by the District Court, and (2) the purchase was made by *X* without notice of the attachment by the District Court, but if the sale was held by the Subordinate Judge's Court after notice of the attachment by the District Court, or the property was purchased by *X* with notice of that attachment, the purchase of *X* would be liable to be defeated by the purchase of *Y*. According to the decision of the Bombay High Court in *Abdul Karim v Thalordas (x)*, it is quite enough to give an indefeasible title to *Y* if he purchased without notice of the attachment by the District Court. The Bombay Court does not regard any notice which the inferior Court may have of the attachment by the superior Court as of any consequence, for the simple reason that the jurisdiction of a Court cannot depend upon notice. A similar view has been taken by the Madras High Court (*y*). Under the present section, it seems, *Y* would take an indefeasible title to the property, whether or not he or the Subordinate Judge's Court had notice of the attachment by the District Court.

| | | |
|-----|--|---|
| (g) | | Prasad v Jagan Lal (1905) 27 All 56 |
| (r) | | Durpat v Diba Ramrach Pal (1909) 31 All 527 31 C 31 |
| (s) | | |
| (t) | | |
| (u) | | |
| (v) | | |
| (w) | | |
| (x) | | |
| (y) | | |

The result therefore is that where property is under attachment by two Courts of different grades and the property is sold by the Court of lower grade in contravention of the provisions of sub-section (1), the sale is not thereby rendered invalid, though the Court selling the property and the purchaser at the Court sale may be aware of the irregularity. The course to be adopted by the Court of higher grade in such a case is to accept the sale made by the lower Court, and to call for the proceeds of the sale and to distribute them rateably amongst all the decree holders (2). Where both the Courts are subordinate to the District Court the procedure, according to the Bombay High Court (a) is for the party interested to apply to that Court to have the sale proceeds transferred to the Court of higher grade, according to the Calcutta High Court (b), the Court of higher grade should move the District Court for that purpose. The Bombay High Court has held that it is competent to the petitioner to apply to the Court of higher grade for a transfer of the sale proceeds to that Court and that Court is competent to make the order (c). If the Court of lower grade has given the decree-holder leave to bid and set off, that is a proceeding which is saved by sub-section (2), and the assets available for rateable distribution is the balance of the purchase money after such set-off (d).

If the same property is attached by a Munsiff and by a Subordinate Judge, and is then sold by the Munsiff to A, the sale is valid. But if after the sale the decree holder in the Subordinate Judge's Court applies to that Court for sale the question arises whether X is entitled to apply to the Subordinate Judge under s. 47 to stop the sale on the ground that the title to the property has passed to him. According to the Madras High Court, he is, the reason given being that he is the "representative" of the judgment debtor within the meaning of s. 47 (e). According to the Calcutta High Court, he is not, the reason given being that he is not the "representative" of the judgment-debtor (f).

"Is under attachment."—These words have been substituted for the words "has been attached" to make it clear that the provisions of this section do not apply unless there are two or more attachments existing at the same time (g).

"Decrees of more Courts than one"—This section applies only as between Civil Courts of different grades or as between Revenue Courts of different grades. It does not apply where one decree is that of a Civil Court and another that of a Revenue Court. Hence where the same property is attached by a Civil Court and a Revenue Court, and it is sold by the Revenue Court, the purchaser is entitled to the property, and it cannot be sold in execution of the decree of the Civil Court (h).

Rateable distribution.—See notes to s. 73, "Court to which application for execution should be made."

64. [S. 276.] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Private alienation of property after attachment to be void

(2) *State of Madras v. State of Mysore* (1897)

(a)

(b) (1919) 48 Cal 64 68 69 44 I C 249 *supra*

(c) *Deviappa v. Chandraappa* (1905) 40 Bom

(d)

(e)

(f)

(g) *Ben Choudhury v. Aljudia* (1854) 6 A

(h) *Roshan Lal v. Muhammad* (1901) 43 All 612 63 I C 900 (21) A L 142

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Section 276 of the Code of 1882 was as follows :—

“When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.”

Changes introduced by the present section.—The present section differs from the corresponding s 276, C P C, 1882, in the following respects —

- (1) The words “by actual seizure or by written order duly intimated and made known in manner aforesaid” after the words “where an attachment has been made” in s 276 have been omitted as being mere surplusage (s). See notes below, “Where an attachment has been made”
- (2) The words “during the continuance of the attachment,” which occurred in s 276, have been omitted, and the words “contrary to such attachment” have been substituted for them. See notes below, “Contrary to such attachment”
- (3) The explanation to the section is new. See notes below, “Explanation to the section, etc.”

Object of the section.—A sues B for Rs 5,000. B owns a house worth Rs 5,000, and he has no other property. B may sell or mortgage the house notwithstanding the institution of the suit against him, and he may sell or mortgage it even after a decree has been passed against him in the suit, and the sale or mortgage in either case will be perfectly valid and pass a good title to the transferee (j). But if the property is attached in execution of the decree, any private transfer of the property by B contrary to such attachment shall be void as against all claims enforceable under the attachment. The object of the section is to prevent fraud on decree holders (k), and to secure intact the rights of the attaching creditor against the attached property by prohibiting private alienations pending attachments (l).

“Where an attachment has been made.”—An attachment to render a subsequent alienation invalid must be made in the manner prescribed by the Code. Thus a promissory note must be attached by actual seizure as provided by O 21, r 51, and not by the issue of a prohibitory order. The mere issue of a prohibitory order does not amount to an attachment within the meaning of this section (m). Similarly in the case of immovable property, the attachment to render a subsequent alienation invalid must be made in the manner prescribed by O 21, r 51 (n). An attachment made under that rule operates as a valid prohibition against alienation from the date on which the necessary proclamation is made and a copy of the order of attachment is affixed as provided

(i) *Sinnappan v Arunachalam* (1919) 42 Mad 844 851, 852 53 I C 207 (F B)

(j) *Pullen Chetty v Ramalinga Chetty* (1870) 5 M H C 363

(k) *Shrinagappa v Chanbasappa* (1906) 30 Bom 337 333

(l) *Dinobunthu v Joymaya* (1902) 29 Cal 154, 29 I A 9

(m) *Subramania v Chokkalinga* (1923) 46 Mad, 415 72 I C 183 (23) A M 317

(n) *Nur Ahmad v Altaf Ali* (1878) 2 All. 58; *Ganga Din v Ahushahi* (1885) 7 All. 709; *Satva Charam v Madhub* (1905) 9 C W. N. 623; *Ahmad Yar v Ewe* (1925) 7 Lah. L. J 501 63 I C 321, (25) A L 383; *Bharat Chandra v Gauranga* (1928) 55 Cal 545 104 I C. 349, (27) A C. 835

by that rule, and not from the date of the order of attachment (o). In *Muthiah Chetti v Palanisappa* (p) Lord Shaw said—"A fasciculus of clauses, beginning at r. 41 of Order XXI and applicable to attachment of property shows in instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached. These instances go to show that under the Code of Civil Procedure, in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished. . . . Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done."

Attachment before judgment.—An alienation of property made after attachment before judgment is void to the same extent as an alienation made after attachment under a decree (q). The attachment, however, must be made in the manner prescribed by the Code, and, in the case of immovable property, as prescribed by O 21, r 54 (r). The High Court of Madras has held that an alienation of property after it is attached pursuant to an order for attachment before judgment is void under this section even though the property was not actually attached until after the passing of the decree (s), but this decision is of doubtful authority. See Notes above, 'Where an attachment has been made'.

"Private transfer."—The expression "private transfer" means a voluntary sale, gift, or mortgage in contravention of the attachment, and not the enforced execution of a conveyance or assignment in obedience to a decree of a Court competent to pass it (t). The decree may be one on an award (u), even though the matters in difference were referred to arbitration without the intervention of the Court (v). Releasing an easement by the dominant owner to the servient owner is a transfer within the meaning of this section (w).

Contract for sale.—The Calcutta High Court have held that a contract for sale entered into before an attachment does not create any interest or charge which can prevail over the attachment (x). In a previous case (y), Woodroffe, J., held that the contractual obligation prevailed over the attachment. Again in a Madras Case (z), the learned Judges said that it does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it.

- | | |
|---|--|
| <p>(o)</p> <p>(p) (1928) 55 I A 256 261 51 Mad. 349 109 I C 626 (28) A PC 139 <i>Abbaduripchan dya v Loke Nath</i> (1932) 59 Cal 1176 142 I C 452, (33) A C 212</p> <p>(q)</p> <p>(r) <i>Bharat v Gauranga</i> (1928) 55 Cal 545 *104 I C 340 (27) A C 835</p> <p>(s) <i>Venkatasubbiah v Venkata Seshayya</i> (1919)</p> | <p>(t) <i>Qurban Ali v Ashraf Ali</i> (1882) 4 All 219 275 <i>Sankari Silaja v Mudaragadai</i> (1934) 46 Mad 1 J 361 80 I C 386 (24) A M 610 <i>Lakshman v Jamelandra</i> (1932) 34 Bom L R 117 139 I C 610 (3-) A B 301</p> <p>(u) <i>Narajana v Bivari</i> (1927) 45 Mad 103, 109 110 68 I C 673 (22) A M 2-1</p> <p>(v) <i>Mahomet Afzal Khan v Abdul Rahman</i> (1932) 59 I A 405 13 Lah 702 139 I C 85 (32) A PC 235</p> <p>(w) <i>Kristodhone v Vandarani</i> (1908) 35 Cal 839</p> <p>(x) <i>Tarak Nath v Sanat</i> (1930) 57 Cal 274, 122 I C 637, (29) A C 494</p> <p>(y) <i>Madan Mohan v Rebat Mohan</i> (1916) 21 C W N 158, 34 I C 953</p> <p>(z) <i>Venkata Reddi v Yellappa Chetti</i> (1917) 38 I C 107.</p> |
|---|--|

which the execution sale is made. Therefore, a "claim enforceable under the attachment" means a claim enforceable under the attachment under which the execution sale is made (g). A claim under any other attachment is not a "claim enforceable under the attachment" within the meaning of this section. The result is that—

if A obtains a decree against B, and B's property is attached in execution of the decree, and

B subsequently alienates the property to C, and

the property is thereafter attached and sold in execution of a decree obtained by D against B, and it is purchased by F,

and C sues F for possession,

C's title is to be preferred to F's title, and C is entitled to possession of the property. D cannot object to the alienation to C, for the alienation to C was prior to his attachment. Nor is A entitled to question the alienation, for the sale in execution was not made under his *alta hment*, but under D's attachment. The sale having been made under D's attachment, A's claim cannot be said to be a "claim enforceable under the attachment" within the meaning of this section. The result would be the same even if we substitute A for D that is even if the decree holder in both cases was the same person. This is the effect of the decision of their Lordships of the Privy Council in *Mina Kumari v. Bijoy Singh* (h), a case under sec 276 of the Code of 1882 which did not contain the Explanation which now occurs at the end of the present section. But the decision proceeded on the assumption that *Sorahy v. Gound* (i) considered in the notes below was good law, an assumption which involved the proposition now quoted in the Explanation. *Mina Kumari*'s case therefore would also govern cases under the present section.

If in the case put above the property was sold by the Court under A's attachment instead of D's and D had applied for execution before the Court received the proceeds of the sale the alienation to C would be void, it being contrary to A's attachment, and further D would be entitled to rateable distribution under sec 73.

The attaching decree holder may agree with a purchaser of the property from the judgment-debtor pending the attachment that he will not bring the property to sale in execution of his decree. Such an agreement has the effect of rendering the alienation valid as against the attaching creditor (j).

"Contrary to such attachment."—These words have been substituted for the words, "during the continuance of the attachment," which occurred in sec 276 of the Code of 1882. The words "during the continuance of the attachment" were too wide in that they comprised alienations that could not possibly prejudice the rights of an attaching creditor, as where property is mortgaged by A to B, and the equity of redemption is subsequently attached at the instance of C in execution of a decree obtained by C against A, and pending the attachment the mortgage is transferred by B and A to D. In such a case the transfer of the mortgage, though made during the continuance of the attachment, cannot prejudice C, the attaching creditor, for the effect of the transfer is merely to substitute D for B. But the transfer having been made "during the continuance of the attachment," it came literally within the old section 276, though it was not contrary

(h) *Annamalai v. Palamalai* (1918) 41 Mad 265 76 285 43 I C 539 [F.B.]
(i) (1917) 44 I A 72 44 Cal 66 40 I C 242

(j) (1890) 16 Bom 91
(j) *Gangavva v. Penkalararamaya* (1923) 44 Mad L J 80 72 I C 839 (23) A.M. 230

any sense be said to be *contrary to the attachment* (l). The words 'contrary to the attachment' have now been substituted for the words 'during the continuance of the attachment' and they give effect to the Privy Council ruling noted above. Similarly, a renewal, though pending the attachment, of a mortgage already existing on the property, is not a transfer contrary to the attachment. But if the amount secured by the renewed mortgage exceeds the amount due under the original mortgage at the date of the attachment, the additional security is to that extent void (l). If a judgment-debtor transfers property after it has been attached in execution, and the property is then sold in execution, the transfer is void as against the auction purchaser, but the transferee is a person whose interests are affected by the sale and is entitled to apply under O 21, r 90, to set aside the sale (m).

Explanation to the section. Claims for rateable distribution of assets under sec 73 are claims enforceable under an attachment within the meaning of this section.—The Explanation to the section is new. A obtains a decree against B, and in execution of the decree attaches Rs 7,000 belonging to B in the hands of a Railway Company. B then assigns the said sum in the hands of the Railway Company to his attorneys for costs due to them subject to A's attachment. After the assignment, C, another creditor of B, obtains a decree against B, and in execution of his decree attaches the said sum in the hands of the Railway Company. Thereafter the Company pays the said sum to the Sheriff of Bombay. The assignment by B to his attorneys though made prior to C's attachment, is void as against C's claim, for C's claim is a claim for rateable distribution of assets [Rs 7,000] within the meaning of sec 73, and therefore a claim enforceable under the attachment of A by virtue of the Explanation to this section. C is therefore entitled to be paid in priority to B's attorneys. This is the law under the present Code, and it is in accordance with the view taken by the Bombay High Court in *Sorabji v Gorind* (n) decided under sec 276 of the Code of 1882. The view taken by the other High Courts was that C's claim, being a claim merely for rateable distribution cannot be said to be a claim enforceable under the attachment, but this view is no longer law (o). The Explanation gives effect to the Bombay decision. But the Explanation does not apply unless the claim of the subsequent decree holder can be said to be a claim for rateable distribution within the meaning of sec 73. Now the essential condition of enforcement of claims for rateable distribution under sec 73 is that there should be assets held by the Court [see sec 73 below] and that condition was satisfied in *Sorabji v Gorind*. But if there be no assets retained by the Court, as would be the case if no payment was made by the Railway Company to the Sheriff, and A's attachment came to an end [O 21, r 55] by B satisfying A's decree out of Court and then certifying it to the Court under O 21, r 2, C's claim cannot be enforced as a claim for rateable distribution and the assignment to the attorneys will prevail over any claim that may be made by C under his subsequent attachment (p). The Explanation to the section protects only those decree holders who are entitled to rateable distribution under sec 73, and no decree holder can be entitled to rateable distribution under that section unless there are assets held by the Court (q).

(k) D

(l) *Mahadevappa v Srinivasa* (188-) 4 Mad. 417.

(m) *Narasappier v Chidambaram* (1932) 63 Mad L J 945 140 I C 600 (33) A M 96.

(n) (188-) 16 Bom 91 referred to in *Mina Kumari v Bijoy Singh* (1917) 44 I A 7-73 44 Cal 66-63 40 I C 42 and followed in *Chundilal v Karamchand* (19)

46 Bom 895 69 I C 161 (22) A B 241
Pratap v A E L. Munon (1926) 4 J Mad 38 97 I C 496 (26) A M 307
 (o) See *Manohar v Ram Awar* (1903) 25 All 431 *Kunhi v Makhi* (1900) 23 Mad 478 *Durga Churn v Monmohini* (1888) 15 Cal 771.

(p) *Jetha Bhatia & Co v Lady Janbai* (1912) 37 Bom 158 17 I C 65 *Mina Kumari v Bijoy Singh* (1917) 44 I A 72, 76 44 Cal 66-673 40 I C 242 *Annammalai v Palamalai* (1918) 41 Mad 265 275 285 43 I C 539
 (q) *Annammalai v Palamalai* (1918) 41 Mad 265 275 285 43 I C 539, *Chundha v Chakrapani* (19) 30 Bom L. E. 1488, (28) A B 543.

enforceable under the attachment (y) The same principle applies where the property attached, is released from attachment, and subsequently re attached by the same Court in execution of the same decree (z)

Private sale to decree holder—A obtains a decree against B In execution of the decree B's property is attached Pending the attachment B sells the property to C A then buys the same property from B Is the sale to C void under this section? No, because A bought the property not at a Court sale, but by private treaty with B The title obtained by the purchaser on a private sale of property in satisfaction of a decree differs from that acquired upon a sale in execution Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his Under an execution sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold (a)

Effect of striking off execution proceedings or of removing them from the file—An attachment is not necessarily *at an end* because the execution case is struck off or removed from the file The effect of such a proceeding depends on the circumstances of each case Where after an attachment has been made, the proceedings in execution are struck off or removed from the file *under circumstances which render a fresh attachment necessary* to bring the judgment debtor's property to sale, a private transfer of the property by the judgment-debtor made after the proceedings are struck off is *valid*, though the same property may subsequently be re-attached in execution of the same decree on a fresh application for execution But if the execution proceedings are struck off or removed from the file *under circumstances which do not render a fresh attachment necessary* the transfer is *void* as against all claims enforceable under the attachment, and the mere fact that a fresh application for attachment is subsequently made in execution of the same decree will not render the transfer valid The reason is that in the former case the proceedings in execution are deemed to have *terminated* on their being struck off or removed from the file, and the attachment is deemed to be at an end, and the transfer having been made after the *termination* of the attachment, it cannot be affected by the subsequent attachment In the latter case, however, the proceedings in execution are merely *suspended*, and the first attachment is therefore deemed to *subsist*, and the second application for attachment is a superfluity (b) Whether the execution proceedings have been struck off or removed from the file under these or those circumstances is a question of fact in each case (c) But where a fresh application for attachment is made, the presumption is that the first attachment has *ceased*, and the burden of proof is on the party alleging that the first attachment was still *subsisting* when the second application was made and that the second application was superfluous (d) B's property is attached in execution of a decree obtained against him by A The execution proceedings are then "struck off" B then sells the property to C The property is again attached on a fresh application by A Is the sale valid? There being a fresh application for attachment, the presumption is that the first attachment *ceased* from the moment the proceedings were struck off The sale

(y) *Aziz Baksh v Kaniz* (1912) 34 All 490
15 IC 49 *Gopal v Kashi* (1909) 42 All
39 521 C 343

(z) *Budhu v Barkat Ram* (1900) 2 Lah L J
99 103

(a) *Dinendronath v Tarakchandra* (1881) ~ Cal
107 *Budhu v Barkat Ram* (1900) 2 Lah
L J 99

(b) *Kush Lal v Charat Singh* (1901) 23 All
114 *Pudlomanee Doree v Mahowanath*
(1874) 12 IL L R 411 *Ferry Lal v*
Chand Charan (1906) 11 C W N 163
Shauk Hamar-ud-din v Jawahar Lal

(1905) 32 I A 102

(c) *Mohunt Bhagwan v Khettar Moni* (1896) 1
C W N 617 *Rangasami v Perdasami*
(1894) 17 Mad 58 *Mungul Feroz v*
Gruja Kant (1870) 8 Cal 51 8 I A 123
Srinivasa v Sami Rau (1834) 17 Mad
180 *Mohamed v Asghar-Mohun* (1895)
2 Cal 903 22 I A 102 *David Ali v Ram*
Feroz (1915) 37 All 54* 30 I C 787,
Laksh Ali v Durpa (1915) 37 All 518 30
I C 8*

(d) *Haji v Abdullah* (1894) 16 All 133

would therefore be valid and the second attachment inoperative unless A showed that the first attachment was still *subsisting* at the date of transfer and that the second application was *superfluous*.

The above cases would not have arisen if the Courts, instead of making an order for "striking off proceedings" or "removing proceedings from the file," had made an order either dismissing the application or adjourning the proceedings where the Court was, by reason of default on the part of the decree holder, unable to proceed further with the proceedings in execution. The practice of "striking off proceedings" or "removing proceedings from the file" had no justification under any of the previous Codes. To put a stop to this practice it is now expressly provided by O 21, r. 57, that where any property has been attached in execution of a decree, but by reason of the decree holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a further date, upon the dismissal of such application the attachment shall cease. Cases like the above are not likely to arise under this Code, if the procedure prescribed by O 21, r. 57, is strictly followed.

Attachment does not create a charge.—Attachment creates no charge or lien upon the attached property (e) It merely prevents and avoids private alienations, it does not confer any title on the attaching creditors (f) There is nothing in any of the provisions of the Code which in terms makes the attaching creditor a secured creditor or creates any charge or lien in his favour over the property attached (g) But an attaching creditor acquires, by virtue of the attachment, a right to have the attached property kept in *custodia legis* for the satisfaction of his debt, and an unlawful interference with that right constitutes an actionable wrong. Thus it is an actionable wrong if A cuts and carries away crops attached by B in execution of a decree against C, and a suit will lie at B's instance against A to recover from A damages which should not, however, exceed the value of the attached property (h)

Effect of order of adjudication on attachment.—Where a judgment debtor has been adjudicated an insolvent, the whole of his property vests in the Official Assignee. What is the effect of an order of adjudication on an attachment levied prior to the date of the adjudication order? Has the attaching creditor, by reason of his prior attachment, priority over the Official Assignee in respect of the property attached by him prior to the date of the adjudication order, or is the Official Assignee entitled to claim the attached property by virtue of the adjudication order as part of the property of the insolvent? The Courts in India had held that whether the attachment is before judgment (i), or in execution of a decree (j), the attaching creditor had no priority over the Official Assignee. These decisions were based on the ground that an attachment in India does not create any charge or lien upon the attached property.

veney Act, s 51, both enact that if execution of a decree has issued against the property

- | | |
|--|---|
| <p>(e) <i>Motilal v Karabuldin</i> (1898) 25 Cal 179, 24 I A. 170, <i>Raghunath Das v Sundar Das</i> (1914) 42 Cal 72, 41 I A 251 24 I C 304, <i>Ram Bhaj v Ram Das</i> (1922) 3 Lah 415, 69 I C 720, (23) A L 261</p> | <p>(A) <i>Sankaralinga v Kandasami</i> (1907) 30 Mad 413 (i) <i>Krishnasawmy v Official Assignee of</i> (f)</p> |
| <p>(g) <i>Krishnasawmy v Official Assignee of Madras</i> (1903) 26 Mad 675, 678</p> | <p>(k) <i>In re Prem Lal Dhar</i> (1917) 44 Cal 1016, 43 I C 348</p> |

of a debtor, no person shall be entitled to the benefit of execution against the Official Assignee or the Official Receiver except in respect of assets realised before the order of adjudication. On the other hand certain dicta of the Privy Council in the case of *Anan* *Tapalmanabhanam v Official Receiver* (l), raise a doubt as to the correctness of these decisions. In this case property in Madras had been attached in execution of a decree in 1926, but the judgment-debtor was adjudged insolvent in 1928 by a foreign Court—the District Judge of Secunderabad. The Official Receiver, Secunderabad objected to the continuance of the execution proceeding on the ground that the property had vested in him. The Madras High Court upheld the objection as the Official Receiver had priority over the attaching creditor. The Privy Council reversed this decision for the reason that the question was one of the comity of nations and not one of the municipal bankruptcy codes of either country, and that although a foreign adjudication order will be recognised as effective, it will not be allowed to interfere with any process at the instance of a creditor already pending, even though the process be incomplete. The case was one of a foreign adjudication order and their Lordships were careful to distinguish a foreign adjudication order which operates under a rule of international law from a British adjudication order which operates by force of a statute. But as to British Adjudication Orders their Lordships observed that such orders would not be affected by sec 61 as they were not private transfers. Their Lordships then proceeded to suggest that the test was whether the insolvent could have assigned the property to the trustee in bankruptcy. This seems to imply that if the judgment debtor is prevented by the attachment from alienating the property, the property will not vest in the Official Receiver or the Official Assignee. With reference to the case law as to the effect of an attachment their Lordships said “In *Krishnaswamy Mudaliar v Official Assignee of Madras* (m) the Court appears to have ignored the opinion expressed by this Board in *Suraj Buns Koer v Sheo Proshad Singh* (n) which was cited to them, and to have taken a dictum in the judgment of this Board in *Moti Lal v Karab-ul din* (o) from its context and used it for a purpose which it did not have in view. In *Frederick Peacock v Madan Gopal* (p) the case of *Suraj Buns Koer* was not referred to and the dictum from *Moti Lal*’s case was similarly employed. Their Lordships desire to reserve their opinion as to the soundness of the Madras and Calcutta decisions. The decision of this Board in *Raghunath Das v Sundar Das Khetri* (q) was also referred to, but that decision proceeded on an admission by counsel, the point was not argued and the case of *Suraj Buns* was not referred to.”

Effect of winding up order on attachment.—The position of the liquidator of a registered company differs from that of the Official Assignee in that the property of the company *does not vest* in him. An attachment, therefore, made on the property of the company at the instance of a decree holder before the winding up of the company cannot be released at the instance of the liquidator (r).

SALE

65. [S. 316.] Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be

Purchaser's title

deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute

(l) (1933) 60 I A 167 174 175 37 C W N 553

142 I C 55* (33) A 170 134

(m) (1901) 26 Mad 673

(n) (1890) 6 I A 84 5 Cal 148

(o) (1898) 24 I A 170 22 Cal 179

(p) (1902) 29 Cal 428

(q) (1914) 41 I A 251 42 Cal 72 24 I C 204

(r) *Amrita Lal v Anandul* (1916) 43 Cal 556,
34 I C 253

Corresponding section of the Code of 1882—Section 316 of the Code of 1882 ran as follows—

"When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale, and, as far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before.

Provided that the decree under which the sale took place was still subsisting at that date.

The first part of section 316 now stands as O 21, r 94 with slight verbal alterations. The second part, with certain substantial alterations to be presently noted, stands as sec 65. The proviso to sec 316 has been omitted altogether.

Changes introduced in the section—Under sec 316 of the Code of 1882 the title to immovable property sold at an execution sale vested in the purchaser from the date of the certificate of sale that is the date on which the sale became absolute. Under the present section the title to such property, where the sale has become absolute vests in the purchaser from the time when the property is sold, and not from the time when the sale becomes absolute. If the sale is otherwise in order and the property is purchased by a stranger the sale must be confirmed even though the decree in execution of which the sale was held is reversed on appeal after the sale and before its confirmation (s).

The proviso to sec 316 has been omitted. It is therefore no longer necessary that the decree should be subsisting at the time of the confirmation of sale.

Vesting of property in auction purchaser—In the case of a private sale of immovable property, the property vests in the purchaser from the time when the deed of sale is executed. The reason is that a voluntary sale becomes absolute on execution and delivery of the deed by the vendor. In the case however of a Court sale, the property does not vest in the purchaser immediately on the sale thereof. The reason is that a compulsory sale does not become absolute until some time after the sale. A period of at least thirty days must expire from the date of sale before the sale can become absolute. During that period the sale is liable to be set aside at the instance of the judgment debtor on the ground of irregularity in publishing or conducting the sale, or on deposit by him in Court of the amount specified in the sale proclamation together with a percentage on the purchase money by way of compensation to the purchaser [O 21, rr 89 90]. The application by the judgment debtor to set aside the sale in either of these two cases must be made within 30 days from the date of sale. Where no such application is made the Court must make an order confirming the sale, and it is upon such confirmation that the sale becomes absolute [O 21, r 92]. After the sale has become absolute, a certificate is granted by the Court to the purchaser which is called a certificate of sale [O 21, r 94]. Such certificate bears as date the day on which the sale became absolute. It is only when the sale becomes absolute that the property sold vests in the purchaser (s). But though the property does not vest in the purchaser until the sale has become absolute, when it does vest in him it shall be deemed to have vested on the sale becoming absolute from the time when it was sold. The vesting of the property is thus made to relate back to the date of sale (u).

(v) *Sorathi v. Vathi*, Krishna (1933) 56 Mad 808 143 I C 854 (33) A M 598
(w) *Iskhan v. Yusuf* (1922) 27 Bom L R 963

88 I C 962 (25) A B 433
(u) See *Abdul Rahman v. Fateh Narain* (1926) 4 Luck 80 91 I C 1047, (26) A O 189

Successive purchasers at sales in execution of money decrees.—Under the Code of 1882, sec 316, the property sold vested in the purchaser from the date of the certificate of sale, and not before. This gave rise to some difficulty when the question arose as to which of two successive auction purchasers should have priority in cases where the later purchaser had the certificate of sale issued to him first. Had the question been determined with exclusive reference to the terms of that section, the priority would have rested with the purchaser who first procured the certificate of sale. But this inequitable result was avoided, and the difficulty was got over by holding that the first purchaser had by his prior purchase obtained an *equitable* interest in the property, and that the subsequent purchaser must be deemed to have purchased the property *subject to* such interest (r). No such difficulty can arise under this Code, for it is provided by the present section that the property is to be deemed to have vested in the purchaser from the date of sale, and not from the date of the certificate of sale.

Illustration

In execution of a money decree obtained by *A* against *B*, certain immovable property belonging to *B* is sold and purchased by *P1*. The same property is subsequently purchased by *P2* at a sale in execution of a money decree obtained by *C* against *B*. *P2* obtains a certificate of sale first, and is placed in possession of the property. Subsequently *P1* obtains a certificate of sale, and sues *P2* for possession. Under the present section *P1* is entitled to possession, for the property is to be deemed to have vested in him from the date of sale, and the sale to him was *prior* to the sale to *P2*. The same result was arrived at under the Code of 1882 by holding that *P2* bought subject to *P1*'s equitable interest and he could not therefore retain possession against *P1* after *P1*'s title was perfected by the issue of a certificate to him.

But where property is sold in execution of a decree to *P1* and the sale is *set aside* on the ground of irregularity under O 21, r 90 and the same property is subsequently sold in execution of another decree and is purchased by *P2*, *P2* is entitled to priority as against *P1*, even though the sale to *P1* may subsequently be confirmed. The sale to *P1* not having been confirmed until after the sale to *P2*, *P1* is not entitled to priority over *P2*. Even under the Code of 1882, *P1* would not be entitled to priority over *P2*, for the sale to him (*P1*) having been set aside, it could not be said that *P2* purchased subject to *P1*'s interest in the property. *P1* had no interest in the property when it was sold to *P2* (w).

Successive purchasers at sales in execution of mortgage decrees.—Priority between successive purchasers of the same mortgaged property in execution of mortgage decree against the same mortgagor is determined by the dates of the several purchases, and not by the dates of the several mortgages (z).

Suit for possession by auction purchaser.—It was held under the Code of 1859 that a purchaser of immovable property at a Court sale could not maintain a suit for possession thereof *against a third person*, unless he had a certificate of sale issued to him before suit, although the sale had become absolute. The reason given was that the transfer of property to a purchaser at a Court sale was not complete until a certificate of sale was issued to him. The decisions turned upon the language of sec 259 which provided that the "certificate shall be taken and deemed to be a valid transfer of such right, title and interest" as had passed from the judgment debtor to the purchaser. The line of reasoning adopted was that if a certificate was to be taken as a transfer the transaction must necessarily be incomplete until the certificate was issued. The said words were

(r) *Yeshwant v Gorind* (1886) 10 Bom 453
Chandamann v Tulabai (1887) 11 Bom
 83

(w) *Banks Lal v Jyoti Narain* (1900) 22 All

168
 (z) *Kutti v Subramania* (1902) 3rd Mad 485 &
 1 C 10th *Nanatchand v Teluchetty* (1850)
 5 Cal. 265

construed as controlling the operation of sec 256 which provided that a sale became absolute when it was confirmed by the Court (y) But it was held that *as against the judgment-debtor and his representatives*, the purchaser's title became complete on the confirmation of the sale (z) Under the present section, it seems, that an auction purchaser can maintain a suit for possession even against a person not a party to the suit after the sale is confirmed by the Court, though no certificate has been issued to him before the institution of the suit, provided it is produced at or before the passing of the decree The reason is that property under the present section vests in the purchaser immediately the sale is confirmed by the Court and the vesting is not postponed until the grant of a certificate In a case under the Code of 1839 where the equity of redemption of the judgment debtor was sold, it was held that the purchaser was entitled to sue the mortgagee for redemption even before the issue of the certificate, the reason given being that the suit was not one in ejectment on title, but one for redemption and therefore of an equitable nature, and the purchaser was equitably entitled to redeem The certificate in that case was produced at the hearing (a)

Mesne profits—Under the Code of 1882, the property sold vested in the purchaser from the date of the sale certificate and not before Hence it was held that the purchaser was entitled to mesne profits from the date of the certificate, and not from the date of sale (b) Under the present section the property is to be deemed to vest in the purchaser from the date of sale The purchaser, therefore, is entitled to mesne profits from the date of sale (c)

Title of auction purchaser—Under the Code of 1882, property sold in execution of a decree vested in the purchaser *so far as regards the parties to the suit and persons claiming through or under them* That is to say, a purchaser at a Court sale was entitled to hold the property only against the judgment debtor and his representative but not against third parties The words italicized above, which occurred in sec 316 of the Code of 1882, have been omitted in the present section The omission, however, has not the effect of enlarging the purchaser's rights, and a purchaser at a judicial sale will now as before get a good title only against persons bound by the decree, but not against strangers (d)

Sale when void and when voidable—A sale in execution of a decree is void, if the Court had no jurisdiction to sell the property Thus a Court has no jurisdiction to sell property in execution of a decree, if the notice required by O 21, r 22, is not served (e) Similarly a Court has no jurisdiction to sell the property of a person who was not a party to the suit in which the property was sold or properly represented on the record (f) Again, the Court of first instance has no jurisdiction to sell property after an order is made by the appellate Court for stay of execution (g) In each of these cases the sale is a nullity, and may be disregarded without any proceeding to set it aside (h)

But where a Court has jurisdiction to sell the property, and there has been an irregularity in the course of execution proceedings, the sale is not void, but merely voidable Thus where the notice required by O 21, r 22, is served upon a person who was not in fact the legal representative of the deceased judgment debtor, but whom the

(y) *Padu v Rakhmas* (1873) 10 Bom H C 430, *Harkisandas v Bai Ichha* (1880) 4 Bom 155

(z) *Raj Kshen v Radha Madhub* (1874) 21 W R 849, *Khushal v Bhimabai* (1888) 12 Bom 589, *Shivram v Ravi* (1883) 7 Bom 254

(a) See *Krishanji v Ganesh* (1882) 6 Bom 139

(b) *Amur Karim v Darbari* (1902) 24 All 475, *Shiam Lal v Nathu Lal* (1911) 33 All 63 71 C 63

(c) See *Ma Hama Bi v Sein Khe* (1927) 5 Rang 803, 109 I C 151, (28) A R. 67

(d) See *Umee Chander v Zahur Fatima* (1891)

18 Cal 161, 178 17 I A 201

(e)

(f)

(g)

(h)

Court wrongly held to be his legal representative, the sale is voidable, and not void (1). Similarly a sale is voidable and not void if there has been material irregularity or fraud in publishing or conducting the sale [O 21, r 90].

Irregularities of procedure in obtaining decrees or in execution proceedings— Provided that the Court has jurisdiction to sell, a purchaser at a Court sale is not bound to inquire into the correctness of the decree or of the order for sale. "To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues" (j). "Strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do" (k). Therefore, when property sold in execution of a decree under the order of a competent Court is purchased by a stranger *bona fide* and for value, the sale cannot be set aside on the ground that the judgment debtor had a cross decree of a higher amount and the Court therefore ought not to have directed the sale (l), or that the decree had been satisfied out of Court before the sale (m), or that the Court wrongly held that the defendant was served with the summons and on that finding passed an *ex parte* decree against him (n), or that though an attachment was subsisting at the date of the sale, the decree holder's application for an order of sale had been dismissed for want of prosecution *before* sale (o), or that the property was not liable to attachment and sale within the meaning of sec 60 (p), or that the execution of the decree was barred by limitation (q), or that the decree proceeded upon an erroneous view of the law (r), or that the decree was one which the Court ought not to have passed (s). See notes to sec 60. Objection that property not liable to attachment and sale when to be raised, on p 226 above, notes to O 21, r 22, "Consequence of omission to give notice, and Notice to wrong person, and notes to O 21, r 90. 'Material irregularity in publishing or conducting the sale

The above principles apply in favour of a third party purchasing at a Court sale, they do not apply where the decree holder himself is the purchaser. The reason is that where the decree holder himself is the purchaser, he ' must be held to have had notice of all the facts relating to the suit and execution proceedings (t) Nor do they apply in favour of a party to the suit, though he may not be a decree holder (u)

Effect of reversal of decree upon sale where decree reversed after confirmation of sale—There is a great distinction between decree holders who come in and purchase under their own decree, which is afterwards reversed or modified, and *bona fide* purchasers who come in and buy at a sale in execution of the decree to which they are not parties, and at a time when that decree is a valid and subsisting decree and when the order for sale is a valid order. A *bona fide* purchaser, who is a stranger to the decree, does not lose his title to the property

- | | |
|--|--|
| (i) <i>Mallikarjun v Narhari</i> (1901) 25 Bom 337 | 58 |
| (j) " 348 -7 I A 216 " " " " " | (p) <i>Dwarkanath v Tarini</i> (1907) 34 Cal 199 |
| " " " " " " " " " | <i>Umed v Jas Ram</i> (1907) 29 All 612 |
| " " " " " " " " " | <i>Indurang v Krishnaji</i> (1904) 28 Bom 1-5 |
| (k) " " " " " " " " " | (q) <i>Saradi Churn v Mahomed</i> (1885) 11 Cal. 3-6 |
| " " " " " " " " " | (r) <i>Girdhars Lall v Kuntoo Lall</i> (1875) 14 Beng L R 187 11 A 321 |
| (l) <i>Rewa Mahton v Ramkishan Singh</i> (1857) 14 Cal 18 13 I A 106 | (s) <i>Kaunalia v Chandar Sen</i> (1900) 22 All. 23 4U. 25 |
| (m) <i>Mothura Mohun Ghose v Akhoy Kumar Mitter</i> (1888) 15 Cal 557 1 Alloppa v Ramchandra (1897) 21 Bom 463 | (t) <i>Kharaymal v Daim</i> (1905) 32 Cal 296, 315 32 I A 23 <i>Mian Akmari v Jagat Vettani</i> (1841) 10 Cal 220 <i>Gangaperiashad v Gopal S nph</i> (1881) 11 I A. 234 |
| (n) (1911) 38 Cal 6-2 101 C 361 <i>supra</i> | (w) <i>Official Receiver v Kottappa</i> (1925) 45 Mad 76, 91 I C 16, (75) A. M 78 |
| (o) <i>Rangasami v Perasami</i> (1894) 17 Mad | |

by the subsequent reversal or modification of the decree. But where the decree holder himself is the purchaser, the sale may be set aside if the decree is subsequently reversed or modified. Where the purchaser is a stranger, the judgment debtor whose property is sold is entitled only to the sale proceeds of the property if the decree is subsequently reversed. But where the purchaser is the decree holder, he is bound to restore the property to the judgment debtor (v). 'A sale in execution of a decree at which a third party becomes the purchaser is upheld notwithstanding the subsequent reversal of the decree, because otherwise there will be less inducement to intending purchasers to buy at an execution sale, and consequently less chance of property fetching proper value at such sales (w)'. See notes to sec 144, 'Who may apply for restitution'. But where property sold in execution of a decree is bought by the decree holder, and it is subsequently resold by him to a bona fide purchaser for value such purchaser acquires a good title, though the decree may be subsequently reversed (x).

Effect of reversal of decree upon sale where decree reversed before confirmation of sale—On referring to sec. 316 of the Code of 1882 (p 240) it will be observed that it contained a proviso the effect whereof was stated to be that a sale could not be confirmed if, at the time of application for confirmation, the decree under which the sale was effected had ceased to be a subsisting decree (y). That proviso has not been reproduced in the present section. Under the present section therefore a sale held in execution of a decree may be confirmed in any event where the purchaser is a third party, though the decree has been reversed before confirmation of the sale (z). See O 21 r 92 (1) and note the words, 'the Court shall make an order confirming the sale'.

What passes at a Court sale—See notes to O 21, r 94

66. [S 317.] (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims

Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that

(v) *Zain-ul-Abidin v Muhammad Asghar Ali* (1938) 10 All 166 15 I A 12. *Mukhoda v Gopal Chunder* (1899) 26 Cal 734. *Set Umedmal v Srinath* (1900) 27 Cal 810. *Pareek Nath v Hari Charan* (1911) 38 Cal. 600. 607 10 I C 351. *Shirbai v Yesoo* (1919) 43 Bom 235 238 48 I C 130. *Puri Lal v Hanifun-Nissa* (1916) 33 All 40 34 I C 303 [stranger purchaser]. *Chintaman v Chunusahu* (1916) 1 Iat L J 43 46 34 I C 747 [decree-holder purchaser]. *Agha Husan v Qasim Ali* (1905) 23 All L J 946 80 I C 1018 (6) A A 30.

(w) *Mukhoda v Gopal Chunder* (1899) 26 Cal 734 735.

(x) *Sheik Ismail v Rajab Rautler* (1907) 30 Mad 295. *Maruthu v Subbaraja* (1903) 13 Mad L J 231.

(y)

(z)

it is liable to satisfy a claim of such third person against the real owner.

Changes introduced by the section.—

1. The words "no suit shall be maintained against any person claiming title under a purchase certified by the Court" have been substituted for the words "no suit shall be maintained against the certified purchaser" which occurred in the corresponding section (s 317) of the Code of 1882
2. The words "on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims" have been substituted for the words "on behalf of any other person or on behalf of some one through whom such other person claims" See notes below, "Joint purchase"
3. The latter part of sub section (2) is new See notes below under the head "Suit by a third person for a declaration that the certified purchaser is merely a benamidar"

Benami purchases.—The object of the section is to put a stop to benami purchases at execution sales (a) If *A* under a secret understanding with *B* purchases property with his own money but in *B*'s name, the purchase is said to be benami In such a case *B* is merely a benamidar or ostensible owner, he holds the property in trust for *A* and *A* may compel him to transfer the property to him (*A*) If, however, *A*'s object in purchasing the property in *B*'s name was to defraud his creditors and the object of the fraud is carried out, the Court will not assist *A* in recovering possession of the property from *B*, but if the object of the fraud is not carried out, the Court will assist *A* in recovering possession of the property from *B* notwithstanding *A*'s primary intention to effect a fraud This is the law as applicable to benami purchases at a private sale (b) The law, however, is different as to benami purchases at a Court sale If *A* purchases property in *B*'s name at a Court sale, and a certificate of sale is issued to *B* (O 21, r 94), *B* will be conclusively deemed to be the real purchaser as against *A*, and no suit will lie under this section by *A* against *B* for possession of the property, unless *A* can prove that *B*'s name was inserted in the certificate fraudulently or without his consent [see sub section (2)] The same rule applies even if the claim made by the beneficial owner is not for the whole of the property of which the defendant is the certified purchaser Thus if *B* is the certified purchaser of certain property, part of which was purchased by him on his own account, and part benami for *A* *A* is not entitled to maintain a suit under this section for recovery of the part purchased by *B* benami for him (c) The mere fact, however, that the plaintiff has described the defendant as a benamidar does not make the transaction benami if it was not benami in fact, it is a mere misdescription, and it is no ground for refusing the plaintiff a relief to which he is otherwise entitled (d)

Section must be construed strictly.—Where a transaction is once made out to be benami, the Courts of India, which are bound to decide according to equity and good conscience, will deal with it in the same manner as it would be treated by an English Court of equity (e) That is to say, effect will be given to the real and not to the nominal title, unless the result of doing so would be to work a fraud upon innocent

- | | | |
|--|---------------------------------|---|
| (a) <i>Booth Singh v. Ganesh Chunder</i> (1874) 12 | <i>Barryar</i> (1908) 31 Mad 97 | <i>Kondeti v. Nukamma</i> (1904) 31 Mad 485 |
| <i>Leas L. R. 317</i> | | See Indian |
| (b) <i>Gowda v. Lala Kishan</i> (1901) 28 Cal | | Trusts Act 1860 s 64 |
| <i>S'0 Jadunath v. Pupal</i> (1906) 33 Cal | | |
| 967 | | (c) <i>Durga v. Bhagwanadas</i> (1901) 23 All 34 |
| <i>Jencirappa v. Putappa</i> (188) | | But |
| 11 B m 704 | | see <i>Hari v. Ramchandra</i> (1907) 31 Lwm 61 |
| <i>Sudi ngappa v. Hirasa</i> (1907) | | |
| 31 B m 405 | | (d) <i>Fenkatappa v. Jajaya</i> (1919) 42 Mad 615 |
| <i>Karamoti v. Chandra</i> (1897) | | 51 L C 111 [1 B] |
| 20 Mad 36 | | |
| <i>Muthuraman v. Arushna</i> | | (e) <i>Kakandas In re</i> (1881) 5 P. m 134 |
| (1906) 29 Mad 72 | | |
| <i>Muniam v. Sub-</i> | | |

plaintiff against the certified purchaser as defendant, on the allegation that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. This point is now made clear by the substitution of the word "plaintiff" for the words "any other person" in sub section (1)

Suit by a third person for a declaration that the certified purchaser is merely a benamidar—Under the corresponding s 317 of the Code of 1882, the High Court of Calcutta held that the only suits barred under that section were suits brought by the *beneficial owner as plaintiff* against the certified purchaser as defendant, and that suits brought by a *third party as plaintiff* against the certified purchaser as defendant for a declaration that the property, though ostensibly sold to the certified purchaser, is liable to satisfy a claim of such third party against the beneficial owner, were not barred under that section (p). On the other hand, the High Courts of Madras (q) and Allahabad (r) held that even suits brought by a *third person as plaintiff* were barred under that section. The present section gives effect to the Calcutta decision by providing in sub section (2) that "nothing in this section shall interfere with the right of a *third person* to proceed against that (*sic*) property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner"

Illustration

A obtains a decree against B, and attaches certain property alleged to belong to B. C objects to the attachment, alleging that he is the certified purchaser of the property, having purchased the same at a Court sale held in execution of a decree obtained against B by D. A alleges that the property was purchased by C benami for B, and sues C for a declaration that C was merely the benamidar for B. The suit is not barred under this section, for it is a suit not by the *beneficial owner*, but by a *third person*.

Suit by beneficial owner in possession for declaration of title—There is a conflict of opinion whether a suit by a beneficial owner *in possession* for a declaration of his right to the property against the certified purchaser is barred under this section. The High Court of Calcutta in a case under s 317 of the Code of 1882, held that such a suit was not barred under that section (s). On the other hand, the High Court of Allahabad held that such a suit was barred under that section (t). A obtains a decree against B. In execution of the decree certain property belonging to B is sold. B purchases the property in C's name. The certificate of sale is granted to C, but B continues in possession of the property. After a few years C gives notice to the tenants not to pay rent to B. B thereupon sues C for a declaration that he is the real purchaser and for an injunction restraining C from interfering with his tenants. The suit is not barred according to the Calcutta decision. It is barred according to the Allahabad decision. In the Calcutta case, the Court said "It is not a case in which the plaintiff seeks to obtain a decree for possession against the ostensible purchaser. Resting as it does, on an existing possession, we do not think that it is a suit of the nature prohibited by s 317". As to this it was observed by Strachey, C.J., in the Allahabad case cited above "If the learned Judges in that case meant to lay down that s 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them". Bannerji, J., said "The first paragraph [of the section] is not confined to a

(p) *Kanwal v Monohur* (1886) 12 Cal 204.
Subba Ebi v Hara Lal (1894) 21 Cal 519

(q) *Rama Kurup v Sridani* (1893) 18 Mad 290.
But see Kollan arudu v Tiruvallu (1897) 20 Mad 36.

(r) *Delhi and London Bank v Partab Bhaskar* (1899) 21 All 29. *Ashkan Lal v Gurnood Ahwaja Prasad* (1899) 21 All 238. *Ram*

Narain v Mohanram (1904) 26 All 8.
Khanda Baksh v Azee Alam (1905) 27 All 194. *Surya Prasad v Bindeshari* (1911) 33 All 382, 9 I C 293.

(s) *Sadi Churn v Annapurna* (1896) 23 Cal 609.

(t) *Bukhan Dial v Ghazid-din* (1901) 23 All 175.

suit for recovery of possession only." The correctness of the Calcutta decision was doubted by the same Court in the undermentioned cases (u), but the principle of that decision was followed by the same High Court in another case (v). It was held in the last mentioned case that where a Mahomedan father purchases property at a Court sale with his own money in the name of one of his sons, and then lets the property to a tenant and the tenant pays rent to him, this section is no bar to a suit by the other sons against the tenant and the son in whose name the property was bought for recovery of rent after their father's death. The Patna High Court holds that a suit for a declaration of title by the beneficial owner is barred, and that it is immaterial whether the plaintiff is in possession and seeks confirmation of possession or whether he is out of possession and seeks to recover possession (w).

Where the beneficial owner has been in possession for twelve years or upwards, a suit will lie at his instance against the benamidar for a declaration of his title to the property. The basis of such a suit is the plaintiff's title by possession. The suit is based, not on the ground that the defendant is a benamidar, but on the title by possession. Such a suit does not come within the purview of this section (x).

Persons claiming through beneficial owner.—This section precludes a suit by the beneficial owner or one claiming through him. It does not preclude a suit by a person who does not claim through the beneficial owner, but claims through another person (z).

Joint purchase.—The provisions of this section are designed "to create some check on the practice of making what are called benami purchases at execution sales for the

Where property is purchased at a Court sale by two or more persons jointly, the declaration that the purchase was made in his name, but with family funds, the declaration that the purchase was made of sale is in his name. The section does not apply to such a case. This was decided by their Lordships of the Privy Council in *Bodh Singh v. Gunesh Chunder* (a), a case under the Code of 1859. Their Lordships said: "[The provisions of the section]

When property is purchased at a Court sale by two or more persons jointly, the executing Court has no power to grant the certificate of sale to one of them only without the consent of the others. If it does so, the case is one within sub sec (2), and the other purchasers are entitled to maintain a suit against the certified purchaser for their share of the property (c).

(u) *Hanuman Pershad v. Jodu* (1916) 43 Cal. 20 28 29 I C 787 *Umasesi v. Akrur* (1928) 53 Cal 297, 92 I C 984 (26) A C 542

(v) *Mahamad v. Mahammad* (1919) 24 C W N 51 54 I C 127

(w) *Keshri Mull v. Sukan Ram* (1933) 12 Pat 616 (33) A P 261

(x)

ALL 175 178 179
(z) *Narain v. Durga* (1913) 35 All, 138, 18 I C 246

(y)

(z)

(a) (1874) 12 Beng L R 317

(b)

(c)

If a joint Hindu family consists of *A* and his sons, and *A* purchases property at a Court sale with joint family funds without the concurrence of his sons in the name of a third person, are the sons entitled to recover their share of the property from the third person [certified purchaser]? The High Court of Madras (*d*) has held that they are, the reason given being that the purchase cannot in such a case be said to have been made by the father on behalf of the sons, and the sons are not therefore beneficial owners, and the section does not apply. On the other hand, the Allahabad High Court has held that if a managing member makes a purchase in the name of a third person, the purchase though made without the consent of his sons, must be deemed to have been made "on behalf of the sons, and the sons are precluded by this section from maintaining the suit (*e*)". The Allahabad High Court purports to follow the Privy Council ruling in *Suraj Narain v. Ratan Lal* (*f*), but that case, as pointed out by the Madras High Court, was a case under s 317 of the Code of 1882, which contained the words 'on behalf of any other person,' now altered into 'on behalf of the plaintiff.'

Where beneficial owner is in possession with permission of certified purchaser.—The High Court of Madras has held that if after obtaining a certificate of sale, the purchaser acknowledges that his purchase is benami, and gives up possession, or does some act which clearly indicates an intention to waive his right, or restore the property to the beneficial owner, such act may, by reason of the antecedent relation between the parties, operate as a valid transfer of the property from the purchaser to the beneficial owner. Thus if *A* is the manager of *B*'s estate [and this is the antecedent relation between the parties], and the estate is sold in execution of a decree against *B*, and is purchased by *B* in *A*'s name, a suit will lie at the instance of *B* against *A* for possession, if, after obtaining the certificate of sale, *A* delivers possession of the property to *B*, and then disturbs *B* in his possession. The reason given is that the permission to hold possession amounts to a transfer of title from the benamidar to the beneficial owner and the suit is thus based not on the ground that the purchase was benami but on a fresh title created by the transfer (*g*). The High Court of Allahabad has dissented from this view, and held, relying on the Privy Council case of *Lokee v. Kallippudde* (*h*), that the mere permission to hold possession cannot give or transfer a title from the benamidar to the real owner, and that a suit like the above would be barred under this section (*i*). The Calcutta High Court has followed the Allahabad decision (*j*). However that may be, if the certified purchaser allows the beneficial owner to take possession, the section does not enable him to sue the beneficial owner for possession, because possession has come into the hands of the person entitled to it (*k*).

Suit for specific performance against certified purchaser.—In *Venkatappa v. Jalayya* (*l*), a Full Bench of the Madras High Court held that this section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement to convey the property entered into after the purchase. The decision in *Venkatappa*'s case was approved by the Judicial Committee in *Ramatbaai v. Peria* (*m*). In *Ramatbaai*'s case it was held that the

- | | |
|--|--|
| <p>(d) <i>J</i></p> <p>(e) <i>Baijnath Dae v. Dishes</i> (1921) 43 All 711 63 I C 676 (21) A A 185 [purchase by manager in his wife's name] <i>Ram Puv</i> <i>v. Ahsadur</i> (1925) 50 All 5 2 168 I C 180 (25) A A 619</p> <p>(f) (1917) 44 I A 201 211 40 All 159 170, 40 I C 988</p> <p>(g) <i>Monappa v. Surappa</i> (1888) 11 Mad 234 <i>Nankunni v. Narayannan</i> (1894) 17 Mad 252 <i>Ambalangi v. Aruputur</i> (1895) 18 Mad 436 <i>Venkatappa v. Jalayya</i></p> | <p>(h) (1912) 42 Mad 615 616 51 I C 111 (1873) 23 W 1 358 21 A 154</p> <p>(i) <i>Bishan Dial v. Glazi ud din</i> (1901) 23 All 175 179-180</p> <p>(j) <i>Harish v. Arupandra</i> (1920) 24 C W N 1024 59 I C 719</p> <p>(k) <i>Mulammad Abdul Jalil v. Muhammad</i> <i>Obaid Ullah</i> (1920) 56 I A 350 51 All 675 129 I C 651 (29) A I C 224</p> <p>(l) (1919) 47 Mad 615 51 I C 111 <i>Laturam</i> <i>v. Dolkina</i> (1912) 24 C W N 27, 54 I C 26</p> <p>(m) (1920) 4 I A 108 43 Mad 643 56 I C 355 See also <i>Laturam v. Salim</i> (1922) 50 175 L J 221 105 I C 11, (25) A I C 55</p> |
|--|--|

suit for recovery of possession only. The correctness of the Calcutta decision was

of title by the beneficial owner is barred, and that it is immaterial whether the plaintiff is in possession and seeks confirmation of possession, or whether he is out of possession and seeks to recover possession (vi)

Where the beneficial owner has been in possession for twelve years or upwards a
to the
based,
Such

Persons claiming through beneficial owner.—This section precludes a suit by the beneficial owner or one claiming through him. It does not preclude a suit by a person who does not claim through the beneficial owner, but claims through another person (z)

Joint purchase.—The provisions of this section are designed "to create some check on the practice of making what are called benami purchases at execution sales for the way affect the title of persons otherwise bene

It has accordingly been held that where one of
creo applies for execution of the decree under
O 21, r 10, on behalf of all and the purchase money is set off against the entire amount of the debts, the other decree holders are entitled to a declaration that the purchase was made on behalf of all the decree holders (z)

Where property is purchased
in his name, but with family
declaration that the purchase

When property is purchased at a Court sale by two or more persons jointly, the executing Court has no power to grant the certificate of sale to one of them only without the consent of the others. If it does so, the case is one within sub sec (2), and the other purchasers are entitled to maintain a suit against the certified purchaser for their share of the property (c)

(u) *Hanuman Pershad v Jadu* (1916) 43 Cal 20 26 29 I C 787 *Umastai v Akur* (1926) 53 Cal 297, 92 I C 984 (26) A C 542

(v) *Mahamad v Mahammad* (1919) 24 C W N 51, 54 I C 127

(vi) *Keshri Afull v Sikan Ram* (1933) 12 Pat 616 (31) A P 264

(w)

ALL 175 178 179
(x) *Narain v Durga* (1913) 35 All 138 18 I C 246

(y)

(z)

(a)

(b)

(c)

If a joint Hindu family consists of *A* and his sons, and *A* purchases property at a Court sale with joint family funds without the concurrence of his sons in the name of a third person, are the sons entitled to recover their share of the property from the third person [certified purchaser]? The High Court of Madras (*d*) has held that they are, the reason given being that the purchase cannot in such a case be said to have been made by the father on behalf of the sons, and the sons are not therefore beneficial owners, and the section does not apply. On the other hand, the Allahabad High Court has held that if a managing member makes a purchase in the name of a third person, the purchase though made without the consent of his sons, must be deemed to have been made "on behalf of the sons," and the sons are precluded by this section from maintaining the suit (*e*). The Allahabad High Court purports to follow the Privy Council ruling in *Suraj Narain v. Ratan Lal* (*f*), but that case, as pointed out by the Madras High Court, was a case under s. 317 of the Code of 1852, which contained the words 'on behalf of any other person,' now altered into "on behalf of the plaintiff."

Where beneficial owner is in possession with permission of certified purchaser.—The High Court of Madras has held that if after obtaining a certificate of sale, the purchaser acknowledges that his purchase is benami, and gives up possession, or does some act which clearly indicates an intention to waive his right, or restore the property to the beneficial owner, such act may, by reason of the antecedent relation between the parties, operate as a valid transfer of the property from the purchaser to the beneficial owner. Thus if *A* is the manager of *B*'s estate [and this is the antecedent relation between the parties], and the estate is sold in execution of a decree against *B*, and is purchased by *B* in *A*'s name, a suit will lie at the instance of *B* against *A* for possession, if, after obtaining the certificate of sale, *A* delivers possession of the property to *B*, and then disturbs *B* in his possession. The reason given is that the permission to hold possession amounts to a transfer of title from the benamidar to the beneficial owner and the suit is thus based not on the ground that the purchase was benami but on a fresh title created by the transfer (*g*). The High Court of Allahabad has dissented from this view, and held relying on the Privy Council case of *Lokee v. Kallippudde* (*h*), that the mere permission to hold possession cannot give or transfer a title from the benamidar to the real owner, and that a suit like the above would be barred under this section (*i*). The Calcutta High Court has followed the Allahabad decision (*j*). However that may be, if the certified purchaser allows the beneficial owner to take possession, the section does not enable him to sue the beneficial owner for possession, because possession has come into the hands of the person entitled to it (*k*).

Suit for specific performance against certified purchaser.—In *Tenkatappa v. Jalappa* (*l*) a Full Bench of the Madras High Court held that this section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement to convey the property entered into after the purchase. The decision in *Tenkatappa* case was approved by the Judicial Committee in *Pamatbai v. Peria* (*m*). In *Ramatappa*'s case it was held that the

- (d) *Adams v. Adams* (1912) 42 Mad 615 616 51 I C 111
(e) *Baynath Das v. Buteh* (1901) 43 All 711 63 I C 66 (1) A A 185 (purchase by manager in his wife's name) *Ram Puri v. Khatir* (1908) 50 All 5 2 I C 150 (2) A A 613
(f) (1917) 44 I C 201 211 40 All 159 170 40 I C 948
(g) *Munappa v. Surappa* (1886) 11 Mad 234 *Nankunni v. Narayannan* (1894) 17 Mad 22 *Akmalnaga v. Ariaputra* (1885) 18 Mad 436 *Tenkatappa v. Jalappa*
(h) (1875) 23 W R 358 21 A 154
(i) *Bukan Dial v. Glaziud din* (1901) 23 All 173 179-180
(j) *Parath v. Nripandra* (1920) 24 C W N 1024 59 I C 719
(k) *Muhammad Abdul Jalil v. Muhammad Obaid Ullah* (1909) 56 I A 330 51 All 675 120 I C 651 (2) A PC 228
(l) (1919) 42 Mad 615 51 I C 111 *Daburam v. Dokhina* (1919) 24 C W N 27, 54 I C 26
(m) (1904) 47 I A 102 43 Mad 643, 56 I C 395 See also *Lalaram v. Sakru* (1923) 20 Lrn L 1 621, 105 I C 11, (2b) A I C 75

present section does not debar a plaintiff from maintaining a suit for specific performance against the certified purchaser if the plaintiff's claim is based upon an agreement made after the purchase to transfer the property to the plaintiff in pursuance of an agreement made before it. If the contract is subsequent to the purchase, such a purchase is not affected by the section (n).

Certified purchaser.—Where a purchaser, who had not obtained a certificate, was sued, and afterwards applied for and obtained a certificate, it was held that he was a certified purchaser within the meaning of this section (o).

Successor in title of certified purchaser.—This section bars a suit not only against a certified purchaser, but also against persons claiming title from him (p). Under the Code of 1882 there was a conflict of decisions as to whether s. 317 of that Code was a bar to suits against persons claiming title from the certified purchaser. On the one hand the High Courts of Madras, Allahabad and Calcutta held that the expression ‘certified purchaser’ in s. 317 of that Code *did not* include a person claiming through or under the certified purchaser, such as an heir or an assignee (q), and that that section therefore was no bar to a suit against such person. On the other hand, the Bombay High Court held that the expression ‘certified purchaser’ *included* his successor in title (r). The present section contains a legislative recognition of the view taken by the High Court of Bombay (s). It is obvious that the section does not apply where the real owner seeks for a declaration of his title against a person who does not claim under a certified purchaser (t).

67. [S. 327.] (1) The Local Government may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where

Power for Local Government to make rules as to sales of land in execution of decrees for payment of money

such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

(2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the Local Government may, by notification in the local official Gazette, declare such rules to be in force, or may, by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.

(n) *Haran Chandra v. Ram Kumar* (1932) 35 C W N 940, 136 I C 539, (32) A C 170

(o) *Aldwell v. Hah, Balsh* (1883) 5 All 478

(p) *Soulier Kamurudien v. Noor Mahamad* (1915) 28 Mad L J 251, 28 I C 205

(q) *Theyyavelan v. Kochan* (1898) 21 Mad 7,

Saba v. Bhagohi (1899) 21 All 186, *Dukhadi v. Srimonto* (1899) 28 Cal 950

(r) *Nari v. Ramchandra* (1907) 31 Bom 81

(s) *Manji v. Hoobai* (1911) 35 Bom 342, 347, 81 C 752

(t) *Abinas Chandra v. Pratul Chandra* (1928) 55 Cal 1070, 108 I C 585, (28) A C 448

Sub sec (2) was inserted in the section by the Code of Civil Procedure Amendment Act I of 1914. As to the result where no notification is issued as provided by sub sec (2), see the undermentioned cases (u)

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVABLE PROPERTY

68. [S. 320, 1st para] The Local Government may declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector

Power to prescribe rules for transferring to Collector execution of certain decrees

Object of the section—"The object of these provisions [i.e., provisions relating to the execution of decrees by Collectors] is well known. In different parts of India the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain members of the Government of India, that these results of the administration of civil justice were impolitic and inexpedient, and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land holders without the immediate sale of their estates, and so to preserve the old landed gentry of the country. The provisions of secs 320 to 325C [now secs 68, 70, 71, and 72 and schedule III] were inserted in the Code of Civil Procedure, in order to give effect to these suggestions (v). See notes to O 21, r 90 Waiver and estoppel."

Notification has retrospective effect—A notification under this section transferring execution to the Collector affects procedure and therefore has retrospective effect and will apply to an execution application pending at the date of the notification (vi)

69. [New] The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section

Provisions of Third Schedule to apply

70. [S. 320, 2nd, 3rd and 4th paras] (1) The Local Government may make rules consistent with the aforesaid provisions—

Rules of procedure

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court,

(u) *Amarendra Chand v. Ishar Singh* (1913) 1 IL 60 89 p 318 19 IL 42 *Fair v. Amin Chand* (1915) 5 Lah 1 J 5 CB 1 IL 833 (1) 41 223

(v) *Huro Prasad Roy v. Kali Prasad Roy* (1933) 6 Cal 30 at p 234

(vi) *Nagendra Nath v. Shro. Shankar* (1932) 8 Luck 44 145 IL 363 (33) A O 274

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders, made on appeal with respect to such orders would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section

Jurisdiction of Civil
Court barred

(1) upon the Collector or any gazetted subordinate of the Collector or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Power of Local Government to make rules—A Local Government has power under this section to make a rule providing that no suit shall lie to set aside a sale held or confirmed by a Revenue Authority. Such a rule is not *ultra vires* (1c)

Civil Courts are precluded from interfering in any matter declared by notification to be within the Collector's jurisdiction—Thus if it is declared by notification that a decree for the sale of a particular kind of property, e.g., "ancestral" property, should be transferred to the Collector for execution, a sale of the property, if made, by a Civil Court, is void. Such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree (1c). For the same reason, if the execution of a decree is transferred to the Collector, the Court transferring the decree has no power to postpone the sale (y), or to give leave to the decree holder to bid under O 21, r 72 (z), or to re sell the property where a re sale is necessary (a), the Collector alone has that power. Similarly where a decree is transferred for execution to the Collector, and the decree is subsequently adjusted, the application under O 21, r 2 [Code of 1882, s 258] for recording the adjustment should be made to the Collector (b). But where a decree has been sent

(1c)

- (y) *Dawlat Singh v Jugal Kishore* (1900) 22 All 108, 111
 (z) *Shrinivas v Jagaderappa* (1918) 42 Bom 621, 46 I C 653
 (a) *Shahzad Singh v Hanuman Rai* (1924) 46 All 502 83 I C 766, (24) A A 704
 (b) *Muhammad v Payao Sahu* (1894) 16 All 228 *Ahusalehand v Nandram* (1911) 30 Bom 516, 12 I C 572

to the Collector for execution under this section, he holds the money which may be realized in execution of such decree at the disposal of the Court which sent the decree to him for execution, and he is not competent to distribute such money, in contravention of an order of the Court indicating the mode of distribution (c)

It is to be noted that sub section (2) does not take away the jurisdiction of any Court other than the Court referred to in it. The Court there referred to is the Court mentioned in the previous portion of the section, namely, the Court to which an application was made for execution and which as such Court transmitted the decree for execution (d)

Where a suit would lie to set aside an order made by a Court executing a decree the fact that such order has been made by the Collector does not deprive the Civil Courts of the jurisdiction to entertain a suit to set aside such order (e)

Suit to set aside orders of Collector.—A suit will lie to set aside an order made by the Collector, if the order is *ultra vires*. Thus no rule has been made by the Government of Bombay under this section empowering the Collector to set aside a sale under O 21, r 89 [Code of 1882, s 310A] on a deposit by the judgment debtor of the amount specified in that rule, nor is there any rule empowering him to set aside a sale under O 21, r 90 [Code of 1882, s 311] on the ground of material irregularity in publishing or conducting the sale (f). Nor has any rule been made by the Local Government of the N W P, under this section empowering the Collector to set aside a sale under O 21, r 89 [Code of 1882, s 310A] (g) though there is a rule empowering him to set aside a sale under O 21, r 90 [Code of 1882, s 311]. Again, no rule made by any of the Local Governments empowers the Collector to set aside a sale on the ground of fraud (h). The Collector again has no power to set aside a sale after it has been confirmed and the decree retransmitted to the Civil Court (i). If in any of these cases the Collector arrogates to himself the power which he has not and sets aside the sale, the order is *ultra vires* and it is competent to the auction purchaser to bring a regular suit in a Civil Court for a declaration that the sale was valid and that the order of the Collector setting aside the sale was invalid (j).

Suit to set aside sale held by Collector.—A suit will lie to set aside a sale held by the Collector if the sale was brought about by the fraud of the decree holder, the auction purchaser and persons who had brought pre-emption suits and who had all conspired to deprive the plaintiff of the property, for O 21, r 90 applies only to fraud in publishing and conducting a sale (k).

Appeal.—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him under this section. The reason is that this section specially provides that an appeal shall lie from the order of the Collector to such authorities as the local Government may by rules prescribe (l).

Revision.—The High Court has no power to interfere in revision with an order made by the Collector even though the order is not in accordance with the provisions of Sch III, cl I of the Code (m). An order made by the Collector in the course of execution

(c) *Tapeeri v Deolnandan* (1894) 16 All 1

(d) *Shiam Behari Lal v Jup Kulkore* (1902) 20 All 393 83

(e) *Sham Behari Lal v Jup Kulkore* (1902) 20 All 39

(f) *Pala v Ch nial* (1907) 31 Bom 70
Narayan v Tasilkhan (1897) 23 Bom 331
Anaptram v Isaac (1891) 15 Bom 300
Bai Amhi v Madhar (1891) 15 Bom 631

(g) *Shro Prasad v Muhammad* (1903) 25 All 16

(h) *Sadho Chaudhari v Atharnandan Prasad* (1904) 26 All 101 at p 104

(i) *Vand Atkore v Ladan Singh* (1906) 49 All 564 95 I C 58 (26) A A 55

(j) *Mathuradas v Janhalal* (1902) 19 Bom 16
Mathura Das v Jamna (1903) 25 All 355

(k) *Dhawan Das v Suraj Prasad* (1925) 47 All 21 84 I C 1031 (25) A A 144

(l) *Manchery v Thakurdas* (1902) 7 Bom L.R. 82

(m) *Krishna Das v Pann Gopal* (1922) 50 All 115 1 C 125 (22) A A 53

proceedings under this section sanctioning the prosecution of a party to the suit under sec 476 of the Code of Criminal Procedure is an order made by him as a Revenue Court, and is not therefore subject to revision by the High Court (n)

71. [S 320, 5th para] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

Collector deemed to be acting judicially

' Shall be deemed to be acting judicially —The effect of this provision is that the Collector and his subordinates are entitled to the benefit of the provisions of the Judicial Officers Protection Act XVIII of 1850, which are as follows —

No Judge, Magistrate Justice of the Peace Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction provided that he at the time, in good faith believed himself to have jurisdiction to do or order the act complained of and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same

But though the Collector is deemed to be acting judicially, he is not a Court (n1)

72. [S 326] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share

Where Court may authorize Collector to stay public sale of land

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable

The Court may authorize the Collector —These words are not imperative, but leave a discretion to the Civil Court That discretion can only be exercised upon materials placed before the Court It is therefore open to the decree holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court as well by evidence as by argument that the proposal of the Collector is not feasible or practicable The Court should not decline to receive the evidence offered by the decree holder (o)

(n) *Emperor v Ashraf Lal* (1917) 39 All 91
38 I C 419 See also *Emperor v Bhaja*
(1915) 37 All 334 29 I C 80
(n1) *Bhagwan Das v Suraj Prasad* (19 5) 47

All 217 84 I C 1031 (25) A A 146
(o) *Huro Prasad Roy v Kail Prasad Roy* (1883)
9 Cal 290, *Sardarna v Ram Rattan* (19 40)
1 Lah 19 58 I C 603 [F B]

Temporary alienation.—This section admits only of a temporary alienation of land, and not an arrangement by which possession is to be left with the judgment-debtor subject to payment of the judgment-debt by instalments (p)

A temporary alienation of land belonging to a judgment debtor who is a member of an agricultural tribe does not come within the purview of s 16 of the Punjab Alienation of Land Act 13 of 1900 which prohibits a sale out and out (q)

Provisions of sections 69 to 71 to apply.—Reading this section with para 2 of schedule III [Code of 1882 s 322] referred to in s 69, it is clear that the provisions of this section cannot be applied to a decree which directs the sale of land in pursuance of a contract specifically affecting the same (r) Similarly reading this section with para 11, sub para (1) of schedule III [Code of 1882, s 352A] it follows that where a judgment-debtor executes a mortgage of his property, while the property is in the management of a Collector under this section, with an undertaking to put the mortgagee in possession, the mortgagee is not entitled to claim possession (s) Likewise, reading this section with the same paragraph, no Court can issue any process of execution against any immovable property in the management of a Collector under this section Therefore, the period during which the property is in the management of the Collector under this section should be excluded from the period of limitation applicable to the decree of which execution is refused by the Court by reason of the property having been in the Collector's management (t). see sch III, para 11, sub para (3)

DISTRIBUTION OF ASSETS

73. [S. 295.] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons

Proceeds of execution
sale to be rateably distributed
among decree holders

Provided as follows —

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold

(p) *Kathee Lal v. Ameer Jan* (1870) 6 All H C 347 *Muttra Pershad v. Jam Pershad* (1873) 6 All H C 33
(q) *Sardarna v. Jam Fattan* (1900) 1 Lah 19 54 I C 603 [F B.] See *India v. Nur Ahmad* (1904) 4 Lah L J 476 4 I C 194

(r) *Bhawan Prasad v. Shoo Sahas* (1880) 2 All 236
(s) *Seth Jaidaval v. Jam Sahas* (1880) 17 Cal 43 [I C].
(t) *Girdhar Das v. Har Shankar* (1894) 20 All 235

proceedings under this section sanctioning the prosecution of a party to the suit under sec 476 of the Code of Criminal Procedure is an order made by him as a Revenue Court, and is not therefore subject to revision by the High Court (n)

71. [S. 320, 5th para.] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

Collector deemed to be acting judicially

"Shall be deemed to be acting judicially."—The effect of this provision is that the Collector and his subordinates are entitled to the benefit of the provisions of the Judicial Officers Protection Act XXIII of 1850, which are as follows —

'No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same

But though the Collector is deemed to be acting judicially, he is not a Court (n1).

72. [S. 326.] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to stay public sale of land

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

"The Court may authorize the Collector."—These words are not imperative, but leave a discretion to the Civil Court. That discretion can only be exercised upon materials placed before the Court. It is therefore open to the decree holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court as well by evidence as by argument that the proposal of the Collector is not feasible or practicable. The Court should not decline to receive the evidence offered by the decree holder (o)

(n) *Emperor v Ashraf Lal* (1917) 39 All 91
38 I C 419 See also *Emperor v Bhaja*
(1915) 37 All 334 29 I C 89

(n1) *Bhagwan Das v Suraj Prasad* (19 5) 47

All 217 84 I C 1031 (25) A A 146
(o) *Huro Prasad Roy v Kais Prasad Roy* (1883)
9 Cal 290 *Sardana v Jam Patten* (19 0)
1 Lah 192 68 I C 603 [F B]

Temporary alienation.—This section admits only of a temporary alienation of land, and not an arrangement by which possession is to be left with the judgment-debtor subject to payment of the judgment-debt by instalments (p)

A temporary alienation of land belonging to a judgment debtor who is a member of an agricultural tribe does not come within the purview of s 16 of the Punjab Alienation of Land Act 13 of 1900 which prohibits a sale *out and out* (q)

Provisions of sections 69 to 71 to apply.—Reading this section with para 2 of schedule III [Code of 1882, s 322] referred to in s 69, it is clear that the provisions of this section cannot be applied to a decree which directs the sale of land in pursuance of a contract specifically affecting the same (r) Similarly reading this section with para 11, sub para (1) of schedule III [Code of 1882, s 302A] it follows that where a judgment-debtor executes a mortgage of his property, while the property is in the management of a Collector under this section, with an undertaking to put the mortgagee in possession, the mortgagee is not entitled to claim possession (s) Likewise, reading this section with the same paragraph, no Court can issue any process of execution against any immovable property in the management of a Collector under this section Therefore, the period during which the property is in the management of the Collector under this section should be excluded from the period of limitation applicable to the decree of which execution is refused by the Court by reason of the property having been in the Collector's management (t) see sch III, para 11, sub para (3)

DISTRIBUTION OF ASSETS

- 73. [S. 295.]** (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons

Process of execution
sale to be rateably distri-
buted among decree holders

Provided as follows —

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold

(p) *Kashee Lal v Ameer Jan* (1870) 2 All H C 347 *Muttra Iershad v Jam Iershad* (1873) 6 All H C 39
(q) *Sardarna v Jam Patten* (1920) 1 Lah 19, 541 C 603 [F B] *Sain Ditta v Nur Ahmad* (1922) 4 Lah L J 46, 741 C 194

(r) *Bhawvan Prasad v Shro Sahas* (1880) 2 All 606

(s) *Seth Jaidaval v Lam Sahas* (1890) 17 Cal 43, [F C]

(t) *Girdhar Das v Har Shankar* (1893) 20 All 333.

free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

- (c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;

thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets

(3) Nothing in this section affects any right of the Government.

Changes introduced by the section.—The present section differs from the corresponding s. 295, C. P. C., 1882, in the following respects :—

1. The words, "where assets are held by a Court," have been substituted for the words, "whenever assets are realized *by sale or otherwise in execution of a decree*" This, it is submitted, introduces an important alteration, though the High Court of Bombay has held otherwise See notes, "Assets held by Court," on p. 260 below.
2. The words, "before the receipts of such assets," have been substituted for the words, "prior to the realization." See notes, "Before the receipt of the assets," on p. 258 below.
3. The word, "passed," has been added after the word, "money." See notes, "Same judgment-debtor," on p. 267 below.
4. The words, "interest in," in cl. (b) have been substituted for the words, "right against," to bring the wording of that clause into line with the Transfer of Property Act, 1882, s. 96. This is a mere verbal alteration

Rateable distribution.—The object of this section is to provide a cheap and expeditious remedy for the execution of money-decrees held against the same judgment-debtor by adjusting the claims of rival decree holders without the necessity for separate proceedings (u). Under the Code of 1859 (s. 270), the creditor who first attached property has a prior claim to have his decree satisfied out of the sale proceeds to the exclusion of other creditors, but now all judgment creditors who apply to the Court, prior to the receipt of the sale proceeds by the Court, are entitled to share rateably (t). In *Bithal Das v. Nand Kishore* (w), Strachey, C.J., said. "The object of the section is two fold. The first object is to prevent unnecessary multiplicity of execution proceedings, to obviate, in a case where there are many decree holders, each competent to execute his decree by attachment and sale of a particular property, the necessity of each and every one separately attaching and separately selling that property. The other object is to secure an equitable administration of the property by placing all the decree holders in the position I have described upon the same footing, and making the property *rateably* divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property." A obtains a decree against B in Court X for Rs. 4,000, and applies to that Court for execution of his decree by attachment and sale of certain property belonging to B, and the property is thereupon attached. C then obtains a decree also against B in Court X for Rs. 2,000, and applies to that Court for execution of his decree by attachment and sale of the same property attached in execution of A's decree. The property is then sold by the Court in execution of A's decree for Rs. 3,000. C is entitled to share rateably in the net sale proceeds, that is to say, if the net sale proceeds amount to Rs. 3,000, A will be paid Rs. 2,000 and C will be paid Rs. 1,000. It is not necessary to entitle C to participate in the assets that he should have given notice to A of the application made by him for execution of his decree (x).

Conditions for rateable distribution.—To entitle a decree holder to participate in the assets of a judgment debtor, the following conditions must be present—

1. The decree holder claiming to share in the rateable distribution should have applied for execution of his decree to the Court by which the assets are held.
2. Such application should have been made prior to the receipt of the assets by the Court.
3. The assets of which a rateable distribution is claimed must be assets held by the Court.
4. The attaching creditor as well as the decree holder claiming to participate in the assets should be holders of decrees for the payment of money.
5. Such decrees should have been obtained against the same judgment debtor.

No rateable distribution can be claimed under the section unless all the conditions enumerated above are fulfilled. We proceed to examine those conditions.

Application for execution.—The application for execution must be in the form prescribed by O 21, r 11 (y). An application in this form was held to be sufficient, although the applicant did not ask for attachment or sale of the property, but only for rateable distribution of the assets to be realised at the execution sale of another decree holder (z). It has, however, been held that an application which does not contain all the particulars required by O 21, r 11, may yet be sufficient for the purposes of the section (a).

(u) See *Hasson Ara v. Jawadunnissa* (1874) 4 Cal. 101.

(v) *Kommachi v. Talier* (1877) 20 Mad. 117, 111.

(w) (1881) 3 All. 106, 110.

(x) *Kunni Lal v. Jugal Kishore* (1885) 22 All. 132.

(y) *Keshna Bank v. Chandrasekhari* (1881) 51 M. 118.

(z) *Deewan Kuer v. Jafunnissa* (1931) 53 All. 122, 131, 14, 14 (31) A & 92.

(a) *Ghul Salim v. Jeeva Krishna* (1922) 22 Mad. 26, 11, 14, 22 (22) A & 73.

Court to which application for execution should be made.—Those decree holders alone are entitled to rateable distribution who have applied for execution of their decrees as provided by O 21, r 11 [Code of 1882, s 235] to the Court by which the assets are held (b). An application to the Court which passed the decree to issue a precept of attachment under s 46, to the Court by which the assets are held is not sufficient (c). Nor is an application to a Court in anticipation that the decree will be transferred to it for execution (d).

The point to be considered under this head is whether where property of the same judgment debtor is attached in execution of decrees of more Courts than one, and the property is sold by the Court of the highest grade, the holders of decrees of inferior Courts are bound, in order that they may be entitled to rateable distribution, to have their decrees transferred to the Court of the highest grade and make a fresh application for execution to that Court. A obtains a decree against B in the Court of a Subordinate Judge of the First Class. In execution of the decree B's property is attached by that Court. C then obtains a decree against B in the Court of a Subordinate Judge of the Second Class and applies to that Court for execution of his decree by attachment and sale of the same property. The property is then sold by the First Class Subordinate Judge in execution of his decree, and the sale proceeds are received by that Court. Here the Court of the Subordinate Judge of the First Class is the Court by which the assets are held. Is C entitled to rateable distribution? No, according to the High Court of Bombay, he not having applied to the Court of the Subordinate Judge of the First Class for execution of the decree that being the Court by which the assets are held (e). Yes, according to the Calcutta (f), Allahabad (f1), Rangoon (g) and Madras High Courts (h) the reason given being that under s 63 the Court of the Subordinate Judge of the First Class is the Court to determine all claims relating to the attached property, and such claims include claims for rateable distribution.

2 Before the receipt of the assets—The application for execution must be made before the receipt of the assets by the Court. The corresponding s 295 of the Code of 1882 commenced as follows—

‘Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held’

The present section begins as follows—

Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court

The word realization was rather obscure. Indeed it called for several decisions in which the Courts had to define its precise meaning. The word “receipt” which is now substituted for “realization” is not likely to require any judicial interpretation. Cases of the character noted below which turned upon the word “realization” are not likely to arise under the present section, so clear is the meaning of the word “receipt”

A, B and C held each a money decree against the same judgment debtor. In December 1892, A attached by a prohibitory order funds of the judgment debtor in the hands of D [O 21, r 46, Code of 1882, s 268]. In January 1893, B attached the same funds in execution of his decree. In February 1893, D paid the funds into Court. On the same day, but after payment was made into Court, C applied to attach the fund as property in the custody of the Court [O 21, r 52, Code of 1882, s 272]. It was held

(b) *Krishnashankar v Chandrashankar* (1881) 5 Bom 198 201

(c) *Kanwar v Aspin* (1900) 90 IC 527, (26) A C 249

W N 126, *Bejo v Hukam* (1902) 29 Cal 773, *Gurindra v Kedar Nath* (1924) 29

(f1)

(g)

(h)

under s 295 of the Code of 1892 that the funds should be rateably distributed between *A* and *B*, and that *C* was not entitled to participate therein, as his application was made *subsequent* to the *realization* of the assets by the Court (i). The decision would be the same under the present section, for it is quite clear that *C*'s application was made *after* the receipt of the assets by the Court.

It was held under s 295 of the Code of 1882 that where property is sold in execution of a decree, the sale proceeds are deemed to be realized not when the 25 per cent is deposited by the purchaser into Court under s 306 [now O 21, r 84], but when the balance of the purchase money is paid (j). Hence a decree holder who applied for execution *before* the entire amount due from the purchaser had been paid into Court was held entitled to share in the rateable distribution though the application was made after deposit of the 25 per cent. But it was held that a decree holder who applied for execution *after* the entire amount of the purchase money had been paid into Court was not entitled to share in the rateable distribution though his application was made before the sale was confirmed by the Court under s 312 [now O 21, r 92], and the decision was put on the ground that the point of time when assets are realized is when the sale-proceeds are paid into Court, and not when the sale becomes absolute (k). The result is the same under the present section as will be seen by substituting the word "received" for the word "realized" (l).

The High Court of Madras has held that where immovable property is sold in execution of a decree in separate parcels, the sale proceeds are not deemed to be realized until the entire amount of the purchase money in respect of *all* the parcels is paid into Court (m). This decision was followed by the Calcutta High Court (n), but in a later case that Court held that where immovable property is sold in separate parcels, the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Court (o). As regards movables the Lahore Court had held that if the property consists exclusively of movables, and they are sold in separate lots on different dates, the sale proceeds are deemed to be realized *on the several dates* on which they are received by the Officer of the Court and not on the date on which the last payment is received. Thus if some of the movables are sold and the price thereof is received on January 5 and the rest are sold and the price thereof is received on January 10, a decree holder who applies for rateable distribution on January 7 is entitled to rateable distribution of the sale proceeds realized on January 10, but not of those realized on January 5 (p).

Where property is sold in execution by a person appointed by the Court under O 21, r 65, the receipt of purchase money by such person is for the purposes of this section equivalent to receipt of assets by the Court. The material date, therefore, is not the date on which the Court receives the amount of the purchase money from such person, but the date on which such person receives the purchase money from the purchaser (q).

When property which is attached in execution of decrees of several Courts, is sold by a Court of inferior grade and the sale proceeds are transferred to the Court of highest grade for rateable distribution, the date of receipt of assets is the date when the sale proceeds are received by the latter Court (r).

If Court A attaches the proceeds of a sale held by the Collector and directs the Collector to send the sale proceeds to itself and the Collector sends the proceeds not to Court A but to Court B there is no constructive receipt of assets by Court A (s).

- | | |
|---|--|
| (i) <i>Dr. Arora v. Neetharamayyar</i> (1886) 10 Mad. | (l) Cal L.J. 10 641 (16) (21) A.C. 401 |
| (j) <i>Dr. Arora v. Neetharamayyar</i> | (m) <i>G. Srinivas Nalla v. Andur Nalla</i> (1911) 23 A. |
| (k) <i>Dr. Arora v. Neetharamayyar</i> | W.N. 5-5 8-14 7-3 (25) A.C. 466 |
| (l) <i>Dr. Arora v. Neetharamayyar</i> | (n) <i>Suryan Singh v. Pray Dutt</i> (1912) 1 R. |
| (m) <i>Dr. Arora v. Neetharamayyar</i> | 10 33 p. 1-4 45 1-4 104 |
| (n) <i>Dr. Arora v. Neetharamayyar</i> | (o) <i>Goldman v. Fournery</i> (1917) 44 Cal. 702 |
| (o) <i>Dr. Arora v. Neetharamayyar</i> | 35 L.C. 250 |
| (p) <i>Dr. Arora v. Neetharamayyar</i> | (r) <i>Goldarichai v. Iyechappa</i> (1927) 23 L.C. |
| (q) <i>Dr. Arora v. Neetharamayyar</i> | L.J. 319 101 1-4 411 (77) A.B. 24 |
| (r) <i>Dr. Arora v. Neetharamayyar</i> | (s) <i>Paramathan v. Kadambaram</i> (1913) 6 Mad. |
| (s) <i>Dr. Arora v. Neetharamayyar</i> | L.J. 31 144 1-4 2-2 (22) A.M. 342 |

When a decree holder is given leave to bid and set off at a Court sale, there is a receipt of assets when the sale takes place (s). In such a case the decree holder purchaser must share the proceeds of the sale rateably with the competing decree holders (t), and the Court ordering rateable distribution may make an order for the refund of the proportionate amount to be enforced by summary process in execution (u).

Sale by Collector—Where the sale is held by the Collector, the application for execution must be made before the sale proceeds are received by him, though he may send the sale proceeds to the Court under Sch. III, cl. 9, at a later date (v).

Sale in execution of mortgage decree—In the case of a sale in execution of a mortgage decree the words "prior to the sale" in clause (c) shew that the receipt of assets is the date of the sale and not the date when the money is actually received (w).

3 Assets held by a Court—Far more important than the change effected by the word "receipt" is the change introduced by the omission of the words "whenever assets are realized by sale or otherwise in execution of a decree" and the substitution thereof of the words "where assets are held by a Court". The Code contemplates the Court receiving certain assets and then proceeding to hold them. Money paid by a garnishee to the sheriff are assets received and held by the Court although the judgment debtor obtains a stay order directing the money to remain in the sheriff's hands (x). The words "held by the Court" coupled with the word "realization" which occurs later on in the section include it is submitted several kinds of assets which were held not liable to rateable distribution under s. 293 of the Code of 1882.

Assets available for rateable distribution—The only kinds of assets that were held to be available for rateable distribution under s. 293 were —

(a) assets realized by "sale in execution of a decree," that is, sale proceeds of property sold in execution of a decree (y), and

(b) assets realized "otherwise in execution of a decree." These words were held to mean assets realized from the property of the judgment debtor by such modes as those prescribed by s. 291 [O. 21 r. 69] s. 305 [O. 21, r. 83] and s. 322 [Sch. III paras. 2 and 7] (z). This was explained in later decisions as meaning assets realized in one of the modes expressly prescribed by the sections of the Code (a). The following were held to be assets of this class —

(i) debts attached under s. 268 [now O. 21, r. 46] and paid into Court by the garnishee (l)

(ii) rents of property under attachment realized by a receiver appointed under s. 503 [now s. 51, cl. (d)] at the instance of the decree holder (c) [The appointment of a receiver by the Court in such a case is a "process of execution"],

(iii) money in the custody of a public officer attached under s. 272 [now O. 21, r. 52] and paid into Court by that officer (d),

- | | |
|-----|--|
| (a) | 736 129 I.C. 189 (30) A.C. 673 |
| (y) | <i>Prasannomoyi v. Sreenauth</i> (1834) 21 Cal 809 |
| (z) | <i>Purahotamdass v. Sirajbharthi</i> (1887) 6 Bom 588 <i>Copal Dal v. Chunnai</i> (1886) 8 All 67 <i>Vidulhapriya v. Jus f</i> (1905) 24 Mad 380 |
| (a) | <i>Sew Bur v. Sh. b. Chunder</i> (1886) 13 Cal 225 |
| (c) | <i>Prasannomoyi v. Sreenauth</i> (1834) 21 Cal 809 817 <i>budhapriya v. Jus f</i> (1905) 28 Mad 380 384 |
| (l) | <i>Sorabji v. Govind</i> (1832) 16 Bom 91 |
| (c) | <i>Pink v. Bahadur Singh</i> (1899) 26 Cal 772 |
| (d) | <i>Manilal v. Nanabhai</i> (1904) 28 Bom 264 |
| (t) | <i>Jam. Adis v. Bui. Sponnabai</i> (193) 34 Bom 140 <i>L.R. 140, 141 I.C. 349 (37) A.B. 62</i> |
| (x) | <i>Mohari Murthi v. Bignath</i> (1930) 57 Cal |

- (iv) money realized in execution of a decree held by the judgment debtor against another, where such decree is attached and realized under O 21, r 53 [Code of 1882, s 273] (e),
- (v) money paid under O 21, r 69, to the officer conducting the sale to stop the sale (f),
- (vi) money raised by the judgment debtor by private alienation under O 21, r 83, and paid into Court (g)
- (vii) the 25 per cent deposit paid by a defaulting execution purchaser which has not, under O 21, r 86 been forfeited to Government (h)

Assets not available for rateable distribution—Assets not realized by sale or otherwise in execution of a decree were not liable to rateable distribution under s 295. The following are instances of assets held not to be realized by sale or otherwise in execution of a decree within the meaning of s 295, and therefore not subject to rateable distribution under that section —

Cases under s 295 of the Code of 1882.

A—*Purshotamdass v Surajbharthi* (1882) 6 Bom 588—Money paid by a judgment debtor under arrest under s 236 of the old Code [now s 55, proviso 4] to the officer arresting him in order to secure his release were held to be assets not subject to rateable distribution. Sir Charles Sargent, C.J., said “Section 295 . . . must . . . be read as if the words ‘from the property of the judgment debtor’ were inserted after the word realized. The provisions contained in sections 291 [O XXI r 83], 303 [O XXI, r 69] and 322 [now Sch III paras 2 and 7 the latter para corresponding with s 323 of the old Code] are all modes of realizing assets from such property otherwise, than by sale, and are sufficient to account for the introduction of that expression into section 295. The effect of the above decision is that to constitute a realization with the meaning of s 295 it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code.”

The correctness of the reasoning in *Purshotamdass* case seems to have been doubted in *Manilal v Nanabhai* (i) where Sir Lawrence Jenkins (J.), said *Prima facie* the word realized implies that property has been converted into or obtained in cash or some other form available for immediate distribution and there is nothing in the word itself which requires that that process should take place as the result of any ulterior proceeding in the course of execution. But it was the leading case under the old section, and it was followed in cases B, C, D and E below.

B—*Gopal Des v Chunni* (1886) 8 All 67 following case A—Money paid into Court by the judgment debtor under s 275 of the old Code (now O XXI, r 55 (a)) for payment of the amount due to the decree holder at whose instance the property was attached was held to be an asset not available for rateable distribution the reason given being that the money was not realized from the property of the judgment-debtor.

(e) *Anand v Anand* (1908) 31 M.L.J. 201
 (f) *Purshotamdass v Surajbharthi* (1882) 6 Bom 588 589
 (g) *Purshotamdass v Surajbharthi* (1882) 6 Bom 588 589
 (h) *See Mahant Prasad v State of Madhya Pradesh* (1924) 42 M.L.J. 279 280 281 (27) A.M.
 (i) (1885) 2 L.R. 264 274

C—*Sew Bux v. Shib Chunder* (1886) 13 Cal 225 following case A—A obtained a decree for money against B. B's property was attached in execution of the decree. C then obtained a decree for money against B, and applied for attachment of B's said property, a warrant of attachment was issued, but the property was not actually attached. B then filed his petition in insolvency, and a vesting order was made. The Official Assignee then paid into Court the amount of A's decree, and the property was released from attachment. C then applied for rateable distribution under s 295 of the amount paid into Court. Held that C was not entitled to rateable distribution. Trevelyan, J., said: "I do not think that in this case the money was realized out of the property of the judgment debtor." "I think that, by 'sale or otherwise' means by sale or by other process of execution provided for in the Civil Procedure Code."

D—*Prosonnomoys v. Sreenauth* (1894) 21 Cal 809—In this case Sale, J., said that the rule deducible from cases A and C was that "to constitute a realization within the meaning of section 29, it must be either a realization by a sale in execution under the process of the Court, or it must be a realization in one of the other modes expressly prescribed by the sections of the Code."

E—*Ishudajriya v. Yusuf* (1905) 28 Mad 380 following cases A, B, C and D—Moneys realized by a judgment debtor by a private sale of his property attached in execution of a decree against him and paid by him into Court under s 275 of the old Code [now O XXI, r 55 (a)] for payment of the amount due to the decree holder at whose instance the property was attached were held to be assets not available for rateable distribution, the reason given being that though there was a realization of assets the realization was not in one of the modes expressly prescribed by the sections of the Code.

Note—The only distinction between cases B and E is that in case E the judgment debtor obtained the money by sale of the attached property, while in case B he obtained it without any sale.

It is submitted that the assets in cases A, B, C and E should under the present section be treated as assets available for rateable distribution. The test under the present section is—

- (1) whether the moneys of which rateable distribution is claimed are assets held by the Court, and
- (2) whether they have been realized or obtained in execution. The scope of the new section is wider than that of the old one (j). See below, notes under case F.

Cases under the present section

In the following cases which were all decided under the present section it was held that the moneys held by the Court were not assets available for rateable distribution within the meaning of the section.—

F—*Sorabji v. Kala* (1911) 36 Bom 156 12 IC 911—Money paid into Court by a judgment debtor under O XXI, r 55 (a) [Code of 1882, s 275] for payment of the amount due to the decree holder at whose instance the property was attached has been held not subject to rateable distribution under this section. (This is the same as case B above.) Sir Basil Scott C.J., said: "In

the reference to the costs of realization, we have an indication that the legislature contemplated that the assets referred to should be assets held in the process of execution. If we were to hold that money paid into Court under Order XXI, rule 55, was assets held by the Court within the meaning of section 73, we should be only nullifying the provisions of Rule 55, for, there would be no inducement to any judgment debtor to procure a payment into Court of the amount of the claim of his attaching creditor if the money could at once be absorbed by rateable distribution amongst a number of other creditors." This assumes that the word 'realized' means realized by sale or other process of execution expressly prescribed by the sections of the Code as was held in cases A, C, D and E. It is submitted, with respect, that the words "sale or otherwise" which occurred in s 293 of the Code of 1882 having been omitted in the present section, the interpretation put upon those words in cases A, C, D and E can no longer govern cases arising under the present Code. All that is necessary under the present Code is that (1) there should be assets held by the Court, and (2) that such assets should have been realized or obtained in execution proceedings [see the observations of Sir Lawrence Jenkins cited in case A above]. It cannot possibly be said that moneys paid into Court by a judgment debtor under stress of execution under O 21, r 55 (a), are not assets obtained in execution proceedings. It is indeed difficult to see how this view of the section nullifies the provisions of O 21, r 55, for money paid into Court under r 55 may be held to be assets subject to rateable distribution, and yet full effect may be given to r 55. There is no reason why because a particular payment may operate to release the person [see case G] or property of a judgment debtor from attachment, that payment should be applied for the benefit exclusively of the decree holder at whose instance the person or property of the judgment debtor was attached. Moreover, the object of O 21, r 55 is not to afford any inducement to a judgment-debtor as supposed by the Court in *Sorabji v Kala*. All that O 21, r 55, says is that the circumstances mentioned in cls (a), (b) and (c) of that rule shall have the effect indicated in the rule. As to the argument based on the costs of realization, it cannot possibly be said that no costs were incurred in obtaining the moneys from the judgment debtor. The decision in *Sorabji v Kala* has been disapproved by the High Court of Madras (k). It has also been disapproved by Pratt, J, in a later Bombay case—*Nathmal v Maniram* (l). As to the first of the two grounds on which the decision in *Sorabji v Kala* was based, namely, that the money was not realized in process of execution, Pratt, J, said that it followed the cases decided on the words 'sale or otherwise,' which were held to mean sale or other process of execution expressly provided for in the Code, but that it was too restrictive a construction under the amended section (m). As to the second ground, namely, that to allow rateable distribution of money paid into Court under O 21, r 55, would be to nullify the provisions of r 55, the learned Judge said: "I also venture to doubt the correctness of the second reason. Order XXI, rule 55, operates effectively where there is one decree holder. If there are a number of decree holders, there is no scope for the rule for the judgment debtor has no motive for paying off one judgment creditor when the same property is liable to be re-attached by the others. To allow one decree holder to be paid off in full when the

(k) *Thiruvengadam v Lakshmana* (1918) 41 Mad 616, 618, 47 I C 578. *Prattappa v K L L. Narayan* (1919, 6) 42 Mad 38, 97 I C 406.
(l) *N M S*.

(b) (1919) 21 B in L J 95, 97, 99, 53 I C 578.
(m) See *Hari Lal v Fajal Rahman* (1913), 40 Cal 619, 622, 18 I C 852.

of section 73 that other creditors could claim to share. Nor could they under O 21, r 52, where funds in Court are themselves the subject matter of the execution.'

G—*Edg Umersey v W & A Griham & Co* (1917) 19 Bom L R 274, 39 I C 623—Money paid by a judgment debtor under arrest under section 55, proviso 4, to the officer arresting him in order to secure his release is not an asset subject to rateable distribution. [This case is the same as case A.] Macleod J⁶, said: 'It appears that the section was only intended to apply to assets *realised by the sale* of property attached. This view of the section it is submitted is not correct. If this view were correct, money paid to stop a sale under O 21, r 69, and money raised by private alienation under O 21, r 83 would not be assets subject to rateable distribution. But even under the old section it was assumed by Sir Charles Sargent in case A that such monies were available for rateable distribution. It cannot possibly be said that the present section is more restricted in its scope than the old section. See also the observations of Rankin, J., in *Noor Mahomed's case* cited in case F above.'

H—*Nathmal v Maniram* (1919) 21 Bom L R 975, 53 I C 599—A obtained a decree for money against B and in execution of the decree took out a warrant for attachment of the movable property of B under O 21, r 43. The bailiff entered B's shop and showed the warrant to B and pointed out that if the money were not paid he would seize and keep in his custody the movable property in his shop. B then paid the decretal amount and costs of execution and sheriff's poundage. Upon these facts Pratt J expressed the opinion that the money having been paid under stress of the warrant (1) and the warrant being a process of execution the money was an asset available for rateable distribution within the meaning of the present section. The learned Judge, however, felt bound by the decision of the Appellate Court in *Sorabji v Kala* [case F], and held that the money was not subject to rateable distribution.

I—*Ghisulal v Todarmull* (1921) 26 C W N 169, 70 I C 539 (22) A C 19—In a money suit by A against B B's property was attached before judgment and then released on C standing security for the amount of the claim. The suit was ultimately decreed and A applied for execution whereupon C deposited the amount of the decree in Court. On that very day just before the deposit was made D another decree holder applied for execution of his decree. It was held that the monies deposited by the surety were assets held by the Court within the meaning of this section, and D was entitled to rateable distribution.

J—*For other cases see—*

O 21, r 52 notes Priority

O 21, r 72 notes Amount due on the decree

O 21, r 83 notes Rateable distribution

O 21, r 84 notes For payment to the decree holder—rateable distribution

O 38, r 5 notes Deposit in Court

Compensation under Land Acquisition Act, 1894—Compensation deposited by the Collector in Court under sec 31 of the Land Acquisition Act, 1894, has been held to be "assets held by the Court" (u)

4 Decrees for the payment of money.—It is only holders of decrees for the payment of money that are entitled to a rateable distribution under this section. What is a decree for the payment of money within the meaning of this section? We proceed to note the decisions—

- (i) A decree for the payment of mesne profits is a "decree for the payment of money within the meaning of this section, notwithstanding that the amount of mesne profits has not yet been ascertained. The holder of such a decree, who has applied for attachment under O 21, r 42 [Code of 1882, s 255] is entitled to a rateable distribution with other decree-holders under this section (t)
- (u) A decree upon a mortgage, which enables the mortgagee to realize the amount of the mortgage-debt 'from the mortgaged properties and from the defendants personally' was held to be a 'decree for the payment of money within the meaning of the old section by the High Court of Calcutta in *Hart v Tara Prasanna Mukherji* (w). In that case the Court said 'Every decree by virtue of which money is payable, is to that extent a decree for money within the meaning of the section, even though other relief may be granted by the decree [e.g., sale of mortgaged property], and the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money only (x). Following these observations, the High Court of Madras held that where a decree upon a mortgage directs the mortgagor to pay the mortgage-debt to the mortgagee within the period fixed by the Court, and provides that in default the mortgaged property should be sold, and the balance if any should be recovered from the mortgagor, the decree was one 'for the payment of money' within the meaning of the old section (y). In subsequent cases, however which turned upon the meaning of the expression 'decree for the payment of money' which occurred in sec 230 of the Code of 1882 [now s 48] the High Court of Calcutta dissented from the Madras decision on the ground that the decree in that case was not similar to the decree in *Hart v Tara Prasanna Mukherji*, the decree in the latter case containing a distinct order upon the mortgagor personally to pay the amount of the mortgage debt (z). The decree in those cases was similar to the decree in the Madras case, and it was held that the decree was not a 'decree for the payment of money' within the meaning of sec 230 of the Code of 1882. The decision, it seems, would have been the same if the Court had been called upon to interpret the same expression in sec. 230 of the Code of 1882, and the observations in *Hart's* case set out above would have been regarded as mere *obiter dicta*. The Allahabad decisions bearing on the expression 'decree for the payment of money' in sec 230 of the Code of 1882, are also to the same effect (a). There is little doubt that if these High Courts were called upon to decide whether a decree of the character

(u) *Sa t S ra v A F L Mission* (1926) 49 Mad 307

(t) 5 Mad 123

the expression 'decree for the payment of money' now s 48] and approved in *Said nadassamy Ayyar v Somasundaram Pillai* (1905) 28 Mad 473 [a case under s 258 of the Code of 1882, now O 21 r 2]

(x) *Fazil v Krishna* (1898) 95 Cal 590 *Kar-tick v Juggernath* (1900) 27 Cal 283

(a) *Ram Charan v Sheobarat* (1894) 16 All 418, *Isharcan v Dara n* (1900) 22 All 401

in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not. In any event the Madras decision cannot be sustained under this Code see O 21, r 20

- (iii) A decree directing the payment under sec 90 of the Transfer of Property Act [now O 34, r 6] of the balance of the mortgage debt remaining due after payment to the mortgagee of the nett proceeds of the sale of the mortgaged property is a 'decree for the payment of money' within the meaning of this section (b)
- (iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money so far as that person is concerned, merely because it directs, as against another person, the realization of the money claim from mortgaged property. Thus a decree against A, B and C, which, so far as A and B are concerned, is a decree for the enforcement of a mortgage by sale of their property, but which does not direct the sale of any specific property belonging to C, is as regards C, a decree for the payment of money (c)
- (v) A judgment entered up under sec 86 of the Insolvent Debtors Act is a money decree (d)

5. Same judgment debtor.—The provisions of this section do not apply unless the judgment debtor is the same. Where the holder of a decree against two or more persons applies for a rateable distribution of the assets realized from property belonging to one of such persons, the application is one for the execution of the decree against the same judgment debtor.

Illustration

A obtains a decree against A, and attaches A's property in execution of the decree. Y, who holds a decree against A and B, applies for execution of his decree by attachment and sale of A's property attached in execution of A's decree. Y is entitled under this section to share in the proceeds of the sale of A's property. It is immaterial that Y's decree is against B also and that the decree might have been separately executed against B. *Shumbhoo Nath v Luckynath* (1883) 9 Cal 920, *Grant v Subramanian* (1899) 22 Mad 241, *Delhi and London Bank v Uncovenanted Service Bank* (1888) 10 All 35.

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realized from property belonging to that person and another such application is an application for the execution of a decree against the same judgment debtor.

Illustration

A obtains a decree against A, B and C, and attaches in execution of the decree certain property belonging to A, B and C jointly. D holds a decree against A alone. D is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property so far as they represent the share of A in that property. Similarly, if D held a decree against A and B, he would be entitled to a rateable distribution of the assets so far as they represented the share of A and B in the property. *Ginesh v Shira* (1903) 30 Cal 583, *Gatti Lal v Bar Lalalal* (1904) 27 All 158, *Pamanathan v Subramanian* (1903) 26 Mad 179, *Chhotulal v Vaidikhan* (1904) 29 Bom 528. These were decisions under sec 205 of the Code of 1882. They have been followed under the present Code in *Hussain Sahel v P. Sahi* (1906) 28 Bom L R.

(b) *Mall Narayana v L. Narayana* (1900) 23

Service Bank (1888) 10 All 35

Mad 44 256-57

(c) *Delhi and London Bank v Uncovenanted*

(d) *In re Lakshmandas* (1904) 8 B M 511

Rights of Government not affected—A judgment debt due to the Crown is entitled to precedence in execution (r)

Attorneys lien—The section does not apply to a solicitor's common law lien for costs. That lien is not affected by the attachment of the decree (w)

Rights created by this section not affected by insolvency—An order made under this section for rateable distribution is not affected by the insolvency of the judgment debtor *subsequent* to the making of the order. But the order will be confined in its operation to the assets of the judgment debtor realized *up to the date of the order of adjudication*, assets realized *after* the date of the order of adjudication will vest in the Official Assignee (x)

Appeal—An order made under this section is not appealable unless all the conditions enumerated in s 47 are present (y). One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit, that is, between the judgment debtor on the one hand and the decree holder on the other (z). Hence an order made under this section determining a question between *two rival decree holders* in which the judgment debtor had no interest does not fall within s 47 and no second appeal lies from such order (a). But if the question determined by the order arose not only between rival decree holders, but also between the judgment debtor on the one hand and the decree holders on the other, the order would be within s 47, and would therefore be appealable (b).

Revision—As to revision see the undermentioned cases (c)

RESISTANCE TO EXECUTION.

74. [S. 330] Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

See O 21, rr 97 103

(r) *Secretary of State v Lombay Landings Co* (1808) 5 Bl R 33

(w) *Tambly v Jetti* (1917) 51 Bom 855 103 I C 383 (27) A B 542

(x) *Houston v Hurrant* (1900) 27 Cal 351, Official Receiver of Tanjore v Venkatarama (1922) 42 Mad I J 361, 63 I C 512 (2)

(y) A M 31

(z)

(a)

(b)

(c)

I C 546 (2) A M 59 A M 59 A M 59 A M 59
(1911) 31 Bom I R 503 131 I C 37,
(31) A B 25, Shadrappa v Changanur
(1911) 55 Bom 473 133 I C 81 (31)
A B 350

(b) *Sardar v Koli* (1912) 36 Bom 156 12 I C 911 *Jayak of Karvetnagar v Venkata Reddy* (1916) 39 Mad 50 23 I C 231

(c)

in the Madras case was a "decree for the payment of money" within the meaning of this section, they would hold that it was not. In any event the Madras decision cannot be sustained under this Code see O 21, r 20

- (iii) A decree directing the payment under sec 90 of the Transfer of Property Act [now O 34, r 6] of the balance of the mortgage debt remaining due after payment to the mortgagee of the nett proceeds of the sale of the mortgaged property is a "decree for the payment of money" within the meaning of this section (b)
- (iv) A decree directing the payment of money by a person does not cease to be a decree for the payment of money so far as that person is concerned, merely because it directs, as against another person, the realization of the money claim from mortgaged property. Thus a decree against A, B and C, which, so far as A and B are concerned, is a decree for the enforcement of a mortgage by sale of their property, but which does not direct the sale of any specific property belonging to C, is as regards C, a decree for the payment of money (c)
- (v) A judgment entered up under sec 86 of the Insolvent Debtors Act is a money decree (d)

5 Same judgment debtor—The provisions of this section do not apply unless the judgment debtor is the same. Where the holder of a decree against two or more persons applies for a rateable distribution of the assets realized from property belonging to one of such persons, the application is one for the execution of the decree against the same judgment debtor.

Illustration

A obtains a decree against A and attaches A's property in execution of the decree. Y, who holds a decree against A and B, applies for execution of his decree by attachment and sale of A's property attached in execution of A's decree. Y is entitled under this section to share in the proceeds of the sale of A's property, it is immaterial that Y's decree is against B also and that the decree might have been separately executed against B. *Shumbhoo Nath v Luckynath* (1883) 9 Cal 920, *Grant v Subramanian* (1899) 22 Mad 241, *Delhi and London Bank v Uncoordinated Service Bank* (1888) 10 All 33.

Similarly, where the holder of a decree against one person applies for a rateable distribution of the assets of that person realized from property belonging to that person and another such application is an application for the execution of a decree against the same judgment debtor.

Illustration

X obtains a decree against A, B and C, and attaches in execution of the decree certain property belonging to A, B and C jointly. Y holds a decree against A alone. Y is entitled under the provisions of this section to a proportionate distribution of the assets realized by the sale of the joint property so far as they represent the share of A in that property. Similarly, if Y held a decree against A and B he would be entitled to a rateable distribution of the assets so far as they represented the share of A and B in the property. *Ganesh v Shiva* (1903) 30 Cal 583, *Gattu Lal v Lur Lohar* (1905) 27 All 158, *Pamanathan v Subramanian* (1903) 26 Mad 179, *Chhotalal v Valilhal* (1905) 29 Bom 528. These were decisions under sec 295 of the Code of 1882. They have been followed under the present Code in *Hussain Sahib v Feroze* (1926) 29 Bom L.J.,

(b) *Mall Karjunnath v Lingamurti* (1887) 25

Service Bank (1888) 11 All 2.

Mad 241 "uncoordinated"

(c) *Delhi and London Bank v Uncoordinated*

(d) *In re Lohchandani* (1904) 6 Bom 211

78, 93 I C 222, (26) A B 150 and C R M. A Chettyar v K R S V. Chettyar (1927) 5 Rang 757, 107 I C 169, (28) A R 96 In *Balmer Laurie & Co v Jalunath* (1915) 42 Cal 1, 27 I C 644, it was doubted whether the earlier decisions were affected by the introduction in the present section of the word "passed" which did not occur in the Code of 1882 *Balmer Laurie & Co v Jalunath* (1915) 42 Cal 1, 27 I C 644

Decree against legal representative of judgment debtor—The High Courts of Bombay, Madras and Calcutta have held that if a decree is obtained by X against B, and by Y after B's death against B's legal representative, the judgment debtor is not the same and the present section does not apply (e). There is a dictum in a Calcutta case (f), that a decree against a defendant personally and a decree against the same defendant in a representative character are not decrees against the same person, but the observation was not intended as a considered decision (g).

Clauses (a), (b) and (c)—The first paragraph of this section and clauses (a) and (b) have reference to sales in execution of simple money decrees. Clause (a) declares the incompetence of a mortgagee or incumbrancer as such to share in any surplus proceeds when property is sold subject to his mortgage or charge. But the alternative is afforded to him by clause (b) of consenting to the property being sold free of his mortgage or charge, in which case the Court may give him the same right against the sale proceeds as he had against the property. Clause (c) has reference to a sale in execution enforcing an incumbrance, but in distributing the sale proceeds the discharge of subsequent (and not prior) incumbrances is alone taken into account (h), but no payment can be made to a subsequent incumbrancer if the mortgagor challenges its existence or validity (i). In cases coming under clause (c) the application for execution must be made prior to the sale of the property (j). Compare O 34, r 13.

A curious use was sought to be made of clause (b) in the following case. B mortgaged property to A. A sued to enforce the mortgage, but the Court holding that B had no title to the property granted A a simple money decree. A filed an application to execute the money decree. During execution proceedings B became entitled to the property by succession. A believed that under sec 43 of the Transfer of Property Act the mortgage had become effective. He therefore withdrew his application and filed another application for execution by way of realization of his supposed charge under sec 43. This was of course disallowed as the decree was a simple money decree. He then sought to treat his application as an application for attachment and sale of the property reserving a charge on the sale proceeds under sec 73 (1) (b). Thus the Court disallowed as it was diverting the execution proceeding into an enforcement, not of a money decree but of a mortgage decree (l). The Court did not decide whether sec 43 was at all applicable, and it may be noted that sec 43 does not apply after the contract of transfer has merged in a decree.

Claims for rateable distribution of assets—These claims are claims enforceable under an attachment within the meaning of sec 64. See notes to sec 64, "Explanation to the section."

Attachment before judgment—A decree holder who has caused property to be attached before judgment, is not entitled to share in a rateable distribution of

(e)

(f)

(g) *Jahar Lal v Lal & S. Adari* (1930) 34 C W N 204 130 I C 227, (30) A C 454(h) *Jagat v Dhunthien* (1883) 5 All 566. See also *Mithal v Kishin* (1890) 12 All 516(i) *Lachmi v Mithu* (192) 49 All 636 101 I C 502 (27) A A 467(j) *Dalwarya v Pundli* (1900) 22 Bom L R 1001 1003 58 I C 992(k) *Gopin Ambal v Pannathian* (1930) 53 Mad 670 122 I C 366 (30) A M 138

the sale proceeds of that property, unless he makes after judgment, a fresh application for execution under O. 21, r. 11 [Code of 1882, s. 235] O. 38, r. 11 [Code of 1882, s. 400] does not touch the point (f)

Sub-sec. (2): Suit for refund.—The scheme of this section is to enable the Court as a matter of administration to distribute the assets according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication as to those rights, which may be subsequently re-adjusted in a suit brought under the penultimate paragraph of the section (m). Such a suit is virtually a suit for money had and received, and the period of limitation is three years from the date of the receipt of the assets by the defendant (n). The suit being one for money had and received, it would be premature if it were brought before the money was actually paid to the defendant. A mere order for the payment of money under the section is not sufficient to found the action (o).

Suit by subsequent mortgagee to recover balance of money realized by sale under a prior mortgage.—A mortgages his property to A. He then mortgages the same property to B. Subsequently he executes a further charge on the property in favour of A. A sues X on the first mortgage, joining B as a defendant, and obtains a decree on the mortgage. The property is sold in execution of the decree and a balance of Rs. 12,000 which remains after satisfying A's decree is deposited in Court. A then obtains a decree for sale on the further charge and in execution of the decree draws out the balance deposited in Court. B is not joined as a party to this suit, nor is any notice given to him that A was drawing out of Court the balance of Rs. 12,000. B then sues A to recover the amount drawn out by A, that is, Rs. 12,000. Such a suit is not one under sub-sec. (2), and the period of limitation applicable to the suit is 12 years under art. 132 of the Limitation Act. The suit is really one to enforce payment of money charged upon immovable property within the meaning of that article (j).

Declaratory suit.—Is a decree holder claiming under this section entitled to file a suit for a declaration that another decree holder is not entitled to receive distribution, and for an injunction restraining him from receiving payment, before distribution of the assets by the Court, or is he bound to wait until actual distribution is made and then sue for a refund? In a Madras case (q), Sadasiva Ayyar, J., expressed the opinion that he is entitled to sue for a declaration.

Inquiry as to the validity of decree.—There is a conflict of opinion whether or not a claimant's objection that a decree obtained by another claimant is collusive, that is, obtained by the latter in collusion with the judgment debtor, the Court has power to inquire into the validity of the decree. The High Court of Calcutta (r) has held that it has. On the other hand, the High Courts of Madras (s) and Bombay (t) have held that it has not. The latter view, it is submitted, is correct. If a Court executing a decree has no power to go behind the decree [see notes to s. 38], much less has a Court acting under the provisions of this section (u).

(l) *Illangoi v. Jordan* (1884) 12 B.M. 400.

(m) *Arumachellum v. Haji Sheel Umera* (1910).

(n)

(o)

(j)

(k) *Hart v. Tara Prabhanna Mulharji* (1887) 11 Cal. 738.

(l) *Pirbhai v. Tara Prabhaji* (1914) 41 Cal. 644.

(m) *Indurima v. The Bank of India* (1912) 43 Mad. 381.

(n) *Indurima v. The Bank of India* (1912) 43 Mad. 381.

(r) *In re Sunita Dixie* (1885) 11 Cal. 42.

(s) *Purandhar v. Surentra* (1912) 18 Cal. 13.

(t) *In re Sunita Dixie* (1885) 11 Cal. 42.

(u) *In re Sunita Dixie* (1885) 11 Cal. 42.

(v) *In re Sunita Dixie* (1885) 11 Cal. 42.

(w) *In re Sunita Dixie* (1885) 11 Cal. 42.

(x) *In re Sunita Dixie* (1885) 11 Cal. 42.

(y) *In re Sunita Dixie* (1885) 11 Cal. 42.

(z) *In re Sunita Dixie* (1885) 11 Cal. 42.

Rights of Government not affected.—A judgment debt due to the Crown is entitled to precedence in execution (i)

Attorneys lien.—The section does not apply to a solicitor's common law lien for costs. That lien is not affected by the attachment of the decree (ii)

Rights created by this section not affected by insolvency.—An order made under this section for rateable distribution is not affected by the insolvency of the judgment debtor *subsequent* to the making of the order. But the order will be confined in its operation to the assets of the judgment debtor realized *up to the date of the order of adjudication*. Assets realized *after* the date of the order of adjudication will vest in the Official Assignee (x)

Appeal.—An order made under this section is not appealable unless all the conditions enumerated in sec 47 are present (y). One of those conditions is that the question decided by the Court should be one which arose between the parties to the suit, that is, between the judgment debtor on the one hand and the decree holder on the other (z). Hence an order made under this section determining a question between *two rival decree holders* in which the judgment debtor had no interest does not fall within sec 47 and no second appeal lies from such order (a). But if the question determined by the order arose not only between rival decree holders, but also between the judgment debtor on the one hand and the decree holders on the other, the order would be within sec 47, and would therefore be appealable (b).

Revision.—As to revision see the undermentioned cases (c)

RESISTANCE TO EXECUTION.

74. [S. 330] Where the Court is satisfied that the

holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property

See O 21, rr 97-103

(i) *Secretary of State v. Bombay Loaning Co.*

(1868) 5 B. H. C. 23

(ii) *Tribh v. Jetha* (19—) 51 Bom. 855, 105

I. C. 383 (97) A. B. 542

(z) *Horsatton v. Durrant* (1900) 27 Cal. 351.

Official Receiver of Tanjore v. Venkatarama

(1921) 42 Mad. L. J. 361, 68 I. C. 512 (—)

A. B. 31

(y) " " " " " " " " " " " "

(z) " " " " " " " " " " " "

(a) " " " " " " " " " " " "

(b) " " " " " " " " " " " "

(c) " " " " " " " " " " " "

(d) " " " " " " " " " " " "

(e) " " " " " " " " " " " "

(f) " " " " " " " " " " " "

(g) " " " " " " " " " " " "

(h) " " " " " " " " " " " "

(i) " " " " " " " " " " " "

(j) " " " " " " " " " " " "

(k) " " " " " " " " " " " "

(l) " " " " " " " " " " " "

(m) " " " " " " " " " " " "

(n) " " " " " " " " " " " "

(o) " " " " " " " " " " " "

(p) " " " " " " " " " " " "

(q) " " " " " " " " " " " "

(r) " " " " " " " " " " " "

(s) " " " " " " " " " " " "

(t) " " " " " " " " " " " "

(u) " " " " " " " " " " " "

(v) " " " " " " " " " " " "

(w) " " " " " " " " " " " "

(x) " " " " " " " " " " " "

(y) " " " " " " " " " " " "

(z) " " " " " " " " " " " "

(aa) " " " " " " " " " " " "

(ab) " " " " " " " " " " " "

(ac) " " " " " " " " " " " "

(ad) " " " " " " " " " " " "

(ae) " " " " " " " " " " " "

(af) " " " " " " " " " " " "

(ag) " " " " " " " " " " " "

(ah) " " " " " " " " " " " "

(ai) " " " " " " " " " " " "

(aj) " " " " " " " " " " " "

(ak) " " " " " " " " " " " "

(al) " " " " " " " " " " " "

(am) " " " " " " " " " " " "

(an) " " " " " " " " " " " "

(ao) " " " " " " " " " " " "

(ap) " " " " " " " " " " " "

(aq) " " " " " " " " " " " "

(ar) " " " " " " " " " " " "

(as) " " " " " " " " " " " "

(at) " " " " " " " " " " " "

(au) " " " " " " " " " " " "

(av) " " " " " " " " " " " "

(aw) " " " " " " " " " " " "

(ax) " " " " " " " " " " " "

(ay) " " " " " " " " " " " "

(az) " " " " " " " " " " " "

(ba) " " " " " " " " " " " "

(bb) " " " " " " " " " " " "

(bc) " " " " " " " " " " " "

(bd) " " " " " " " " " " " "

(be) " " " " " " " " " " " "

(bf) " " " " " " " " " " " "

(bg) " " " " " " " " " " " "

(bh) " " " " " " " " " " " "

(bi) " " " " " " " " " " " "

(bj) " " " " " " " " " " " "

(bk) " " " " " " " " " " " "

(bl) " " " " " " " " " " " "

(bm) " " " " " " " " " " " "

(bn) " " " " " " " " " " " "

(bo) " " " " " " " " " " " "

(bp) " " " " " " " " " " " "

(bq) " " " " " " " " " " " "

(br) " " " " " " " " " " " "

(bs) " " " " " " " " " " " "

(bt) " " " " " " " " " " " "

(bu) " " " " " " " " " " " "

(bv) " " " " " " " " " " " "

(bw) " " " " " " " " " " " "

(bx) " " " " " " " " " " " "

(by) " " " " " " " " " " " "

(bz) " " " " " " " " " " " "

(ca) " " " " " " " " " " " "

(cb) " " " " " " " " " " " "

(cc) " " " " " " " " " " " "

(cd) " " " " " " " " " " " "

(ce) " " " " " " " " " " " "

(cf) " " " " " " " " " " " "

(cg) " " " " " " " " " " " "

(ch) " " " " " " " " " " " "

(ci) " " " " " " " " " " " "

(cj) " " " " " " " " " " " "

(ck) " " " " " " " " " " " "

(cl) " " " " " " " " " " " "

(cm) " " " " " " " " " " " "

(cn) " " " " " " " " " " " "

(co) " " " " " " " " " " " "

(cp) " " " " " " " " " " " "

(cq) " " " " " " " " " " " "

(cr) " " " " " " " " " " " "

(cs) " " " " " " " " " " " "

(ct) " " " " " " " " " " " "

(cu) " " " " " " " " " " " "

(cv) " " " " " " " " " " " "

(cw) " " " " " " " " " " " "

(cx) " " " " " " " " " " " "

(cy) " " " " " " " " " " " "

(cz) " " " " " " " " " " " "

(da) " " " " " " " " " " " "

(db) " " " " " " " " " " " "

(dc) " " " " " " " " " " " "

(dd) " " " " " " " " " " " "

(de) " " " " " " " " " " " "

(df) " " " " " " " " " " " "

(dg) " " " " " " " " " " " "

(dh) " " " " " " " " " " " "

(di) " " " " " " " " " " " "

(dj) " " " " " " " " " " " "

(dk) " " " " " " " " " " " "

(dl) " " " " " " " " " " " "

(dm) " " " " " " " " " " " "

(dn) " " " " " " " " " " " "

(do) " " " " " " " " " " " "

(dp) " " " " " " " " " " " "

(dq) " " " " " " " " " " " "

(dr) " " " " " " " " " " " "

(ds) " " " " " " " " " " " "

(dt) " " " " " " " " " " " "

(du) " " " " " " " " " " " "

(dv) " " " " " " " " " " " "

(dw) " " " " " " " " " " " "

(dx) " " " " " " " " " " " "

(dy) " " " " " " " " " " " "

(dz) " " " " " " " " " " " "

(ea) " " " " " " " " " " " "

(eb) " " " " " " " " " " " "

(ec) " " " " " " " " " " " "

(ed) " " " " " " " " " " " "

(ee) " " " " " " " " " " " "

(ef) " " " " " " " " " " " "

(eg) " " " " " " " " " " " "

(eh) " " " " " " " " " " " "

(ei) " " " " " " " " " " " "

(ej) " " " " " " " " " " " "

(ek) " " " " " " " " " " " "

(el) " " " " " " " " " " " "

(em) " " " " " " " " " " " "

(en) " " " " " " " " " " " "

(eo) " " " " " " " " " " " "

(ep) " " " " " " " " " " " "

(eq) " " " " " " " " " " " "

(er) " " " " " " " " " " " "

(es) " " " " " " " " " " " "

(et) " " " " " " " " " " " "

(eu) " " " " " " " " " " " "

(ev) " " " " " " " " " " " "

(ew) " " " " " " " " " " " "

(ex) " " " " " " " " " " " "

(ey) " " " " " " " " " " " "

(ez) " " " " " " " " " " " "

(fa) " " " " " " " " " " " "

(fb) " " " " " " " " " " " "

(fc) " " " " " " " " " " " "

(fd) " " " " " " " " " " " "

(fe) " " " " " " " " " " " "

(ff) " " " " " " " " " " " "

(fg) " " " " " " " " " " " "

(fh) " " " " " " " " " " " "

(fi) " " " " " " " " " " " "

(fj) " " " " " " " " " " " "

(fk) " " " " " " " " " " " "

(fl) " " " " " " " " " " " "

(fm) " " " " " " " " " " " "

(fn) " " " " " " " " " " " "

(fo) " " " " " " " " " " " "

(fp) " " " " " " " " " " " "

(fq) " " " " " " " " " " " "

(fr) " " " " " " " " " " " "

(fs) " " " " " " " " " " " "

(ft) " " " " " " " " " " " "

(fu) " " " " " " " " " " " "

(fv) " " " " " " " " " " " "

(fw) " " " " " " " " " " " "

(fx) " " " " " " " " " " " "

(fy) " " " " " " " " " " " "

(fz) " " " " " " " " " " " "

(ga) " " " " " " " " " " " "

(gb) " " " " " " " " " " " "

(gc) " " " " " " " " " " " "

(gd) " " " " " " " " " " " "

(ge) " " " " " " " " " " " "

(gf) " " " " " " " " " " " "

(gg) " " " " " " " " " " " "

(gh) " " " " " " " " " " " "

(gi) " " " " " " " " " " " "

(gj) " " " " " " " " " " " "

(gk) " " " " " " " " " " " "

(gl) " " " " " " " " " " " "

(gm) " " " " " " " " " " " "

(gn) " " " " " " " " " " " "

(go) " " " " " " " " " " " "

(gp) " " " " " " " " " " " "

(gq) " " " " " " " " " " " "

(gr) " " " " " " " " " " " "

(gs) " " " " " " " " " " " "

(gt) " " " " " " " " " " " "

(gu) " " " " " " " " " " " "

(gv) " " " " " " " " " " " "

(gw) " " " " " " " " " " " "

(gx) " " " " " " " " " " " "

(gy) " " " " " " " " " " " "

(gz) " " " " " " " " " " " "

(ha) " " " " " " " " " " " "

(hb) " " " " " " " " " " " "

(hc) " " " " " " " " " " " "

(hd) " " " " " " " " " " " "

(he) " " " " " " " " " " " "

(hf) " " " " " " " " " " " "

(hg) " " " " " " " " " " " "

(hh) " " " " " " " " " " " "

(hi) " " " " " " " " " " " "

(hj) " " " " " " " " " " " "

(hk) " " " " " " " " " " " "

(hl) " " " " " " " " " " " "

(hm) " " " " " " " " " " " "

(hn) " " " " " " " " " " " "

(ho) " " " " " " " " " " " "

(hp) " " " " " " " " " " " "

(hq) " " " " " " " " " " " "

PART III.

Incidental Proceedings.

COMMISSIONS.

Power of Court to issue
commissions

75. [*New.*] Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts or
- (d) to make a partition.

The general powers of Courts in regard to commissions have been summarised in this section. The detailed provisions are set forth in O 26

Commission to another
Court

76. [S. 385.] (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

See O 26, r 4

Letter of request,

77. [*New*] In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

Jurisdiction—A suit against the Secretary of State for India can only be brought in the Court within the local limits of whose jurisdiction the cause of action arose. The words 'dwell' or 'reside,' or 'carry on business' or 'personally work for gain' which occur in secs 16, 19 and 20 of the Code and cl 12 of the Letters Patent do not apply to the Secretary of State in Council (i)

Information exhibited by Advocate General.—The power of the Advocate General to exhibit information in the nature of actions at law or bills in equity was expressly declared by sec 111 of the East India Company Act 1813 [53 Geo 3, c 155] and kept alive by sec 2 of the Government of India Act 1833 [3 & 4 Will 4 c 85] and again by sec 1 of the Government of India Act 1853 [16 & 17 Vict, c 95] and by sec 29 of the Government of India Act 1858 [21 & 22 Vict c 106] now merged in sec 114 of the Government of India Act 1915 [5 and 6 Geo 5 c 61]. As the Governor General in Council was precluded by sec 22 of the Indian Councils Act 1861 [24 & 25 Vict, c 67] from legislative interference with the provisions of any of the enactments above quoted it was thought that sec 416 of the Code of 1882 [now sub section (1) of the present section] in so far as it excluded information exhibited by the Advocate General did not comprehend a full and accurate statement of the law on the subject. Accordingly sub section (2) was added to show that the power exists and is not affected by the section.

Appeals—The rule laid down in this section applies also to appeals (j)

80. [S 424] No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.

Changes in the section—This section corresponds with sec 424 of the Code of 1882. The words 'any act' have been substituted for the words 'an act' and the words 'by such public officer' for the words 'by him'. See notes below.

Notice to Secretary of State

Provisions of this section imperative—The section is a matter of civil procedure and cannot be said to be subject to section 63 of the Government of India Act, see note. Scope of section under section 79. The section is explicit and mandatory and admits of no implications or exceptions (k). The language of this section is imperative and absolutely debars a Court from entertaining a suit instituted without compliance with its provisions. If the provisions of the section are not complied with the plaint must be rejected under O 7 r 11 (d) (l).

(i) *Datta v Secretary of State* (1887)

(k) *Bhaghat v Secretary of State* (1914) 54 I A 338 51 Bom 104 I C 100 (1) A PC 100

(l) *Bachhat v Secretary of State* (1907) 23 All 187. *Jagdish Chand v Debendranand* (1931) 53 Cal 830 137 I C 634 (31) A C 503

Object of notice—The object of the notice required by this section is to give the Secretary of State or the public officer an opportunity to reconsider his legal position and to make amends or settle the claim, if so advised, without litigation (m).

Notice must be given after accrual of cause of action—A notice given before the cause of action has arisen is invalid (n).

Devolution of defendant's interest upon Government pending suit—No notice is necessary if the defendant's interests devolve upon Government during the suit, e.g., a private railway company is taken over by Government, for then the suit has already been instituted (o). But if the suit was instituted in a Court which has no jurisdiction to try a suit against Government, and the devolution occurs after the plaint has been returned for presentation to the proper Court, notice is necessary (p).

Sufficiency of notice.—In some cases a liberal construction was put upon the section and it was held that a notice is sufficient if it substantially fulfils its object in informing the parties concerned of the nature of the suit to be filed (q), and that a notice is not invalid merely because it is given by two out of three plaintiffs (r). But since the Privy Council judgment in *Bhagchand v Secretary of State* (s) strict compliance with the terms of the section has been enforced and a notice given by one of two plaintiffs has been held to be insufficient (t). Again in a case where the plaintiff's father gave notice and then plaintiff filed a suit after the father's death, the notice given by the father in respect of the same cause of action was held to be insufficient (u).

It is essential that the notice should state the names, descriptions, and places of residence of all the plaintiffs. Hence where a suit was brought by sixty three plaintiffs, but the notice contained the names, descriptions and places of residence of only two of them, it was held that the notice was insufficient (v).

If the public officer sued is a receiver appointed by the Court, the application for leave to sue the receiver does not dispense with the necessity for notice (w).

Waiver of notice—It is competent to the Secretary of State to waive notice and he may be estopped by his conduct from pleading the want of notice at a late stage of the trial. Thus where the Secretary of State took objection to the sufficiency of notice in his written statement, but raised no issue on the point when issues were settled, and took no objection during the trial, the Court held that another defendant was not competent to raise this issue at a later stage as the Secretary of State had waived notice (x).

Notice to Secretary of State—Where a suit is to be instituted against the Secretary of State for India in Council, notice to him under this section must be given in all cases, whether the act in respect of which the suit is to be brought purports to be done by him in his official capacity or not. The words "in respect of any act purporting to be done by such public officer in his official capacity" refer to the public officer and not to the Secretary of State. The substitution of the words "by such public officer" for the words "by him" which occurred in the corresponding sec. 424 of the Code of

- (m) *Secretary of State v Perumal* (1901) 24 Mad 273; *Shahbazzee v Ferguson* (1881) 7 Cal 449; *Manindra v Secretary of State* (1907) 5 Cal L J 148; *Secretary of State v Cullum Taml* (1916) 40 Bom 34, 346, 341 C 535.
- (n) *Kennison v Secretary of State* (1925) 54 Cal 961, 107 I C 301 (27) A C 74.
- (o) *G. J. J. v. U. v. U. v. U.* (1926) 24 All. L. J 76, 461 C 351 (27) A C 585.
- (p) *Hirschman v G. J. P. L. v. L.* (1928) 32 Bom 548 (28) A B 421.
- (q) *Jehangir v Secretary of State* (1932) 27 Bom 181.
- (r) *Secretary of State v Perumal* (1901) 24 Mad 273.

- (s) (1927) 54 I A 338, 51 Bom. 725, 104 I C, 27, (27) A B 176.
- (t) *Appa Rao v Secretary of State* (1931) 54 Mad 416, 123 I C 456 (31) A B 175.
- (u) *Mahadev v Secretary of State* (1931) 32 Bom L. R. 604, 124 I C 814 (31) A B 367.
- (v) *Lkha Nath v Secretary of State* (1913) 40 Cal 503, 161 C 842.
- (w) *Jayadukhandra v Indendraprasad* (1931) 54 Cal 250, 132 I C 634 (31) A C 503.
- (x) *Manindra v Secretary of State* (1907) 5 Cal L J 148; *Lkha Nath v Secretary of State* (1913) 40 Cal 503, 161 C 842; *Murari Lal v L. J. Indira* (1925) 47 All. 231, 293, 84 I C 754, (25) A. A. 241.

1882 makes the point quite clear. If a railway is owned by Government a suit in respect of a claim against the Railway Administration must be brought against the Secretary of State after notice under this section (y). Notice of a claim to the Railway Administration under sec. 77 of the Railways Act of 1890, does not dispense with the necessity for notice under this section to the Secretary of State (z).

Notice to public officer—Act purporting to be done in official capacity.—The present section corresponds with sec. 424 of the Code of 1882 except that the word 'any' has been substituted for the word "an," and the words 'such public officer' have been substituted for the word "him." According to the concise Oxford Dictionary, to "purport" in this context means to "be intended to seem." Applying this meaning, the words "any act purporting to be done by such public officer in his official capacity" mean any act "intended to seem to be done by him in his official capacity" (a). If the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was so acting the act clearly purports to be done in his official capacity "within the ordinary meaning of the term 'purport' (b). In a case where the Official Receiver of the Calcutta High Court was sued for negligence in that he failed to collect rents, Rankin, C. J., held that the section applied to non-feasance as well as to misfeasance and referred to the definition of the word 'act' in the General Clauses Act as extending to illegal omissions (c).

Notice to the Secretary of State must be given in all cases *whatever the character of the suit may be* (d) but notice to a public officer is to be given in those cases only where the suit is in respect of any act purporting to be done by such public officer in his official capacity. It follows that notice to a public officer is not necessary where the act done by him is not within his sphere of duties. Thus where a public officer took possession of property which he had no authority to seize and was sued for trespass, it was held that the suit was not against him in his official capacity, but as a private individual and therefore no notice was necessary (e). So also when an investigating police officer assaulted a witness (f) or a sub-overseer was assaulted by his superior officer and the suit was for damages, the act complained of was not an act purporting to be done by the defendant in his official capacity, and therefore no notice was necessary (g). No notice is necessary when the suit is not in respect of an act done by the public officer, although he is made a defendant, as when a Collector is made a party defendant for the protection of the title of a minor (h), or when the suit is against the Official Trustee for the determination of the rights of beneficiaries to trust funds in his hands (i), or when the Official Assignee, as representing the estate of an insolvent, is made a party in a suit for declaration of title and no act of the Official Assignee is complained of except an objection to the entry of plaintiff's name on the record of rights (j).

The decisions are conflicting as to whether notice is necessary under this section when a public officer acts *mala fide*, that is, maliciously or dishonestly, it being held in

- | | |
|-----|---|
| (j) | 130 I. C. 903 (31) A. C. 61 |
| (d) | <i>Secretary of State v. Jale Khan</i> (1911) 37 Mad. 313 10 I. C. 91 |
| (e) | <i>Ganesh v. Jale Khan</i> (1909) 36 C. I. 24 1 I. C. 514 |
| (f) | " " |
| (g) | " " |
| (h) | " " |
| (i) | <i>Abdul Rahman v. Abdul Rahman</i> (1924) 40 All. 844 40 I. C. 72 (24) A. A. 831 |
| (j) | <i>Prasanna v. Jornerjee</i> (1930) 57 Cal. 1127 |
| (k) | <i>Shah v. Jale Khan</i> (1881) 1 Cal. 499 |
| (l) | <i>Damodar v. Jale Khan</i> (1913) 25 Bom. I. R. 378 73 I. C. 240 (23) A. R. 39 |

some cases that it is not (l) while in others that it is (l) necessary. The former proceed on the ground that an act done *mala fide* by a public officer cannot be said to be an "act purporting to be done by such public officer in his official capacity." The latter proceed on the ground that the section makes no distinction between acts done *bona fide* and acts done *mala fide* and that notice is necessary in every case where a public officer purports to act in his official capacity. Thus a suit against a police officer, for having searched the house of the plaintiff, dragged him to the thana, and detained and kept him in confinement for several hours maliciously and without cause could be filed according to the former view without notice because the officer having acted illegally and in bad faith could not be said to have acted in his capacity as a public officer (m). Similarly, in a suit against a District Magistrate and two officers of Police for conspiracy and malicious arrest and search, it was held that the suit was one in which the public officer was sued in respect of an act done in bad faith and therefore no notice under this section was required (n). On the other hand, in *Jogendra Nath Roy v. Price* (o) where the plaintiff sued a District

Magistrate for malicious arrest and search, the High Court of Allahabad in a suit against a Police Officer to recover certain books seized by him in a search, said that if he seized the books, which was denied, he did so in his capacity of Police Officer and that notice was necessary under this section (p). In a case decided by a Full Bench of the Madras High Court (q), A sued B and attached before judgment certain wood belonging to B. Thereafter the village munsif sold the wood for arrears of revenue due from B though there was no necessity to sell the whole and after retaining the amount due for arrears of revenue handed over the balance of the sale proceeds to B, although he had knowledge of the attachment. Thereupon A brought a suit against the village munsif for damages, alleging that the munsif had colluded with B and paid the balance to him. The Court found that the munsif was aware of the attachment and that he dishonestly and fraudulently paid over the balance of the sale proceeds to B. On the question of notice under this section, the Full Bench held that the munsif was entitled to notice under this section, although he acted *mala fide* in the discharge of his duties. The latest decisions of all the High Courts are in favour of the view that notice is necessary even if the act is done *mala fide* and it has been held that notice is necessary when a suit is filed against a Police Officer for malicious prosecution (r). In this connection it is well to recall the dictum of the Privy Council in *Bhagchand v. Secretary of State* (s) that the section admits of no implications or exceptions.

Suits on contracts and torts—The High Court of Bombay had held in a series of cases that the requirement of notice was limited to suits on tort and that no notice was

| | |
|---|--|
| (l) <i>Shahabzade v. Fergusson</i> (1881) Cal 431 per Cunningham J. <i>Mahomed v. Panna Lal</i> (1904) 26 All 100 per Banaji J. <i>Paghubans Sahai v. Phool</i> | <i>Fahman</i> (1974) 46 All 884 50 J 1 72 (24) A 851 <i>Cerret ray v. The Canton</i> |
| (m) | |
| (n) | |
| (o) | (1881) 24 Cal 584 |
| (p) | <i>Thakur Mal v. Balal Lal</i> (1907) 29 All 567 |
| (q) | <i>Kidell v. Southwick</i> (1916) 41 Cal 732 46 J 1 86 |
| (r) | <i>Mukhammad Sharif v. Nasir Ali</i> (1911) 53 All 41 (2) A 742 |
| (s) | (1977) 54 J 1 33 51 J 1 m 725, 104 J 1 55 (27) A 18 176 |

necessary in suits founded on contract (t) In *Prasanna v. Bonnerjee* (u) Rani, C J, said 'It is, no doubt, broadly speaking, true that such a section as this is not intended to apply to actions *ex contractu* and there are other classes of actions no doubt which do not come within the meaning of the expression 'in respect of any act purporting to be done by such public officer in his official capacity' The learned Chief Justice then referred to the case of *Sharpton v. Fulham Guardians* (t) In that case the guardians were under a public duty to supply a receiving house for poor children and had employed a builder to alter a mansion house so as to make it a receiving house for the children of paupers The guardians were sued by the builder on the contract with him Farwell, J, held that the guardians were not subject to a special period of limitation provided by the Public Authorities Protection Act, 1893, because it was a breach of a private contract that was complained of and that it was not a complaint by a number of children or by a member of the public in respect of a public duty In another Calcutta case (u) the section was held applicable to a suit to enforce a mortgage by a common manager under sec 90 of the Bengal Tenancy Act 9 of 1883

Declaratory suits—The section applies to suits for a declaration (x)

Suits for injunction—There was a conflict of decisions as to whether the section applied to suits where the relief claimed was a perpetual injunction This is settled by the Privy Council judgment in *Bhagchand v. Secretary of State* (y) approving Calcutta, Madras, and Allahabad decisions (z) that the section and the corresponding section 124 of the previous Codes should be strictly complied with and that they are applicable to all forms of action and all kinds of relief The Privy Council overruled Bombay decisions that no notice was necessary in a suit for injunction against a public officer or even against the Secretary of State when the act to be restrained might occasion serious or irreparable damage (a) In delivering the judgment of the Board Viscount Sumner said 'To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while sec 80 is a mere procedure, is fallacious, for sec 80 imposes a statutory and unqualified obligation upon the Court So, too, the contention that the 'act purporting to be done by the Collector in his official capacity in respect of which the suit was begun was his threatened enforcement of payment is fallacious also since the illegality, if any is in the order for recovery of the tax If that was valid there was nothing to be restrained Hence though the act to be restrained is something apprehended in the future the act alone in respect of which the suit lies if at all, is the order already completed and issued In a Bombay case it was left open whether if with notice of a suit the intended defendant proceeded to act in such a way as to anticipate a hostile order of the Court in the intended suit, the Court could restore the status quo ante on an interlocutory application before the trial (b)

(t) —————

(194) 50 Cal 902 75 I C 173 (24)

(u)

(v) (1904) 2 Ch 449

(w) *Jatindramohan v. Rebati-mohani* (1932) 59 Cal 961 138 I C 4 (33) A C 25

(x) *Chhaganlal v. Collector of Kaira* (1911) 35 Bom 42 7 I C 993 *Bhagchand v. Secre*

(a)

(y)

(b)

(z)

Application under Sch II, para 17—Notice not necessary.—An application to file an agreement to refer a dispute to arbitration, though registered as a suit, is not a suit and notice is not necessary when the other party is the Secretary of State (c)

By what name public officer to be sued—The suits referred to in this section are suits against the public officer personally in respect of acts done in his official capacity. The public officer cannot be sued by his official name unless he is a corporation sole (d)

Death of complainant after notice but before suit—Notice is given by A under this section to the Secretary of State of a proposed suit. A dies before the institution of the suit. The notice by A does not enure for the benefit of his legal representative, and he must give a fresh notice under this section before instituting the suit (e)

Amendment of plaint—Where notice of a proposed suit is once given, it is not necessary to give a fresh notice of two months if the plaint has to be amended owing to discovery of facts not within the plaintiff's knowledge at the time of the institution of the suit (f). But no amendment will be allowed if the effect of the amendment is to convert the suit into another of a different character, e.g., a suit based on negligence into one based on nuisance. In such a case a fresh suit must be brought after giving fresh notice as required by this section (g).

Notice to Collector.—A Collector is entitled to notice under this section of a suit for damages in respect of an act done by him in his official capacity as agent of the Court of Wards, but he is not entitled to such notice if he is sued or joined as a party not by reason of any act purporting to be done by him in his official capacity, but merely for the protection of a minor's title (h)

Notice to Cantonment Committee—A Cantonment Committee constituted under the Indian Cantonments Act, 1889, is a "public officer" within the meaning of this section (i)

Municipal Council—Notice not necessary—A Municipal Council is not a public officer and no notice is necessary when a suit is filed against a Municipality (j)

Notice to Official Assignee—The Official Assignee is a public officer, and he is entitled to notice under this section before a suit is filed against him in respect of any act purporting to be done by him in his official capacity (l). The same rule applies to a Receiver appointed under the Provincial Insolvency Act, 1920 (l). But no notice is necessary when the Official Assignee or Receiver is made a party to a suit to realize a charge on the property of the insolvent which has vested in him and no act or omission on the part of the Receiver is alleged (m). The Bombay High Court had held that no notice was necessary in a suit to restrain an Official Receiver from selling goods claimed by the plaintiff (n), but as stated above this case has been overruled by Privy Council (o). The Lahore High Court has accordingly held that in such a case notice is necessary (p)

- (c) *Secretary of State v. Kundin Singh* (1932) 13 Lah. 672 137 I C 266 (32) A L 374
 (d) *Sheriff of Bombay v. Hakimji* (1927) 51 B. M. 741 104 I C 645 (27) A B 504 A B 517
Pratt v. The Institution v. N. H. Indraprastha (1933) 14 Lah. 330 (33) A L 213
 (e) *Pachhu v. Secretary of State* (1902) 25 All. 167
 (f) *Eva v. Secretary of State* (1903) 21 Cal. 26
 (g) *McInerney v. Secretary of State* (1911) 35 Cal. 77 13 I C 35
 (h) *Anantaraman v. P. Thangaraj* (1888) 11 Mad. 517 11 Ann. 155 13 B. M. 343
 (i) *Coal Cr. v. The Cantonment Committee of Poonah* (1911) 34 B. L. 555 1 I C 679

- (j) *Municipal Council Anantapur v. Faruquee* (1912) 55 Mad. 207, 135 I C 311 (31) A B 804
 (k) *Joorub v. Kemp* (1902) 26 B. M. 809 11 Ann. 124 I C 144 (30) A B 434
 (l) *De Nira v. Govind* (1927) 44 B. M. 895 59 I C 411 12 Ann. 141 (27) A A 241
 (m) *47 All. 291 84 I C 73 (27) A A 241*
 (n) *Si pper d. Co. v. David* (1927) 45 All. 821, 131 I C 138 (27) A C 132
 (o) *Nayindal v. Officiat* (see page (1912) 37 B. M. 213 1 I C 876
 (p) *Bhagchand v. Secretary of State* (1907) 54 I A 338 51 B. M. 725, 104 I C 257, (27) A B 176
 (r) *Dalchand v. Kalyan Singh* (1931) 12 Lah. 299 133 I C 4, (31) A L 705

Notice to receiver necessary—A receiver appointed in a suit is a public officer and is entitled even after his discharge to notice before a suit is filed against him for acts purporting to have been done in his official capacity (g)

Notice to Official Trustee—By sec 16 of the Official Trustees Act 2 of 1913 it is enacted that nothing in sec 80 of the Code shall apply to any suit against the Official Trustee in which no relief is claimed against him personally

Notice to Administrator General—By sec 41 of the Administrator General's Act 3 of 1913 it is enacted that nothing in sec 80 of the Code shall apply to any suit against the Administrator General in which no relief is claimed against him personally

Notice to common manager appointed under sec 95 of the Bengal Tenancy Act 8 of 1885—Such a manager is a public officer within the meaning of this section and he is entitled to notice under this section (r).

Limitation—In computing the period of limitation prescribed for a suit under this section the period of the notice should be excluded (s)

Place of suing—See note to sec "3 above Jurisdiction"

81. [Ss 427 428] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Execution in arrest and personal appearance

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person

Otherwise than in execution of a decree—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment See O 27 r 8

82. [S 429] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied, and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

(g) *P. Bhattacharya v. J. Ramakrishna* (1) D. 34 C. W. N. 611 1913 C. 108 (3) A. C. 37
(r) *Prabhat Singh v. Deb Narayan* (3) 1915 4 W. N. 328 551 C. 47 J. P. 100
v. *Bhatnagar* (1913) 50 Cal. 961 121 TC

104 (3) A. C. 35
(s) Limitation Act 1908 s. 15 (1) North India Law Commission's *Report on the Law of Limitation* (1911) P. R. no. 5 P. 18 341 C. 600

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS

83. [S 430] (1) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends, may

When aliens may sue

sue in the Courts of British India, as if they were subjects of His Majesty

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of subsection (2), be deemed to be an alien enemy residing in a foreign country.

Alien enemy.—As to who are alien enemies see the undermentioned cases (i)

Alien enemy residing in British India with permission of Government of India—A filed a petition in the Allahabad High Court for judicial separation against her husband. The parties were Germans, and the petition was filed while England was at war with Germany. At the time of filing the petition A was residing in Lucknow apparently with the permission of the Government of India while her husband was in Germany. After filing the petition, A applied for an order directing the summons together with a copy of the petition to be sent to the Probate Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent. The Court granted the application (u)

Limitation—Where the right of alien enemies to sue is suspended by an order of the Government, the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit (t)

84. [S 431.] (1) A foreign State may sue in any Court of British India

When foreign States may sue

Provided that such State has been recognised by His Majesty or by the Governor-General in Council.

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(i) *Janson v. Dreyfonsen Consulate Mines Ltd* [1902] A C 484 p. 505 *Dimer Company Ltd v. Continental Tyre and Rubber Co., Ltd* [1916] 2 A C 338 *Haji Ali v. Abdul Jalil* (190) 1 Lah. 26

55 I C 34
() *Asjari v. Joseph* (1917) 39 All 377 39 I C 862
(r) *De tach Asatuche Davil v. Hra Lall* (1919) 46 Cal 506 47 I C 398

Notice to receiver necessary.—A receiver appointed in a suit is a public officer and is entitled, even after his discharge to notice before a suit is filed against him for acts purporting to have been done in his official capacity (g)

Notice to Official Trustee.—By sec 16 of the Official Trustees Act 2 of 1913 it is enacted that nothing in sec. 80 of the Code shall apply to any suit against the Official Trustee in which no relief is claimed against him personally.

Notice to Administrator-General.—By sec 41 of the Administrator General's Act 3 of 1913 it is enacted that nothing in sec 80 of the Code shall apply to any suit against the Administrator General in which no relief is claimed against him personally.

Notice to common manager appointed under sec. 95 of the Bengal Tenancy Act 8 of 1885.—Such a manager is a public officer within the meaning of this section, and he is entitled to notice under this section (r)

Limitation.—In computing the period of limitation prescribed for a suit under this section, the period of the notice should be excluded (s)

Place of suing.—See note to sec 79 above, "Jurisdiction."

81. [Ss. 427, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance

- (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,
- (b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

"Otherwise than in execution of a decree."—The object of clause (a) is to exempt a defendant who is a public officer from mesne arrest and his property from mesne attachment. See O 27, r 8

82. [S. 429.] (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report

(g) *Pillayandi v. Jurnachandani* (1930) 34 C W N 671, 129 I C 102, (30) A C 737
(r) *Benu Mallick v. Deb Narayan* (1919) 24 C W N 132, 53 I C 747, *Jatin Pradhan v. Ichaitimohan* (1932) 59 Cal 961, 131 I C

104, (32) A C 275
(s) Limitation Act 1908 s 15 (2), *North Western Railway v. Jam Dhanab Lal* (1917) P R no 52 p 187 3-1 C 600

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS

83. [S 430] (1) Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts

Explanation—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of subsection (2) be deemed to be an alien enemy residing in a foreign country

Alien enemy—As to what are alien enemies see the undermentioned cases (f)

Alien enemy residing in British India with permission of Government of India—*It* filed a petition in the Allahabad High Court for judicial separation against her husband. The parties were Germans and the petition was filed while England was at war with Germany. At the time of filing the petition *It* was residing in Lucknow apparently with the permission of the Government of India while her husband was in Germany. After filing the petition *A* applied for an order directing the summons together with a copy of the petition to be sent to the Probate Divorce and Admiralty Division of the High Court in England for transmission to the Foreign Office for service upon the respondent. The Court granted the application (u)

Limitation—Where the right of alien enemies to sue is suspended by an order of the Government the period during which the right is suspended is not to be excluded from the time prescribed by the Limitation Act for the suit (v)

When foreign States may sue **84. [S 431]** (1) A foreign State may sue in any Court of British India

Provided that such State has been recognised by His Majesty or by the Governor General in Council

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity

(f) *Jansson v. Driefontein Consol. Ltd.* 1901 A.C. 484. *Compagnie Financière et Industrielle du Nord et du Pas de Calais v. British Overseas Airways Corp.* 1910 A.C. 334. *Hay v. Abdol Jalil* (1913) 1 Ind. 66

55 L.C. 34
(v) *A. J. Joseph* (1917) 39 All. 377. 39
1 C. 86
(v) *De Luchas v. Luchas* (1910) 46 Cal. 56. 47 I.C. 398

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council

Foreign State—The Gadwal Samasthan in the Hyderabad State is not a foreign state (u)

Sub section (1) proviso (2)—The second proviso to the corresponding sec 431, C P C 1882 ran as follows —

Provided that the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State

The language of that proviso was liable to be construed as conferring upon the head of a foreign State a general power to litigate in respect of the private rights of his subjects. Such however, was not the object and the language has accordingly been modified to make it clear that the object of litigation by a foreign State must be the enforcement of a private right vested in the head of the State or in an officer of the State as such.

Private right vested in the head of a State—That is those private rights of a State that must be enforced through a Court of Justice as distinguished from its political rights (z)

Foreign State as plaintiff—A suit by a foreign State must be brought in the name by which it has been recognized by His Majesty (y)

85. [S 432] (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

(u) *Venkataram v Raja of Gadwal* (1930) 53 Cal 1000 128 I C 870 (30) A M 1004
(z) *Hajon v Bur Singh* (1885) 11 Cal 17

(y) *United States of America v Wagner* (1907) 2 Ch App 55.

Recognized agents specially appointed under this section - This section is an enabling section. It enables a Sovereign Prince or Prince Consort to appoint or discontinue through recognized agents specially appointed in that behalf, it does not prevent the institution of a suit by a Sovereign Prince or Prince Consort or through a recognized agent appointed under this section (Article 1902 & 1903).

A plaintiff may institute a claim on behalf of a P'ing Ch'ieh in a given *li* *li* *li*. At the time of signing the plaintiff *A* *B* was a specially appointed *ts'ao* on behalf of the Ch'ieh under this *ts'ao*. The plaintiff is nevertheless good if *A* *B* is subsequently appointed *ts'ao* on behalf of the Ch'ieh and if the appointment is made before the expiration of the period of limitation prescribed by the suit (*su*).

A Political Agent is especially appointed under this section cannot take on behalf of a Prince (1)

Discovery A foreign State is not exempt from giving discovery (c)

86. [S 433] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued, but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

- (a) has instituted a suit in the Court against the person desiring to sue him, or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court, or
- (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(2) *Malajaja* of *Blaratp* r s *Kicleru* (1837)
 13 All 510 *Beer Chunder* s *Mal* in
Chunder (1884) 19 (al 136 *bee* als)
Rimshel *o* *ira* v *Malajaja* *Ber* *ira*
 (1924) 2J C W N .87 80 I C 100 (-5)
 A C 513

(a) *Mal Traji f Herah v Summa Saran* (1903)
→ All 615
(b) *Yenktiray v Mathuray* (1887) 11 Bom 53
(c) *United States of America v Wagner* (1867)
→ Ch App 530 *Republic of Peru v*
Haguelin (1875) L R 10 Eq 140

(4) The Governor-General in Council may, by notification in the *Gazette of India*, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Consent shall not be given "unless it appears to the Government that"—The words 'it appears to the Government that' have been added in sub section (2) to make it clear that the decision of the Government is final and not open to question by the Court. The contrary was assumed in the undermentioned cases (d)

Consent must be obtained before institution of suit.—This section provides that a Sovereign Prince or Ruling Chief may be sued in any competent Court with the consent of the Governor General in Council. Such consent must be obtained before the institution of the suit, consent given after the institution of the suit is not a sufficient consent under this section. If the consent is not obtained before the institution of the suit, the proper course is to dismiss the suit, or, perhaps, allow the plaintiff to withdraw it with liberty to bring a fresh suit under O 23, r 1 [Code of 1882, s 373] (e)

Waiver of objection to want of consent.—As stated in the notes to s 21 where a Court has no jurisdiction at all to entertain a suit, the objection to its jurisdiction may be taken at any stage of the suit even though the defendant may have at one time waived the objection, for a defect in the jurisdiction cannot be cured by waiver, but if the case is one of irregular exercise of jurisdiction, the defect may be cured by waiver on the part of the defendant. If a suit is entertained against a Sovereign Prince without the consent of the Governor General in Council, the case is one of irregular exercise of jurisdiction, and if the defendant does not object until the suit is ripe for hearing, he will be deemed to have waived the objection to jurisdiction. This was decided by the High Court of Bombay after an exhaustive review of the authorities on the subject (f). This view has been dissented from by the High Court of Madras on the ground that 'the recognition of cases of waiver, as excepted from the ordinary provisions of International Law as understood in England, cannot be imported into the clear language of the Indian Code' (g). The Patna High Court has gone to the length of holding that applications for adjournment made on behalf of a Ruling Chief amount to a waiver of his privilege and debars him from objecting to the jurisdiction of the Court (h).

The fact that a Sovereign Prince chooses to waive his privilege in one suit does not preclude him from pleading it in another suit (i)

- (d) *Beer Chunder v Raj Coomur Nobodeep Chunder* (1883) 9 Cal 535. *Maharaja of Jaipur v Lajp Sahai* (1907) 29 All 379.
 (e) *Chandulal v Asut bin Umar* (1894) 21 Bom 351, 355-56. See also *Maharaja of Nripendra v Maharaja Manindra* (1912) 17 C W N 1242, 22 I C 889.
 (f) *Chandulal v Asut bin Umar* (1897) 21 Bom 351. As to what amounts to a

- submission to jurisdiction see *Mughel v Sultan of Johore* (1831) 1 Q. B. 149.
 (g) *Narayana v The Cochin Sarkar* (1916) 29 Mad 681, 30 I C 511.
 (h) *Maharaj Paladur v Saan Suran* (1921) 6 Pat L J 185, 61 I C 989 (21) A P 23.
 (i) *Beer Chunder v Raj Coomur Nobodeep Chunder* (1883) 9 Cal 535.

Suit against person who subsequently becomes a Puling Chief—Where a person attains the rank of a Puling Chief after the institution of a suit against him the suit cannot be continued against him without the consent of the Governor General in Council (j)

Immovable property—Where a Puling Chief and a private individual are co-owners in the profits of land within British India a suit by the latter against the Puling Chief for his share of the profits under s. 105 of the Agra Tenancy Act [U. P. Act 2 of 1901] cannot be instituted in a Court of British India without the consent of the Governor General in Council (l)

Money charged on immovable property—Unless maintenance has been made a charge upon immovable property a mere claim for maintenance is not a claim for money charged on immovable property within the meaning of sub-section (2) of (c) (f)

Suit against Ruling Chief in his private capacity—The provisions of this section apply whether the suit is brought against a Ruling Chief in his Sovereign capacity or in his private capacity e.g. as a trustee of a temple in British India (i)

Sovereign Prince—The Maharajah of Hill Tipperah is a Sovereign Prince within the meaning of this section in that the Tipperah State governs itself without dependence on any foreign power. It makes and administers its own laws and the Maharajah limitedly exercises the power of life and death within his own territory. Its acknowledgement of the British Government as the paramount power and the nazar paid on the recognition by that Government of succeeding Maharajahs do not take away from it the status of a Sovereign State (n)

Ruling Chief—The Desai of Patah is a Puling Chief within the meaning of this section (o). The Kurundwal Jahageerdars are also Ruling Chiefs (p). The Maharaja of Benares is also a Ruling Chief (q).

Sub-section (4)—For notifications issued under this sub-section see General Statutory Rules and Orders Vol I pp 625-638

Limitation—In computing the period of limitation the plaintiff is not entitled to deduct the time spent in obtaining a certificate under this section (r). Sec. 13 of the Indian Limitation Act 1908 provides that in computing the period of limitation prescribed for a suit the time during which the defendant has been absent from British India shall be excluded. The Calcutta High Court has held that the time must be excluded even if the defendant was carrying on business in British India through an authorised agent during his absence (s). The High Court of Bombay however has held that sec. 13 of the Limitation Act must be read with secs. 85-86 and 87 of the Code so far as a Sovereign Prince or a Ruling Chief is concerned and that such a Prince or Chief can be held to reside in British India within the meaning of sec. 13 of the Limitation Act in so far as he actually carries on business through his representatives in British India (t).

- | | |
|---|--|
| (j) <i>Maharaj Lalur v. S. S. Sa</i> (1901) 6 Pat. L. J. 185 H. I. C. 983 (1) A. I. 23 | (l) <i>Prashad v. Secret. of State</i> (1918) 1 Bo. L. R. 365 I. C. 8 |
| (k) <i>Jankhaya Lal v. H. H. the Maharaj of Jodhpur</i> (1914) 46 All. 355 78 I. C. 559 (24) A. A. 4 | (m) <i>Inahaya Lal v. H. H. the Maharaj of Jodhpur</i> (1914) 46 All. 355 78 I. C. 559 (24) A. A. 4 |
| (n) <i>Beer Chund r. v. Raj. Coon a. Voholep Chund r.</i> (1883) 9 Cal. 530 | (o) <i>Shr. t. Sayaj. M. J. a. J. Malharao</i> (1913) 53 B. n. l. 115 I. C. 369 (2) A. B. 14 |
| (p) <i>V. r. Janna v. The Coch. n. S. ar</i> (1913) 38 Mad. 635 1 I. C. 33 affirmed (1916) 39 Mal. 661 30 I. C. 511 | (q) <i>Poor o. Ch. n. l. r. v. S. sooo</i> (1898) 25 C. I. 460 |
| (r) <i>Beer Chund r. v. Raj. Coon a. Voholep Ch. n. d. r.</i> (1883) 9 Cal. 530 | (s) <i>Sh. n. a. t. S. n. J. a. J. Malharaj v. Malharao</i> (1913) 53 B. n. l. 115 I. C. 369 (20) A. B. 14 |
| (s) <i>Pambha v. H. mat Sangji</i> (1894) 8 Thom. 415 | |

87. [S 434] A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State

Style of Princes and Chiefs as parties to suit

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name

INTERPLEADER

88. [S 470, R S C, O 57, rr 1-2] Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from

Where interpleader suit may be instituted

another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted

See O 3a below

Changes in the section —This section corresponds with s 470 of the Code of 1882 except in the following particulars

- (1) The words the same debt sum of money or other property movable or immovable have been substituted for the words the same payment or property
- (2) The words who claims no interest therein other than for charges or costs have been borrowed from R S C O 57 r 2 and have been substituted for the words whose only interest therein is that of a mere stakeholder

What is an interpleader suit—An interpleader suit is one in which the real dispute is between the defendants only and the defendants *interpl ad* that is to say plead against each other instead of pleading against the plaintiff as in an ordinary suit. In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the Court to be entitled to it. Thus

suppose certain property is claimed by *A* as well as by *B*, and *X* is in possession of that property and claims no interest in the property himself and is ready and willing to deliver it to such party as may be declared by the Court to be the rightful owner of it, *A* as plaintiff may institute an interpleader suit against *A* and *B* as defendants. In such a case *A* will as a rule, be dismissed from the suit at the first hearing after his costs are provided for, and *A* and *B* will be left to interplead and to fight the matter out between themselves as if one of them was plaintiff and the other was defendant (O 35, r 4). But before the plaintiff is dismissed from the suit, he must deposit the property in dispute in Court (O 35 r 2).

Who claims no interest other than for charges or costs.—These words indicate that the plaintiff in an interpleader suit must be in a real position of impartiality. A railway company which claims no interest in goods in its possession other than a lien on the goods for wharfage, demurrage and freight may institute an interpleader suit, where the goods are claimed by two persons adversely to each other (u).

I holds in his hands a sum of Rs. 5,000 which is claimed by *B* and *C* adversely to each other. *I* institutes an interpleader suit against *B* and *C*. It is found at the hearing that *I* had entered into an agreement with *B* before the institution of the suit that if *B* succeeded in the suit he should accept from *I* Rs. 4,000 only in full satisfaction of his claim. Here *I* has by virtue of the agreement an interest in the *subject matter* of the suit, and he is not therefore entitled to institute an interpleader suit. The suit must be dismissed (r).

A party who has taken an indemnity from one of the claimants is not entitled to file an interpleader suit (w).

A suit is not necessarily an interpleader suit and subject to the provisions of this section, merely because one of the reliefs claimed by the plaintiff requires the defendants to interplead together concerning certain claims. The Court must have regard to all the prayers of the plaint to determine the exact nature of the suit (x).

(u) *Bombay and Burda Ely Co v Sassoon* (1894) 18 Bom. 231. *Allenborough v St Katharine's Dock* (18 8) 3 C P D 450.
(r) *Murietta v South American Co* (1893) 62 L J Q B 396.

(w) *Hari Karmakar v Robin* (1927) 4 Rang 465 99 I C 985 (-7) A 11 91.
(x) *Juggannath v Tulka Keri* (1908) 32 Bom 532.

PART V.

Special Proceedings.

ARBITRATION.

89. [New.] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule.

Arbitration.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Arbitration—The provisions of the Code of 1882 relating to arbitration have been transferred with certain modifications to a separate Schedule [Sch II] "in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act"

The effect of the section is that that all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder are governed by the provisions contained in the second Schedule except where the Arbitration Act or any other law relating to arbitration applies (y) But see notes to O 23, r 3, "Submission and award"

Indian Arbitration Act 9 of 1899, application of the Act.—The Act came into force on the first day of July 1899. It relates to "arbitration by agreement without the intervention of a Court of Justice," that is to say, to private arbitrations only. Sec 3 of the Act provides that sections 523 to 526 of the Code of 1882 [now paras 17, 19 and 20 of Sch II] shall not apply to any submission or arbitration to which the Act applies. The question then arises, to what cases does the Act apply? Sec 2 of the Act provides that the Act "shall apply only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town." The terms of that section show that two conditions must be present before the provisions of the Arbitration Act can be applied to an agreement to refer matters in dispute to arbitration, namely, (1) that there should not be a suit pending in respect of those matters (z), and (2) that the case must be one in respect of which if either party wanted to bring a suit the suit could be instituted in a Presidency town. It is only to such cases that the Arbitration Act applies. In other cases the provisions of paras 17, 19 and 20 of Sch II apply.

(y) *Dinkarrai v. Ieshwantrao* (1930) 54 Bom 197, 124 I C 119 (30) A B 98

(z) *Ramjidas v. House* (1908) 33 Cal 199, 200,

Perera v. Gullapudi (1910) 34 Bom 372, 373, 4 I C 133

PART V.

Special Proceedings.

ARBITRATION.

89. [New.] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second Schedule

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code

Arbitration—The provisions of the Code of 1882 relating to arbitration have been transferred with certain modifications to a separate Schedule [Sch II] “in the hope that at no distant date they may be transferred into a comprehensive Arbitration Act”

The effect of the section is that that all references to arbitration whether by an order in a suit or otherwise and all proceedings thereunder are governed by the provisions contained in the second Schedule except where the Arbitration Act or any other law relating to arbitration applies (y) But see notes to O 23, r 3, ‘Submission and award.

Indian Arbitration Act 9 of 1899, application of the Act.—The Act came into force on the first day of July 1899. It relates to “arbitration by agreement without the intervention of a Court of Justice,” that is to say, to private arbitrations only. Sec 3 of the Act provides that sections 523 to 526 of the Code of 1882 [now paras 17, 19 and 20 of Sch II] shall not apply to any submission or arbitration to which the Act applies. The question then arises, to what cases does the Act apply? Sec 2 of the Act provides that the Act “shall apply only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town.” The terms of that section show that two conditions must be present before the provisions of the Arbitration Act can be applied to an agreement to refer matters in dispute to arbitration, namely, (1) that there should not be a suit pending in respect of those matters (2) and (2) that the case must be one in respect of which if either party wanted to bring a suit the suit could be instituted in a Presidency town. It is only to such cases that the Arbitration Act applies. In other cases the provisions of paras 17, 19 and 20 of Sch II apply.

(y) *D. Narayan v. Jeshwantrao* (1930) 54 Bom 197 1241 C 119 (39) A B 98
(z) *Ramjiadas v. House* (1903) 30 Cal 190, 200,

Perera v. Gollapudi (1910) 34 Bom 32
373 41 C 133

Sec. 2 of the Arbitration Act empowers the Local Government with the previous sanction of the Governor General in Council to declare the Act applicable to local areas other than Presidency towns as if they were Presidency towns.

"Any other law for the time being in force.—There are other Acts besides the Arbitration Act and the Civil Procedure Code which deal with arbitration, e.g. the Companies Act, the Indian Arbitration Act, the Indian Arbitration Act and the Co-operative Societies Act.

Suit on an award.—As to the form of a suit on an award see Sch. I App. A Form No. 10. See also notes to Sch. II para. 20. This paragraph is not a regular suit to enforce an award.

In this connection may be noted the provisions of sec. 31 of the Specific Relief Act of 1930 by which it is enacted that the provisions of Chapter II of the Act relating to the specific performance of contracts shall *mutatis mutandis* apply to awards. See Pollock and Mulla's Indian Contract and Specific Relief Acts notes to sec. 30 of the latter Act.

SPECIAL CASE

90. [New] Where any persons agree in writing to state a case for the opinion of the Court then the Court shall try and determine the same in the manner prescribed.

Power to state case for opinion of Court

See O. 36 below.

Re opening of case.—It is settled practice that where a special case is stated by consent it can only be re-opened by mutual consent (a).

SUITS RELATING TO PUBLIC MATTERS

91. [New] (1) In the case of a public nuisance the Advocate General or two or more persons having obtained the consent in writing of the Advocate General may institute a suit though no special damage has been caused for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Public nuisances

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

This section is new. It creates a right of action where there was none before.

Remedies for a public nuisance.—Nuisances are of two kinds—(1) public and (2) private.

A public nuisance is an act or illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy

property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right [Indian Penal Code, s 268]

Where a person commits a public nuisance—

- (a) he is liable to criminal prosecution under the Indian Penal Code,
- (b) he may be proceeded against under this section,
- (c) he is liable to damages in a suit at the instance of a private individual who suffers *special damage* by reason of the nuisance, that is, damage *beyond* what is suffered by him in common with other persons affected by the nuisance (b)

These remedies, it is conceived, are concurrent. The institution of a criminal prosecution does not bar a suit under this section (c), nor does the institution of a suit under this section bar a criminal prosecution, though cases may occur where the Advocate-General may, in the exercise of his discretion, refuse his consent under this section where a criminal prosecution is pending in respect of the same act or omission.

Illustrations—A keeps his horses and waggons standing for an unreasonable time in the highway

(a) This is a public nuisance for which a criminal prosecution may be instituted against A

(b) Further, a suit may be instituted against A under the present section by the Advocate General, or by two or more persons with the consent in writing of the Advocate General though no special damage has been caused for an order requiring A to abate the nuisance, and for an injunction restraining him from continuing the nuisance. If the nuisance is repeated or continued, notwithstanding the injunction he is liable for contempt where the decree granting the injunction is passed by a High Court (d) or he may be proceeded against under O 21, r 32 below, or he may be punished with imprisonment or fine or both under sec 291 of the Penal Code

(c) If the horses and waggons are kept standing opposite a man's house, so that the access of customers is obstructed, the house is darkened and the people in it are annoyed by bad smells a suit may be brought against A by the occupiers for damages, the damage so caused being sufficiently *special* to entitle them to maintain the action (e). The mere fact that a suit has been instituted under this section against A by the Advocate General at the relation of the occupiers, or by the occupiers themselves as plaintiffs with the consent of the Advocate General, will not preclude the occupiers from maintaining a *private action* against A for the *special damage* caused to them. *Quære* whether they can claim damages for the special damage in a suit brought under this section? It is conceived they cannot. It is submitted that the words 'such other relief as may be appropriate' do not include such damages. In England however, persons who have suffered special damage from a public nuisance may join the Attorney General as a co plaintiff in a suit brought by the Attorney General at their relation and the Attorney General may claim an injunction, and the persons specially damaged by the nuisance may claim damages (f). The present section does not warrant such a procedure in India

- | | |
|---------------|---|
| (b) — " " " " | 513 ('99) A B 94 |
| " " " " | (c) <i>Comptre Attorney-General v Proprietor of the Bradford Canal</i> (1866) L R Eq 71 |
| " " " " | (d) See <i>Kochappa v Sacha Devi</i> (1903) 26 Mad 494 |
| " " " " | (e) <i>Benjamin v Storr</i> (1874) L R 9 CP 400 |
| " " " " | <i>Poorobashi Pal v Bhobun Chunder Das</i> (1874) 21 W R 408 |
| " " " " | (f) See for instance <i>Attorney-General v Logan</i> [1891] 2 Q B 100 |

The suit contemplated by this section is a suit of a public nature, exclusively brought to vindicate a public right. The section finds its place in the Part headed "Special Proceedings" under the division "Suits relating to public matters," and this affords a sufficient indication of the object of the section.

Nature of proceeding under this section.—Proceedings for a public nuisance in England were formerly commenced by an *Information* filed by the Attorney General in the High Court of Chancery. They are now instituted by action in the High Court of Justice [See R.S.C., O. 1, r. 1]. The action may be brought like the *Information*—

- (1) by the Attorney General acting *ex officio*, or
- (2) by the Attorney General at the relation of a private individual.

Under the present section, a suit for a public nuisance may be instituted—

- (1) by the Advocate General acting *ex officio*, or
- (2) by the Advocate General at the instance of relators, or
- (3) by two or more persons having obtained the consent in writing of the Advocate General.

Difference between suit by Advocate General acting *ex officio* and suit by him at the relation of private individuals.—Except for the purposes of costs, there is no difference between an *ex officio* suit and a suit at the relation of private individuals. In both cases the Sovereign, as *parens patriae*, sues by the Advocate General (g). "When the Attorney General proceeds at the relation of a private person or a corporation, he takes the proceeding as representing the Crown, and the Crown through the Attorney General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party to the proceedings although he is responsible for the costs, any more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right, it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant but of the Crown" (h). "When once the matter is in the hands of the Attorney General it becomes substantially a public proceeding, in which the Attorney General, if there be no relator, becomes as prosecutor responsible for the costs, while if a relator is introduced, the responsibility for costs is upon the latter" (i).

Relator's interest in the suit.—A relator need not have any personal interest in the matter, except as one of the public, he need not in fact, be himself damaged at all' (j).

Interest of persons suing with consent of Advocate General.—Persons suing for a public nuisance with the consent of the Advocate General under the section need not have any personal interest in the matter of the suit, except as members of the public. They are entitled to sue under this section, 'though,' to use the words of the section, "no special damage has been caused [to them]." In the other words, they need not have a cause of action in themselves.

Injunction.—The following are some of the leading principles by which the Courts are guided in granting injunctions—

- 1 The injury complained of must be either irreparable or continuous (l). The remedy by way of injunction is therefore not appropriate for damage which

(g) *Attorney-General v. Cockermouth Local Board* (1874) L. R. 18 Eq. 172 per Jessel M.R.

(h) *Attorney-General v. Loosan* (1891) 2 Q. B. 100 106 per Vaughan Williams J.

(i) *Ib.* p. 103 per Will. J.

(j) *Ib.*

(k) *Attorney-General v. Cambridge Gas Consumers Co.* (1868) L. R. 4 Ch. 71, 81.

is in its nature temporary and intermittent (l) or is accidental and occasional (m) or for an interference with legal rights which is trifling in amount and effect (n)

- 2 Apprehension of future mischief from something in itself lawful and capable of being done without creating a nuisance is no ground for an injunction (o) "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial" (p)
- 3 Though no substantial damage is proved, the Court may grant an injunction if the defendants claim the right to continue doing that which the Court has held they are not entitled to do (q)
- 4 Where an illegal act is committed which in its nature tends to the injury of the public, an injunction will be granted to restrain the act without proof of actual injury to the public (r)
- 5 Where the plaintiff has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to enquire in what way the defendant can best remove it, the plaintiff is entitled to an injunction at once, and it is the duty of the defendant to find his own way out of the difficulty whatever inconvenience or expense it may put him to But where the difficulty of removing the nuisance is considerable the Court may suspend the operation of the injunction for a time (s)
- 6 No length of time can legalize a public nuisance Though twelve years user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance apart from the length of time for which it may have continued (t)
- 7 A public nuisance is not excused on the ground that it causes some convenience or advantage [Indian Penal Code, s 268]

"Declaration"—A suit may be instituted under this section by two or more Mahomedans for a declaration that they are entitled to carry *tabuts* in procession along a public road for immersion in the sea against persons who obstruct them in doing so and for an injunction restraining interference in the exercise of this right (u)

"Other relief."—The removal of a public nuisance, e.g., encroachment on a public street may be directed by the Court under this part of the section (v)

Sub section (2)—The Code of Criminal Procedure contains provisions for the removal of a public nuisance by summary proceedings before a Magistrate (w) The High Court of Calcutta has held that where special damage is caused to a private individual by a public nuisance, he has a right of suit against the person causing the nuisance

- (l) *Attorney General v Sheffield Gas Consumers Co* (1853) 3 D M G 304 *Attorney General v Cambridge Gas Consumers Co* (1868) L R 4 Ch 71
- (m) *Cooke v Forbes* (1867) L R 5 Eq 168
- (n) *Gaint v Fynney* (1872) L R 8 Ch App 8 *Handuano Urban District Council v Woods* [1899] 2 Ch 705
- (o) *Attorney-General v Corporation of Manchester* [1893] 2 Ch 87 (a leading case on injunctions in *quia timet* action)
- (p) *Fletcher v Bealey* (1884) 28 Ch 633 at p 698
- (q) *Attorney-General v Action Local Board* (1882) 22 Ch D 221
- (r) *Attorney-General v Shrewsbury Bridge Co* (1882) 21 C D 75

- (s) " " " "
- (t) " " " "
- (u) " " " "
- (v) " " " "
- (w) " " " "
- orders in urgent cases where a speedy remedy is desirable see s 144 of the same Code

for a removal of the nuisance, and a Civil Court may pass a decree to that effect, notwithstanding that an order for the like purpose might be made by a Magistrate (x) This right is saved by sub-sec (2)

Instances of public nuisance.— 'Public or common nuisances affect the King's subjects at large, or some considerable portion of them, such as the inhabitants of a town, and the person therein offending is liable to criminal prosecution. A private nuisance affects only one person or a determinate number of persons, and is the ground of civil proceedings only' (y) Building over any part of a public street is a public nuisance, for such act must necessarily cause obstruction to persons who may have occasion to use their public right over the part encroached upon. The public is entitled to the full width of the public street, however wide it may be, and whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over (z) An obstruction is not the less a nuisance, because it is on a part of the street not commonly used, or otherwise leaves room enough for the ordinary amount of traffic (a) On the other hand, the High Court of Calcutta has held that as regards tidal navigable rivers, a slight encroachment does not necessarily constitute a public nuisance. It seems to us rather," the Court said, "that there must be some evidence that such encroachment *causes* one of the results specified in sec. 268" [of the Indian Penal Code] (b)

Acts which merely offend the sentiments of a class do not amount to a public nuisance. In India it must often happen that acts are done by the followers of one creed which must be offensive to the sentiments of those who follow other creeds. Upon this principle it has been held that the placing of a Mahomedan symbol in the neighbourhood of a Hindu temple is not a public nuisance, though likely to cause annoyance to Hindus (c) Similarly, it is not a public nuisance to expose on the verandah of a house, meat cut up for a dinner, though it may annoy the feelings of Jains frequenting a temple close by the house (d) But wilfully slaughtering cattle in a public street so that the groans and blood of the animals could be heard and seen by the passers by is a public nuisance, for it must necessarily cause annoyance to every one of the passers by Hindu, European, Mahomedan or other, who was not utterly devoid, not merely of refinement, but also of all proper feelings (e)

92. [s. 539] (1) In the case of any alleged breach of any express or constructive trust created

Public charities

for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local

- | | | | | |
|-----|--|---|---|---|
| (z) | " | " | " | 605 609 dissenting from <i>dicta</i> to the contrary in <i>Umesh Chandra Kar in the matter of</i> (1887) 14 Cal 606 |
| (y) | | | | (c) <i>Muttumira v Queen-Empress</i> (1884) 7 Mad 590 |
| (z) | | | | (d) <i>Queen Empress v Byramji</i> (1888) 12 Bom 437 |
| (a) | <i>Turner v Ringwood Highway Board</i> (1870) | | | (e) <i>Queen-Empress v Zakhruddin</i> (1888) 10 All 44 |
| | L.R. 9 Eq 418 | | | |
| (b) | <i>Jujil Das v Queen Empress</i> (1893) 20 Cal | | | |

2 Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquiries ;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Changes introduced by the section.—This section corresponds with sec 539 of the Code of 1882 except in the following particulars —

- 1 The words, ' public purposes of a charitable or religious nature,' have been substituted for the words, " public, charitable or religious purposes," to remove the misconception that " public " is merely co ordinate with " charitable " or " religious "
- 2 The words, " whether contentious or not," have been added to give effect to a Calcutta decision See note below, " Whether contentious or not "
- 3 The words, " in the principal Civil Court of original jurisdiction," have been substituted for the words, " in the High Court or the District Court "
- 4 The words, " or any other Court empowered in that behalf by the Local Government," have been added in order to invest *Courts subordinate to District Courts* with power to try cases under this section
- 5 Clause (a) is new It is intended to supersede a Madras decision, and to give effect to the Calcutta, Bombay and Allahabad decisions cited in note below, " Clause (a) removing any trustee "
- 6 Clause (d) is also new It gives legislative recognition to a Bombay decision cited in note below, " Clause (d) directing accounts and inquiries "

- 7 Sub-section (2) is new. It is intended to give effect to the view of the section taken by the Bombay High Court that this section is mandatory, and to supersede the decision to the contrary of the other High Courts. See note below. Sub-section (2) this section is mandatory.

Romilly's Act.—The present section has been borrowed in part from s. 2 (now s. 101) called Romilly's Act. As to the applicability of decisions under that statute to cases under the present section see the unmentioned case (f).

Object of the section.—The real object of the special provisions of sec. 23 [this section] seems to us to be clear. Persons interested in any trust were if there were a bill "join always competent to maintain a suit against any trustee for his removal for breach of trust" but where the joining of all of them was inconvenient or impracticable it was considered desirable that some of them might sue without joining the others. Provided they obtained the consent of the Advocate General or of the Collector of the District and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust. (g)

Representative suit and res judicata.—The suit contemplated by this section is a representative suit that is a suit which is prosecuted by individuals not for their own interests but as representatives of the general public (h). A decree in a suit under this section will therefore operate as res judicata under sec. 11, Explanation VI of the Code (i).

Jurisdiction.—The words 'within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situated' apply both to the Principal Civil Court of original jurisdiction and to the Court empowered in that behalf. The section therefore overrides cl. 12 of the Letters Patent (j). But if the trust fund is deposited with a firm at Madras and that firm has a place of business at Calcutta the Calcutta High Court has jurisdiction as the trustees could require payment at Calcutta (k). Where the trustees and the trust fund are within the jurisdiction of a Court, but the charity is to be founded in a territory outside the jurisdiction the Court has jurisdiction to pass a decree declaring the trusts upon which the fund is to be held but it cannot go further in the way of settling a scheme and it will leave it to the Court of the place in which the charity is to be carried out to settle the scheme (l). Nor can a Court apply the *cy pres* doctrine *extra territorium* (m).

Who may sue under this section.—A suit under this section may be brought—

- (1) by the Advocate General and outside the Presidency towns by the Collector or such officer as the Local Government may appoint in that behalf [see s. 93] or
- (2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

All persons to whom sanction has been given must sue. A suit by some only of the persons to whom sanction has been given will not lie (n).

(f) *Ranganami Naikan v Varadappa Naikan* (1894) 17 Mad 463.

(g) *Sajedur Iyaz v Gour Mohun Das* (1897) 24 Cal 418 425. *Budree Das v Choom Lal* (1906) 33 Cal 789 804. *D Cruz v D Silva* (1909) 3rd Mad 131 135 1 IC 995.

(h) *Anand Rao v Ramdas* (1911) 48 I A 12 16 48 Cal 493 497 498. 6th IC 737 (21) A IC 123. *Gopu v Rajammal* (1909) 43 Mad. L. J 418 69 IC 15 (2) A M 394.

(i) *Abdur Rahim v Mahomed Barkat Ali* (1918) 55 I A 96 55 Cal 519 108 IC 361 (28) A FC 16. *D Naha v Jamatia* (1909) 33 Bom 509. 1 IC 701 per

Davar J at pp 556-531 per Beaman J at pp 56 563 2 IC 71.

(j) *Padampat v Narayandas* (1930) 59 Cal 357 137 IC 808 (32) A C 444.

(k) *Padampat v Narayandas supra*.

(l)

(m)

(n)

(n) *Pulchayya v Venkatakushnamachari* (1930) 53 Mad 223 124 I C 29 (30) A M 129. *Venkatesha v Rana* (1915) 34 Mad 119 26 IC 99.

Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquiries ;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Changes introduced by the section.—This section corresponds with sec. 539 of the Code of 1882 except in the following particulars :—

1. The words, "public purposes of a charitable or religious nature," have been substituted for the words, "public, charitable or religious purposes," to remove the misconception that "public" is merely co ordinate with "charitable" or "religious"
2. The words, "whether contentious or not," have been added to give effect to a Calcutta decision See note below, "Whether contentious or not."
3. The words, "in the principal Civil Court of original jurisdiction," have been substituted for the words, "in the High Court or the District Court."
4. The words, "or any other Court empowered in that behalf by the Local Government," have been added in order to invest *Courts subordinate to District Courts* with power to try cases under this section
5. Clause (a) is new It is intended to supersede a Madras decision, and to give effect to the Calcutta, Bombay and Allahabad decisions cited in note below, "Clause (a) : removing any trustee"
6. Clause (d) is also new. It gives legislative recognition to a Bombay decision cited in note below, "Clause (d) . directing accounts and inquiries"

- 7 Sub-section (2) is new. It is intended to give effect to the view of the section taken by the Bombay High Court that this section is mandatory, and to supersede the decision to the contrary of the other High Courts. See note below. Sub-section (2) this section is mandatory.

Romilly's Act.—The present section has been borrowed in part from 52 Geo. 3 c. 101, called Romilly's Act. As to the applicability of decisions under that statute to cases under the present section see the unmentioned case (f).

Object of the section.—The real object of the special provisions of sec. 639 [this section] seems to us to be clear. Persons interested in any trust were, if they could all join, always competent to maintain a suit against any trustee for his removal for breach of trust, but where the joining of all of them was inconvenient or impracticable it was considered desirable that some of them might sue without joining the others provided they obtained the consent of the Advocate General or of the Collector of the District, and this condition was imposed to prevent an indefinite number of reckless and harassing suits being brought against trustees by different persons interested in the trust" (g).

Representative suit and res judicata.—The suit contemplated by this section is a representative suit that is, a suit which is prosecuted by individuals not for their own interests but as representatives of the general public (h). A decree in a suit under this section will therefore operate as res judicata under sec. 11, Explanation VI of the Code (i).

Jurisdiction.—The words "within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate" apply both to the principal Civil Court of original jurisdiction and to the Court empowered in that behalf. The section therefore overrides cl. 12 of the Letters Patent (j). But if the trust fund is deposited with a firm at Madras and that firm has a place of business at Calcutta, the Calcutta High Court has jurisdiction as the trustees could require payment at Calcutta (k). Where the trustees and the trust fund are within the jurisdiction of a Court, but the charity is to be founded in a territory outside the jurisdiction the Court has jurisdiction to pass a decree declaring the trusts upon which the fund is to be held, but it cannot go further in the way of settling a scheme, and it will leave it to the Court of the place in which the charity is to be carried out to settle the scheme (l). Nor can a Court apply the *cy pres* doctrine *extra territorium* (m).

Who may sue under this section.—A suit under this section may be brought—

- (1) by the Advocate General and outside the Presidency towns, by the Collector or such officer as the Local Government may appoint in that behalf [see s. 93], or
- (2) by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General.

All persons to whom sanction has been given must sue. A suit by some only of the persons to whom sanction has been given will not lie (n).

- | | |
|---|---|
| (f) <i>Rangasami Naikan v Varadappa Naikan</i> (1894) 17 Mad 462 | Davar J at pp 596-531 per Beaman J at pp 56 509 2 I C 701 |
| (g) <i>Sajedur Raja v Gour Mohun Das</i> (1897) 24 Cal 418 425 <i>Budree Das v Choomi Lal</i> (1908) 33 Cal 789 804 <i>D Cruz v D Silva</i> (1909) 32 Mad 131 135 1 I C 935 | (j) <i>Padampat v Narayandas</i> (1932) 59 Cal 267 127 I C 600 |
| (h) <i>Anand Rao v Ramdas</i> (1921) 48 I A 12 16 48 Cal 493 497 498 62 I C 737 (21) A PC 123 <i>Gopu v Rajammal</i> (19-2) 43 Mad. L J 448 69 I C 15 (22) A M 394 | (k) " |
| (i) <i>Abdur Rahim v Mahomed Barkat Ali</i> (1978) 55 I A 96 55 Cal 519 108 I C 361 (28) A PC 16 <i>Dunsha v Jametji</i> (1909) 33 Bom 509 2 I C 701 per | (l) " |
| | (m) " |
| | (n) <i>Putchayya v Venkatakruśnamachari</i> (1937) 53 Mad 223 124 I C 220 (30) A M 129 <i>Venkatesha v Ramaya</i> (1915) 33 Mad 1192 26 I C 202 |

"Interest in the trust"—When a suit under this section is not instituted by the Advocate General it must be brought by at least two persons, and such persons must have "an interest" in the trust. S 539 of the Code of 1877 contained the words "a direct interest". Those words seem to have been taken from the judgment of Lord Eldon in *In re the Bedford Charity* (o). Those words also occurred in sec 539 of the Code of 1882. That section was amended by sec 44 of Act 7 of 1888, and the words "an interest" were substituted for the words "a direct interest". It must have appeared to the Legislature that the limitation of a "direct" interest was not expedient in India, and hence the section must have been amended (p). The effect of the amendment has been to widen the class of persons who are entitled to institute a suit under this section (q). Thus persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit under this section against the trustees of the temple (r). Similarly persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf were held to have a sufficient interest to entitle them to sue the shevals or ministers of the idol under this section (s). Likewise worshippers at a mosque have "an interest" within the meaning of this section in the trusts of the mosque (t). If the persons suing have an interest in the trust it is not necessary that they should have been personally affected by any act done by the person sued (u). But the interest must be an existing interest and not a mere contingency, the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue (v). It has been held by a Full Bench of the Madras High Court that the "interest" contemplated by this section must be a present and substantial interest and not sentimental or remote. Thus public Hindu temples are prima facie taken to be dedicated for the use of all Hindus resorting to them. But the bare possibility, however remote, that a Hindu of another place might desire to visit a temple does not give him "an interest" in the trust sufficient to entitle him to sue under this section. Hence where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry it was held that though he had a right as a Hindu to worship in the temple, he had not such an interest in the trust as to entitle him to sue under this section (u). The Lahore High Court has held that a right of worship constitutes an interest under the section (x), but that a bare possibility of resort for worship does not give the plaintiff a locus standi (y). It has been held by the Judicial Committee that descendants of the founder of a public Hindu chattram, although only in the female line, are "persons having an interest in the trust," and consequently they are entitled to maintain a suit under this section, even though they might never themselves make use of the chattram (z).

(o) (1819) 2 Swans 518

(p) *Vaidyanatha v Swaminatha* (1924) 51 I A 282, 288, 47 Mad 884, 891, 82 I C 804, (24) A FC 221.(q) *Shailayananda v Umeshanunda* (1905) 2 Cal L J 460, 470.(r) *Sajedur v Gour Mohun* (1897) 24 Cal 418. *Jugalkishore v Lakshmandas* (1899) 23 Bom 659, *Chintaman v Dhondo* (1888) 15 Bom 612, 622, 623, *Pam Churn v Protab* (1905) Cal L J 448.(s) *Manohar v Lakshmuram* (1888) 12 Bom 247.(t) *Jawahra v Aibor Hussain* (1885) 7 All 178, 183, 184, *Vaidyanatha v Swaminatha* (1924) 51 I A 282, 288, 47 Mad 884, 891, 82 I C 804, (24) A FC 221.(u) *Srinaram v Srinivasa* (1927) 50 Mad 726, 102 I C 270, (27) A M 462.(v) *Mohiuddin v Sayeduddin* (1893) 20 Cal 810.

(u) " " " "

" " " "

" " " "

(x) *Narainjan v Kirpal* (1924) 5 Lah. 455, 85 I C 111, (25) A L 189.(y) *Kirpa Singh v Asaupal Singh* (1930) 11 Lah 142, 124 I C 305, (30) A L 1.(z) *Vaidyanatha v Swaminatha* (1924) 51 I A 282, 47 Mad 884, 82 I C 804, (24) A L 221 affirming (1921) 41 Mad L J 20, 68 I C 631, (21) A M 563.

Consent of Advocate General.—The “consent in writing” required by this section must be a specific permission given to two or more persons by name, a permission given to one applicant by name ‘and another’ is not a sufficient compliance with the terms of this section (a). The High Court of Bombay has held that a suit under this section brought by only one plaintiff with the consent of the Advocate General is bad at its institution, and the plaint cannot be amended by the addition of a second plaintiff, though the Advocate General may consent to the amendment, the reason given being that the section nowhere speaks of the consent of the Advocate General to an amendment of the plaint, and that a suit which was bad at its inception is not bettered by its amendment (b). On the other hand, it has been held by the High Court of Madras that persons interested may be added as parties to the suit with the consent of the Advocate General under O 1, r 10. It has thus been held by that Court that if a suit is brought by A alone under this section (c) or by A and B of whom B has no interest in the trust (d), the plaint may be amended by adding C, a person interested, as a party plaintiff in either case with the consent of the Advocate General. Similarly it has been held by that Court that if a suit be brought by A and B, and neither of them has any interest in the trust, the plaint may be amended by adding the Advocate General as a plaintiff on his application (e).

The “consent in writing” required by this section is a condition precedent to the institution of the suit to which such consent relates. If, therefore, no valid consent is given before the institution of the suit, the suit must be dismissed, or the plaintiff may be allowed to withdraw the suit with liberty to bring a fresh suit. The defect cannot be rectified after the institution of the suit (f). And where such consent is given, the suit must be confined to the matters included in the consent, it is not competent to the Court to grant reliefs other than those included in the terms of the consent (g). Further where a suit is brought under this section, no amendment should be permitted without the sanction of the Advocate General. Where a plaint in a suit brought under this section is amended without the consent of the Advocate General e.g., where a new party is added as a defendant and possession of the trust property is claimed from him, the Court must dismiss the suit (h). It is an invariable practice in the Bombay Presidency for the Advocate General to endorse his consent upon the plaint (i).

The Advocate General in giving his consent has to exercise his judgment in the matter, and see not only whether the persons suing are persons who have an interest in the trust, but also whether the trust is a public trust of the character defined in the section, and whether there are *prima facie* grounds for thinking that there has been a breach of trust (j). Where the sanction given by the Advocate General is so worded as to indicate that the Advocate General has not exercised his judgment it is *not a defect fatal to the suit*, but a mere irregularity falling within the scope of sec 99, hence the decree in the suit will not be interfered with in appeal unless the irregularity is shown to have affected the decision of the suit on the merits (l).

When an order is made against the trustee of a charity under sec 5(5) of the Charitable and Religious Trusts Act, 1920, and the trustee without reasonable excuse fails to comply with it, he shall be deemed to have committed a breach of trust affording ground for a

- (a) *Gopal Dei v Kanno Dei* (1903) 26 All 162
 (b) *Darves v Jainudin* (1906) 30 Bom 603
 (c) *Ramayyanganar v Krishnayyanganar* (1887) 10 Mad 185
 (d) *Jekkam v Sur S Subramania* (1920) 43 Mad 720 56 IC 450
 (e) *Ambalavana v The Advocate-General* (1920) 43 Mad 707, 55 IC 548
 (f) *Tricumdars v Akimji* (1892) 16 Bom 626, *Gopal Dei v Kanno Dei* (1904) 26 All 162
 (g) *Sayad Hussein v Collector of Kara* (1897) 21 Bom 257 *Aziz-ul Haq v Muham*

- mad* (1919) P R no 144, p 370, 51 IC 611 *Srinivasa v Venkata* (1888) 11 Mad 148 *Putchayya v Venkatakrishnamachariu* (1930) 53 Mad 223, 124 IC 220, (30) A M 129
 (h) *Abdul Rehman v Cassim* (1912) 36 Bom 169, 11 IC 726
 (i) *Suleman v Shaikh Ismail* (1915) 39 Bom 580, 30 IC 17
 (j) *Sajedur Raja v Gour Mohun Das* (1897) 21 Cal 418 428
 (k) (1897) 24 Cal 418, 428 *supra*

"Interest in the trust"—When a suit under this section is not instituted by the Advocate General it must be brought by at least two persons, and such persons must have "an interest" in the trust. S 539 of the Code of 1877 contained the words "a direct interest". Those words seem to have been taken from the judgment of Lord Eldon in *In re the Bedford Charity (o)*. Those words also occurred in sec 539 of the Code of 1882. That section was amended by sec 44 of Act 7 of 1898, and the words 'an interest' were substituted for the words "a direct interest". It must have appeared to the Legislature that the limitation of a 'direct' interest was not expedient in India, and hence the section must have been amended (p). The effect of the amendment has been to widen the class of persons who are entitled to institute a suit under this section (q). Thus persons entitled to worship in a temple have such an interest in the trust as to enable them to institute a suit under this section against the trustees of the temple (r). Similarly persons residing in a village, whose business it was to conduct pilgrims to a shrine and perform the worship of the idol on their behalf were held to have a sufficient interest to entitle them to sue the shevals or ministers of the idol under this section (s). Likewise worshippers at a mosque have 'an interest' within the meaning of this section in the trusts of the mosque (t). If the persons suing have an interest in the trust it is not necessary that they should have been personally affected by any act done by the person sued (u). But the interest must be an existing interest and not a mere contingency, the mere possibility of succession to the managership of trust properties in respect of which the suit is brought is not sufficient to give a right to sue (v). It has been held by a Full Bench of the Madras High Court that the interest contemplated by this section must be a present and substantial interest and not sentimental or remote. Thus public Hindu temples are prima facie taken to be dedicated for the use of all Hindus resorting to them. But the bare possibility, however remote, that a Hindu of another place might desire to visit a temple does not give him 'an interest' in the trust sufficient to entitle him to sue under this section. Hence where a suit was brought under this section by a Hindu residing in Madras and another residing in Tellicherry in respect of a temple situated in Tellicherry, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry it was held that though he had a right as a Hindu to worship in the temple, he had not such an interest in the trust as to entitle him to sue under this section (w). The Lahore High Court has held that a right of worship constitutes an interest under the section (x) but that a bare possibility of resort for worship does not give the plaintiff a locus standi (y). It has been held by the Judicial Committee that descendants of the founder of a public Hindu chattram although only in the female line, are "persons having an interest in the trust," and consequently they are entitled to maintain a suit under this section, even though they might never themselves make use of the chattram (z).

(o) (1819) 2 Swans 518

(p) *Vaidyanatha v Swaminatha* (1924) 51 I A 282 288 47 Mad 884 891 82 I C 804 (24) A PC 221

(q) *Shivalajananda v Umeshanunda* (1905) 2 Cal L J 460 470

(r) *Sa*

(s) *Manohar v Lakshmiram* (1888) 12 Bom 247

(t) *Jawahra v Akbar Husain* (1885) 7 AIL 178 183 184 *Vaidyanatha v Swaminatha* (1924) 51 I A 282 288 47 Mad 884 891 82 I C 804 (24) A PC 221

(u) *Srinaram v Srinivasa* (1907) 50 Mad 726 102 I C 270 (27) A M 462

(v) *Mohiuddin v Sayyiduddin* (1893) 20 Cal 810

(w) *Ramachandra v Parameshwaran* (1919) 42 Mad 360 50 I C 693 referred to it seems with approval in *Vaidyanatha v Swaminatha* (1924) 51 I A 282 288 47 Mad 884 891 82 I C 804 (24) A PC 221

(x) *Narainjan v Kirpal* (1924) 5 Lah 455 85 I C 111 (25) A L 189

(y) *Kirpa Singh v Ajaipal Singh* (1930) 11 Lah 142 124 I C 305 (30) A L 1

(z) *Vaidyanatha v Swaminatha* (1924) 51 I A 282 47 Mad 884 82 I C 804 (24) A PC 221 affirming (1921) 41 Mad L J 20, 68 I C 631 (21) A M 563

suit under sec. 92 of the Code, and such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate General, and in such a suit the Court may make a decree removing the trustee (l). It is not necessary that the suit should be instituted by the party who has secured the order under the Charitable and Religious Trusts Act, 1920, but the reliefs claimed must be such as arise from the failure to produce accounts (ll).

Public purposes—This section relates to those charities only in which the public are interested. A trust for a public Hindu temple is a trust for a public purpose of a religious nature within the meaning of this section (m). A permanent bequest by a Parsi for the purpose of Muktaḍ ceremonies is a trust for public purposes of a religious nature for such ceremonies include prayers for the spiritual welfare of all Zoroastrians and tend to the advancement of the Zoroastrian religion (n). A Mahomedan wakf is a trust for public purposes of a charitable and religious nature (o) and the trust may be for the sale of a property in India to provide funds for the establishment of a boarding house for Hajis at Mecca (p). If the reliefs specified in the section are claimed with reference to a wakf the section applies (q). A *muff* that is otherwise private does not become public simply because some persons are fed when *gurus* is performed and a water *pandal* is maintained in the *muff* during the hot season (r). But where a number of the public had always used a temple to which a *dharmashala* was attached and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadarant* it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature (s). A trust is not the less a trust for a public purpose because the main object of the trust is the support of *fakirs* of a particular sect and the propagation of the tenets of that sect (t).

"Any alleged breach of trust."—These words are not equivalent to "any alleged breach of any admitted trust." It is not therefore a condition precedent to the applicability of the section that the trust alleged by the plaintiffs is admitted by the defendants (u).

"Where the direction of the Court is deemed necessary for the administration of any such trust."—To bring a suit within this section there must either be a breach of trust or the directions of the Court must be necessary for the administration of the trust. The directions, which we referred to in this section are such as are necessary for the carrying out of the trust and as are given to a trustee, either the existing trustee where there is one or the new trustee, where one is to be appointed. The nature of the reliefs expressly mentioned shows what is meant by the words "deemed necessary for administration of any such trust" (v). The mere appointment of a *Mutawalli* is not a direction within the meaning of this section (w).

"Whether contentious or not."—These words are new. They are intended to give effect to a decision of the Calcutta High Court under sec. 539 of the Code of 1882

Who may be sued under this section.—It is not necessary that the defendant should be either a de jure or de facto trustee, otherwise no suit can be brought under this section in a case in which all trustees are dead or refuse to act (z). Thus a suit may be brought under this section against persons in possession of the trust property who claim adversely to the trust, that is, claim to be the owners of the property (a), or against persons who deny the validity of the trust (b). But a suit against one who is merely a servant for misappropriation of the trust property does not fall under this section (c). See notes, below, "Trustee" and "Suits for possession of trust property."

Order for security for costs against defendant trustee.—Section 10 of the Charitable and Religious Trusts Act, 1920, provides that if in any suit instituted under the present section, the Court trying such suit may if, on the application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred, or likely to be incurred, by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part, and that when any money has been so deposited, the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit, but that before making over any sum to the plaintiff the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Clause (a): removing any trustee.—This clause is new. Though this clause did not occur in the corresponding sec. 539 of the Code of 1882, it was held by the High Courts of Calcutta, Bombay and Allahabad (i), following an earlier decision of the Madras High Court (e), that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee came under that section, though the removal of a trustee was not one of the reliefs specified in that section. Such a relief, it was said, was either covered by the words "such further or other relief as the nature of the case may require" or it was implied in the clause providing for the appointment of new trustees. On the other hand the Madras High Court held in a later case that such a suit did not come under that section (f). Sub sec. (1) cl. (a), of the present section gives effect to the Calcutta, Bombay and Allahabad decisions. A suit for the removal of a trustee must therefore be instituted in conformity with the provisions of this section. The High Court of Madras has held that a suit by the trustees of a temple for a declaration that the appointment by the Devasthanam Committee of the defendant as a trustee in place of a deceased trustee is invalid and for an injunction to restrain him from interfering with the management of the temple is in effect a suit for the removal of the defendant from the office of trustee, and that it cannot be instituted without the sanction required by this or the next section (g). A similar view has been taken by the Patna High Court (h). This view has been dissented from by the High Court of Bombay on the ground that to bring a suit within this section there must either be an alleged breach of trust or the direction of the Court must be deemed necessary for the administration

(z) *Venkatanarayanan v. Subba Rao* (1923) 48 Mad 300 318 321 73 I.C. 991 (23) A.M. 376

(a) *Raghobar v. Kesho* (1889) 11 All. 18 [F.B.]
Budh Singh v. Niradbaran (1905) 2 Cal. L.J. 431
Chintaman v. Dhondo (1891) 15 Bom. 612
Jafarkhan v. Daudshah (1911) 13 Bom. L.R. 49 9 I.C. 358
Deo Saran v. Deoti (1924) 3 Pat. 842

(b) " " " " " "

(c) *Baldeo v. Gopalji* (1923) 21 All. L.J. 310,

(23) A.A. 247
 (d) *Sayedur Raja v. Gour Mohun Das* (1907) 24 Cal. 418
Sayad v. Collector of Kham (1897) 21 Bom. 48
Thurani Hyatt v.

(e) " " " " " "

(f) " " " " " "

(g) " " " " " "

(h) *Syed v. Jilani* (1905) 4 Ind. 741, 89 I.L. 1035 (25) A.L.J. 144

suit under sec 92 of the Code, and such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate General, and in such a suit the Court may make a decree removing the trustee (i) It is not necessary that the suit should be instituted by the party who has secured the order under the Charitable and Religious Trusts Act, 1920, but the reliefs claimed must be such as arise from the failure to produce accounts (ii)

Public purposes.—This section relates to those charities only in which the public are interested. A trust for a public Hindu temple is a trust for a public purpose of a religious nature within the meaning of this section (m) A permanent bequest by a Parsi for the purpose of Muktaf ceremonies is a trust for public purposes of a religious nature for such ceremonies include prayers for the spiritual welfare of all Zoroastrians and tend to the advancement of the Zoroastrian religion (n) A Mahomedan wakf is a trust for public purposes of a charitable and religious nature (o), and the trust may be for the sale of a property in India to provide funds for the establishment of a boarding house for Hajis at Mecca (p) If the reliefs specified in the section are claimed with reference to a wakf the section applies (q) A *mutt* that is otherwise private does not become public simply because some persons are fed when *gurupuja* is performed and a water *pandal* is maintained in the *mutt* during the hot season (r) But where a number of the public had always used a temple to which a dharmashala was attached and the surplus funds not required for the service of the temple were to be applied to feeding travellers and maintaining a *sadavari*, it was held that the intention of the founder was to devote the property to public purposes of a religious and charitable nature (s) A trust is not the less a trust for a public purpose because the main object of the trust is the support of *faqirs* of a particular sect and the propagation of the tenets of that sect (t)

"Any alleged breach of trust."—These words are not equivalent to "any alleged breach of any admitted trust" It is not therefore a condition precedent to the applicability of the section that the trust alleged by the plaintiffs is admitted by the defendants (u)

"Where the direction of the Court is deemed necessary for the administration of any such trust"—To bring a suit within this section there must either be a breach of trust or the directions of the Court must be necessary for the administration of the trust The directions, which we referred to in this section, are such as are necessary for the carrying out of the trust and as are given to a trustee, either the existing trustee where there is one, or the new trustee, where one is to be appointed. The nature of the reliefs expressly mentioned shows what is meant by the words 'deemed necessary for administration of any such trust' (v) The mere appointment of a Mutawalli is not a direction within the meaning of this section (w)

"Whether contentious or not."—These words are new They are intended to give effect to a decision of the Calcutta High Court under sec 539 of the Code of 1882 that the section was not confined to non contentious proceeding, and that it applied to contentious suits also (x), and to the opinion to the same effect of Best and Weir, J J, in an earlier Madras case (y)

- | | |
|--|---|
| (i) <i>Umrao Singh v Har Prasad</i> (1910) 52 All 453 | (z) <i>Jugalkishore v Lalshmandas</i> (1899) 23 Bom 659 |
| (ii) " | (i) <i>Mahant v Darshan</i> (1912) 34 All 468 14 I C 698 |
| (m) " | (u) <i>Jafar Khan v Daud Shah</i> (1911) 13 Bom L R 40 53 9 I C 338 |
| (n) " | (v) <i>Per Woodroffe J in Bidree Das v Choudhury Lal</i> (1906) 33 Cal 789 at p 809. <i>Lut see Amritram v Ramji</i> (1908) 10 Bom L R 87 |
| (o) <i>Muhammad Kazim v Ali Saghar</i> (1930) 11 Pat 288 136 I C 417 (33) A P 33 | (w) <i>Abd Alim Abdul v Abd Jan Bibi</i> (1928) 50 Cal 1284 110 I C 416 (28) A C 368 |
| (p) " | (x) <i>Mohiuddin v Saifuddin</i> (1893) 20 Cal 810 |
| (q) " | (y) <i>Subbaya v Krishna</i> (1891) 14 Mad 166 |
| (r) " | 208, 221 |

Who may be sued under this section.—It is not necessary that the defendant should be either a de jure or de facto trustee, otherwise no suit can be brought under this section in a case in which all trustees are dead or refuse to act (z). Thus a suit may be brought under this section against persons in possession of the trust property who claim adversely to the trust, that is, claim to be the owners of the property (a), or against persons who deny the validity of the trust (b). But a suit against one who is merely a servant for misappropriation of the trust property does not fall under this section (c). See notes, below, 'Trustee' and 'Suits for possession of trust property'.

Order for security for costs against defendant trustee.—Section 10 of the Charitable and Religious Trusts Act, 1920, provides that if in any suit instituted under the present section, the Court trying such suit may if, on the application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the public interest, direct the defendant either to furnish security for any expenditure incurred, or likely to be incurred, by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part, and that when any money has been so deposited, the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit, but that before making over any sum to the plaintiff the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Clause (a): removing any trustee.—This clause is new. Though this clause did not occur in the corresponding sec 539 of the Code of 1882, it was held by the High Courts of Calcutta, Bombay and Allahabad (d), following an earlier decision of the Madras High Court (e), that a suit for the removal of a trustee of a public trust and for the appointment of a new trustee came under that section, though the removal of a trustee was not one of the reliefs specified in that section. Such a relief, it was said, was either covered by the words 'such further or other relief as the nature of the case may require,' or it was implied in the clause providing for the appointment of new trustees. On the other hand, the Madras High Court held in a later case that such a suit did not come under that section (f). Sub sec (1), cl (a), of the present section gives effect to the Calcutta, Bombay and Allahabad decisions. A suit for the removal of a trustee must therefore be instituted in conformity with the provisions of this section. The High Court of Madras has held that a suit by the trustees of a temple for a declaration that the appointment by the Devasthanam Committee of the defendant as a trustee in place of a deceased trustee is invalid and for an injunction to restrain him from interfering with the management of the temple is in effect a suit for the removal of the defendant from the office of trustee, and that it cannot be instituted without the sanction required by this or the next section (g). A similar view has been taken by the Patna High Court (h). This view has been dissented from by the High Court of Bombay on the ground that to bring a suit within this section there must either be an alleged breach of trust or the direction of the Court must be deemed necessary for the administration

(z) *Venkatanaswami v Subba Rao* (1923) 46 Mad 300 318 321 73 IC 991 (23) A M 376

(a)

(b)

(c) *Baldeo v Gopalji* (1923) 21 All LJ 310,

(23) A A 247

(d)

(e)
(f)

(g)

(h) *Syed v Bibi* (1925) 4 Pat 741, 88 IC 1035, (25) A P 544

of the trust and that neither of these conditions was present in the Madras case. The Bombay case was similar to the Madras case and it was held that the case did not fall within this section (s). The Madras case though not overruled was dissented from in a later Full Bench case (j) and the Madras High Court has since held that a suit by a trustee to establish his right as hereditary trustee and for consequential relief as the Temple Committee had appointed another person as sole trustee did not fall within the section (l).

In a suit under this section by two trustees of a temple against a co trustee for his removal the Court has the power to investigate charges of misconduct made by the defendant against the plaintiff and even to remove them (l).

In framing a scheme of management under this section [see clause (g)] it is desirable to include a provision for the removal of trustees for breach of trust for where such a provision is included the removal of a defaulting trustee may be obtained by an *application* in execution of the decree and the costs and trouble of a *regular suit* which would otherwise be probably necessary may thus be avoided (m). The procedure is necessary to avoid multiplicity of suits (n) though some Madras cases consider such a provision *ultra vires* (o).

In connection with the removal of a trustee the Bombay High Court has held that mere lax and improvident management on the part of the manager of a shrine fostered by the belief that he was entitled to manage the trust property free from control and very much as if he was its absolute owner is no ground for removing him from the trust (p). In another case the same High Court said that there is no hard and fast rule that because the manager of a shrine has arrogated to himself the position of owner he should be removed from the office of trustee and that each case must be decided with reference to

to continue in office if he denies the wakf character of the property and sets up an adverse claim to it (s). A dictum of the Privy Council would suggest that the Bombay decisions are too indulgent. Lord Blanesburgh said that the standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest and that the standard must in all circumstances be maintained by the Courts if the safety of property held upon such trusts is not to be imperilled throughout British India (t).

The Patna High Court removed a Sajjadanashin from the management of a wakf for gross mismanagement but allowed him to retain the spiritual office of Sajjadanashin (u).

Trustee —A person appointed trustee by the Court though his appointment may be impeached as being illegal is a trustee within the meaning of cl (a) and not a trespasser (v). So is a trustee *de son tort* that is a person who has not been appointed trustee but who takes charge of the trust property and purports to manage it as trust

(s) *Atlan A v Ramirashna* (10 2) 46 Bom

(j)

(k)

(l)

(m)

(n)

331

(o) *Abdul Halim v Mahomed Burram d n*
1726) 49 Mad 580 95 I C 720 (26)
A M 559 *Bahmavva v Venkataswamy*
narayana rthy (1928) 50 Mad L J
409 94 I C 554 (26) A M 557 *Veera*

(p)

(q)

2 Bom 493

(r) *Shriyananda v Umesbannu da* (1905) 2 Cal
L J 460

(s) *Faz a v Zaynab* (193) 13 Lah 160 131
I C 630 (33) A L 309

(t) *Gulari Lal v Collector of Etah* (1931) 58
I A 460 53 All 910 13 I C 603 (31)
A PC 121

(u) *S/ I Shah Mahomed Kaz m v Syed Al*
Saghir (1932) 11 Pat 988 130 I C 417
(3) A P 33

(v) *Sa yid Ali v Ali Jan* (1913) 35 All 99 18
I C 573

property (w). The Acharya of a temple is a trustee of the property of this section and he may be sued as such (x). (1872) 10 M. L. J. 100.

Clause (b) appointing new trustee.—An application for the appointment of a trustee of a temple on the ground that the defunct trustee is a Hindu, is a suit under this section if the office of trustee is therefore vacant (y). (1872) 10 M. L. J. 100.

Under this section, the Court in an application for the appointment of additional or new trustees through which application is made to the Court with the original constitution of the trust or with the rules of the trust. New trustees appointed under a scheme have the right to sue the defunct trustee.

Clause (d) directing accounts and inquiries. This section is in accordance with the corresponding sec. 539 of the Code of 1882 the High Court has the power to remove the trustees of a public charity, and to compel them to account for the losses sustained by the charity by reason of default on the part of the trustees and for the appointment of new trustees, was a suit within that section. The relief for accounts was not one of the reliefs specifically mentioned in that section. The relief it was said, was covered by the words "further or other relief." (c). The present clause gives legislative recognition to the above decision (d).

Clause (e): apportionment of income.—A suit for a declaration as to what share of the income of a property is due to a particular person is a suit under this section.

Clause (f): authorizing trust property to be let.—An application by a mutawalli for sanction of the Court to grant a lease of the wakf property is not a suit under this section (f).

Clause (g): settling a scheme.—This section vests a very wide discretion in the Court as regards directions to be given for the administration of public trusts. In giving effect to the provisions of the section and in appointing new trustees and settling

existing conditions that may have grown up since its foundation (g). The Court may refuse to frame a scheme where no mismanagement is proved (h). The Madras High

enforced a scheme by the appointment in execution of a receiver of properties which the scheme had placed under the control of a temple trustee (j).

- (c) *Jugal Kishore v. Lakshmandas* (1899) 23 Bom. 659, *Budree Das v. Chooni Lal* (1908) 33 Cal. 789, 805 806, *Ram Bidas v. Nityanand* (1922) 44 All. 652, 653 I. C. 990 (22) A. A. 542, *Bihari Lal v. Shira* (1925) 47 All. 17, 84 I. C. 631 (24) A. A. 104.

- (d) *Balakrishna Chettiar v. Arishnamurthi Aiyar* (1927) 52 Mad. L. J. 192, 100 I. C. 841 (27) A. M. 416.

- (e) *Sakharam v. Ganu* (1921) 45 Bom. 683, 690, 60 I. C. 924 (21) A. B. 297.

- (f) *Fakhrunnas v. District Judge* (1920) 47 Cal. 522, 55 I. C. 473.

- (g) *Mahomed Ismail v. Ahmed* (1916) 43 I. A. 127, 135, 43 Cal. 10-3, 1101, 1102, 33 I. C. 39.

- (h) *Advocate-General v. Jure'sall's* (1922) 24 Bom. L. R. 107, 54 I. C. 759, (21) A. B. 552.

- (i) *Thapareswami v. Edayar* (1924) 107 I. C. 156 (24) A. M. 61.

- (j) *Thapare v. Temple Committee* 54 Mad. 1101, 133 I. C. 14, 31) A. M. 41.

- (a) *Iravay Doss v. Tirumala* (1905) 23 Mad. 313.

- (b) *Varadach v. Narasimulu* (1931) 54 Mad. 315, 134 I. C. 60, (32) A. M. 41.

- (c) *Synd v. Collector of Kaira* (1897) 21 Bom. 48, *Amritram v. Ramji* (1908) 10 Bom. L. R. 87.

A scheme framed by the Court may be varied, if good cause is shown (k) But where a scheme is once settled, it precludes a suit to establish a private right to manage the property [e.g., hereditary trusteeship] which, if established, would interfere with the scheme settled by Court (l)

The Court has power under this section to frame a scheme in respect of a public temple though it be under the control of a Temple Committee constituted under the Religious Endowments Act 20 of 1863 (m) But where a trust is a *private* trust, e.g., for a family idol, the settlement of a scheme under this section is inappropriate (n)

In decrees passed under this section liberty is generally reserved to the parties to apply to the Court as occasion arises, as to the effect of such a clause, see the under mentioned case (o) The Madras High Court has held that liberty may be reserved to parties to apply to the Court to fill any vacancy in the office of a trustee appointed under a scheme (p), but the same High Court has also held that liberty to apply for a modification of the scheme or for a relief coming under s. 92 is *ultra vires* (q), and the Rangoon High Court has followed these decisions (r) But such clauses have appeared in schemes approved by the Privy Council (s), and the Bombay High Court holds that the original consent of the Advocate General is sufficient to give the Court seisin of the case and the Court is competent to entertain applications, for liberty to apply is reserved in order to avoid multiplicity of actions (t)

Where it is quite clear that a public trust has been properly constituted by will, it is not necessary that a suit for the administration of the estate of the testator should precede a suit under this section But it is otherwise where it is doubtful whether there would be funds sufficient for the charitable bequest In the latter case an administration suit may become necessary before any scheme can be framed under this section (u) Where the trust funds are not ascertained and the defendants are accountable for their management of the trust property, the proper course is to take the accounts before a scheme is framed (v)

In a suit brought under this section in respect of a public religious trust, the Court has jurisdiction to frame a scheme regulative of the conduct of the institution as the owners of moneys and property which it possesses, even in cases where the Acharya, as the head of its spiritual and temporal affairs, is worshipped by the members of the sect as the representative of the god In drawing up the scheme, however, the Court must not encroach upon the rights and prerogatives of the Acharya as a religious preceptor of the community, but while the institutional trust must be respected, the sect and body of worshippers for whose benefit it was set up have the protection of the Court against their property being the subject of abuse, speculation and waste (u)

- (k) *Prayag Dass v. Tirumala* (1905) 28 Mad 319 *Ramadas v. Hanumantha* (1913) 36 Mad 364 12 I C 449

(l)

(m)

- (n) *Gopal Lal v. Purna Chandra* (1922) 49 I A 100 49 Cal 459, 67 I C 561, (22) A FC 253

- (o) *Manadananda v. Taralanda* (1923) 37 Cal I J 281, 76 I C 220 (24) A C 330 See also *Narayana Murthi v. Acharya* (1924) 47 Mad I J 714, 85 I C 188, (25) A M 411

- (p) - - - - -

- (q) - - - - -

- Narayana Murthi* (1926) 50 Mad I J 409 94 I C 554 (26) A M 557 *Peeraraghava Chariar v. Advocate General* (1927) 51 Mad 31 106 I C 665 (27) A M 1073 [F B I]

- (r) *U Po Maung v. U Jun Pe* (1928) 6 Rang 594 114 I C 253 (29) A R 20

- (s) *Prasadjosephar v. T. Srinagachariar Iyer* (1907) 30 Mad 138 P C *Jeranchoed v. Dakore Temple Committee* (1925) 27 Bom L R 872 87 I C 313 (25) A FC 155

- (t) *Chandraprasad v. Jinabharthi* (1931) 55 Bom 414 133 I C 740 (31) A B 331

- (u) *Venkataranasimha v. Subba Rao* (1923) 46 Mad 800 320 321 73 I C 991, (23) A M 376

- (v) *Chotalal v. Manohar* (1900) 24 Bom 50 26 I A 109

- (w) *Sripatisprasadji v. Laxmidas* (1929) 31 Bom L R 243, 114 I C 10 (29) A I C 27

Where provision is made in a scheme for an application being made to the Court for the purposes mentioned in it, and an order is made on the application, the order is not one in execution, and no appeal lies from it (x)

Clause (h), further or other relief—The words "granting such further or other relief as the nature of the case may require," must be read with what has preceded as referring to further relief to which the party may be entitled which arises out of the existence of the trust in respect of which the suit has been brought. Therefore, where the only relief claimed in a suit is for a declaration that certain property is wakf property the suit does not come within the purview of this section. Such a relief does not come within the words "further or other relief" (y). The general clause dealing with "further or other relief" ought to be read with the five preceding specific clauses, and nature of the the reliefs which may be properly granted under it is of the same character as the reliefs which may be granted under the preceding clauses. The five specific clauses are not merely illustrative, but furnish an indication of the nature of the relief, which may be granted in a suit under this section" (z).

The question as to the precise scope of clause (h) is of great importance, for if the words "such further or other relief as the nature of the case may require" mean relief of the same nature as clauses (a) to (g), a relief in a suit against strangers to a trust for a declaration that property in their possession is trust property, would be outside the scope of this section as it would not be of the same nature as clauses (a) to (g) and the suit could be maintained without the consent of the Advocate General. This very question arose in *Abdur Rahim v. Abul Mahomed Barkat Ali* (a) where the Privy Council held that a suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the consent of the Advocate General. It was argued in that case on behalf of the defendants that the words "further or other relief" must be taken, not in connection with the previous clauses (a) to (g), but in connection with the nature of the suit—namely, any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case, and that a breach of trust having been alleged the suit came under this section and it could not be maintained without the consent of the Advocate General. But this argument was not accepted and it was held that the words "further or other relief" in clause (h) must, on general principles, be taken to mean relief of the same nature as clauses (a) to (g), and that as the relief for a declaration that the property belonged to the wakf was not of that nature, the suit was outside the scope of the section. Their Lordships said that the construction suggested on behalf of the defendants would cut down substantive rights which existed before the enactment of the Code of 1908, and a Code regulating procedure should not be construed as having that effect in the absence of express words. Before the enactment of that Code a person interested in a public trust had the right to maintain a suit for such a declaration as the above without the consent of the Advocate General and this is the substantive right referred to above. It follows that when a suit is brought for some of the reliefs mentioned in this section with the consent of the Advocate General, and a prayer for a declaration is afterwards added and strangers to the trust are joined as defendants, the suit ceases to that extent to be one under sec. 92 or of a representative character.

There is a conflict of opinion as to whether a prayer that a deed of trust may be construed by the Court and that the true scope and object of the trust fund may be

(x) *Jeranchood v. Dakore Temple Committee* (19 5) 27 Bom. L. R. 872 87 I. C. 313 (5).
A. P. C. 155. *Abul Hakkim Bhai v. Burramuddin* (12 6) 43 Mad. 540 45 I. C. 70.
(26) A. M. 553. *S. Ram v. Rajagopal* (1930) 54 Mad. 315 15 I. C. 515 (30).
A. M. 918.
(y) *Jamaluddin v. M. Jaba Hussain* (1903) 5

All. 631 632. *Salig Ram v. Basavo Mal* (1919) 1 Lah. L. J. 150 67 I. C. 320.
(z) *B. deo Das v. Chooni Lal* (1906) 33 Cal. 783 810.
(a) (19 8) 55 I. A. 96 55 Cal. 519 108 I. C. 361, (8) A. P. C. 16. *Gafaralli v. Mohuddin* (1931) 33 Bom. L. R. 1575, 135 I. C. 806, (37) A. B. 65.

of Bombay has held that where the defendant is in management of the trust property and the plaint also contains a relief for accounts against him, the suit is one under this section *Narayn v Vasudeo* (1924) 26 Bom L R 950, 86 I C 490, (24) A B 518, *Chhaganlal v Solharam* (1933) 33 Bom L R 1119 (34) A B 26. But this view conflicts with the Madras view See (1922) 45 Mad 113, 69 I C 304, (22) A M 17, cited in ill (c) below

- (5) It has been held by the High Court of Allahabad that the right of a Mahomedan to use a mosque is not a public but a private right. It is like the right to use a private road, any one who has the right may maintain a suit in respect of it [*Jauhar v Husain* (1885) 7 All 178, at pp 182 183]. To such a suit the provisions of this section do not apply. Thus it has been held that any Mahomedan entitled to frequent a mosque may, if property belonging to the mosque is sold by the manager of the mosque for his private debts maintain a suit for a declaration that the property is wakf property and to set aside the sale and evict the purchaser [*Zafaryng Ali v Baktawar Singh* (1883) 5 All 497]. Similarly if land attached to a mosque is encroached upon, any Mahomedan entitled to use the mosque may sue to eject the trespasser. And if the mosque be in a dilapidated condition and a Mahomedan frequenting the mosque, or one looking after it is desirous of repairing it, but is obstructed by a third person, he may maintain a suit to establish his right to repair the mosque [*Jauhar v Albar Husain* (1885) 7 All 178]. The contrary however has been held by the High Court of Calcutta in *Jan Ali v Ram Nath* (1882) 8 Cal 32 and *Lutfunnessa Bibi v Nazirun Bibi* (1885) 11 Cal 37. According to these decisions, the right sought to be established in suits such as the above is not a private but a public right, and it can only be enforced by a suit brought in conformity with the provisions of this section. But in a later Calcutta case [*Mohiuddin v Sajiduddin* (1893) 20 Cal 810] it was pointed out that the reasoning of the Allahabad cases showing that the right of worship of each worshipper in a Mahomedan mosque or religious endowment was an independent right wholly irrespective of the rights of the other worshippers, was correct. The view taken in the earlier Calcutta decisions is it is submitted not correct (f) and it cannot be sustained since the decision of the Privy Council in *Abdur Rahim v Abu Mahomed Barkat Ali* (g)
- (6) A suit by a trustee against a co trustee for accounts *Appanna v Varasing* (1922) 45 Mad 113 69 I C 304 (22) A M 17 [F B] *Bapuji v Goundlal* (1916) 40 Bom 439 34 I C 167
- (7) A suit by an idol as a juristic person against persons who interfere unlawfully with the property of the idol or the income thereof *Darshan Lal v Shibji* (1923) 45 All 215, 71 I C 420 (23) A A 120, *Madharao v Shri Omkareshwar Ghat* (1929) 31 Bom L R 192 119 I C 775 (29) A B 153
- (8) A suit for a declaration that the plaintiff is entitled to appoint mutawallis *Rugghan Prasad v Dhanno* (1927) 49 All 435 99 I C 1045, (27) A A 257

Suits for a declaration and for possession of trust property against third persons that is strangers to the trust—Suits against strangers to the trust that is, against trespassers and against transferees from trustees for a declaration that property in their hands is trust property and for possession, are outside the scope of this section. The reason is that the relief claimed is not one of those mentioned in clauses (a) to (h). Such suits must be instituted in the ordinary manner and not under this section (h)

(f) See *Lakshyanatha v Sraminatha* (1924) 51 I A 28, 88 47 Mad 884 891 8-1
C 804 (24) A PC 21
(g) (1918) 55 I A 96 55 Cal 519 108 I C

351 (28) A PC 16
(h) *Budree Das v Choomi Lal* (1906) 33 Cal 739
805

This has now been definitely held by the Privy Council in *Abdur Rahim v Mahomed Barlat Ali*, (1) [see case (1) below] The following are instances of suits of this character —

- (1) A suit for a declaration that property belongs to a wakf can be maintained by Mahomedans interested in the wakf without the sanction of the Advocate General *Abdur Rahim v Mahomed Barlat Ali* (1928) 55 I A 96, 55 Cal 519, 108 I C 361, (28) A PC 16
- (2) A suit by the disciples of a *mutt* for a declaration that the defendant was not the duly appointed successor to the late head of the *mutt*, and that he was in possession under a false claim of title, and for ejecting the defendant from the *mutt* properties *Strinitasa v Strinitasa* (1893) 16 Mad 31, *Ganga Charan v Ramchandra* (1928) 50 All 165, 106 I C 389, (28) A A 33 [Here the claim against the defendant is as against a trespasser]
- (3) A suit for a declaration that a certain piece of land of which it was alleged the defendants had taken wrongful possession was a public graveyard, and for the ejectment of the defendants from the land *Muhammad v Kallu* (1899) 21 All 187, *Ghazaffar v Jawar Husain* (1906) 28 All 112, 117, 120, 121 *Dasondhay v Muhammad* (1911) 33 All 660 11 I C 36, *Muhammad Baksh v Musammat Piar* (1921) 19 All L J 236, 62 I C 744, (21) A A 116 [Here also the claim against the defendants is as against trespassers] Compare *Latifunissa Bibi v Nazirun Bibi* (1885) 11 Cal 33 where the suit was for a declaration that certain property was wakf property and for recovery of possession thereof from a third party, and where the Court held that the suit ought to have been instituted in conformity with the provisions of this section This decision would appear to be no longer law see *Mohiuddin v Sayiduddin* (1893) 20 Cal 810 p 816
- (4) A suit to set aside an alienation of trust property alleged to have been wrongfully made by the trustees and for the recovery of property from the alienee *Kazi Hassan v Sagun* (1900) 24 Bom 170, *Lalshmandas v Ganpatrav* (1884) 8 Bom 365, *Islanath v Rambhat* (1891) 15 Bom 148, *Ghelabhai v Uderam* (1911) 36 Bom 29 12 I C 577 [Here the defendants are transferees from trustees]
- (5) A suit by the trustees of a temple against the manager and treasurer of the temple for accounts and for a decree for what may be found due on taking such accounts *Malhar v Narasimha* (1912) 37 Bom 90 17 I C 665
- (6) A suit by two of the worshippers of a temple with the leave of Court under O 1, r 8, against the committee of management (not being trustees) and *archakas* of the temple for a declaration that a transfer made by the committee to the *archakas* of the right to collect and receive offerings made by the pilgrims is invalid *Penkalaramana v Kasturivanga* (1917) 40 Mad 212, 38 I C 73 [F B]
- (7) A suit by the newly appointed trustees of an *inambara* for possession of the *inambara* against a former trustee who has been dismissed *Inayat v Faiz Muhammad* (1923) 45 All 335, 71 I C 767, (23) A A 319 [the defendant in such a case is a trespasser] *Ganga Puri v Mohan Lal* (1923) 4 Lah. 290, 73 I C 645 (24) A L 131

But in a case where the plaintiff not only asked for a declaration as against the defendant that a temple was a public trust of a religious nature but also alleged that the defendant was under a contractual obligation to hold the profits of a shop in the temple

premises for the use of the temple and prayed for an account of the profits—the suit was one for directing accounts against a constructive trustee *Abdur Rahman's* case did not apply and the sanction of the Advocate General was necessary (j) See note “Trustee” above

Suits for removal of trustees for unlawful alienation of trust property and against transferees from those trustees —A common type of suits under this section is a suit against the trustee of a charity for his removal on the ground that he has unlawfully alienated the trust property treating it as his private property, and for the appointment of a new trustee in his place. It is clear that such a suit is within this section for the relief claimed is one under cl (a) of this section and the ground on which the relief is claimed is a breach of trust in alienating the property. It is also clear that the Court cannot remove the trustee unless it finds that the property is trust property and that it has been wrongfully alienated by the trustee. The question to be considered is whether the Court has power, in the absence of the alienee, to declare that the property is trust property and that the alienation is unlawful. It has been held by the High Court of Madras that an alienee is *not a proper party* to a suit under this section, and that if he is joined as a party, the suit as against him should be dismissed. But this, it has been held, does not preclude the Court from determining in a suit against the trustee alone whether the property is trust property, and declaring, if it is so found, that it is trust property. But the transferee, not being a party to the suit, is not bound by the declaration and if a suit is subsequently brought against him for possession of the property, it is open to him to contend that the property is not trust property (l). A similar view has been taken by the High Court of Calcutta (l). On the other hand it has been held by the High Court of Allahabad that the alienee though not a necessary party to the suit (m) is a proper party (n), and that if he is joined as a party, and the Court declares that the property is trust property he will be bound by such declaration in a subsequent suit for possession against him (o). The High Court of Bombay has gone further and held that the transferee is *not only a proper but a necessary party* and that no such declaration can be made in his absence (p). But all the High Courts are agreed that in a suit such as the above a decree cannot be passed against the alienee directing him to deliver possession of the property to the plaintiffs though he is a party to the suit as such relief is neither specifically mentioned in the section nor implied in cl (h) and that the remedy of the newly appointed trustee is to institute a separate suit for possession against him (q). The proposition that the Court has no power under this section to pass a decree against an alienee directing him to deliver possession to the plaintiffs is in accordance with a recent ruling of the Privy Council where it was held that a relief or a remedy against third persons that is strangers to the trust, was not within the scope of this section (r). It is submitted that the Court has also no power under this section to make a declaration that the property in suit is not trust property so as to bind the alienee, such a relief also being outside the scope of the section. The Rangoon High Court,

- (j) *Varadasi v. Rameshwar* (1930) 32 Bom L R 1435 129 I C 891 (31) A B 33 reversing 3 Bom L R 205 105 I C 445 (30) A B 167
(k) *Raghoebari v. Jellati* (1914) 27 Mad L J 260 105 I C 794 *Rangasamy v. Chinniasamy* (1915) 28 Mad L J 326 28 I C 898
Etaleppa Mudaliar v. Balakrishnammal

- (n) *Gha affar v. Jawar Hussain* (1906) 28 All 110 116 118 119
(o) *Manohari v. Muhammad* (1911) 33 All 750 111 C 218
(p) ~
(q)

(l)

- (m) *Husen Begam v. Collector of Moradabad* (1895) 20 All 46

- (r) *Abdur Rahim v. Abu Mahomed* (1908) 55 I A 96 55 Cal 519 108 I C 361 (28) A FC 16

however, has gone further and holds that if in a suit under sec 92 a claim to relief against alienees who are strangers to the trust is added, there is a misjoinder both of parties and causes of action and that unless the plaint is amended the suit cannot be entertained. In such a suit, praying (1) for the removal of a trustee, (2) for the vesting of the property in new trustees, and (3) for a declaration that a mortgage of the property by the trustee was invalid—the first two reliefs were granted but the suit as against the mortgagee was dismissed (s)

Suits only for a declaration of trust.—This section presupposes the existence of a trust for the administration of which it is necessary to make provision. Hence it does not apply to a suit brought solely for the purpose of having a declaration of the Court that certain property is *wakf*, the fact of endowment being denied on the other side (t). Nor does this section apply to a suit brought merely for a declaration that the plaintiffs are trustees of an endowment (u). See note above, "Suits for a declaration and for possession of trust property against third persons, i.e., strangers to the trust."

Suits for a declaration that the defendant is not a properly appointed trustee and for an injunction against him.—See note above, "Clause (a). removing any trustee."

Courts competent to try suits under this section.—A suit under this section must be instituted either in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government. But this does not empower the Local Government to direct the transfer of a particular suit pending in a District Court to a particular Judge. The authority must be a general one to try suits under this section (v).

The expression "principal Civil Court of original jurisdiction" in this section does not include the Court of an Additional District Judge appointed under sec 8 of the Civil Courts Act XII of 1887 (u) unless the District Judge has under sub sec (2) of that section assigned to him the functions of a District Judge relating to all suits cognizable by the District Judge (x).

Where a suit is brought against an executor in the Court of a Subordinate Judge for the administration of the testator's estate, the mere fact, that the will contains directions for applying portions of the estate to charitable purposes does not bring the suit within this section. The Subordinate Judge has jurisdiction to entertain such a suit, but if any questions relating to charitable bequests arise before him and a scheme has to be framed under this section, he should hold the amount appropriated for charities in the possession of a Receiver until the Advocate General or the Collector obtains the directions of the District Court (y).

Where some of the reliefs are outside the scope of the section.—When some of the reliefs claimed are outside the scope of the section, the Court is not justified in returning the plaint. It should require the plaintiff to amend his plaint by confining himself to reliefs within the section, or it might wait till it came to pronounce judgment and dismiss the suit as to reliefs without the section (z). So in a suit by worshippers for the appointment of trustees and for the ejectment of trespassers the Court may appoint

(s) *Radha v. D. P. V. N. U. (1932) 10*

(t)

810, *Ramados v. Hanumantha* (1913) 36 Mad 364 12 I C 419

(v)

(w)

(x)

(y)

(z) *Budree Das v. Choont Lal* (1906) 33 Cal 789,

(z) *Ramrup v. Ramdhari* (1925) 47 All 770 89 I C 40, (25) A A 683

trustees without passing a decree in ejectment (a) But worshippers cannot sue under O 1, r 8, to recover the property unless they are supported by the trustees They should sue to remove the trustees first and then let the new trustees sue in ejectment (f) When a trustee dies the party entitled to succeed to the management may sue to establish his right The section does not apply to such a suit and if objection is raised to his appointment on the ground of misconduct the objector should be referred to a suit under sec 92 (c)

Sub section (2) this section is mandatory—The Legislature has by enacting this section constituted a special tribunal for the trial of a class of suits which it has removed from the cognizance of the ordinary Courts Those are suits for any of the reliefs specified in sub sec (1) in cases where there is an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or

where the direction of the Court is deemed necessary for the administration of any such trust This class of suits can only be instituted in the special Courts mentioned in this section, and they can only be brought either by the Advocate General or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General This is enacted by sub sec (2) of the present section Under the corresponding section 539 of the Codes of 1877 and 1882 it was doubtful whether every suit of the character described above was to be instituted in the manner aforesaid Sub sec (2) makes it clear that every such suit must be so instituted, it enacts that no suit claiming any of the reliefs specified in sub sec (1) shall be instituted without the consent of the Advocate General (d) But sub sec (2) must be read with sub sec (1) Reading sub sec. (2) with sub sec (1) it follows that it is not every suit claiming any of the reliefs specified in sub sec (1) that should be brought with the consent of the Advocate General but those suits only which besides claiming any of those reliefs are brought by individuals as representatives of the general public Accordingly a Full Bench of the Madras High Court has held that a suit by a trustee of a public religious trust against a co trustee for accounts does not fall within this section, though the relief claimed is the one specified in sub sec (1) cl (d) Such a suit is not a representative suit The relief is sought not in the larger interest of the public but merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by the trust (e) When a trustee sued his two co trustees for the settlement of a scheme of management by rotation the Court said that if the suit was brought on the basis of an agreement between the trustees or on the terms of the will of the founder of the trust it would be a suit to assert a private right and sec 92 would not apply but as there was no such agreement or will the learned Judge held that the suit was a representative suit and that sec 92 did apply (f)

The doubt referred to in the preceding paragraph arose in the following way The Code of 1859 did not contain any special provisions for the institution of suits relating to public charities Such provisions were introduced for the first time by sec 539 of the Code of 1877 They were reproduced in sec 539 of the Code of 1882 and they now find a place in sub sec (1) of the present section But neither the Code of 1877 nor the Code of 1882 contained any provision corresponding to sub sec (2) Before the enactment of

(a)

(b)

(c)

Bushambar v. Mest. Philari (1930)
11 Lah 673 151 C 601 (3) A L 15

(d) *Syed v. Bibi* (1905) 4 Pat 741 88 I C 1035
(1905) A I 544 *Saw v. Bagga* (1905) 3
Rang 213 89 I C 63 (1905) A R 294
[suit for possession of a church and for
accounts from the defendants]

(e) *Appanna v. Narasinga* (1921) 45 Mad 113
69 I C 304 (1921) A M 17 [F B]

(f) *Krishna v. Alwarappa* (1930) 63 Mad
L J 703 140 I C 197 (33) A M 70

the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the *ordinary Courts* by certain persons as plaintiffs Thus—

- (1) *persons appointed supervisors over trustees* could sue in any *ordinary Court* competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (*g*) similarly
- (2) *one or more of the members* of a defined class of the general public [such as the Satchasi community of Chatra] could sue on behalf of the whole class, *with the leave of the Court under sec 30* [now O 1, r 8], in any *ordinary Court* competent to hear the suit, to obtain a declaration of their right to take part in the management of the worship of a goddess (*h*)

It is obvious that the above suits fall within the purview of the present section. They also came within the terms of sec 539 of the earlier Codes. In the absence of any provision in sec 539 similar to that contained in sub sec (2), the question arose whether these suits were to be instituted in the special Courts mentioned in sec 539 and by the Advocate General as plaintiff, or whether they could be instituted as before in ordinary Courts and by persons who could have sued if sec 539 had not been enacted. The High Court of Bombay held that s 539 was mandatory, in other words, that *every* suit of the character mentioned in that section must be brought in accordance with its provisions, and not otherwise. Therefore the suits referred to above could not be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other, but they had to be instituted either by the Advocate General or by two or more persons interested in the trust after obtaining the sanction of the Advocate General, and further, these suits could only be brought in the *special Courts* indicated in that section, namely the High Court or the District Court, as the case might be (*i*). On the other hand, the other High Courts held that section 539 was permissive and that it did not take away the right of suit which existed prior to and independently of it. According to the latter view suits of the character mentioned above could, notwithstanding the enactment of section 539 be brought as before by the *abovenamed parties* as plaintiffs in any Court competent to entertain those suits, and it was not obligatory to institute them in accordance with the provisions of sec 539 (*j*). Sub section (2) gives effect to the Bombay decisions and supersedes the decisions of the other High Courts. It provides in distinct terms that no suit claiming any of the reliefs specified in sub section (1) shall be instituted except in conformity with the provisions of that sub section. At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section. The provisions of that Act and their bearing on the present section are discussed in the next paragraph.

“Save as provided by the Religious Endowments Act 1863”—After the downfall of the Mogul Empire in India, it was discovered that the income of many endowments granted in land “by the presiding Governments of this country and by individuals for the support of mosques temples colleges and for other pious and beneficial purposes” was misappropriated by persons managing the endowments. It was therefore deemed expedient that the British Government should take charge of these endowments, and for that purpose and the purpose also of providing for the maintenance of bridges, serais, uttaras and other buildings erected for the use of the

(g) *Nellaiyappa v Thanayama* (1898) 21 Mad 406. *Ram Das v Badri Narain* (1907) 29 All 27.

(h) *Monmotho v Harish Chandra* (1906) 33 Cal 905.

(i) *Tricumdas v Khimji* (1892) 16 Bom 626.

Sayad Hussein v Collector of Kara (1897) 21 Bom 48.

(j) *Nellaiyappa v Thanayama* (1898) 21 Mad 406. *Budree Das v Chooni Lal* (1906) 33 Cal 789. 800-804. *Monmotho v Harish Chandra* (1906) 33 Cal 905. *Ram Das v Badri Narain* (1907) 29 All 27.

public, Regulation 19 of 1810 was passed, whereby the general superintendence of all the *religious and charitable* endowments referred to above was vested in the Board of Revenue. That Regulation applied to endowments in Bengal. A similar Regulation, Regulation 7 of 1817, was subsequently passed to provide for like endowments in the Madras Presidency (l). Several years after the passing of these Regulations, it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahomedans was inexpedient, and a report was therefore called for by the Government of India in the year 1811 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments, and transfer the management to properly qualified individuals. As a result, Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to *religious* endowments were repealed, and provision was made for the transfer of all such endowments, in certain cases to trustees, and in others to committees (ss 3-8). But the duty of superintending *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact, express care is taken in the Act to declare that this duty as to *charitable* endowments is not intended to be affected or interfered with (ss 21, 23).

The Religious Endowments Act applies only to *public* religious endowments, as did the old Regulations. It does not apply to *private* religious endowments. Sec 14 of the Act provides that any person interested in any mosque, temple or religious establishment may sue the trustees or members of a committee for any *misfeasance, breach of trust, or neglect of duty* committed by them in respect of the trust vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a committee. A suit which does not charge the trustees or members of a committee with misfeasance, breach of trust, or neglect of duty, does not fall under that section (l). Sec 18 provides that *no suit under the Act shall be instituted without the leave of the Court*.

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only. But it does not apply to presidency towns, so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under sec 18 of the Act (m).

After the passing of the Regulations above referred to, the Board of Revenue took over the management of some endowments, but in the large majority of cases they did not take charge of endowments created by private individuals. The operation of the Act, however, is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations. The Act applies to every public religious endowment to which the provisions of the old Regulations applied, that is to say, to every public religious endowment created "by the preceding Governments of this country and by individuals," whether the management of the endowment was taken over by the Board of Revenue or not (n).

Reading sec 92 of the Code and the Religious Endowments Act together we had the following result —

- (1) No suit in respect of *charitable* endowments of a public nature, claiming any of the reliefs specified in sub section (1) of section 92, can be brought except in conformity with the provisions of that sub section.

(l) See *Sutharama v. Sutharama Iyer* (1916) 39 Mad 700 703, 32 I C 211.

(l) *Subramania v. Krishnamurthy* (1919) 42 Mad 689, 53 I C 605.

(m) *Lanch Courts Mull v. Chumroo Lall* (1878)

3 Cal 563. *Annamalai Temple v. F. J. Krishna Moolnar* (1901) 21 All 1111.
(n) *Jan Ali v. Ram Nath* (1899) 8 All 1111.
Shoraban v. Ram Nath (1899) 8 All 1111.
227 All 1111 v. *Chandrabai* (1911) 17 Mad 99.

the Code of 1877 suits relating to public charitable or religious trusts could be instituted in the ordinary Courts by certain persons as plaintiffs Thus—

- (1) *persons appointed supervisors over trustees* could sue in any ordinary Court competent to hear the suit for the removal of the trustees for malversation and to obtain the appointment in their place of other fit and proper persons (g) similarly
- (2) *one or more of the members of a defined class of the general public* [such as the Satchasi community of Chatra] could sue on behalf of the whole class, with the leave of the Court under sec 30 [now O I, r 8], in any ordinary Court competent to hear the suit, to obtain a declaration of their right to take part in the management of the worship of a goddess (A)

It is obvious that the above suits fall within the purview of the present section. They also came within the terms of sec 539 of the earlier Codes. In the absence of any provision in sec 539 similar to that contained in sub sec (2), the question arose whether these suits were to be instituted in the special Courts mentioned in sec 539 and by the Advocate General as plaintiff, or whether they could be instituted as before in ordinary Courts and by persons who could have sued if sec 539 had not been enacted. The High Court of Bombay held that s 539 was mandatory, in other words, that every suit of the character mentioned in that section must be brought in accordance with its provisions, and not otherwise. Therefore the suits referred to above could not be brought by the supervisors as plaintiffs in the one case and by the members of the community in the other, but they had to be instituted either by the Advocate General or by two or more persons interested in the trust after obtaining the sanction of the Advocate General, and further, these suits could only be brought in the *special Courts* indicated in that section, namely, the High Court or the District Court, as the case might be (i). On the other hand, the other High Courts held that section 539 was permissive, and that it did not take away the right of suit which existed prior to and independently of it. According to the latter view suits of the character mentioned above could, notwithstanding the enactment of section 539 be brought as before by the *abovenamed parties* as plaintiffs in any Court competent to entertain those suits, and it was not obligatory to institute them in accordance with the provisions of sec 539 (j). Sub section (2) gives effect to the Bombay decisions and supersedes the decisions of the other High Courts. It provides in distinct terms that no suit claiming any of the reliefs specified in sub section (1) shall be instituted except in conformity with the provisions of that sub section. At the same time it declares that the special provisions of the Religious Endowments Act 20 of 1863 for the institution of suits governed by that Act are not affected by the provisions of this section. The provisions of that Act and their bearing on the present section are discussed in the next paragraph.

“Save as provided by the Religious Endowments Act, 1863”—After the downfall of the Mogul Empire in India, it was discovered that the income of many endowments granted in land “by the presiding Governments of this country and by individuals for the support of mosques, temples, colleges and for other pious and beneficial purposes” was misappropriated by persons managing the endowments. It was therefore deemed expedient that the British Government should take charge of these endowments, and for that purpose and the purpose also of providing for the maintenance of bridges, serais, uttaras and other buildings erected for the use of the

(g) *Nellaiyappa v Thangama* (1896) 21 Mad 408. *Ram Das v Badri Narain* (1907) 29 All 27.

(A) *Monmotho v Harish Chandra* (1906) 33 Cal 905.

(i) *Tricumdass v Khimji* (1892) 16 Bom 626,

Sayad Hussain v Collector of Kara (1897) 21 Bom 43.

(j) *Nellaiyappa v Thangama* (1896) 21 Mad 408. *Budree Das v Chooni Lali* (1900) 33 Cal 789, 800 804. *Monmotho v Harish Chandra* (1906) 33 Cal 905. *Ram Das v Badri Narain* (1907) 29 All 27.

public, Regulation 19 of 1810 was passed, whereby the general superintendence of all the *religious and charitable* endowments referred to above was vested in the Board of Revenue. That Regulation applied to endowments in Bengal. A similar Regulation, Regulation 7 of 1817, was subsequently passed to provide for like endowments in the Madras Presidency (l). Several years after the passing of these Regulations it was thought that the connection of a Christian Government with the religious establishments of Hindus and Mahomedans was inexpedient, and a report was therefore called for by the Government of India in the year 1811 from the Collectors of all Districts with a view to divest themselves of the management of *religious* endowments and transfer the management to properly qualified individuals. As a result, Act 20 of 1863 was passed, whereby such of the provisions of the abovementioned Regulations as related to *religious* endowments were repealed, and provision was made for the transfer of all such endowments in certain cases to trustees, and in others to committees (as 38). But the duty of superintending *charitable* endowments imposed on the Board of Revenue by the old Regulations is still retained, and, in fact, express care is taken in the Act to declare that this duty as to *charitable* endowments is not intended to be affected or interfered with (as 21, 23).

The Religious Endowments Act applies only to *public* religious endowments, as did the old Regulations. It does not apply to *private* religious endowments. Sec 14 of the Act provides that any person interested in any mosque, temple or religious establishment may sue the trustees or members of a committee for any *misfeasance, breach of trust, or neglect of duty* committed by them in respect of the trust vested in them, and the Court may in such suit direct the specific performance of any act by them, and may decree damages and costs against them, and may also direct the removal of any of the trustees or any member of a committee. A suit which does not charge the trustees or members of a committee with misfeasance, breach of trust, or neglect of duty, does not fall under that section (l). Sec 18 provides that *no suit under the Act shall be instituted without the leave of the Court*.

The Act is in force in all Presidencies except the Presidency of Bombay where it is in force in North Canara only. But it does not apply to presidency towns, so that a suit instituted in a Chartered High Court in the exercise of its ordinary original jurisdiction inherited from the Supreme Court charging neglect of duty on the part of a temple trustee does not require the leave of the Court under sec 18 of the Act (m).

After the passing of the Regulations above referred to, the Board of Revenue took over the management of some endowments, but in the large majority of cases they did not take charge of endowments created by private individuals. The operation of the Act, however, is not confined to such endowments as *had actually been taken under the management* of the Board of Revenue under the old Regulations. The Act applies to

was taken over by the Board of Revenue or not (n).

Reading sec 92 of the Code and the Religious Endowments Act together we have the following result —

- (1) No suit in respect of *charitable* endowments of a public nature, claiming any of the reliefs specified in sub section (1) of section 92, can be brought except in conformity with the provisions of that sub section

(l) See *Sutharama v Subramania Iyer* (1916) 39 Mad 700 703 32 I C 211

(l) *Subramania v Krishnaswamy* (1910) 4 Mad 668 53 I C 605

(m) *Panch Couris Mull v Chumroo Lall* (1878)

3 Cal 563 *Annasami Iyalar v Rama*

(n)

- (2) In the case of *religious* endowments of a public nature to which the *Religious Endowments Act* applies, a suit charging the trustee, manager, superintendent, or a member of a committee of a mosque, temple, or religious establishment, with *misfeasance, breach of trust or neglect of duty*, may be brought under the provisions of that Act with the leave of the principal Civil Court of original civil jurisdiction in the District in which the mosque, temple, or religious establishment is situate as provided by sec. 18 of the said Act, or it may be brought under the provisions of the Code with the consent of the Collector as provided by sec. 92 of the Code (o)
- (3) No suit in respect of *religious* endowments of a public nature to which the *Religious Endowments Act* does not apply, claiming any of the reliefs specified in sub-section (1) of section 92, can be brought except in conformity with the provisions of that sub-section

Madras Hindu Religious Endowments Act Mad. Act 2 of 1927—This Act (p) repeals the Religious Endowments Act, 1863, and Madras Regulation 1 of 1817 so far as they apply to the more important Hindu public religious endowments in the Presidency of Madras except the Presidency town. It makes provision for the better administration of such endowments by Temple Committees and by a Board of Commissioners. Section 73 of the Act provides that secs. 92 and 93 and O. 1, r. 8 of the Civil Procedure Code shall not apply to any suit claiming relief in respect of the administration or management of such a religious endowment. Such suits can only be brought by the Board or Temple Committee or by an interested person with the consent of the Board or Committee. If an endowment is partly secular and partly religious the Board is empowered to make an allocation and declare what part is secular and what part is religious. After such allocation the religious portion is subject to the provisions of the Act. But if such allocation has not been made, a suit for removing a trustee of an endowment partly secular and partly religious is within sec. 92 (q).

Death of a plaintiff pending suit—It has been held by the High Court of Allahabad that where a suit is brought by two persons under this section, and one of them dies pending the suit, the suit abates unless some other person is brought on the record in place of the deceased. Such person must be one who has an interest in the trust, and he must have obtained the consent of the Advocate General as required by this section (r). On the other hand, the High Court of Madras has held that a suit brought under this section being a representative suit, no question of abatement can arise, and the Court has power under O. 1, r. 10 (2), to add other persons interested in the trust as parties not because they are the legal representatives of the deceased plaintiff, but because they had become parties to the representatives' suit by the very fact of its having been instituted on behalf of all persons interested in the trust, and that the consent of the Advocate General to such addition is not necessary (s). The Madras decisions have been followed in Lahore (t) and Rangoon (u). The Allahabad

(o) *Venkataranga v. Krishnama* (1914) 37

Bapuraja v. Ramchandra (1933) 65 Mad L.J. 890, 146 I.L. 628 (33) A.M. 884

(t) *Gopi Das v. Lal Das* (1918) P.R. 20 97 p. 321 47 I.C. 983

(u) *C.E. Dooply v. M.E. Moolla* (1927) 5 Rang 263 103 I.C. 261 (27) A.R. 180

(v) *Anand Rao v. Ramdas* (1921) 48 I.A. 1st 16 48 Cal. 493 497 498 62 I.C. 737 (21) A.I.C. 123 *Ram Ghulam v. Shyam Sarup* (1933) 55 All. 637, (34) A.A. 1

(s) *Parameswarani v. Narayanan* (1917) 40 Mad 110 34 I.C. 384 *Sayed v. Dost* (1924) 47 Mad L.J. 745 85 I.C. 666 (25) A.M. 244

colluding with the defendant, other persons interested may apply to the Court to be brought on the record under O 1, r 10 in order to apply for an amendment of the scheme (w).

Death of defendant trustee pending suit.—Where a suit is brought under this section against a trustee not only for his removal but for framing a scheme and the scheme is one of the main reliefs sought, the suit does not abate on the death of the trustee, and his successor in office may be brought on the record as a party defendant (x). The suit, of course, would abate, if it was solely for the removal of the trustee.

Specific Relief Act, 1877, s. 42.—Where a suit falls within this section the Plaintiffs cannot evade the requirements of the Code by framing the suit as one under sec 42 of the Specific Relief Act (y). At the same time where the suit is one maintainable under this section, and the plaintiff seeks any of the reliefs specified in the section sec 42 of the Specific Relief Act does not apply. Thus if a suit is brought under this section for a declaration that the defendants are not the lawful trustees and for the appointment of new trustees, the suit will not be dismissed because consequential relief such as delivery of the trust property to the new trustees is not claimed (z). [Sec. 42 of the Specific Relief Act provides in effect that where a suit is brought for a declaratory decree, and the plaintiff is able to seek further relief than a mere declaration, but omits to do so, the suit should be dismissed.]

Dismissal of suit by trustees no bar to suit by Advocate General. The fact that de jure managers and trustees of a public charity have been held in a previous suit to have lost their right by limitation to oust de facto trustees, does not confer on the latter immunity from suit on the part of the Advocate General under this section (a).

Limitation—Accounts against trustee de son tort.—A suit for account under this section against a trustee de son tort is governed not by sec 10 of the Limitation Act, but by art 120 of the Limitation Act. Such a trustee is only liable to render accounts for 6 years preceding the suit (b).

Relators cannot appeal in their own right.—Where a suit instituted under this section by the Advocate General at the instance of relators is dismissed, and the Advocate General does not think fit to appeal, the relators are not competent to file an appeal on their own account against the decree dismissing the suit (c). The reason is that relators are not parties to the suit (d).

Cy pres doctrine.—Though the section does not expressly empower the Court to apply the cy pres doctrine in the settling of schemes, it would seem that the Court has the power to apply the doctrine (e). But it has no jurisdiction to apply the cy pres doctrine *extra territorium* (f).

Appeal.—An order refusing to join persons as defendants in a suit under sec 42 is a judgment within the meaning of cl 15 of the Letters Patent and is appealable as such (g).

(w) *Kadri v Khubmisa* (1931) 33 Bom L R 546 133 IC 823 (31) A B 398

(x) *Siraganana v Advocate General* (1915) 28 Mad LJ 174 27 IC 874

(y) *W v v v*

(z)

(a) *Lakshmandas v Jugalkishore* (1893) 92 Bom LJ 16 See also *Gopu v Rajammal* (1922) 43 Mad LJ 449 452 453 69 IC 15 (22) A M 334

(b) *Bihari Lal v Shri Narain* (1926) 47 All 17 81 IC 831 (21) A A 884

(c) *Jas Mahomed v Syed Nurulla* (1908) 32 Bom 15

(d) *Attorney General v Wright* (1841) 3 Beav 447 *Attorney General v Jogan* [1891] 2 Q B 100 106

(e) *Mayor of Ipswich v Advocate General of Bengal* (1871) 1 Cal 303 31 A 32

(f) *Kanji v Advocate General* (1910) 18 Bom L R 60 32 IC 925

(g) *C E Dooply v M E Moolla* (1927) 5 Rang 223 103 IC 261 (27) A R 180

93. [S. 539, last para.] The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Exercise of powers of Advocate General outside Presidency towns

Previous sanction of the Local Government.—The Privy Council have held that the previous sanction of the Local Government is necessary whether the suit is instituted by the Collector, or by an officer appointed by the Local Government or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer (A) The effect of this decision is that the Collector or other officer appointed must in every case obtain the sanction of the Local Government before instituting a suit or giving his consent to the institution of a suit The previous practice of Local Governments had been to give previous sanction generally and not in respect of each particular case and therefore the Public Suits Validation Act, 1932 (11 of 1932) was passed to validate pending suits filed under the previous practice The Act also provides for the restoration of suits and appeals dismissed after the 30th November 1931 (the date of the Privy Council decision) for want of sanction of the Local Government, on application made within six months of the commencement of the Act, i.e., the 8th April 1932 In the case of suits already filed under the previous practice, it is not necessary to obtain the sanction of the Local Government (A1)

Collector.—The fact that the Legal Remembrancer is in a particular province invested as a rule with the duties elsewhere discharged by the Advocate General is no reason why in a particular case the Local Government may not appoint the Collector or any other officer to prosecute it (1) Before the Privy Council decision requiring sanction of the Local Government in each case, it was held that an Assistant Collector had no power to give his consent to the institution of a suit and that if a suit is filed with his consent but not that of the Collector the plaint must be rejected (2)

Visitatorial power of Collector.—Formally the Collector had a visitatorial power enabling him to enforce an honest and proper administration of religious endowments The connection of the Government in its *executive capacity* with Hindu and Mahomedan foundations was brought to an end for Bombay by Bombay Act 7 of 1863 and for Bengal and Madras by Act 20 of 1863 (3)

Collector's refusal to sanction proceeding.—The Advocate General, it seems, may give his consent to a suit to be instituted outside the Presidency towns though the Collector may have refused to give his consent under this section (4)

- | | |
|-----------------------------------|---|
| <p>(A)</p> <p>(A1)</p> <p>(1)</p> | <p>(2) <i>Somchand v Chhaganlal</i> (1911) 35 Bom 243 10 IC 803</p> <p>(3) <i>Manohar v Lakhmiram</i> (1882) 12 Bom 247, 260</p> <p>(4) <i>Aromalla v Arimanda</i> (28) A M 401, 108 IC 375</p> |
|-----------------------------------|---|

PART VI.

Supplemental Proceedings.

94. [New] In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

Supplemental proceedings

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ,
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ,
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ,
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ,
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient

This section summarizes the general powers of the Court in regard to interlocutory proceedings The details of procedure have been relegated to Schedule I

Clauses (a) and (b) Arrest and attachment before judgment—See O 38 below

Clauses (c) and (e) Temporary injunctions and interlocutory orders—See O 39 below

Clause (d) Appointment of receiver—See O 40 below See also notes to sec 51 Receiver in execution proceedings'

95. [Ss 491, 497] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

Compensation for obtaining arrest attachment or injunction on insufficient grounds

- (a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

5

to be appealable (y) The present section combines the provisions of secs 491 and 497, and sec 104 gives a right of appeal from all orders under this section, whether they are orders made on an application for compensation for wrongful injunction, or for wrongful arrest or attachment

Undertaking.—Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the undertaking is enforced by an application under this section to the Court which granted the injunction *A* attaches a house in execution of a decree against *B* *C* sues for a declaration that the house belongs to him, and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the value of the house if his suit be dismissed *C*'s suit is dismissed In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree, but to the Court which granted the injunction (z)

Chartered High Court.—Where a temporary injunction was granted by the High Court of Bombay on an undertaking by the plaintiff under Rule 347 of that Court to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order, it was held that the Court had power under that rule to award compensation to the defendant exceeding Rs 1,000 on an application by the defendant in that behalf (a)

(y) *Varaswami v Govinda* (1901) 24 Mad 60
Lok Nath v Amir Singh (1906) 28 All 81
 (z) *Varajal v Kastur* (1898) 22 Bom 42

(a) *Haji Abdul v Munjibhai* (1926) 98 Bom
 L R 10 7 97 I C 783 (6) A B
 523

PART VII.

Appeals.

APPEALS FROM ORIGINAL DECREES.

96 [S. 540 Jud Act, 1873. s 49] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

(2) An appeal may lie from an original decree passed *ex parte*

(3) No appeal shall lie from a decree passed by the Court with the consent of parties

Changes introduced by the section—Sub section (3) is new In other respects this section corresponds with sec 540 of the Code of 1882 As to the effect of sub section (3) see notes below under the head Sub section (3) consent decrees not appealable

Compare Judicature Act 1873 s 49 which provides that no order made by the High Court of justice or any Judge thereof by the consent of parties shall be subject to any appeal except by leave of the Court or Judge making such order

Letters Patent appeals—The *right of appeal* from a decree of a single Judge of a High Court to the High Court is governed not by this section but cl 15 of the Letters Patent The Code makes no provision for an appeal within the High Court, that is to say from a single Judge of the High Court This right of appeal depends on clause 15 of the Charter (b) But as regards *procedure* the Court and the rules therein contained especially the rules contained in O 41, apply to proceedings in a High Court under the Letters Patent save so far as the Code expressly provides to the contrary (c)

Right of appeal—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court, such right must be given by statute or by some authority equivalent to a statute (d) Unless a right of *appeal* is clearly given by Statute it does not exist whereas a litigant has independently of any Statute a right to institute any *suit* of a civil nature in some Court or another (e)

- | | |
|-----|--|
| (b) | 80 (d) <i>Minalshi v Subramanya</i> (1888) 11 Mad 26 33 14 I A 160 <i>Paramurama v Sethier</i> (1904) 2 nd Mad 504 <i>Rotatoung Co v Collector of Rangoon</i> (1913) 40 Cal 21 27 39 I A 197 200 161 C 188 |
| (e) | (e) <i>Zair Hussain Khan v Khurshed Jan</i> (1906) 28 All 545 549-550 |

to be appealable (y) The present section combines the provisions of secs 491 and 497, and sec 104 gives a right of appeal from all orders under this section whether they are orders made on an application for compensation for wrongful injunction or for wrongful arrest or attachment

Undertaking—Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction the undertaking is enforced by an application under this section to the Court which granted the injunction *A* attaches a house in execution of a decree against *B* *C* sues for a declaration that the house belongs to him and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the value of the house if his suit be dismissed *C*'s suit is dismissed In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree but to the Court which granted the injunction (z)

Chartered High Court.—Where a temporary injunction was granted by the High Court of Bombay on an undertaking by the plaintiff under Rule 34, of that Court to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order it was held that the Court had power under that rule to award compensation to the defendant exceeding Rs 1 000 on an application by the defendant in that behalf (a)

(y) *Varas nga v Govinda* (1901) 24 Mad 60
Lok Nath v Amir Singh (1906) 28 All 81
 (z) *Farajlat v Kastur* (1898) 22 Bom 40

(a) *Haji Abd l v Munj dhat* (1906) 28 Bom
 L R 1077 97 I C 783 (6) A B
 523

to be appealable (y) The present section combines the provisions of secs 491 and 497, and sec 104 gives a right of appeal from all orders under this section, whether they are orders made on an application for compensation for wrongful injunction, or for wrongful arrest or attachment

Undertaking.—Where a temporary injunction has been granted on an undertaking by the plaintiff to compensate the defendant for any loss that may arise by reason of the injunction, the undertaking is enforced by an application under this section to the Court which granted the injunction *A* attaches a house in execution of a decree against *B* *C* sues for a declaration that the house belongs to him, and obtains a temporary injunction staying the sale on his undertaking to pay interest to *A* at 6 per centum on the value of the house if his suit be dismissed *C*'s suit is dismissed In such a case the procedure to be adopted by *A* to recover the interest from *C* is to apply not to the Court executing the decree, but to the Court which granted the injunction (z)

Chartered High Court.—Where a temporary injunction was granted by the High Court of Bombay on an undertaking by the plaintiff under Rule 317 of that Court to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such order, it was held that the Court had power under that rule to award compensation to the defendant exceeding Rs 1,000 on an application by the defendant in that behalf (a)

(y) *Narasinga v Gorinda* (1901) 24 Mad 62
Lok Nath v Amir Singh (1906) 28 All 81
 (z) *Varajlal v Kastur* (1898) 22 Bom 42

(a) *Haji Abdul v Munjibhai* (1926) 28 Bom
 L R 1077 97 I C 763 (1926) A B
 523

PART VII.

Appeals.

APPEALS FROM ORIGINAL DECREES.

96. [S. 540 Jud. Act, 1873. s. 49] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Changes introduced by the section.—Sub section (3) is new In other respects this section corresponds with sec 540 of the Code of 1882 As to the effect of sub section (3), see notes below under the head Sub section (3) consent decrees not appealable "

Compare Judicature Act, 1873, s 49, which provides that "no order made by the High Court of justice or any Judge thereof, by the consent of parties, shall be subject to any appeal except by leave of the Court or Judge making such order "

Letters Patent appeals—The *right of appeal* from a decree of a single Judge of a High Court to the High Court is governed not by this section, but cl 15 of the Letters Patent "The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court This right of appeal depends on clause 15 of the Charter (b) But as regards *procedure*, the Court and the rules therein contained, especially the rules contained in O 41, apply to proceedings in a High Court under the Letters Patent, save so far as the Code expressly provides to the contrary (c)

Right of appeal—It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Court, such right must be given by statute or by some authority equivalent to a statute (d) Unless a right of appeal is clearly given by Statute, it does not exist, whereas a litigant has independently of any Statute a right to institute any *suit* of a civil nature in some Court or another (e)

- | | | |
|-----|-------------|--|
| (b) | " " " " " " | 80 |
| | " " " " " " | (d) <i>Minaishi v Subramanya</i> (1888) 11 Mad |
| | " " " " " " | 26 33 14 I A 160, <i>Tarasurama v.</i> |
| | " " " " " " | <i>Seshier</i> (1904) 27 Mad 504 <i>Jiangoon</i> |
| | " " " " " " | <i>Isolatoung Co v Collector of Jiangoon</i> |
| | " " " " " " | (1913) 40 Cal 21 27, 39 I A 197, 200, |
| | " " " " " " | 16 I C 188 |
| (c) | " " " " " " | (e) <i>Zair Hussain Khan v Khurshed Jan</i> (1906) |
| | " " " " " " | 28 All 545, 542-550 |

No right of appeal can be given except by *express* words (f) This section in express words gives a right of appeal from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decision of such Court But the Court of a special judicial officer appointed under sec 3 (d) of the Land Acquisition Act, 1894, is a Court of special jurisdiction and the High Court is not authorised to hear appeals from it (g) Rights of appeal again are substantive rights. They are not mere matters of procedure Hence an Act which takes away an existing right of appeal must not be applied retrospectively in the absence of express enactment or necessary intendment (h)

Agreement not to appeal.—An agreement whereby the parties agree not to appeal from a decree, the parties thereto, if it is for a lawful consideration, is an agreement by the next friend of a minor not to

Decree—As to the distinction between a decree and an order, see p 5 above All decrees are appealable unless the appeal is barred under this Code or any other law But all orders are not appealable The only orders appealable are those specified in sec 104 An order determining the apportionment of compensation awarded under the Land Acquisition Act 1894, is a decree and appealable (i)

Where decree not drawn up—No appeal can be entertained from a decree unless the decree has been drawn up (l) See notes to sec 33, also notes to sec 97,

Where preliminary decree not drawn up

Appeal from ex parte decree—Sec 540 of the Code of 1882 as it originally stood did not contain any clause allowing appeals from *ex parte* decrees The clause allowing such appeals was added by sec 45 of the Civil Procedure Code Amending Act 7 of 1888 Prior to that Act it was doubted in some cases whether an appeal lay from an *ex parte* decree As to the powers of an appellate Court in the matter of *ex parte* decrees, see notes to O 9, r 13, "Whether remedies concurrent"

Forum of appeal.—The value of a suit, that is, the amount or value of the subject matter thereof, determines the forum of suit that is the Court in which the suit is to be filed. It also determines the forum of appeal, that is, the Court to which the appeal lies What then is the value of a suit for the purposes of appeal? Now a plaintiff may in his plaint fix a sum *definitively* as the amount of his claim as in a suit for debt, or he may fix it *approximately* or *tentatively* as in a suit for accounts or for mesne profits [O 7, r 2] Where the plaintiff fixes a sum *definitively* it is that sum which determines the forum of appeal, and not the amount awarded by the decree and involved in the appeal Where the plaintiff fixes a sum *approximately*, there is a difference of opinion as to the forum of appeal According to the Calcutta High Court, it is the amount decreed by the first Court as the amount due to the plaintiff which determines the forum of appeal

(f)

(g)

(h)

(i) *Bai Divali v Shah Vishnav* (1910) 34 Bom 182 4 I C 829 See also *Irrani v*

(m)

(n)

(n)

(o) *Rhodes v Switthenbank* (1889) 22 Q B D 677

(o)

High Courts it is the amount determined by the first Court as the amount of the plaintiff and accepted by the plaintiff by payment of the amount of the determination the form of appeal. According to the Madras High Court it is the amount or value of the subject matter as fixed in the plaint that determines the Court to which the appeal lies and not the amount decreed. It has accordingly been held by that Court that where in a suit for accounts filed in the Court of a District Munsif whose jurisdiction is limited to suits of value the value does not exceed Rs. 200 the plaintiff fixes his claim approximately at Rs. 2000 and the Munsif passes a decree for more than Rs. 1000 the appeal from the Munsif's decree lies not to the High Court but to the District Court (f). In a case (g) the Allahabad High Court has adopted the same rule as Madras. Where a suit is dismissed by the first Court in which case the mesne profits remain undetermined the sum stated in the plaint determines the form of appeal (r). The Allahabad High Court of Calcutta has recently held that where a suit is properly brought in the Court of a Munsif for recovery of possession of land and mesne profits and a decree is claimed or a decree is passed at a sum beyond the pecuniary jurisdiction of the Munsif the Munsif has jurisdiction to fix such mesne profits and pass a decree for a sum beyond his pecuniary jurisdiction. The value of such a suit for purposes of jurisdiction is the value of the immovable property plus mesne profits up to the date of the suit where such profits are claimed. If a suit is rightly entertained as within the jurisdiction of the Munsif a decree passed has power to grant the proper and adequate relief is not affected by any event which increases the value of the relief during the pendency of the suit. The result of appeal is determined by the value of the suit and not by the amount decreed (s). The undermentioned decisions (t) of the same High Court must be taken to have been overruled by the Full Bench case. See notes to s 6 on p 91 above.

Over valuation and Under valuation on p 104 above

A decree is passed by Court M in respect of a cause of action which arises at Kailash. Appeals from decrees of Court M lie to Court C. Subsequently Kailash is transferred to the territorial jurisdiction of Court P from which appeals lie to Court B. To which Court does the appeal from the decree lie to Court C or to Court B? The answer lies to Court B because a transfer of territorial jurisdiction operates to effect a transfer of venue (u).

Who may appeal—An appeal under this section may be preferred by any of the following persons—

- 1 Any party to the suit adversely affected by the decree (v) or if such party is dead by his legal representative (w) [see s 146]
- 2 Any transferee of the interest of such party who so far as such interest is concerned is bound by the decree provided his name is entered on the record of the suit (x) [See note to s 47 Representative on p 174 above]
- 3 An auction purchaser may appeal from an order in execution setting aside the sale on the ground of fraud [See notes to s 47 Appeal on p 185 above]

No person unless he is party to the suit is entitled to appeal under this section (y)

| | |
|---|--|
| (p) Kannayya Venkata (1917) 40 Mad 1 | 24 C W N 34 591 C 1 |
| 39 I C 433 (P B) | (u) S. Jayaraj Iyer (14) 37 Ma L 477 |
| (q) Muhammad Abdul Ala Baksh (19 5) 47 | 26 I C 59 |
| All 534 861 C 1055 (5) A 4 376 | (r) F. Jha Mohan Chandra (190) 9 |
| (s) Saaya I nka Raja I anad agh (19 0) | C W N 584 |
| 4 Pat L J 447 5 I C 45 | (w) C. dha Gan A 1871 7 B I R 140 |
| (t) Bidhyadha Manad a Na h (19 5) 53 | (x) M. dha I u haba (18 8) Bon 249 |
| Cs 14 891 C 6 (5) A C 1 631 | 50 |
| (v) Bhupend a v I u na (19) 43 Cal 650 8 | (y) R. m. O. a L. u. d. a. o. 1019 P R |
| I C 34 I a l n ha Moha anda (1910) | n p 104 1 C 851 |

We have said above that any party to a suit adversely affected by a decree may prefer an appeal from the decree. The question whether a party is adversely affected by a decree is a question of fact to be determined in each case according to its particular circumstances. It is clear that if a plaintiff's claim is decreed in its entirety and

The reason is that the very fact that the decree is entirely in the plaintiff's favour notwithstanding a finding adverse to him on one of the issues shows that such finding was unnecessary to the determination of the plaintiff's suit. It has been stated in the notes to s 11, pp 79-80 above, that when a finding on an issue is not necessary to the determination of a suit, such finding does not operate as *res judicata*, and it is an elementary principle that an appeal is not admissible on any point that does not operate as *res judicata*. Similarly, if a suit is brought by A against B, and the suit is dismissed in its entirety B cannot appeal from the decree. And even if one of the issues is found against B B cannot appeal from the finding, for such finding does not operate as *res judicata* for the reason stated above (a). See notes to s 11, "Decision in the former suit must have been necessary to the determination of that suit," on p 80 above, and the cases there cited.

It sometimes happens where there are two or more defendants, that although a suit is dismissed as against one of them in other words, the decree on the face of it is entirely in his favour, the decree impliedly negatives the right claimed by such defendant as against the plaintiff and the other defendants. In such a case it has been held that an appeal lies at the instance of such defendant on the ground that he is adversely affected by the decree. X owes Rs 2,000 to A. A assigns the debt first to B and then to C. C sues A and B to recover the debt, alleging that the assignment to B had become void through non fulfilment of the conditions upon which it was made. A decree is passed against A, but the suit is dismissed as against B. Here the decree necessarily implies the finding that the assignment to B had become void, inasmuch as but for such a finding the decree could not have been passed in favour of C who admittedly was the second assignee of the debt. B may therefore appeal from the decree, though as against him the suit was dismissed (b).

In some cases an appeal may be preferred by a defendant against his co-defendants. A sues two Hindu brothers B and C on a promissory note passed by B for money borrowed by him (B) as manager of the family, alleging that B and C were joint, and that the loan was obtained by B for family purposes. B does not appear at the hearing. C appears and admits that he and B are joint, but denies that the loan was obtained for family purposes. An issue is raised as to whether the debt contracted by B was for family purposes. It is found by the Court that the loan was obtained by B for family purposes, and a decree is passed against B and C. Here C can appeal from the decree as between himself and B. The rule is that when a Court deals with a case as raising not only a question between the plaintiff and the defendants but also as between the defendants one of the defendants can appeal from the decree as between himself and the other defendants (c). See notes to s 11, "Res judicata between co-defendants" on p 63 above.

- (a) *Secretary of State v. Naminatha* (1914) 37 Mad 55 L.J. C 187.
 (a) *R. in Jalad v. Jucha Kuer* (1895) 21 Cal 301. *Nanda v. Indhu* (1886) 13 Cal 17.
Mudnapur Zamindars Co. v. Auresh (1911) 48 Cal 460 48 L.J. 49 64 L.C. 241 (C).
A.P. 241 Tanasah Jai v. Gopal (1923) 8 Pat 617 119 L.J. 503 (24) A.L.J. 586.
Latchayya v. Kotamma (1914) 47 Mad L.J. 743 84 L.C. 945 (15) A.L.J. 64.

- (b) *Jamna Das v. Pidey Pata* (1899) 21 All 117. *Krishna Chandra v. Mohesh Chandra* (1905) 9 C.W. 584. *Isuf Sahib v. Durg* (1917) 30 Mad 447. *Venkataramulu v. Lingayya* (1911) 47 Mad 623 83 L.C. 660 (24) A.L.J. 689. *Venkataramulu v. Jadhava Ramma* (1914) 47 Mad L.J. 619 85 L.C. 868 (24) A.L.J. 868.
 (c) *Soru v. Narayanrao* (1894) 18 Bom 520.

Decree holder may accept what the decree awards him and appeal for what the decree refuses him — If the decree awards the decree holder a sum smaller than what he claims he may accept the smaller sum and appeal for the balance. He may approve the decree as to what it awards him and reprobate the decree as to what it refuses him (d)

Joinder of appellants — It is irregular for defendants with different defences to a suit and with different grounds for appeal to join in a single appeal (e)

Sub section (3), consent decrees not appealable — Sub section (3) is new. It declares that no decree passed by consent of parties shall be appealable. Under the Code of 1882 consent decrees were passed under sec 375. Under the present Code (f) a consent decree may be passed under O 23, r 3. This rule corresponds with sec 375 of the Code of 1882 except that certain words which occurred at the end of sec 375 have now been omitted. Sec 375 ran as follows —

If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction

O 23, r 3, is a reproduction of sec 375 with the omission of the words italicized above (g). This omission has been supplied by sub section (3) of the present section. The said words barred an appeal from a consent decree *only so far as* such decree related to so much of the *subject matter of the suit* as was dealt with by the agreement, compromise or satisfaction on which the decree was based. If a consent decree dealt with any matter extraneous to the suit that is matters that *did not relate to the subject matter of the suit* it was held that the decree *though passed with the consent of parties* was appealable and that it should be modified by omitting such terms as did not relate to the subject matter of the suit (h). As regards the terms so excluded it was held that they might be enforced in a separate suit as a contract (i). It would be so also under the present Code. See in this connection the observations of the Judicial Committee in *Hemanta Kumari Devi v Midnapur Zemindari Company* (j).

Both under O 23 r 3 and the corresponding sec 375 of the Code of 1882 the agreement or compromise in terms of which the Court is invited to pass a consent decree must be lawful. It was accordingly observed by the High Court of Bombay in *Goculdas v James Scott* (k) a case under sec 375 that notwithstanding the declared finality of the decree an appeal against it would be maintainable where the party against whom the decree was passed alleged that there had been in fact no 'lawful agreement' come to in which case the condition precedent to the making of the decree would not be fulfilled. These observations were mere *obiter dicta*, but they were adopted by the High Court of Madras in *Sridharan v Puramathian* (l) where it was held that an appeal would lie from a consent decree if the agreement in terms of which the decree was passed was not lawful. The present Code does not allow an appeal from a consent decree

(d) *Hurrybux v Johrm* II (1931) 5 Cal 345
(29) A C 794

(e) *Hodges v Delhi and London Bank* (1900) 5
C W N 1

(f)
(g)

notes to O 23 r 3
(h) *Venkatappa v Thimma* (1895) 18 Mad

410 *Praglas v Girdhardas* (1907) 26
Bom 76 73 *Manager of Sri Sarnakshi*
Deostanam v Abul Kasim (1907) 30
Mad 4 14 3

(i) *Jasimuddin v Bah* (1907) 31 Cal 456
(j) (1919) 46 I A 441 46 47 Cal 485 495,
51 IL 534

(k) (1911) 16 Bom 200 at p 212. See also
Praglas v Girdhardas (1912) 26 Bom
76 73

(l) (1900) 23 Mad 101

in any case. But it is competent to either party to appeal from the order recording the compromise where the compromise is not a lawful compromise on the ground that the Court had no power under O 23 r 3 to record a compromise that was not lawful [O 43 r 1 cl (m)]. See notes to O 22 r 3, Appeal.

Plaintiff sued upon an account stated. The Court found that the account stated was a deliberate fabrication and fraud and the plaintiff had to fall back on items in the general account. Each of these was found to be barred by limitation but defendants consented to a decree for such items as plaintiff could prove. A decree was passed on this footing. The Privy Council held that it was a consent decree and not appealable and that if it were not a consent decree the plaintiff's claim would have to be dismissed (m).

Practice.—The Privy Council have said that when a decree or any part of a decree is passed by consent of parties it should always so appear on the face of the decree when drawn up (n).

Procedure for setting aside consent decrees.—Sub-section (3) in so far as it bars an appeal from consent decrees gives effect to the principle that a judgment by consent acts as an estoppel (o). In the case of a consent decree the Privy Council refused to entertain an appeal or to consider the sufficiency or otherwise of the consent as the decree could only be set aside by substantive proceedings appropriate to that particular remedy (p). A consent decree can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake (q). This can only be done by a suit and a consent decree cannot be set aside by an appeal (r) or a review (s) or by a rule obtained on a motion (t). But the Court in its inherent jurisdiction may set aside an interlocutory consent order which is not a final order or judgment (u). But an appeal from an order recording a compromise under O 23 r 3 is not incompetent if the decree is passed before the appeal (v). In some cases it may be done by an application for a review (w). But it cannot be done by a rule (x). See notes to sec 11. Consent decree and estoppel.

By consent of parties.—To constitute consent there must be an agreement between the parties. Mere acceptance by a party of an order offered by the Court does not amount to consent (y).

97. [New] Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree
where no appeal from pre-
liminary decree

- (m) *Itamachandra v Chaitan* (1903) 31 Mad L J 68 47 I A 55 I C 539 [P C]
(n) *Zahid ul Said v Lachmi Narayan* (1931) 33 C W N 619 131 I C 316 (31) A PC 107
(o) *Re S American Co* [1895] 1 Cl 37
(p) *Zahid ul Said v Lachmi Narayan* (1931) 33 C W N 619 131 I C 316 (31) A PC 107
(q) *Huddersfield Bank v Co v Lister* (1895) 2 Ch 73 (mistake common to both parties) *Willis v Santoro* (1897)

(r)

- (s) *Galstoun v Promatha Nath* (1903) 57 Cal 154 (29) A C 40 *West Gulab Kuer v Badshah* (1911) 13 C W N 1197 11 I C 129 *Nath Lal v Raghob Singh* (1906) 48 All 160 89 I C 946 (28) A A 50
(t) *Fatmabai v Sonbai* (1912) 36 Bom 77, 11 I C 568 *31 suf v Abdullahai* (1931) 56 Bom 331 139 I C 845 (37) A B 615

(u)

(v)

- (w) *Aushootosh v Tara* (1894) 10 Cal 612 618
(x) *Fatmabai v Sonbai* (1912) 36 Bom 77 11 I C 568
(y) *Idam v Bro n* (1890) W N 116 *Mad da v Fordham* (1893) 10 T L R 139

Preliminary decree—For definition of preliminary decree, see sec 2 (2) above

Appeal from preliminary decree.—This section is new. The object of the section is to estop parties aggrieved by a preliminary decree who do not appeal from such decree within the period of limitation, from afterwards disputing its correctness in any appeal which may be preferred from the final decree.

This section has expressly excepted preliminary decrees from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. This is because the final decree is in its nature dependent and subordinate, as it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon (a).

The Calcutta decisions under the Code of 1852 are now obsolete. The general trend of these decisions was in the opposite direction. According to these decisions, a party aggrieved by an order in the nature of preliminary decree was not bound to appeal from the order, though the order was appealable as a decree, he was at liberty to wait until the final decree was passed, and then to dispute the correctness of the order in an appeal from the final decree, though the period of limitation for an appeal from the order had then expired. Thus it was held that when an order was passed in a suit for dissolution of partnership and accounts, declaring the shares of the parties, and referring the case to a commissioner for taking accounts, it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order, and the period prescribed by the law of limitation for appealing from the order had then expired (b). In a subsequent case it was held by a Full Bench of that Court in *Khalem Hossein v Emlad Hossein* (c) [Maclean, C J, and Rampini, J, dissenting], that where an order was passed in a suit for partition declaring the rights of the parties (d), it was open to the party aggrieved by the order to dispute its correctness in an appeal from the final decree, though no appeal was preferred from the order within the time allowed by law. The contrary had been laid down in an earlier case decided by the same High Court (e) but that decision was dissented from by a majority of the Full Bench in *Ahadem Hossein* & case. Under this section omission to prefer an appeal from a preliminary decree precludes objections to it in an appeal from the final decree (f). It is to be noted that the present section applies only to preliminary decrees passed after the commencement of this Code. For preliminary decrees, see O 20 below.

Where preliminary decree not drawn up—A right of appeal under this section only arises when a preliminary decree is passed that is, drawn up. It is the duty of the Court, and not of the parties, to see that a decree is drawn up. Unless a preliminary decree is drawn up, this section does not therefore apply. See sec 33, and notes thereon.

Two preliminary decrees—The Code, it seems, contemplates only one preliminary decree (h). The High Court of Calcutta, however, has held that there may in an exceptional case be more than one preliminary decree (i).

(a) See the judgment of Rankin C J in *Taleb Ali v Abdul Aziz* (1903) 57 Cal 1013 (1903) 4 C 653.

(b) *Buxa Nath v Bani Kanta* (1896) 23 Cal 406. See O 20 r 15.

(c) (1902) 29 Cal 755.

(d) See O 20 r 14 below.

(e) *Bolaram Dey v Tim Chandra Dey* (1891) 18 Cal 333.

(f) *Ahmed v Hashim* (1915) 4 I A 914. Cal 914 24 I C 10 [preliminary decree dissolving partnership].

(g) *Iamanacharya v Gorind* (1903) 25 Bom LR 86 6 I C 1014 (1903) 4 B 33. *Saikharam v Salaur* (1913) 37 Bom 480 12 I C 894. *Kaliram v Gangaram* (1914) 16 Bom LR 67 23 I C 605.

(h) *Iamanacharya v Gorind* (1923) 25 Bom LR 86 831 835 76 I C 1014 (24) 4 B 33.

(i) *Laja Icaru Mohan v Manohar* (1923) 27 C W N 353 992 74 I C 373 (24) 4 C 160.

Final decree passed prior to or during pendency of appeal from preliminary decree—A Full Bench of the Calcutta High Court after an exhaustive review of the case law has held that an appeal from a preliminary decree is not incompetent if the final decree is passed before it is presented, and that in such a case it is not necessary for the party aggrieved by the preliminary decree to appeal against the final decree, if the final decree, apart from being based on the preliminary decree is otherwise correct (j) Rankin, C J, said that the function of the final decree is merely to restate and apply with precision what the preliminary decree has ordained, that the decrees being in the same suit the Court in appeal from the preliminary decree as it has power to reverse or vary the preliminary decree, has also power to affect the final decree, that as the right of appeal from the preliminary decree is given without any qualification the passing of a final decree is no bar to the institution or hearing of any appeal against the preliminary decree, that if the preliminary decree is set aside the final decree is superseded whether the appeal was brought before or after the passing of the final decree and that the Court when setting aside or varying the preliminary decree can and should give directions for setting aside or varying the final decree if the existence of the final decree is brought to its notice as in all cases it should be

This illuminating judgment has the effect of overruling previous Calcutta decisions which had held that after the final decree an appeal from the preliminary decree was incompetent (k), or infructuous as the final decree cannot be contingent on the result of the appeal from the preliminary decree (l), and that if the final decree is passed after institution of the appeal from the preliminary decree the latter should be amended to include an appeal from the final decree (m)

The Madras and Allahabad High Courts had held that an appeal from the preliminary decree is competent although no appeal has been filed against the final decree, and that after the preliminary decree is set aside the final decree falls with it (n)

98. [S 575] (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges

Decision where appeal heard by two or more judges

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed.

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law

(j) *Taleb Ali v Abdul Iz* (19-9) 57 Cal 1013 (29) A C 680

(k) *Macienzio v Varsi & Sahas* (1901) 36 C 1 762 11 C 413

(l) *Gopal Chandra v Abdur Rahim* (19-7) 54 Cal 3 4 103 1 C 538 (7) A C 41

Jogendra Narayan v Salyendra (19-5) 20 C W N 641 90 I C 380 (5) A C 793

(m) *Kh Rodamaji v Adhar* (1919) 18 Cal I J

31 11 I C 516 *Chandumal v Motilal* (19-5) 7 B n I R 140 J I C 646 (26)

A B 43 *Yanubala v Ichhamoyee* (19-5) 41 Cal L J 29 841 C 746 (5) A C

114

(n)

(11-11)

upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court

Difference between the old and new section.—This section corresponds with s 575 of the Code of 1882 except that the proviso to sub section (2) of the present section differs in several material respects from the proviso to the second paragraph of s 575. The proviso to the second paragraph of s 575 ran as follows —

Provided that if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, *the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it*”

As to the points of distinction between the old and the new section, see notes below “The appeal shall then be heard upon that point only, and “By whom appeal to be heard upon point of law stated.”

Amendments.—Sub sec (3) was added by the Repealing and Amending Act 18 of 1928

Difference of opinion as to part of decree.—When a Bench of two Judges agree in reversing part of a decree but differ as to the rest, the portion on which they agree will be reversed and the rest confirmed (o)

“Differ in opinion on a point of law”—No reference can be made under this section if the Judges differ on a question of fact. The power to refer can only be exercised if there is a difference of opinion on a point of law (p)

“The appeal shall then be heard upon that point only.—Under the old section it was the *appeal* that was referred to a third Judge when the Judges hearing the appeal differed in opinion on a point of law and it was held that on such reference the *whole appeal* was open for argument, and not only the point of law on which the Judges had differed (q). Under the present section the Judges have to state the point of law upon which they differ and the appeal is to be heard *upon that point only*

By whom appeal to be heard upon point of law stated.—Where a point of law on which the Judges hearing the appeal differ has been stated, the appeal is to be heard upon that point by one or more of the other Judges of the Court. This was, in fact, the practice followed in Bombay under the Code of 1882 (r). In Allahabad the appeal was heard by a Bench including the Judges who first heard it (s)

(o) *Rajagopala v Subbaram* (1908) 51 Mad 91 109 1 C 153 (9) A M 140
Harakh Narain v Rabban (1933) 55 All 672 (33) A A 473 dissenting from
Punjab Akhbarat & Land Press Co v Omice (1906) 7 Lah 179 93 I C 344 (28) A L 65
 (p) *Gossami v Romanisly* (1890) 17 Cal 3

See also *Har Prasad v Fazal Ahmad* (193) 60 I A 116 55 All 83 142 I C 217 (33) A PC 83
 (q) *Seshadri v Nataraja* (1896) 21 Mad 179
 (r) *Nagu v Salu* (1891) 15 Bom 424 *Jehangir v Secretary of State* (1904) 6 Bom L.R. 131
 (s) *Rohilkhand Bank v Pow* (1884) 6 All 468

sub section (3) is that sec 98 applies only to Courts other than Chartered High Courts. The difference of procedure between cl 36 and sec 98 is (1) that while a reference on the point of difference is obligatory under cl 36, it is optional under sec 98, and (2) while a reference under cl 36 may be on a question of fact and law, it can be a question of law only under sec 98. See notes under cl 36 of the Letters Patent.

Income Tax Act.—It is clause 36 of the Letters Patent that applies to a reference to the High Court under sec 66 of the Income Tax Act, 1922, and not sec 98 of the Code (c)

99. [S. 578.] No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction

Changes introduced by the section—This section corresponds with sec 578 of the Code of 1882, except in the following respects —

- 1 The words "any misjoinder of parties or causes of action" are new. As to the effect of these words see notes to O 2, r 3 "Procedure in case of misjoinder of plaintiffs and causes of action," and "Procedure in case of multifariousness," and notes to O 2, r 4, "Leave of the Court"
- 2 The words, "in any proceedings in the suit," have been substituted for the words, "whether in the decision or in any order passed in the suit or otherwise" As to the effect of this alteration, see notes below, "In any proceeding in the suit"

Scope of the section—The mere circumstance of there being an error, defect or irregularity in any proceeding in a suit is no ground for reversing or varying a decree in appeal. But if it appears that the error, defect or irregularity affected the merits of the case or the jurisdiction of the Court, it would be a ground for reversing or varying the decree. Where an irregularity is one which affects the merits of a case or the jurisdiction of a Court, it is said to be a *material* irregularity. Where it does not, it is usually spoken of as a *mere* irregularity. This section cures a *mere* irregularity, error or defect. It does not cure a *material* irregularity, error or defect.

"Misjoinder of parties or causes of action"—This expression may be analysed and the rule contained in this part of the section may be stated as follows.—

No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal, on account of—

- (1) misjoinder of plaintiffs (O 1, r 1),
- (2) misjoinder of defendants (O 1, r 3),
- (3) misjoinder of plaintiffs and causes of action (O 2, r 3) [The practice was different under the Code of 1882, see notes to O 2, r 3, "Procedure in case of misjoinder of plaintiffs and causes of action"],
- (4) misjoinder of defendants and causes of action (d) [O 2, r 3] [The practice was different under the Code of 1882, see notes to O 2, r 3, "Procedure in case of multifariousness"],

- (5) misjoinder of causes of action (e) (O 2, rr 3-4 and 5) See notes to O 2, r 4, "Leave of the Court"

The words, "on account of any misjoinder of parties or causes of action," have been inserted in the section to make it clear that such a misjoinder is to be treated as a mere irregularity

Non joinder.—The Madras High Court has held that the expression "misjoinder" in this section includes "non joinder" (f). But this was doubted in a later Madras case (g). The non joinder of a necessary party is a defect which affects jurisdiction and is not within this section (h). See O 1, r 9, and notes thereto.

Error, defect or irregularity not affecting the merits of the case.—A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped (i), or for admitting a document declared invalid where the judgment is not based on that document (j) or because the wrong side was allowed to begin (k) or because the suit was decided on a Sunday (l), or because the suit was instituted by an agent under a defective power of attorney (m) [O 3, r 2], or because an order allowing execution against the legal representative of a deceased judgment debtor was made by the transferee Court instead of by the Court which passed the decree (n). All these are irregularities not affecting the merits of the case or the jurisdiction of the Court and they are cured by this section. The exclusion of evidence by the lower Court is an irregularity which may or may not affect the merits of the case if it does not the irregularity is condoned under this section (o). An omission to draw up a final decree under O 34, r 5 has been condoned under this section (p). For other cases see—

- 1 notes to s 15, "Where a suit which ought to have been instituted in a Court of lower grade is instituted in a Court of higher grade,"
- 2 notes to s 92, "Consent of the Advocate General,"
- 3 notes to O 6, r 14, "Omission to sign plaint,"
- 4 notes to O 16 r 1, "Remedy of party when witness summons refused,"
- 5 notes to O 21, r 13, "Omission to verify inventory,"
- 6 notes to O 26 r 4, "May issue,"
- 7 notes to O 32 r 1, "Objection to authority of next friend,"
- 8 notes to O 32 r 3, "Irregular appointment of guardian ad litem,"
- 9 notes to O 41, r 23, "Effect of erroneous order of remand,"
- 10 notes to O 41, r 26, "Sending back case for a revised finding,"
- 11 notes to Sch II, para (1), "Application shall be in writing,"
- 12 notes to Sch II, para 16, "After the time for making such application has expired"

(e) *Mudnapore Zemindari Co., Ltd. v. Narain* (1911) 33 Cal L.J. 317 63 I.C. 161 (21) A.C. 308 *Alub Lal v. Jhansi* (1941) 3 Pat 244 78 I.C. 880 (24) A.P. 613

(f) *Taifanath v. Manaklat* (1910) 33 Mad 436 5 I.C. 774

(g)

(h)

(i)

(j)

(k)

(l)

(m)

(n) *Jang Bahadur v. Bank of Upper India*, 10 I.C. 103

(o)

(p) *Chhaganlal v. Jajaram* (1917) 51 Bom 120 30 I.C. 906 (27) A.B. 131

"In any proceedings in the suit. —These words have been substituted for the words, 'whether in the decision or in any order passed in the suit or otherwise,' which occurred in sec. 578 of the Code of 1882. The latter words were held to apply only to irregularities in proceedings *subsequent* to the institution of the suit, and not to irregularities in the frame or institution of the suit (g). The rules of the Chief Court of Oudh require money deposited in Court to be paid to the person entitled through the Treasury, but when the Munsiff paid the money directly this was held to be an irregularity cured by this section (r). The present section applies to irregularities in *any* proceedings in the suit.

Irregularity affecting jurisdiction of Court—See sec. 21 and notes thereto

Suits Valuation Act, 1887, section II—Sec. II of the Suits Valuation Act, 1887, modifies the provisions of the present section in cases where an objection is taken in appeal that by reason of the over valuation or under valuation of a suit a Court which had no jurisdiction with respect to the suit exercised jurisdiction with respect thereto. The section is as follows—

- (1) Notwithstanding anything in section [99] of the Code of Civil Procedure, an objection that by reason of the over valuation or under valuation of a suit or appeal, a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless—
 - (a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower appellate Court in the memorandum of appeal to that Court, and
 - (b) the appellate Court is satisfied for reasons to be recorded by it in writing that the suit or appeal was over valued or under valued, and that the over valuation or under valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits
- (2) If the objection was taken in the manner mentioned in clause (a) of sub section (1), but the appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub section, and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance or lower appellate Court
- (3) If the objection was taken in that manner and the appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals, but if it remands the suit or appeal, or frames and refers issues for trial or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

APPEALS FROM APPELLATE DECREES

100. [S 584] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed

Second Appeal

in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

- (a) the decision being contrary to law or to some usage having the force of law ;
- (b) the decision having failed to determine some material issue of law or usage having the force of law ,
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed *ex parte*

Changes introduced by the section —The word ' specified ' in the expression " specified law or usage " which occurred in cl (a) of sec 584 of the repealed Code has been omitted, see the undermentioned case (s)

Scope of the section —This section deals with second or special appeals to the High Court. A Court of first appeal is competent to enter into questions of fact, and decide whether the findings of facts by the lower Court are or are not erroneous. But a Court of second appeal is not competent to entertain questions as to the soundness of a finding of fact by the Court below (f). A second appeal can only lie on one or other of the grounds specified in the present section (w). A judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not to reject the appeal summarily (t). The limitations to the power of the Court imposed by secs 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (w). Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100]. No Court in India or elsewhere has power to add to or enlarge those grounds' (x).

No second appeal lies on the ground of an erroneous finding of fact —In *Durga Choudhram v Jauahar Singh* (y), the Privy Council held that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be. No doubt a second appeal lies where there is a substantial error or defect in procedure [see cl (c)], but an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the

(s) *Ism Gopal v Shamshaton* (1897) 19 I.A. 228, 233, 20 Cal. 93, 99, 100

(f) *Ism Gopal v Shamshaton* *supra*

(w) *Luchman v Iuna* (1887) 16 Cal. 703, 16 I.A. 125

(c) *Rudr Prasad v Baij Nath* (1893) 15 All. 367

(w) *Pertab Chunder v Mahendranath* (1890) 17 Cal. 291, 16 I.A. 233

(x) *Durga Choudhram v Jauahar Singh* (1891) 18 Cal. 23, 30, 17 I.A. 12.

(y) (1891) 17 I.A. 102, 18 Cal. 23

finding (z) In *Ramratan Sukul v Musamat Andu* (a), the Judicial Committee said " It has now been conclusively settled that the third Court, which in this case was the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court, if there is evidence to be considered the decision of the second Court, however unsatisfactory it might be if examined, must stand final " The mere fact that the High Court would have upon the documents and evidence placed before the Court of first appeal come to a different conclusion is no ground for a second appeal This section was enacted for the express purpose of securing some measure of finality in cases where the balance of evidence verbal and documentary arose for decision (b) In *Nafir Chandra Pal v Shukur* (c) their Lordships said " Questions of law and of fact are sometimes difficult to disentangle The proper legal effect of a proved fact is necessarily a question of law, so also is the question of *admissibility of evidence* and the question of whether any evidence has been offered on one side or the other, but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact If the question to be decided is one of fact it does not involve an issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents have to be construed (d) A second appeal will not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court has made a mistake as to its meaning (e) But a second appeal will lie if the documents erroneously construed themselves constitute the foundation of rights claimed (f) The question whether a statutory presumption has been rebutted is always a question of fact (g) Accordingly no second appeal lies from a finding that an oral sale in the Punjab is not proved and that entries in the Record of Rights are erroneous (h) Again if there is evidence to support the finding of the appellate Court that the appellants are not tenure holders and that an entry to that effect in the Record of Rights is erroneous no second appeal will lie (i) A finding on appeal that an estate had not been privately partitioned previously to its partition under the Estates Partition Act, 1897, is entirely a finding of fact and is binding on the High Court in second appeal (j) But an appeal will lie if it can be shewn that the appellate Court has misdirected itself on a point of law in dealing with the evidence (k) For if the appellate Court has based its finding on the failure of a party to discharge the onus of proof which has been wrongly held to be incumbent on him, the finding, though a finding of fact is not based on positive evidence (l)

- (2)
- (a) (1892) 19 I A 1 3 19 Cal 249 25^a 259
- (b) *Nagar Chandra Pal v. Shukur* (1914) 45 I A 183 189 19^a 46 Cal 189 51 I C 760
- (c) (1914) 45 I A 183 187 46 Cal 189 195 51 I C 760
- (d) *Midnapur Zemindari Co. v. Uma Charan* (1913) 29 C W N 131 74 I C 482 (23) A I C 187 (P C)
- (e) *Akourbat Singh v. Chatter Dharee* (1873) 19 W R 22^a approved by the Privy Council in *Bali Mohammad v. Mohammad Baksh* (1930) 57 I A 86 11 Lah 199 12 I C 316 (30) A P C 91
- (f) *Amiruddin v. Afkhan Lal* (1930) 34 C W N 285 121 I C 514 (30) A P C 83
- (g) *Kumeda Prasanna v. Secretary of State* (1915) 19 C W N 1017, 30 I C 205
- (h) *Wali Mohammad v. Mohammad Baksh* (1930) 57 I A 86 11 Lah 199 12 I C 316 (30) A P C 91
- (i) *Midnapur Zemindari Co. v. Secretary of State* (1922) 56 I A 383 57 Cal 756 1^a I C 56 (23) A P C 286
- (j) *Basiram Saha Roy v. Ram Ratan Roy* (1907) 54 I A 196 54 Cal 588 101 I C 359, (2^a) A P C 117
- (k) *Midnapur Zemindari Co. v. Uma Charan* (1923) 23 C W N 131 74 I C 482, (23) A P C 18^a (P C)
- (l) *Jogesh Chandra v. Emdad Miyah* (1932) 59 I A 1 59 Cal 1012 136 I C 328, (3^a) A P C 28

in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

- (a) the decision being contrary to law or to some usage having the force of law ;
- (b) the decision having failed to determine some material issue of law or usage having the force of law ,
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits

(2) An appeal may lie under this section from an appellate decree passed *ex parte*

Changes introduced by the section—The word ‘ specified ’ in the expression ‘ specified law or usage ’ which occurred in cl (a) of sec 584 of the repealed Code has been omitted, see the undermentioned case (a)

Scope of the section—This section deals with second or special appeals to the High Court. A Court of first appeal is competent to enter into questions of fact, and decide whether the findings of facts by the lower Court are or are not erroneous. But a Court of second appeal is not competent to entertain questions as to the soundness of a finding of fact by the Court below (i). A second appeal can only lie on one or other of the grounds specified in the present section (ii). A judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily (iii). The limitations to the power of the Court imposed by secs 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate Court upon a matter of fact (iv). ‘ Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in section [100]. No Court in India or elsewhere has power to add to or enlarge those grounds ’ (v).

No second appeal lies on the ground of an erroneous finding of fact.—In *Durga Choudhram v Jawahir Singh* (y), the Privy Council held that there is no jurisdiction to entertain a second appeal on the ground of erroneous finding of facts, however gross the error may seem to be. No doubt a second appeal lies where there is a substantial error or defect in procedure [see cl (c)], but an erroneous finding of fact is a different thing from an error or defect in procedure. Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the

(a) *Ram Gopal v Shamskhaton* (1892) 19 I A 228 233 20 Cal 93 91 100
 (b) *Ram Gopal v Shamskhaton* *supra*
 (c) *Luchman v Puna* (1889) 16 Cal 753 16 I A 125
 (d) *Rishi Prasad v Bai Nath* (1893) 15 All 367

(ii) *Periab Chander v Molendranath* (1890) 17 Cal 291 16 I A 233
 (x) *Durga Choudhram v Jawahir Singh* (1891) 18 Cal 23 30 17 I A 122
 (y) (1891) 17 I A 122 18 Cal 23

finding (2) In *Lamratu Sulai v. Musamat Vandu* (a) the Judicial Committee said "It has now been conclusively settled that the third Court which in this case was the Court of the Judicial Commissioner cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court, if there is evidence to be considered the decision of the second Court, however unsatisfactory it might be if examined, must stand final. The mere fact that the High Court would have upon the documents and evidence placed before the Court of first appeal come to a different conclusion is no ground for a second appeal. This section was enacted for the express purpose of securing some measure of finality in cases where the balance of evidence verbal and documentary arose for decision (b). In *Nafir Chandra Pal v. Shukur* (c) their Lordships said "Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is necessarily a question of law, so also is the question of *admissibility of evidence* and the question of whether any evidence has been offered on one side or the other, but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact." If the question to be decided is one of fact it does not involve an issue of law merely because documents which are not instruments of title or otherwise the direct foundation of rights but are merely historical documents have to be construed (d). A second appeal will not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court has made a mistake as to its meaning (e). But a second appeal will lie if the documents erroneously construed them-

effect in the Record of Rights is erroneous, no second appeal will lie (f). A finding on appeal that an estate had not been privately partitioned previously to its partition under the Estates Partition Act, 1897, is entirely a finding of fact and is binding on the High Court in second appeal (g). But an appeal will lie if it can be shown that the appellate Court has misdirected itself on a point of law in dealing with the evidence (h). For if the appellate Court has based its finding on the failure of a party to discharge the onus of proof which has been wrongly held to be incumbent on him, the finding, though a finding of fact is not based on positive evidence (i).

- | | |
|--|--|
| <p>(2) -</p> <p>(a)</p> <p>(b)</p> <p>(c)</p> <p>(d) <i>Midnapur Zemindari Co. v. Uma Charan</i></p> | <p>(19-3) 29 C W N 131 74 I C 482 (23) A FC 187 (P C)</p> <p>(e) <i>Nourbat Singh v. Chutter Dharee</i> (1873) 10 W R 222 approved by the Privy Council in <i>Wali Mohammad v. Mohammad Baksh</i> (1930) 57 I A 86 11 Lah 193 122 I C 316 (30) A I C 91</p> <p>(f) <i>Amrindil v. Malkhan Lal</i> (1930) 34 C W N 283 121 I C 514 (30) A FC 83</p> <p>(g) <i>Kumeda Prasanna v. Secretary of State</i> (1915) 19 C W N 1017, 30 I C 255</p> <p>(h) <i>Wali Mohammad v. Mohammad Baksh</i></p> <p>(i) "</p> <p>(j) <i>Basram Saha Poy v. Ram Ratan Roy</i> (1927) 54 I A 196 54 Cal 586 101 I C 359, (27) A FC 117</p> <p>(k) <i>Midnapur Zemindari Co. v. Uma Charan</i> (1923) 29 C W N 131, 74 I C 482, (23) A FC 187 (P C)</p> <p>(l) <i>Jogesh Chandra v. Fmdad Miyaah</i> (1930) 59 I A 21 59 Cal 1012, 136 I C 394, (32) A FC 28</p> |
|--|--|

Decision being contrary to law.—A second appeal will lie where the decision of the lower appellate Court is contrary to law. The term "law" in cl (a) is not limited in its meaning to statute law; it means general law (m).

When the question is one of a right construction of a document (n), or of a legal inference from a document (o), the question is one of law, and a second appeal will lie. Thus where in a suit for a declaration of the plaintiff's proprietary title to the land in suit the lower appellate Court found on a construction of the *wajib-ul-arz* and other documentary evidence relating to the land that the plaintiffs were proprietors, their Lordships of the Privy Council held that the right construction of the documents was a question of law which the High Court was not precluded from considering in second appeal. In the course of the judgment their Lordships said: "That finding (namely, that the plaintiffs were proprietors of the lands) of the Subordinate Judge was the result of his having misconstrued the *wajib-ul-arz*. The right construction of documents is a question of law which Judges in second appeal are not by secs 554 and 555 of the Code of Civil Procedure (now secs 100 and 101) precluded from considering by any finding of a lower Appellate Court based upon such documents. The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the *wajib-ul-arz* and the Judges in second appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands" (p). Similarly the question whether a writing which is ostensibly a deed of absolute sale and an agreement by the purchaser to reconvey the property to the vendor constitute an out and out sale and an agreement for reconveyance or a mortgage by conditional sale, is a question of construction of documents, and the High Court is entitled to interfere in second appeal (q). In a Privy Council case where the question was whether the possession of properties by a Hindu widow was merely in lieu of maintenance and not adverse to the plaintiffs, their Lordships held that the question was one of inference from documents and not one of fact, and that they were therefore entitled to draw their conclusion notwithstanding the concurrent opinions of the Courts in India (r). But where the question is not one of construction of a document or of legal inference to be drawn from a document, but is one as to the effect to be given to a document as evidence of a fact or facts in issue, a second appeal is not admissible. Thus when the question was whether certain pension monies were included in a *watan* or hereditary endowment and two Courts after an examination of the *sanad* and other relevant documents had found that they were not, the Privy Council held that the High Court in second appeal was not entitled to reverse the finding unless the documents had been misconstrued (s). Thus where a suit involves a question of the fact of adoption, and documents are produced as evidence of the fact of adoption, the question whether the documents do or do not support the alleged adoption is a question of fact, and no second appeal will lie (t). The law on the subject was thus stated by Mookerjee, J, in *Makund Deb v Gopi Nath* (u). "We hold accordingly that, unless there is a question of the legal effect of a deed which may be treated as a document of title or

(m) *Ram Gopal v Samskhaton* (1893) 20 Cal 93 191 A 229

(n) *Fateh Chand v Kishen Kumar* (1912) 34 All 579 39 I A 247, 16 I C 67, 1 *Uthba v Mahdavi* (1918) 42 Bom 344 350 351, 46 I C 734

(o) *Chaudhri Satgur v Kishori Lal* (1919) 46 I A 197, 201, 42 All 152, 156, 55 I C 486

(p) (1912) 34 All 579, 585 39 I A 247 255-256 16 I C 67 *supra*, *Gopin v Purnan Singh* (1926) 48 All 568, 95 I C 58, (26) I A 542

(q) *Ganesh v Gnanasikhamani* (1924) 47 Mad 1 J 325, 336, 84 I C 605, (25) A M 37

(r) *Chaudhri Satgur v Kishori Lal* (1919) 46 I A 197, 201, 42 All 152 156, 55 I C 486

(s) *Sahabroo v Jauharrao* (1933) 60 I A 231, 35 Bom L R 816, 143 I C 437, (33) A FC 171

(t) *Lachman Lal v Kanhya Lal* (1895) 22 Cal 609 22 I A 51 *Anant Singh v Durga Singh* (1910) 37 I A 191, 197, 32 All 363 373, 6 I C 787 *Mudnapore Zamindars Coy v Uma Charan* (1923) 29 C W N 131 74 I C 482 (23) A FC 167, *Rajul v Lotus* (1911) 35 C W N 732 10 I C 325 *Uyr v Shadhai* (1922) 35 Cal L J 182 68 I C 1003, (22) A C 185 *Puran Krishna v Prasanna* (1923) 37 Cal L J 580, 72 I C 55, (23) A C 358

(u) (1915) 21 Cal L J 45 52 25 I C 236; *Ruidip v Banarsi* (1920) 5 Pat L J, 251, 55 I C 179

embodies a contract or is the foundation of the suit, a second appeal does not lie. A second appeal is not admissible, merely because some portion of the evidence is in writing of which the meaning has been mistaken by the lower appellate Court.

Where the lower appellate Court arrives at a conclusion which is an inference based upon an erroneous view of the law, the judgment is open to question in second appeal (r). A judgment is also open to question in second appeal where a defect in the judgment is due to an error as to the admissibility of evidence (x) or where secondary evidence is admitted in contravention of the provisions of secs. 65 and 66 of the Indian Evidence Act (x) or where there is failure to invoke a presumption of fact under sec. 144 of the Indian Evidence Act, 1872 (y). The question of burden of proof is a question of law, and the High Court is entitled to interfere in second appeal if the lower appellate Court has placed the burden on the wrong party (z). A second appeal will also lie where an unregistered document which requires registration is admitted in evidence (a).

Where the Court of first instance grants a mandatory injunction for the demolition of a building and the decree is reversed in appeal on an erroneous view of the law, a second appeal will lie (b). Though a person may not have been duly appointed executor he may render himself liable as an executor if he intermeddles with the estate of the deceased, misapplication of law on this point is a good ground for a second appeal (c). The question whether a stipulation in a contract is by way of penalty is a question of law which renders a second appeal competent (d).

Where an appeal which ought to have been preferred to the High Court is preferred to a District Court and the latter Court hears and decides the appeal the decision is contrary to law, and a second appeal will lie from the decree of the District Court (e). The High Court of Madras has held that where a Court assumes jurisdiction which it would not have had if the facts necessary to determine the question of jurisdiction had been rightly decided, a second appeal lies from the findings of facts (f).

A second appeal will lie where the question is one of proper inference in law from findings of facts—Though a second appeal does not lie from a finding of fact yet where a legal conclusion is drawn from the finding a second appeal will lie under cl. (a) of the section on the ground that the legal conclusion was erroneous. Thus the question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a mixed question of law and fact. Where the question of adverse possession is one of simple fact, no second appeal will lie, but a second appeal will lie from a finding as to adverse possession when such finding is a mixed question of law and fact depending upon the proper legal conclusion to be drawn from the findings as to simple facts (g). Similarly the question whether a Hindu family is joint or separate is generally a question of fact, but in certain circumstances it may be a mixed question of fact and law and open to reconsideration by the High Court in second appeal (h).

(r) *Ishan Chander v. Bishu* (189) 24 Cal. 85

(w) *Tara v. Arun* (192) 36 Cal. L. J. 383
330 41 C. 333 (3) A. L. 761. *Balram v. Bulter* (191) 2 Lab. 164 L. C. J. J. (1) A. L. 119

(x) *Lachman Singh v. Musummat Lina* (1849) 16 I. A. 15 16 Cal. 53

(y) " " " " " "

(z) " " " " " "

(a) " " " " " "

(b) " " " " " "

(c) " " " " " "

(d) " " " " " "

(e) " " " " " "

(f) " " " " " "

(g) " " " " " "

(h) " " " " " "

(r) " " " " " "

(d) " " " " " "

(i) " " " " " "

(j) " " " " " "

(g) *La Amercar v. Manovar* (189) 19 Cal. 53,

13 I. A. 45. *Balaam v. Syama Charan*

(130) 4 C. W. N. 105 60 I. C. 35,

Jogend a Nath v. Rajend a Nath (132)

6 C. W. N. 840 63 I. C. 200 (—)

A. C. 54

(h) *Sabal Singh v. Salik Ram* (1902) 44 All.

67 6 I. C. 67 (—) A. A. 183. *Mst. Bati*

v. S. Khar Singh (135) 50 All. 150 108.

I. C. 1 (3) A. A. 39

" " " " " "

finding is a question of law (z) In *Pilaniappa v D. Vankimony* (a) the Privy Council said that the Judge must first find what are the things actually done in alleged pursuance of the custom and then decide whether these facts satisfy the requirements of law. The first is a question of fact and the second a question of law. Thus in a case where a mirasdar's right under an alleged local custom was in question the Madras High Court held that findings as to what things were actually done in alleged pursuance of the custom were questions of fact with which the High Court could not interfere, but the inference as to the existence and the decision as to the validity of the custom were matters of law subject to revision by the High Court in second appeal (b). The Madras High Court made the same distinction in a case where the question was whether a holding was transferable by a local custom (c), and so have that Allahabad (d) and Bombay (e) High Courts. In two cases the Allahabad High Court has said that it will interfere if

the Allahabad High Court held that a wrong construction of *wajih-ul arzes* coupled with a wrong inference from certain facts constituted an error of law which justified interference in second appeal (h). As to certificates under sec 41 (3) of the Punjab Court Act VI of 1918, in cases of custom, see the undermentioned cases (j)

Clause (c) substantial error or defect in procedure—

No evidence to go to a jury—Case not raised by parties—Misconception of evidence—Evidence misread or misunderstood—Overlooking material evidence—Irrelevant matters— A second appeal will lie where there is, as an English lawyer would express it, no evidence to go to the jury, because that does not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge (g). Thus where the lower appellate Court found that a deed of compromise was not for the benefit of a certain infant, and there was no evidence in the case upon which that Court could found its judgment it was held by the Judicial Committee that the case was one of a substantial error or defect in the procedure of the first appellate Court and that it was a ground for a second appeal to the High Court (k). In a case where the lower appellate Court had come to a finding of fraud, although, in point of law there was no evidence to support the finding, the Privy Council held that the Judicial Commissioner was within his powers in second appeal in deciding the case on the evidence on the record (l). The High Court in second appeal is not bound by a finding as to whether the defendants were permanent tenants liable to pay a reasonable rent when the finding was based neither on evidence nor admission (m). Again when the lower appellate Court inferred from the fact that a

- (r) 57 641 C 936 (2) A A 85
- (a) *Milki v. V. Punni* (1911) 2 Lah. 345
- (b) 66 I C 49 (21) A L 77 *Nathu v. Banna* (1911) 3 Lah. 344 69 I C 507 (2) A L 46 *Ram Mehr v. Jait Ram* (1914) 5 Lah. 268 78 I C 404 (24) A L 455
- (c) *Anangamanjari v. Tripura Sundari* (1887) 14 Cal. 740 747 14 I A 101 110
- (d) *Hemanta v. Brojendra* (1890) 17 Cal. 875 891 17 I C 65 69 *Shirabasa v. Sanappa* (1905) 29 Bom. 1 31 I A 154
- (e) *Dimusa v. Abdul Samad* (1919) 46 I A 140 47 Cal. 107 51 I C 177 (fraud) *Lakhranath v. Dhondappa* (1893) 17 Bom. 475 (whether defendants were permanent tenants bound to pay a reasonable rent) *Lakshichand v. Lakhand* (1918) 42 Bom. 352 356 45 I C 555 (whether the mortgage debt was fully satisfied)
- (f) *Damusa v. Abdul Samad* (1919) 46 I A 140 47 Cal. 107 51 I C 177
- (g) *Fishranath v. Dhondappa* (1893) 17 Bom. 45
- (h) *Tajim v. Banari Lal* (1916) 48 All. 77 831 C 750 (26) A A 43 *Shamsher v. Iyare Lal* (1911) 23 All. L. J. 57 64 I C 936 (2) A A 85 *Ram Saran v. Praru Lal* (1931) 53 All. 318 131 I C 217 (31) A A 14
- (i) *Devi Lachoddas v. Fawal* (1897) 21 Bom. 110 *Surungji v. Manulal* (1931) 3 Bom. L. R. 167 129 I C 881 (31) A B 167
- (j) *Hashim Ali v. Abdul Fahman* (1906) 23 All. 694 *Ram Bulas v. Lal Bahadur* (1908) 30 All. 311
- (k) *Municipal Board v. Kanhaiya Lal* (1931) 54 All. 6 131 I C 71 (31) A A 499
- (l) *Shamsher v. Iyare Lal* (1912) 20 All. L. J.

Refusal by Court of first appeal to extend time for filing appeal—Where an application is made to a Court of first appeal to admit an appeal from the original decree after the expiration of the period of limitation, that Court has the power, on sufficient cause being shown to admit the appeal [Limitation Act s 5]. If the lower appellate Court refuses to admit the appeal, holding in *the exercise of its discretion* that there was no sufficient cause for not presenting the appeal within the prescribed time there is no ground for a second appeal. The principle is that where a Court has exercised its discretion in a sound and reasonable way, the High Court has no power to interfere in second appeal. But if the lower appellate Court does not exercise its discretion at all, or exercise it capriciously and arbitrarily, or without proper legal material to support its decision a second appeal will lie under cl (a) of the section (g).

New case in second appeal — An appellant should not be allowed to set up a new case in second appeal (1), nor should he be allowed to raise a new issue not supported by the evidence on the record (2). See notes below.

Pleas which may be taken for the first time in special appeal—An appellant will not be allowed to set up for the first time in second appeal a plea not taken by him in the lower Court. But if the objection is one which goes to the very root of the case it may be taken for the first time in second appeal (l). Thus an objection to jurisdiction may be taken for the first time in special appeal if it is patent on the face of the record (i) except, it is submitted, in those cases which fall within sec. 21 above. Similarly the plea of *res judicata* may be taken for the first time in second appeal provided it can be decided upon the record before the Court (m). So also the plea of want of notice in an ejectment suit (n). As to the plea of limitation, see notes to O. 41 r. 2, "Leave of Court Limitation," which refer to first appeals apply also to second appeals (o).

The High Court will entertain in second appeal a point of law although it has not been raised in any of the lower Courts provided the point of law arises on the findings of the lower Court or on the issues as framed and on the evidence already recorded. Thus where the lower appellate Court awarded to the plaintiff a third share of the property in suit on the ground that remoter *gotra* *apin* *las* inherited *per stirpes* and the defendant preferred a second appeal to the High Court on the ground that the plaintiff was not entitled to any share at all the defendant was allowed to contend at the hearing of the second

- (e) *Achal v. Hazari* (1924) 39 Cal L J 61
811 C 33 (75) A C 18
- (f) " " " " " "
- (g) " " " " " "
- (h) " " " " " "
- (i) *Coral v. Hanuman* (1882) 8 Bom 107
Mahomed v. Marumay ar (18) 15 Mad
50 *Kanhia v. Mahin Lal* (1886) 10 AU
495 *Narayan Singh v. Charn Das* (19)
3 Lah 33 68 C 507 () A 1, 363
- (j) *Chandblai v. Hasanbhai* (1920) 46 Bom
13 21 641 C 205 (2) A B 150
- (k) *Gurpa v. Dorasami* (1883) 6 Mad 76
- (l) *Bapuji v. Medhbhai* (1871) 8 B H C A C
45 *Sideshwar v. Harhar* (1888) 1 Bom
155 *Soyad v. Nana* (1889) 13 Bom 424,
1 *Layangudam v. Arunachala* (1894) 13 Mad
273 *Daulatya v. Har-Gorind* (191)
All 18 57 I C 206 (21) A A 219
- (m) *Kanahas Lal v. Suraj Kunwar* (1899) 21
All 446
- (n) *Dodhu v. Maddhavao* (1893) 18 Bom 115.
- (o) *Dee Ahirapa v. Dod Nayaya* (1887) 11 Bom
114

appeal that the plaintiff was not entitled in any event to more than a sixth share as remoter *gotra sapindas* inherited *per capita* and not *per stirpes* (p). But the High Court will not entertain a point of law raised for the first time in second appeal, if the point cannot be decided without remanding the case for further evidence (q). A Full Bench of the Allahabad High Court has held that a point of law not taken in the lower Appellate Court cannot be raised in second appeal unless it is a point involving *res judicata*, jurisdiction or a point the decision of which is necessary to prevent further litigation, and then only if the question does not necessitate the taking of further evidence (r). The Privy Council quoted with approval in an appeal from Rangoon (s), the following passage from a judgment of Lord Watson in *Connecticut Fire Insurance Co v. Karanagh* (t). 'When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.' Nor can a point of law be taken for the first time in second appeal if it sets up a new right differing in kind from that asserted throughout the trial, and not merely in degree as in the above case. Thus where the right claimed by one of the defendants was treated as one of *maintenance* only in the Courts below, she was not allowed to contend in second appeal that besides maintenance, she was entitled to a half share in the property (u).

Provincial Insolvency Act—Section 75 of the Provincial Insolvency Act, 1920 allows a second appeal from a decision of a Court subordinate to a District Court under sec. 4 of that Act on the grounds mentioned in sub sec. (1) of this section (v).

101. [S 585] No second appeal shall lie except on the grounds mentioned in section 100

Second appeal on no other grounds

102. [S 586] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees

No second appeal in certain suits

Suits of the nature cognizable by Courts of Small Causes—Whether a suit is or is not of the nature cognizable by a Court of Small Causes is to be determined in the light of the provisions of the Provincial Small Cause Courts Act 9 of 1887 [see ss. 15, 16 and 27]. If a suit is of the nature cognizable by a Small Cause Court and the value of the subject-matter of the suit does not exceed Rs. 500, no second appeal will lie, though the suit has not been tried in a Small Cause Court or though the Small Cause Court returns the plaint under sec. 23 of the said Act to be presented to another Court on the ground that it involves

(p) " " " " "

v. *Rameshchar v. Malabar* (1906) 5 Pat 759 96 I C 529 (10) A I 401 P 980
Sam v. Kasturba (1930) 39 Pat L R 1001

(r) *Ram Kinkar v. Tifani* (1931) 53 All 65
133 I C 478 (31) A A 30 F B 100 100

(s)

(q)

(t)

(u)

(v)

a question of title and is not therefore cognizable by that Court. The reason is that it is the nature of the suit, and not the Court in which it is tried, that determines the right of appeal (w). The words 'any suit of the nature cognizable by Courts of Small Causes' mean any suit relating to a subject matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction (x). In determining whether a second appeal lies under this section, the original character of the suit is to be regarded rather than the character it may subsequently assume by operation of the findings of the Court (y). Nor should regard be had to the mode of trial of the suit, thus a suit which is of the nature cognizable by a Court of Small Causes is none the less so because instead of being tried under the summary procedure it has been tried in the ordinary manner (z). In applying this section it makes no difference that the decree sought to be appealed from was passed by the lower appellate Court *in review* (a). A suit cognizable by a Small Cause Court was decreed by a first class Subordinate Judge in his Small Cause Court jurisdiction and it was transferred for execution against immovable property to his regular jurisdiction. The order passed on an objection to attachment was appealable to the District Judge by virtue of the provisions of sec. 42 above, as execution was in the regular jurisdiction, but no second appeal lay as the suit was of the nature cognizable by a Court of Small Causes (b).

Suit for mesne profits—Section 15 of the Provincial Small Cause Courts Act gives jurisdiction to Courts of Small Causes to take cognizance of all suits of a civil nature of which the value does not exceed Rs. 500 except such suits as are specified in the second schedule of the Act. That schedule consists of several articles of which art. 31 is the most important for the purposes of the present section. That article excludes from the jurisdiction of Small Cause Courts "any other suit for an account including a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant". This article contemplates cases in which the plaintiff claims an account of moneys which the defendant *has received* and to an account of which the plaintiff is entitled, because the moneys received belonged to him. It has been held by a majority of the Full Bench of the Calcutta High Court that a suit for mesne profits does not fall under this article, in other words it is cognizable by a Small Cause Court. Such a suit is not a suit "for the profits of immovable properties belonging to the plaintiff which have been wrongfully received by the defendant". A suit for mesne profits is a suit for damages in which the defendant would be liable *even if no profits have been actually received* by him during the period of dispossession. For in sec. 2, sub sec. (12), of the Code, mesne profits are defined as profits which the person in wrongful possession of such property actually received or *might* with ordinary diligence have received therefrom (c). On the other hand, it has been held by a Full Bench of the Madras High Court (d), that a suit for mesne profits does come within art. 31 of the said Act, and is therefore not cognizable by a Small Cause Court. Recent Bombay decisions are difficult to reconcile but the general effect of them is that a suit for mesne profits is a "suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant" within the meaning of art. 31 (e), but, that

(u) *Kalian v. Kalian* (1843) 9 Bom. 259.
Mahadeo v. Bidhai Ram (1904) 26 All.
 358. *Sada v. Brij Mahan* (1894) 20 All.
 480. *Lala Kondha v. Lala Lal* (1898)
 25 Cal. 872. *Kali v. Izattannissa* (1897)

(y) *Lakshmandas v. Lane* (1909) 32 Bom. 306.
 (z) *Indra Chandra v. Suresh Chandra* (1913) 40
 Cal. 537. 11 I. C. 129. *Shankarbhav v.*
Somabhai (1901) 25 Bom. 417.

(a) *Kanshi Ram v. Karam Varan* (1921) 3 Lah.
 L. J. 186. 60 I. C. 253 (21) 4 L. 124.

(b) *Maria Teresa v. Pana* (1928) 50 Bom. L. R.
 1447 (4) A. B. 534.

(c) *Kunjo Beharu Singh v. Madhab Chandra*
 (1896) 23 Cal. 854.

(d) *Saravimulla v. Athurumu* (1902) 25 Mad.
 113.

(e) *Antore v. Mahadev* (1901) 25 Bom. 85.

it does not come within the said article, if the amount claimed is an *ascertained* sum so that *no account has to be taken* (f)

Suit for rent—The High Courts of Madras and Rangoon have held that a suit for rent is a suit of the nature cognizable by Courts of Small Causes (g) The High Court of Calcutta has held that it is not (h)

Suit for title—A Small Cause Court has no jurisdiction to entertain a suit for title relating to immovable property A suit, however, which is otherwise cognizable by a Small Cause Court, does not cease to be so, because it incidentally involves a question of title (i)

Suit for a declaration—A Small Cause Court has no jurisdiction to entertain a suit for a declaratory decree The mere fact, however, that there is a prayer for a declaration will not prevent a suit from being of the nature cognizable by a Small Cause Court if the other reliefs claimed in the suit could be obtained without asking for a declaration (j)

Suit to enforce a call—Under sec 179 (2) of the Companies Act no claim founded on the liability of a contributory is cognizable by a Court of Small Causes A second appeal therefore lies in a suit against a shareholder to enforce a call for unpaid capital even though the claim is less than five hundred rupees (k)

Execution—The expression *suit* in this section includes *proceedings* (l) from which it follows that if a suit is of the nature cognizable by a Small Cause Court, no second appeal will lie from an order made in execution of the decree passed in the suit unless the value of the suit exceeds Rs 500 It is immaterial that the order in execution is made by a Court other than a Court of Small Causes or a Court vested with the powers of a Small Cause Court, as where the property attached in execution of the decree is immovable property and the order in execution is made by a First Class Subordinate Judge in his *ordinary* jurisdiction The test is what was the nature of the *suit* in which the decree sought to be executed was passed and not the nature of the *proceedings in execution* (m) It is also immaterial that the amount sought to be recovered in execution exceeds Rs 500 The test is not the amount claimed in execution proceedings but the amount of the subject matter of the suit (n) An order of remand made by an appellate Court in an appeal from an order of the Court executing a decree in a suit of the nature cognizable by a Small Cause Court is also not appealable (o)

Where the plaintiff decree holder *applied* under O 21 r 71, to recover Rs 360 being the deficiency of price from a defaulting purchaser and both the lower Courts disallowed the plaintiff's claim it was held that no second appeal lay to the High Court the reason given being that but for the provisions of r 71 a suit would have to be filed for that amount, in which case it would have been a Small Cause Court suit, and the application therefore must be treated as one made in execution of a Small Cause Court decree (p)

- | | |
|--|---|
| <p>(f)</p> <p>(g)</p> <p>(h)</p> <p>(i) 1 C 253</p> <p>(j) <i>Pinayak v Arunharao</i> (1901) 25 Bom 625 <i>Petrusang v Naransang</i> (1908) 3 Bom 550</p> <p>(k) <i>Pamachendrarayar v Noorulla Salib</i> (1907) 30 Ma 1 101</p> <p>(l) <i>Pabna Dhanabhandar Co v Foyezuddin</i> (1932) 53 Cal 1188 140 I C 232 (3-)</p> <p>(m) A C 716</p> <p>(n) <i>Corrachand v Baykanto</i> (1874) 12 Beng L R 261 [1 B] <i>Din Dayal v Patrothan</i></p> | <p>(1896) 18 All 481 <i>Aithala v Subbanna</i> (1883) 1 Mad 118 <i>Muth karuppa</i> &</p> <p>(m)</p> <p>(n)</p> <p>(o)</p> <p>(p) <i>Rajacharya v Chemanna</i> (1911) 45 Bom 223 59 I C 19 (21) A B 2 9</p> |
|--|---|

103. [New.] In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100.

Power of High Court to determine issues of fact

Changes in the section.—That last part of the section beginning with the words “which has not been determined” was substituted by Act 6 of 1926 for the words “but not determined by the lower appellate Court” which occurred after the words “of the appeal.”

Scope of the section.—This section is new. It was amended by Act 6 of 1926 as stated above. The section as it now stands empowers the High Court in second appeal to determine issues of fact (1) where such issues *have not been determined* by the lower appellate Court or (2) where they *have been wrongly determined* by that Court, provided the evidence on the record is *sufficient* to enable the High Court to determine such issues. If the evidence on the record is not sufficient, the proper course is to refer the issues for trial under O. 41, r. 25.

In the absence of any such provision in the Code of 1882 there was a conflict of decisions as to the power of the High Court to determine in second appeal issues of fact which had not been determined by the lower appellate Court. On the one hand, it was held that where the evidence on the record was sufficient to enable the High Court to deliver judgment, the High Court had the power at the hearing of a second appeal itself to fix and determine issues of fact necessary for the disposal of the appeal but not determined by the lower appellate Court, as a remand in such a case would merely cause delay and increase costs (q). On the other hand, it was held that even if the evidence on the record was sufficient the High Court had no such power, and the only course open to it was to remand the issues for a finding to the lower appellate Court, the ground of the decisions being that the High Court had no power in second appeal to determine any issue of fact (r). The present section gives effect to the former view. It has been held under this section that where the High Court has framed issues and referred the same for trial to the lower Court under O. 41, r. 25, and the findings of the lower Court on those issues are incomplete, the High Court has power under this section to determine those issues if there are materials on which the High Court can come to a conclusion (s).

Under the section as it stood before it was amended by Act 6 of 1926, it was held that where a question of fact had been determined by the lower appellate Court, but the decision could not be supported because it was based in part on evidence *improperly admitted*, the High Court could not look at the evidence to decide whether the remaining evidence, after exclusion of evidence erroneously admitted, was sufficient to warrant the finding of the Court below, and the proper course, it was held, was to remand the case to the lower Court (t). This resulted in unnecessary remands and the section has now been amended to enable the High Court itself in second appeal to come to the necessary

(q) *Bal Kishen v. Jasodh Kuar* (1882) 7 All. 763. 768. 771 per Ietheram, C. J. and Tyrrel.
Drookishen v. Banai (1886) 8 All. 17-176 178 per Ietheram, C. J. and Oldfield.

(r) *Girdhari Lal v. Crawford* (1887) 9 All. 147 [t. B].
Deolushen v. Banai (1886) 8 All.

17-
 (s) *Seturattam v. Venkatachala* (1920) 47 I. A. 76 43 Mad. 567 561 C. 117, *Chandambara v. Veerama* (1922) 49 I. A. 286 43 Mad. 586 68 I. C. 538 (22) A. I. C. 232.
 (t) *Janadas v. Harinar* (1924) 40 Cal. L. J. 19, 78 I. C. 219 (24) A. C. 1042.

finding of fact in all cases where the finding of the lower appellate Court is vitiated by an error or illegality such as is described in sec 100 (1). Since the amendment the High Court may itself determine the necessary issues of fact without remanding the case to the lower Court in cases such as the above (u)

APPEALS FROM ORDERS.

104. [S. 588] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in

Orders from which
appeals lie

force from no other orders —

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court,
- (b) an order on an award stated in the form of a special case,
- (c) an order modifying or correcting an award,
- (d) an order filing or refusing to file an agreement to refer to arbitration,
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration,
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court,
- (ff) an order under section 35 A,
- (g) an order under section 95,
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,
- (i) any order made under rules from which an appeal is expressly allowed by rules

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made

(2) No appeal shall lie from any order passed in appeal under this section

Appealable orders—This section and O 43, r 1, contain a full list of appealable orders. The words, "save as otherwise expressly provided in the body of this Code or by any law for the time being in force," are new. See notes below under the head "Letters Patent appeal."

Clause (a)—See Schedule II, paragraph (8), and notes thereto

Clause (b)—See Schedule II, paragraph (11), and notes thereto

Clause (c)—See Schedule II, paragraph (12), and notes thereto

Clause (d)—See Schedule II, paragraph (17), and notes thereto

Clause (e)—See Schedule II, paragraph (19). This clause does not apply to an order under sec 19 of the Arbitration Act, 1899 (t)

Clause (f)—See Schedule II, paragraph (21), and notes thereto. It has been held by the High Court of Calcutta that this clause does not apply to proceedings under cl (2) of sec 11 of the Arbitration Act, 1899, and that no appeal therefore lies under this clause from an order refusing to set aside an award made and filed under that Act, but the High Court has jurisdiction to hear the appeal under cl 15 of the Letters Patent (w). The Allahabad High Court has however held that an appeal lies under this clause against such an order (x). This has been dissented from by the Lahore High Court on the ground that the Arbitration Act is complete in itself and is not affected by rules as to appeal-laid down in the Code (y). But in a later decision another Bench of the same High Court assumed that an appeal was competent (z).

Clause (ff)—This clause was inserted in the section by Act 9 of 1922. See the proviso to sub sec (1).

Clause (h)—An appeal lies from an order of arrest before judgment (a). See O 16, rr 10, 12, 17 and 21 (summoning and attendance of witnesses), O 26, r 17 (attendance and examination of witnesses before Commissioner), O 39, r 2, sub r (3) (disobedience of injunction).

Clause (i)—See O 43, r 1

Proviso—The proviso was inserted in the section by Act 9 of 1922

Sub section (2)—Thus if an appeal is preferred under O 43, r 1 (a), from an order under O 7, r 10, returning a plaint to be presented to the proper Court, and an order is made in appeal remanding the case under O 41, r 23, no appeal lies from such order (b). This sub section, however, does not take away the right of appeal conferred by cl 15 of the Letters Patent (c). The High Court of Allahabad is the only Court that has held that it does (d). See notes below, "Letters Patent appeal." See also notes to O 41, r 23, "Appeal."

Section 154—There are some orders which were appealable under sec 588 of the repealed Code, which are not appealable under this section. As to these it is provided

- | | |
|--|---|
| (c) <i>Punjab Mercantile Chamber of Commerce v Jam Mal Lul</i> (1932) 13 Lah 59 132 I C 250 (31) A L 644 | (f) 84 I C 270 (21) A R 361 |
| (w) <i>Campbell & Co v Jeshraj</i> (1918) 45 Cal 502 46 I C 687 | (f) <i>Naubat Singh v Laltee Singh</i> (1911) 33 All 473 91 C 686 <i>Chhabu Misra v Hareharan Das</i> (1913) P R no 119 p 406 |
| (x) <i>Nainsuth v Gajanan</i> (1921) 43 All 318 61 I C 209 (21) A L 277 | 18 I C 523 <i>Bhawanji v Haridas</i> (1920) 2 Lah 1 J 527 68 I C 304 |
| (y) <i>Punjab Mercantile Chamber of Commerce v Jam Mal Lul</i> (1932) 13 Lah 59 132 I C 250 (31) A L 644 | <i>Vidant v Idrant</i> (1925) 27 No 1 I L 615 88 I C 73 (23) A B 431 |
| (z) <i>Ichari Lal v Sura Trading Co</i> (1933) 14 Lah 219 141 I C 64 (33) A L 44 | (c) <i>Jullit Singh v Sanwal Singh</i> (1923) 3 Lah 188 67 I C 328 (22) A L 320 |
| (a) <i>Syed Hassan v Chettiar</i> (1924) 2 Lah 362 | (d) <i>Jam Lal v Madan Lal</i> (1916) 39 All 191, 39 I C 460 |

finding of fact in all cases where the finding of the lower appellate Court is vitiated by an error or illegality such as is described in sec 100 (1). Since the amendment the High Court may itself determine the necessary issues of fact without remanding the case to the lower Court in cases such as the above (u)

APPEALS FROM ORDERS.

104. [S. 588] (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders —

Orders from which
an appeal lies

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court,
- (b) an order on an award stated in the form of a special case,
- (c) an order modifying or correcting an award,
- (d) an order filing or refusing to file an agreement to refer to arbitration,
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration,
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court,
- (ff) an order under section 35 A,
- (g) an order under section 95,
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree,
- (i) any order made under rules from which an appeal is expressly allowed by rules

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made

(2) No appeal shall lie from any order passed in appeal under this section

Appealable orders—This section and O 43, r 1, contain a full list of appealable orders. The words, "save as otherwise expressly provided in the body of this Code or by any law for the time being in force," are new. See notes below under the head "Letters Patent appeal."

Clause (a)—See Schedule II, paragraph (8), and notes thereto

Clause (b)—See Schedule II, paragraph (11), and notes thereto

Clause (c)—See Schedule II, paragraph (12) and notes thereto

Clause (d)—See Schedule II, paragraph (17), and notes thereto

Clause (e)—See Schedule II, paragraph (19). This clause does not apply to an order under sec 19 of the Arbitration Act, 1899 (t)

Clause (f)—See Schedule II, paragraph (21), and notes thereto. It has been held by the High Court of Calcutta that this clause does not apply to proceedings under cl (2) of sec 11 of the Arbitration Act, 1899, and that no appeal therefore lies under this clause from an order refusing to set aside an award made and filed under that Act, but the High Court has jurisdiction to hear the appeal under cl 15 of the Letters Patent (w). The Allahabad High Court has however held that an appeal lies under this clause against such an order (x). This has been dissented from by the Lahore High Court on the ground that the Arbitration Act is complete in itself and is not affected by rules as to appeals laid down in the Code (y). But in a later decision another Bench of the same High Court assumed that an appeal was competent (z).

Clause (ff)—This clause was inserted in the section by Act 9 of 1922. See the proviso to sub sec (1).

Clause (h)—An appeal lies from an order of arrest before judgment (a). See O 16, rr 10, 12, 17 and 21 (summoning and attendance of witnesses), O 26, r 17 (attendance and examination of witnesses before Commissioner), O 39, r 2, sub r (3) (disobedience of injunction).

Clause (i)—See O 43, r 1.

Proviso—The proviso was inserted in the section by Act 9 of 1922.

Sub-section (2).—Thus if an appeal is preferred under O 43, r 1 (a), from an order under O 7, r 10, returning a plaint to be presented to the proper Court, and an order is made in appeal remanding the case under O 41, r 23, no appeal lies from such order (b). This sub section, however, does not take away the right of appeal conferred by cl 15 of the Letters Patent (c). The High Court of Allahabad is the only Court that has held that it does (d). See notes below, "Letters Patent appeal." See also notes to O 41, r 23, "Appeal."

Section 154.—There are some orders which were appealable under sec 588 of the repealed Code, which are not appealable under this section. As to these it is provided

- | | |
|---|---|
| (e) <i>Punjab Mercantile Chamber of Commerce v Ram Mal Lulu</i> (1912) 13 Lah 59 132 I C 850 (31) A L 644 | 84 I C 270 (24) A R 361 |
| (w) <i>Campbell & Co v Jeshraj</i> (1918) 45 Cal 502, 46 I C 687 | (b) <i>Naubat Singh v Baldeo Singh</i> (1911) 33 All 479 9 I C 566 <i>Chhabu Mian v Harsha Ram Das</i> (1912) P R no 119, p 406 |
| (x) <i>Naraink v Gajananand</i> (1921) 43 All 348 61 I C 269 (21) A A 273 | 18 I C 523 <i>Bhavani v Haridas</i> (1920) 2 Lah 1 J 587 68 I C 304 <i>Nikanth v Lalram</i> (1925) 27 Bora L R 645, 88 I C 753 (25) A B 431 |
| (y) <i>Punjab Mercantile Chamber of Commerce v Ram Mal Lulu</i> (1912) 13 Lah 59 132 I C 850 (31) A L 644 | (c) <i>Pullu Singh v Sanwal Singh</i> (1922) 3 Lah 188, 67 I C 388, (22) A L 380 |
| (z) <i>Pehari Lal v Siva Trading Co</i> (1913) 14 Lah 211 141 I C 64 (33) A L 44 | (d) <i>Parsi Lal v Madan Lal</i> (1916) 39 All 191, 39 I C 460 |
| (a) <i>Syed Hossain v Chettiar</i> (1924) 2 Kan 362 | |

by sec. 151 that where the right to appeal has already accrued to a party before the commencement of this Code, such right shall not be affected by anything contained in this Code

Letters Patent appeal.—Clause 15 of the Letters Patent provides that an appeal lies from every "judgment" of a single Judge of the High Court in the exercise of its original civil jurisdiction to other Judges of the Court. Now an order refusing to set aside an award is a "judgment" within the meaning of the said clause (e). It is clear that if such an order is made by a Munsif's Court, or by the Court of a Subordinate Judge, or by the District Court, no appeal will lie from it, for it is not an order specified in the present section. It is equally clear that if such an order is made by a Judge of the High Court, an appeal will lie from it *under the Letters Patent*, for the present section expressly saves the right of appeal given by *any law for the time being in force*. Upon this point there was a conflict of decisions under the Code of 1882. The conflict arose from the provision contained in sec. 588 of that Code that an appeal lay from orders specified in that section, *and from no other orders* [see sub-sec. (2) of the present section]. The question accordingly arose whether sec. 588, by declaring that no appeal lies from any order other than those specified in that section, took away the right of appeal given by the Letters Patent. It was held by the High Courts of Calcutta, Madras and Bombay, following a decision of the Privy Council (f), that sec. 588 did not take away the right of appeal given by cl. 15 of the Letters Patent (g), and that an appeal therefore lay from an order of a single Judge of the High Court refusing to set aside an award to the other Judges of the Court. On the other hand, it was held by the Allahabad High Court, on a different reading of the Privy Council case referred to above, that sec. 588 took away the right of appeal given by the Letters Patent (h), and that no appeal therefore lay from an order refusing to set aside an award, though the order might be made by a Judge of the High Court. It is submitted that the words "save as otherwise expressly provided by any law for the time being in force" include the Letters Patent, and that they were added into the present section to give effect to the Calcutta, Madras, and Bombay decisions. This is the view taken by the Lahore (i) and Madras (j) High Courts. The High Court of Allahabad, however, has adhered to its previous view even in cases under the present Code (k).

Privy Council appeal.—The provision in sub-sec. (2) deals with internal appeals within the limits of British India. It does not take away the general right of appealing to the Privy Council given by sec. 109. A applies to the District Judge of East Berar under Sch. II, para. 20, to file an award in Court. B opposes the application. The District Judge makes an order refusing to file the award. A appeals from the order [see cl. (f)] to the Judicial Commissioner. The Judicial Commissioner makes an order filing the award. B appeals to the King in Council from the order of the Judicial Commissioner.

(e) *Toolsee Mone v. Siders* (1899) 26 Cal. 361

(f) *Hurree Chunder v. Jahn Sunders* (1887) 9 Cal. 482, 10 Cal. 4

(g)

(h)

(i) *Rutti Singh v. Sarwal Singh* (1920) 3 Lah.

188 67 I. C. 388 (22) A. I. 380

(j) *Tarusas van v. Jamasami* (1933) 56 Mad. 915, 145 I. C. 449 (33) A. M. 50

(k) *Priya Lal v. Madan Lal* (1916) 39 All. 191, 30 I. C. 480

(l) *Primal v. Kishanchant* (1924) 51 I. A. 251 (31 Cal. 361, 83 I. C. 531 (24) A. F. C. 90

(m) *Tekur Prashna v. Moti Chand* (1913) 40 I. A. 140, 148, 149, 40 Cal. 615, 617, 648, 191 I. C. 230

105. [S. 591.] (1) Save as otherwise expressly provided, ^{Other orders.} no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

Changes introduced by the section—This section corresponds with sec. 591 of the Code of 1882 except in the following particulars—

- 1 Sub-section (2) is new. See notes below, "Sub section (2): appeal from order of remand."
- 2 Sec 591 contained the words, "in any *such* order," after the word "irregularity" The word "*such*" has been omitted, as the expression "*such order*" gave rise to the contention in some cases before the Privy Council that sec 915 applied to non appealable orders only, a contention that was overruled by the Privy Council (n)

Scope of the section—An interlocutory order made in a suit is either appealable (s 104) or not appealable. This section, like the corresponding sec 591, applies to any order, that is, to appealable as well as non appealable order. Where an interlocutory order is appealable, the party against whom the order is made is not bound to prefer an appeal against it, but he may make the irregularity in the order a ground of objection in the memorandum of appeal, where an appeal is preferred from the decree in the suit

appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. Nothing would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon a party the necessity of appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. It was so observed by their Lordships of the Privy Council in *Moheshwar Singh v The Bengal Government* (o) and in subsequent cases (p), and it is this principle that underlies the present section. The present section makes it quite clear that an order appealable under sec 104 may be questioned under sec 105 in an appeal from the decree in the suit although no appeal from the order has been preferred under sec 104 (q). Sub section (2) is an exception to this rule. See note infra "Sub-section (2) appeal from order of remand". Even where the interlocutory order is one from which no appeal lies an error defect or irregularity in that order may be set forth as a ground of objection in the memorandum

(n) See the three Privy Council cases cited in note (p) below

(o) (1859) 7 M L A 233

(p) *Korier v Amersfoortss Forum* (1863) 19

M L A 340 *Achonth v Lamoth* (1865)

10 M L A 413 *Shah Muthun Lall v*

Dree Kishen Singh (1868) 12 M L A 157

(q) See *Shoo Nath v Lam Doo* (1896) 18 All. 19

of appeal, where an appeal is preferred from the decree in the suit in which the order was made (r)

"Affecting the decision on the case"—It has been held by almost all the High Courts that the words "affecting the decision of the case" mean affecting the decision of the case on its merits. It has accordingly been held that an order cannot be attacked in appeal from a final decree unless the error, defect or irregularity in the order is one affecting the decision of the case on the merits (a). It has thus been held by the High Court of Allahabad, Calcutta and Lahore that an order under O 9, r 13, setting aside an ex parte decree, is not an order that affects the merits of the case, such an order merely ensures a hearing upon the merits, hence the order cannot be attacked in an appeal from the decree in the suit (b). But there are cases in which this reason does not apply for an order setting aside an ex parte decree may not have the effect of securing a hearing on the merits. Thus when an application is made to set aside an ex parte final decree in a suit on a mortgage with a view to raising a point of limitation which would render the preliminary decree futile, the order setting aside the ex parte decree may be attacked in the appeal from the final decree (c). Again if the ex parte decree has been set aside as against two defendants at the instance of one defendant by a mistaken application of O 9, r 13 the error affects the decision on the merits and the order may be attacked in the appeal of the other defendant (d). Conversely if an ex parte decree has been set aside as against some of the defendants and the proviso to O 9, r 13 has not been applied so that the necessary parties are not on the record, the error affects the decision on the merits and the order may be attacked in appeal (e). The Rangoon High Court refuses to read the words on its merits into this section and allows an order setting aside an ex parte decree to be impugned in final appeal (f).

An order remanding an appeal from an order returning a plaint for presentation to the proper Court is not an order affecting the decision of the case and cannot be challenged in second appeal (y)

An order under O 41, r 20, re-admitting an appeal which has been dismissed for default, is not one which affects the decision of the case on the merits, and it cannot therefore be attacked in an appeal from the final decree (z).

It has been held by the High Courts of Bombay, Madras, Allahabad and Calcutta that an order setting aside an award and directing the case to be tried by the Court may be attacked in appeal from the final decree (a) the reason given in the Allahabad case being that such an order affects the decision of the case on the merits (b). The High Court of Lahore has taken a different view (c), but the attention of the Court was not drawn to the decisions of the other High Courts.

| | |
|---|-----|
| (v) See <i>Jamestji v Dudabhai</i> (1900) 24 B m 302 and <i>Cofazari v Ciyasrai</i> (1900) 23 Mad 494 | (w) |
| (x) <i>Radha Mohan v Abbas Ili</i> (1931) 53 All 612 133 I C 129 (11) N A 294 F B <i>Isadliq v Hquafunn-ra</i> (1903) 25 All 230 <i>Niddha Lal v Collector of Rubani</i> | (r) |
| | (u) |
| | (x) |
| | (y) |
| | (z) |
| | (a) |
| | |
| (t) <i>Radha Mohan v Abbas Ili</i> (1931) 53 All 612 133 I C 129 (31) N A 294 F B <i>Overruling Nanirani v Bhopal Singh</i> (1912) | (b) |
| | (c) |

An order setting aside an abatement under O 22, r 9 does not affect the decision of the case on the merits. Rather it re-opens the hearing of the case on the merits, and it cannot therefore be challenged in appeal from the final decree (d). But there is a difference of opinion whether an order setting aside an abatement may be so attacked if it is made *simultaneously* with the final decree in the suit. It has been held by the High Court of Allahabad that it may be so attacked if passed *simultaneously* with the final decree (e). On the other hand, it has been held by the High Court of Calcutta, that an order setting aside an abatement cannot be challenged in an appeal from the final decree, whether it is passed before or *simultaneously* with the final decree (f). The Lahore High Court follows Calcutta (g).

An order refusing leave under sec 20 (b) cannot be attacked in an appeal from an order returning a plaint for presentation to the proper Court (h).

"Error, defect or irregularity"—The error, defect or irregularity referred to in this section must be an error, defect or irregularity in law or procedure, and not in matters of fact (i).

"Where a decree is appealed from."—This section contemplates two things namely, (1) a regular appeal from a decree and (2) the insertion in that appeal of a ground of objection relating to an interlocutory order. The High Court of Allahabad has held that no appeal will lie where the appeal is *ostensibly* against the decree passed in the suit, but the grounds of appeal are solely directed against an interlocutory order made in the suit (j). On the other hand, the High Courts of Calcutta and Madras have held that such an appeal will lie, though the only reason for the appeal is an erroneous decision in regard to an interlocutory order (k).

It should be noted that in order to take advantage of the provisions of this section the ground of objection must be set out in the memorandum of appeal (l).

Sub section (2) appeal from order of remand.—An order under O 41 r 23 remanding a case, is appealable, where an appeal would lie from the decree of the Appellate Court [O 43, r 1, cl (u)]. Such an order was also appealable under the Code of 1882 [see sec 588, cl (28)]. Under sec 591 of the Code of 1882, it was held that a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under sec 588 and had not done so (m). Sub section (2) has been added to preclude an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way of appeal from an order of remand (n). The effect of this sub-section has been said by Rankin, C J, to be that "a litigant, aggrieved by an order of remand from which an appeal lies, must appeal therefrom directly, or be precluded from disputing its correctness" (o).

Privy Council appeal.—This sub-section does not apply to Privy Council appeals (p). See notes to sec 109 "Final Order".

- | | |
|--|---|
| <p>(d) <i>Shah v. Shah</i> (1911) 40 Cal 1 L J 548, 851 C 100 (24) A 473 <i>Savna</i></p> <p>(e) <i>Haji v. Mahomed Ali</i> (1925) 52 Cal 472 82 I C 100 (25) A 1766</p> <p>(f) <i>Rhodes v. Rhodes</i> (1919) 14 Lah 561, 143 I C 377 (33) A 152</p> <p>(g) <i>Allen Brothers v. Allen</i> (1925) 7 Lah 1 J 66 83 I C 546 (25) A 1734</p> <p>(h) <i>Singh v. Singh</i> (1900) 18 All 200</p> <p>(i) <i>Shree Nath v. Ram Das</i> (1900) 18 All 19 <i>Sher Singh v. Dwan Singh</i> (1900) 22 All 366</p> | <p>(k) <i>Farsi Bhimara v. Bhikopalnam</i> (1911) 34 Mad 223 61 C 230, <i>Google v. Iremil</i> (1881) Cal 148</p> <p>(l) <i>Tulsi v. Chakradhars</i> (1893) 15 All 114</p> <p>(m) <i>Singh v. Pannu</i> (1890) 14 Bom 232 <i>Sarda v. Bala Chandra</i> (1895) 18 Cal 421 <i>Rameshwar Singh v. Shrotri</i> (1900) 1 All 510 But see <i>Jammalamadai v. H. v. Jammala Venkatarajulu</i> (1903) 26 M 1 314 21 C 525</p> <p>(n) <i>Karim Singh v. Far Singh</i> (1901) 1 I 1 252 63 I C 776 (21) A 174</p> <p>(o) <i>Talbot v. Abdul Aziz</i> (1912) 11 Cal 1919 1027 (23) A 651</p> <p>(p) <i>Abdus Salam v. Abdul J. v. (1911) 33 All 331 61 C 244 I, 173, 174, <i>Narasimha</i> (1916) 23 Mad 60 25 I 1</i></p> |
|--|---|

106. [S. 589.] Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

Forum of appeal.—See notes under the same head to sec 96 above

GENERAL PROVISIONS RELATING TO APPEALS.

107. [S. 582] (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

"Prescribed"—Prescribed means prescribed by the Rules contained in the First Schedule or made under sec 122 or sec 123 of the Code see sec 2, cls. (16) and (18)

Sub section (1)—Sub-section (1) is new Note that the powers of the appellate Court referred to in cls (a) to (d) are limited by the Rules as appears from the opening words of the section (g)

Clause (a)—See O 41, rr 24, 33

Clause (b)—See O 41, r 23

Clause (c)—See O 41, r 25

Clause (d)—See O 41, rr 27, 28

to order the rejection of a memorandum of appeal under O 7, r 13, and such rejection precludes the appellant from filing a fresh memorandum of appeal (s)

See also notes to O 41, r 20

(q) *Mani Mohan v Ramnathan* (1916) 43 Cal 148
33 I C 329

(r) See notes to O 23

(s) *Jnanavendari v Madhab Chandra* (1932)
59 Cal 388, 133 I C 643, (32) A C 492

108. [Ss. 587, 590] The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

Procedure in appeals from
appellate decrees and orders

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided

Compare O 42 r 1, and O 43 r 2

APPEALS TO THE KING IN COUNCIL

109. [s. 595] Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

When appeals lie to King
in Council

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council

Ss 109 and 110 are to be read together. See also cl 39 of the Letters Patent. For rules of procedure in appeals to the King in Council see O 45 below

Difference between the old and the new section.—This section corresponds with s. 590 of the Code of 1882 except that in cls (a) and (b) the words "decree or final order" have been substituted for the words "final decree," and in cl (c) the words "or order" have been added after the word "decree."

Right of appeal to the Privy Council.—The right of appeal from the High Courts to the Privy Council now rests on cl 39 of the Letters Patent and this is elaborated in ss 109 and 110 of the Code of Civil Procedure. Therefore though there is no express provision in the Provincial Insolvency Act 1920 for appeal to the Privy Council from orders of the High Court made under that Act, an appeal to the Privy Council is competent, if the case comes under ss 109 and 110 of the Code (f). Similarly a decree of a High Court in a testamentary matter is appealable to His Majesty in Council although sec 299 of the Indian Succession Act 1925 provides only for an appeal to the High Court (u). Thus an appeal lies from a judgment of the High Court on the appellate side granting probate of a will (v).

(f) *Chattrapat v. Pharrag Singh* (1913) 4 Cal 685, 19 I C 435.
(u) *Jagannath v. J. Chammal* (1906) 49 Mad. 954, 97 I C 236 (1906) A 31, 2nd.

(v) *Tellanuram Serral v. J. Chammal Serral* (1907) 5 I C 119, 99 I C 59 (27) 4 K. 58.

No right of appeal to the Privy Council—When a special statute dealing with a special class of cases uses with reference to the decision given by a tribunal set up under that Statute, the word *final*, the use of this word must be taken to indicate an intention to override section 109 and no appeal would lie from that decision. There is therefore no appeal to the Privy Council from a decree of a High Court under s 91 (3) of the Rangoon City Municipal Act (w). Again there is no right of appeal to the Privy Council from an order of a single Judge of a High Court either in appeal (x) or in second appeal (y) or in revision (z). See s 111 and notes thereon. An order of the High Court refusing to enrol a person as a legal practitioner under the Legal Practitioners Act 18 of 1879 is not one from which the High Court has jurisdiction to grant leave to appeal to the Privy Council. Such an order is one passed in the exercise of the administrative powers of the Court (a). Similarly an order passed by the Rangoon High Court striking an advocate off the rolls under the disciplinary jurisdiction conferred by clause 8 of its Letters Patent is one from which the High Court has no power to grant leave to appeal (b).

* **Decree**—For definition of decree see s 2 (2) above. An act of State is not a decree. Hence no appeal lies to the King in Council from an order of the Viceroy and Governor General of India in Council deposing the Maharajah of a Native State in India such an order being an act of State (c).

Preliminary Decree—An appeal lies to the King in Council from a preliminary decree e.g. a decree declaring the liability of a party and directing accounts to be taken (d).

Final Order—In *Pamchand v Gopendharis* (e) the Privy Council said that an order is final if it finally disposes of the rights of the parties. In that case a stay order under s 19 of the Arbitration Act had been reversed and the suit went back for trial. The appellate Court had thought that the order was final as it 'went to the root of the suit namely the jurisdiction of the Court to entertain it' and it was for this reason that the order was supposed to be final. But it was not final for the rights of the parties were still under trial. In *Abdul Tahman v Cassim* (f) a suit for damages had been dismissed on a preliminary ground and the High Court on appeal reversed the decree and remanded the suit for trial on the merits under O 41 r 23. The Privy Council held that this was not a final order. Sir George Lowndes said 'The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it under s 109 (a)'. Their Lordships distinguished the previous Privy Council decisions of *Rahimbhoy v Turner* (g) and *Muzhar Hossein v Bodha* (h) as decided under the Code of 1852. In *Rahimbhoy v Turner* (i) the order was one determining the defendant's liability to account and directing accounts to be taken. This was held to be a final order as it determined the cardinal point in the suit which was the defendant's liability to account. In *Muzhar Hossein v Bodha* (j) the suit was to recover property which was the subject of a gift by will. The validity of the will was disputed and the High Court differing from the Court of first instance held that the will was valid and remanded the suit for subordinate inquiries. The Privy Council held that the order was a final order as it comprised a decision of the

(w) *Madan Theatres v Corporation of Yangon* (1937) 4 Timg 202 99 IC 994 (2) A.R. 82

(x) *Sardar Ali v Doimiddi* (1930) 56 Cal 513 113 IC 49 (23) A.C. 640

(y) *Hina v Shrivastava* (1931) 33 Ben L.R. 1106, 134 IC 1164 (31) A.R. 503

(z) *Satyanarayana v Venkates* (1933) 46 Mad 92 51 IC 604 (24) A.W. 399

(a) *Sidhant In re* (1931) 1 P.F. 590 70 IC 13 (2) A.I. 693

(b) *In the matter of an Advocate* (1905) 30 A.W. 40 135 IC 260 (30) A.R. 150

(c) *Maharajah Madhava Singh In re* (1905) 3 P.F. 1

(d) *Sanjay v Krishna Rao* (1937) 40 I.A. 105

(e) (1891) 18 I.A. 65 per

(f) (1895) 22 I.A. 1 per Ananda Prasad v

(g) (1891) 18 I.A. 65 per

(h) (1895) 22 I.A. 1 per

(i) (1891) 18 I.A. 65 per

(j) (1895) 22 I.A. 1 per

(k) (1891) 18 I.A. 65 per

(l) (1895) 22 I.A. 1 per

cardinal issue in the suit namely the validity of the will. The order in *Rahimkhoy's* case was one which under the present Code would be a preliminary decree, and with reference to *Muzhar Hossein's* case that if the effect of the decree had been merely to remand the suit for trial on the merits different considerations would have applied. In an earlier case where the lower Court refused to set aside an ex parte decree and the High Court remanded the suit for an inquiry on the merits the Privy Council held that the order of the High Court was not a final order but a purely interlocutory order directing procedure (k). An order remanding a suit for decision on the merits is therefore not a final order (l). But when the appellate Court set aside an ex parte decree so that the suit was restored to be tried de novo, the Allahabad High Court granted leave to appeal on the ground that the proceeding to set aside the ex parte order was an independent and final proceeding (m). When the lower Court dismisses a suit on the ground that it is barred by limitation, and the High Court reversing the decision remands the suit for trial the order is interlocutory (n). In another similar case, however, the Allahabad High Court said that they were not certain that the order might not fairly be described as final (o). And in another case such an order was held to be final as it had the effect of restoring a preliminary decree (p). When the lower Court held that a matter in issue in a suit was res judicata and the High Court held that it was not and remanded the suit for trial on the merits the order was held to be final (q). But in another such case the order was held to be final on the ground that it decided a cardinal point in the case (r).

An order refusing to appoint a receiver in a suit is not a final order and no appeal lies to the Privy Council (s). In a case where the High Court discharged an order made by the District Court appointing a receiver and the High Court granted leave to appeal, the Privy Council observed that as a general rule and in the absence of special circumstances, or some unusual occasion for its exercise, the power of making interlocutory orders was one which was not a suitable subject for review by the Judicial Committee (t).

The following are further instances of orders which have been held not to be final orders: an order of the appellate Court reversing the order of the Court of first instance refusing to set aside an abatement and directing the lower Court to rehear the application (u), an order reversing an order of the lower Court that the suit is barred by O. 2, r. 2 (1), or that the suit as framed is not maintainable (v), or that the plaintiff has no locus standi to maintain the suit (x), and remanding the suit for trial on the merits, an order in revision granting (y), or refusing (z) leave to sue in forma pauperis, an order granting a review (a), an order refusing an application to be brought on the record of a pending appeal as the legal representative of a deceased party (b), an order reversing the

- | | |
|--|--|
| (k) <i>Rahta Kishan v. Collector of Jaipur</i> (1901) 25 IA 28, 23 All 250 | (r) <i>Kishindra v. Sitaram</i> (1931) 25 C W N 896 61 IC 776 (21) AC 177 |
| (l) <i>Abdul Rahman v. Cassim</i> (1933) 60 IA 76 11 RA 59 112 IC 328 (33) A PC 58 <i>Varma v. Gangra Sugar Works</i> (1916) 34 All 150 32 IC 360 1 B Sultan Singh v. Murlidhar (1924) 5 Lah 3-9 89 IC 366 (24) A J 571 <i>Rajyeshwarashram v. Sharda Math</i> (1933) 35 B m L R 454 144 IC 916 (33) A B 260 1 A 100 v. Ma Pura 77 in (191) 10 Rang 335 140 IC 317, (32) A R 137 | (s) <i>Chundia Dutt v. Judmannund</i> (1895) 22 Cal 928 |
| (m) <i>Kishanchand v. Lakshminchand</i> (1937) 54 All 941 143 IC 450 (33) A A 15 | (t) <i>Benari Krishna v. Satish Chandra</i> (1928) 55 IA 131 55 Cal 7-0 108 IC 348 (25) A IC 49 |
| (n) - | (u) <i>Mumtaz ul Daula v. James Skinner</i> (1925) 47 All 315 86 IC 161 (25) A A 213 |
| (o) - | (v) <i>Almad Hossain v. Colind Krishna</i> (1911) 31 All 391 9 IC 912 <i>Ustad dar aga v. Narayana</i> (1915) 34 Mad 409 41 IC 819 |
| (p) - | (w) <i>Mohd Clant v. Lo hu Tam</i> (1931) 1 Lah 106 61 IC 72 (21) A I 3 |
| (q) - | (x) <i>Sultan Singh v. Murlidhar</i> (1934) 1 Lah 3-9 81 IC 366 (25) A L 51 1 B |
| (r) - | (y) <i>Fam Irawad v. Mad F Ipat</i> (1917) 6 Pat 100 14 100 (1) A I 15 |
| (s) - | (z) <i>Patel v. Anan Singh v. Copal</i> (1904) 8 C W N 206 |
| (t) - | (a) <i>A. B. La v. Dori Dival</i> (1937) 54 All 401, 143 IC 125 (33) A A 315 |
| (u) - | (b) <i>Chinnappa v. Chinnappa</i> (1914) 34 B m 471, 23 IC 373 |

and it has now been expressly held that under sec. 12 of the Limitation Act of 1908 the time requisite to obtain a copy of the decree appealed from is to be excluded (2)

Land Acquisition Act.—An award by the Court under Part III of the Land Acquisition Act, 1894, is deemed to be a decree (r). An appeal therefore lies from a decree of a High Court on appeal from such an award. But the Privy Council will not interfere in matters involving valuation of property unless the judgment cannot be supported as it stands either by reason of a wrong application of principle or because some important part of the evidence has been overlooked or misapplied (s).

Interlocutory Orders—See cl 40 of the Letters Patent

Prerogative of the Crown—The Code does not limit the prerogative of the Crown to admit an appeal. See s. 112. Hence special leave may be granted by the King in Council to appeal where leave has been refused by the High Court (t) or even when leave has been wrongly granted by a High Court (u). But no special leave will as a rule be granted, unless there is some substantial question of law or general interest involved (v). Special leave granted on an ex parte application does not preclude the Board when the true facts are brought before it from going into the question whether the special leave is competent or not (u).

Clause (c) : Certificate as to fitness—Leave to appeal to the Privy Council may be granted (1) when a case fulfils the requirements of sec 110, or (2) when it is *otherwise* a fit case for appeal to the Privy Council. In either case a certificate has to be granted by the High Court, in the first case, a certificate to the effect that the case fulfils the requirements of sec 110 and is therefore a fit case for appeal to the Privy Council, and in the second case, that *for other reasons* it is a fit case for appeal to the Privy Council [see O 45, rr 2 3]. Clause (c) of the present section refers to the second class of cases. In this class of cases it is not necessary that the order should be a *final* one. Nor is it necessary that the value of the subject matter of the suit should be Rs 10 000 or upwards (x). The only condition necessary is that the case should be a fit one for appeal to the Privy Council. Referring to this clause Lord Hobhouse said: "That is clearly intended to meet special cases—such for example, as those in which the point in dispute is not measurable by money though it may be of great public or private importance." (y) This was amplified in a later case before the Judicial Committee where it was said that clause (c) contemplated "cases in which it is impossible to define in money value the exact character of the dispute, there are questions, as for example, those relating to religious rites and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money." (z) Thus where a petition was made by a company for a certificate to appeal to the Privy

- (y) Abdullah v. Admr.-Genl. of Bengal (1915)
42 Cal 35 24 I C 273 Fam Sarup v.
Jatwant Lai (1915) 38 All 8⁷ 31 I C 906
- (r) Act 1 of 1894 s. 26 (2) as amended by Act
1 of 1911
- (s) Varma Das v. Secretary of State (1925)
5 I A 133 6 Lah 63 86 I C
556 (-5) A I C 91 Inag Varan v.
Collector of Igra (193) 59 I A 155 54
All 296 136 I C 449 (3) A P C 102
Akhbar v. Secretary of State (1939)
57 I A 2 3 1 4 I C 903 (30) A P C 249
Pat Tam v. Secretary of State (1930)
34 C W N 1108 1-6 I C 43ⁿ (30)
A P C 2-3
- (t) Fakimboy v. Turner (1891) 15 Bom 150
18 I A 6 Ilramul Hug v. Hukse (1906)
33 Cal 8-3
- (u) Sorabjee v. Duranddas (1913) 59 I A 366
36 C W N 94 133 I C 55ⁿ (3)
A P C 19-2
- (v) Moti Chand v. Canga Prasad (1911) 4 All

- (u)
- (x) *Ischnura elegans* Turner (1890) 14 Bom 494
- (y)
- ()

Council on the ground that the financial and commercial position of the company might be seriously affected by the questions at issue, and that those questions were of importance to Indian companies generally the High Court of Bombay granted the requisite certificate. The order sought to be appealed from in that case was an order dismissing a petition presented by the company for a confirmation of a special resolution altering the memorandum of association of the company (a). Similarly when a case involved a substantial question of law, and the point in dispute, though not measurable by money, was of considerable importance, namely, the extent of the control acquired by one who had built a fire temple for Parsis at Udwarda, the High Court of Bombay granted leave to appeal to the Privy Council (b). Similarly the question as to what is the legal position of a person who has collected the debt of a deceased person by virtue of his being a holder of a succession certificate under the Succession Certificate Act, 1889, was held to be a substantial question of law of general public importance, and leave to appeal was granted under cl (c) of this section (c). Leave to appeal was similarly granted where the question was whether a fraud practised by a mortgagor alone upon a Sub Registrar would vitiate registration and disentitle the innocent mortgagee from enforcing the mortgage (d), so also in a case involving the question whether it is necessary to register documents giving an option of repurchase (e). The mere existence of a substantial question of law is not sufficient to give the High Court jurisdiction to give leave to appeal under clause (c) of this section, the question must also be of great public or private importance (f). The question as to the right of Mahomedans to take out new religious processions is one of general importance to both the Hindu and the Mahomedan communities and is a fit case for leave to appeal (g). As to questions of private importance referred to in the judgment of Lord Hobhouse, it has been held that by private importance is meant private importance to both parties to the litigation and not only to one of them (h). The right of appeal to the Privy Council from a decision of the High Court upon a case stated under sec 66 of the Indian Income Tax Act, 1922, is given by sec 66A (2) only in a case which the High Court certifies to be a fit one for such an appeal. The High Court is justified in refusing a certificate in a case which in its view, does not raise any question of such importance as would warrant a certificate under this clause. It is not sufficient that the requirements of sec 110 of the Code are satisfied (i). But if the decision affects not only a particular assessee and depends upon the evidence in a particular case but is a question of great public importance depending upon general principles, a certificate should be given (j).

The High Court has under this clause to certify that the case is a fit one for appeal to His Majesty in Council. 'To certify that a case is of that kind, though it is left entirely in the discretion of the Court is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate' (l). The certificate must make plain upon its face that the discretion conferred upon the High Court was invoked and was exercised (l). It is the certificate, and not the order for the

| | | |
|-----|---|--|
| (a) | " | Mad L J 217 221 C 250 (23) A M 3- [leave refused] <i>Karnata v Corinda chari</i> (1931) 45 Mad L J 514 61 C 511 (24) A M 231 [dispute between two temples of considerable antiquity and considerable importance—leave granted] |
| (b) | " | " |
| (c) | " | " |
| (d) | " | " |
| (e) | " | " |
| (f) | " | " |
| (g) | " | " |
| (h) | " | " |
| (i) | " | " |
| (j) | " | " |
| (k) | " | " |
| (l) | " | " |
| (m) | " | " |
| (n) | " | " |
| (o) | " | " |
| (p) | " | " |
| (q) | " | " |
| (r) | " | " |
| (s) | " | " |
| (t) | " | " |
| (u) | " | " |
| (v) | " | " |
| (w) | " | " |
| (x) | " | " |
| (y) | " | " |
| (z) | " | " |

certificate, which the Judicial Committee has to consider and act upon; and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, it cannot be held that the leave was properly given (m)

As to certificate of fitness in the case of decrees passed by the High Court in cross appeals from the same decree, see the undermentioned case (n) See also notes to O 45, r. 3.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

O. 45, rr. 4 5.—Read O 45, rr. 4 5, with this section

This section corresponds with s. 596 of the Code of 1882 except that the words, "or final order," have been added in paragraphs 2 and 3 after the word "decree" See note to s. 109 above, ' difference between the old and the new section "

Construction of the section—In a recent case the Judicial Committee said "It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section, because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub sec. (c) of sec. 109 (o)

Date of valuation—As regards "the amount or value of the subject matter of the suit in the Court of first instance," the material date is the date of the institution of the suit (p)

As regards "the amount or value of the subject matter in dispute on appeal to His Majesty in Council," the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (q)

As regards the value of "property" referred to in the second paragraph of this section, the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (r) But if the plaintiff's suit is dismissed on appeal, the maximum value to be attached to the appeal is the value of his suit as stated in the plaint and accepted by the trial Court (r1)

(m) *Ladla Krishna Das v. Bal Krishna (Land)* (1901) 21 A 182 183 23 All 415 418

(n) *Muhammad Baki Khan v. Muhammad Mohi-ud Din* (1915) 37 All 124 127 I C 378

(o) *Edoychand v. P. F. (a) dar and Co.* (1920) 52 I A 207 211 52 Cal 650 655 64 I C 445 (20) 4 I C 10

(p) *Pandura Kumar v. Lash Behari* (1931) 35 C W 669 1321 C 60 (31) 4 I C 125

(q) *Gootoojersad v. Juggitchinder* (1871) 8 M I A 166 *Jam Kumar v. Muhammad I* (1870) 4 M All 445 50 I C 976

(r) *Surendra Nath v. Deorika Nath* (1917) 44 Cal 119 35 I C 600 *Isaaji v. Laxmibai* (1920) 44 Bom 104 55 I C 972 *Neshjirs v. Manjivya* (1926) 50 Bom 160, 94 I C 755 (20) 4 B 260

(r1) *Isenkatatharwami v. Appathwami* (1933) 56 Mad 886 143 I C 134, (33) A M 401

Council on the ground that the financial and commercial position of the company might be seriously affected by the questions at issue, and that those questions were of importance to Indian companies generally the High Court of Bombay granted the requisite certificate. The order sought to be appealed from in that case was an order dismissing a petition presented by the company for a confirmation of a special resolution altering the memorandum of association of the company (a). Similarly when a case involved a substantial question of law, and the point in dispute, though not measurable by money, was of considerable importance, namely, the extent of the control acquired by one who had built a fire temple for Parsis at Udawa, the High Court of Bombay granted leave to appeal to the Privy Council (b). Similarly the question as to what is the legal position of a person who has collected the debt of a deceased person by virtue of his being a holder of a succession certificate under the Succession Certificate Act, 1889, was held to be a substantial question of law of general public importance, and leave to appeal was granted under cl (c) of this section (c). Leave to appeal was similarly granted where the question was whether a fraud practised by a mortgagor alone upon a Sub Registrar would vitiate registration and disentitle the innocent mortgagee from enforcing the mortgage (d), so also in a case involving the question whether it is necessary to register documents giving an option of repurchase (e). The mere existence of a substantial question of law is not sufficient to give the High Court jurisdiction to give leave to appeal under clause (c) of this section, the question must also be of great public or private importance (f). The question as to the right of Mahomedans to take out new religious processions is one of general importance to both the Hindu and the Mahomedan communities and is a fit case for leave to appeal (g). As to questions of private importance referred to in the judgment of Lord Hobhouse it has been held that by private importance is meant private importance to both parties to the litigation and not only to one of them (h). The right of appeal to the Privy Council from a decision of the High Court upon a case stated under sec 66 of the Indian Income Tax Act, 1922, is given by sec 66A (2) only in a case which the High Court certifies to be a fit one for such an appeal. The High Court is justified in refusing a certificate in a case which, in its view, does not raise any question of such importance as would warrant a certificate under this clause. It is not sufficient that the requirements of sec 110 of the Code are satisfied (i). But if the decision affects not only a particular assessee and depends upon the evidence in a particular case but is a question of great public importance depending upon general principles a certificate should be given (j).

The High Court has under this clause to certify that the case is a fit one for appeal to His Majesty in Council. "To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion, evinced by the fitting certificate" (k). The certificate must make plain upon its face that the discretion conferred upon the High Court was invoked and was exercised (l). It is the certificate, and not the order for the

- | | |
|-----|---|
| (a) | Mid L J 217 ~2 I C 250 (-3) A M 232 (leave refused) <i>Kesava v. Coratia</i> |
| (b) | <i>clara</i> (19-3) 45 Mid L J 514 ~2 I C 811 |
| (c) | (24) A M 231 (dispute between two temples of considerable antiquity and considerable importance—leave granted) |
| (d) | (i) <i>Delhi Cloth and General Mills Co. v. I. A. Tax Commissioner, Delhi</i> (19-7) 54 I A 401 9 Lah 284 108 I C 156 (-) 4 P L 24- |
| (e) | (j) <i>Commissioner of Income Tax v. Chitambar</i> (1931) 59 I A 290 36 C W N 79-137 I C 7-2 (32) A.P.C. 173, (1931) 23 |
| (f) | (k) |
| (g) | (l) |
| (h) | |
| (i) | |

certificate, which the Judicial Committee has to consider and act upon, and unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, it cannot be held that the leave was properly given (m).

As to certificate of fitness in the case of decrees passed by the High Court in cross appeals from the same decree see the undermentioned case (n). See also notes to O 45, r 3.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

O 45, rr 4 5—Read O 45, rr 4 5 with this section

This section corresponds with s 596 of the Code of 1882 except that the words, 'or final order' have been added in paragraphs 2 and 3 after the word 'decree'. See note to s 109 above. Difference between the old and the new section.

Construction of the section.—In a recent case the Judicial Committee said. It must always be kept in view that no real mischief can arise from not allowing a very wide construction of the section because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub sec (c) of sec 109 (o).

Date of valuation.—As regards the amount or value of the subject matter of the suit in the Court of first instance the material date is the date of the institution of the suit (p).

As regards the amount or value of the subject matter in dispute on appeal to His Majesty in Council, the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (q).

As regards the value of 'property' referred to in the second paragraph of this section the material date is the date of the decree from which the appeal to His Majesty in Council is to be made (r). But if the plaintiff's suit is dismissed on appeal, the maximum value to be attached to the appeal is the value of his suit as stated in the plaint and accepted by the trial Court (r1).

- (i) *I d'la Krishna Das v Bal Krish Chari* (1901) 41 A 18 153 3 All 415 418
(n) *Muhammad Hali Khan v Muhammad Mohi ud Din* (1915) 37 All 14 71 C 3 8
(o) *Ed vchand v P F Cu dar and Co.* (19 5) 5 I A 21 11 5 Cal 659 605 65
I C 445 (25) 1 C 153
(p) *Pandora K mar v Lash Behari* (1931) 35 C W 660 13 I C 600 (31) 1 C 150

- (q) *Gooroopernad v Jaggjuchunder* (1880) 8 M I A 166 *Pam Kumar v Muhammad* (19 0) 47 All 415 55 I C 976
(r) *Surendra Nath v Dwarika Nath* (1917) 44 Cal 119 35 I C 600 *Laoy v Larmahet* (1916) 44 Bom 104 55 I C 972 *Wakker v Manjappa* (19 6) 60 Bom 190 11 I C 700 (26) 4 B 265
(r1) *Venkateswami v Appaswami* (1900) 26 Mad 896 143 I C 153 (32) A 26 67

Value of subject matter of suit

"The amount of value of the subject matter of the suit in the Court of first instance."—In some cases the value of the subject matter in the suit in the Court of first instance may be over Rs. 10,000 and the value of the subject matter in dispute on appeal to His Majesty in Council may be less than Rs. 10,000. In some cases, again, the value of the subject matter in the suit in the Court of first instance may be less than Rs. 10,000, and the value of the subject matter in dispute on appeal to His Majesty in Council may be over Rs. 10,000. What the section requires is that the value of the subject matter of the suit in the Court of first instance must be over Rs. 10,000 or upwards, and the value also of the subject matter in dispute on appeal to His Majesty in Council must be Rs. 10,000 or upwards. The word "and" in the first paragraph of this section means "and" and not "or" (s)

Mesne profits and interest—The only class of cases under the head, "amount or value of the subject matter of the suit in the Court of first instance," that present any difficulty are those which include a claim for interest or for mesne profits. Prior to 1874 appeals to the Privy Council were governed by the Order in Council of April 10, 1838. By that Order it was prescribed that the amount or value of the subject matter in dispute on appeal to His Majesty in Council must be Rs. 10,000 or upwards. It was accordingly held by the Privy Council in cases that interest on money claims and mesne profits of immovable property *subsequent to the date of the institution of the suit* actually awarded by the decree appealed from may be added in calculating the value of the matter in dispute on appeal to His Majesty in Council, but not interest or mesne profits *accruing subsequent to the decree*, and if that amount was Rs. 10,000 or upwards a party was entitled to appeal though the value of the subject matter of the suit in the Court of first instance was less than Rs. 10,000 (t). It was also held that in no case could the costs of the suit be added to the principal in calculating the appealable value (u). The condition that the amount or value of the subject matter of the suit in the Court of first instance also should be Rs. 10,000 or upwards was first prescribed by the Privy Council Appeals Act 6 of 1874 and it was subsequently introduced into sec. 596 of the Code of Civil Procedure, 1877. The first authoritative decision on the meaning of the words, "amount or value of the subject matter of the suit in the Court of first instance," is that of the Judicial Committee in *Moti Chand v. Ganga Prasad* (v). In that case the Court of first instance passed a decree for the plaintiff for principal and interest up to the date of the decree amounting to Rs. 9,496, with further interest up to the date of realization. From this decree the defendant appealed to the High Court and that Court reversed the decree and dismissed the suit with costs. The plaintiff then applied to the High Court for leave to appeal to His Majesty in Council. On behalf of the plaintiff it was contended that interest *subsequent to the decree* should be added to the sum of Rs. 9,496, and that if that was done, the value of the subject matter of the suit would exceed Rs. 10,000. But this contention was overruled, and the application was refused on the ground that the claim and decree in the original Court were for less than Rs. 10,000. The plaintiff then applied to the King in Council for special leave to appeal, but the application was refused. The Privy Council said that the word "and" meant "and" and not "or" and that both conditions must be fulfilled. The amount recoverable under the decree was less than Rs. 10,000 and Lord Davey in delivering the judgment of the Board said: "In the present case the amount or value of the subject matter of the suit in the Court of first instance, construing that in the manner most favourable to the proposed

(t) *Moti Chand v. Ganga Prasad* (1902) 24 All*Poy v. Gohlam Moulah* (1862) Marshall * Rep. 24(v) *Doorga Dass v. Rama Nauth* (1860) 8 M. I. A. 262

(c) (1902) 24 All. 174, 29 I. A. 40 [suit to recover damages for fraud]

appellant was at the outside the amount for which he recovered his decree, which was below Rs. 10,000'. The words italicized led to the impression that interest subsequent to the suit up to the date of the decree could be included in determining the amount or value of the subject matter of the suit in the Court of first instance. But this was corrected by the later decision of the Privy Council in *Mangamma v. Mahalakshamma* (10). In this case part of the property in suit consisted of promissory notes. Taking the promissory notes at their face value, the value of the subject matter of the suit in the Court of first instance was less than Rs. 10,000, but adding interest subsequent to suit and awarded by the decree the sum of Rs. 10,000 was exceeded. Their Lordships held that interest after the institution of the suit could not be included and approved the decision of the Madras High Court in *Subramania Ayyar v. Sellammal* (11) that in calculating the amount of the subject matter of the suit in the Court of first instance mesne profits only up to the date of the suit can be added to the value of the property of which possession is claimed.

The rule therefore is that mesne profits and interest subsequent to the institution of the suit must be excluded in ascertaining the amount or value of the subject matter of the suit in the Court of first instance. The Calcutta cases to the contrary were dissented from by the Privy Council and are no longer law (y). Cases decided by other High Courts following the Calcutta decisions are also superseded (z). The Bombay High Court has followed the Madras case (a).

The rule in *Mangamma v. Mahalakshamma* would appear to apply also to mortgage suits and no interest subsequent to the institution of the suit can be added in computing the amount or value of the subject matter of the suit in the Court of first instance. But on this point previous decisions of the High Courts are conflicting. The Calcutta and Patna High Courts include interests up to the preliminary decree (b), and the Allahabad High Court up to the expiry of the six months period provided in O 34, r 6 (c).

Costs.—Costs cannot be included in determining the amount of the subject matter of the suit (d)

The sum of money actually at stake may not represent the true value.—In *Rathu Krishna v Sunjaraswami* (e), their Lordships of the Privy Council said “The sum of money actually at stake may not represent the true value. The proceeding may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit.” It has thus been held that where the subject-matter in dispute relates to a *recurring liability* and is in respect of a property above the appealable value, the case is within the first paragraph of this section. Hence if the rent claimed in a suit is less than Rs. 10,000, but the liability is of a recurring nature, and the property is above that value, the value of the subject-matter must be deemed to be over Rs. 10,000 (f). It cannot, however,

- (u) (1930) 57 I A 56, 53 *Mad* 167, 121 I C 513

- (r)
(y)

- (x) "

- (a) *Seehaus* v. *Javanaya* (1926) 50 B m 160
34 I C 735 (-6) A B -6
(b) *And Kishore* v. *Iam Gulam* (1912) 32
C 1037 1040 17 I C -1 *Iamvay* v.
Iambal (1921) 6 Pat L J 508 62 I C
952 (721) A I 229

- (c) *Gajadhar v. Ambika* (1923) 43 AH 500

- (d) East India Railway v. British Overseas Airways Corp.
6 Pat 441 104 I C 287, 4 TLR 1

- (D) *Surapati v. I am Arjunam* 1/1/2017

- NH *Rathokristina*

- (1966) 491 A 211, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 84

- μοναρχία Μαλακασική

8. *Journal of the American Medical Association*, 1934, 103, 1031-1032.

- I C 034 (27) A 3

- 74 75 1 6 8 9 0

- (continued from page 6)*

said where the suit is to enforce payment of an annuity of Rs 125 per annum, that the value of the subject matter of the suit is Rs 10,000 or upwards, for such an annuity cannot by any reasonable method of valuation be worth Rs 10,000 (g) Where the sole question was as to the destination of the income of the residue until the residuary attained twenty five, and the aggregate amount of the income was less than Rs 10,000 it was held that the value of the subject matter (namely, income) was less than Rs 10,000, though the value of the residue was over Rs 10,000 (h)

Value as laid in the plaint—If the plaint is not required to be valued for purposes of Court fee according to the real or market value but upon some other basis the doctrine of 'approbate and reprobate' does not apply and the plaintiff may shew when applying for a certificate of leave to appeal that the value exceeded Rs 10,000 although Court fee was paid on a lesser amount (i) But if the Court fee is payable on the market value the plaintiff who has paid Court fee on a smaller amount cannot maintain the contention that the suit should be treated for the purpose of an appeal to the Privy Council as involving over Rs 10,000 (j)

A defendant who has adopted the value given by the plaintiff in an appeal to the High Court cannot, when applying for leave to appeal to the Privy Council, contest the plaintiff's valuation, for he cannot both approbate and reprobate (l)

A plaintiff who sues in a Court which would have no jurisdiction if the value of the suit exceeded Rs 10,000 debars himself from claiming at a later stage to have the value of the subject matter of the suit for purposes of an appeal to the Privy Council, treated as exceeding Rs 10,000 Whether the judgment be in his favour or against him he has adopted a course of litigation as appropriate to the case and cannot claim a right of appeal which is inconsistent with the course adopted (l) But a suit for a declaration and injunction may be brought according to the value put upon the relief by the plaintiff in a Court whose jurisdiction is limited to Rs 5,000 and the plaintiff may shew that the value of the property involved is over Rs 10,000 This is because the value as laid in the plaint is not the real but the fiscal value and the case is under the second paragraph of section 110 (m)

In a suit for a general account against a trustee which charges him also with specific items of malversation, each item of malversation does not constitute a distinct subject matter (n)

Value of subject matter in dispute on appeal to Privy Council

"The amount or value of the subject matter in dispute on appeal to His Majesty in Council"—Not only the amount or value of the subject matter of the

(f) See the observations of Rankin J.J. in *Mahendra arayan v Jaganath* (1931) 58 Cal 40 s pri and *Hirabai v Jamshedji* (1913) 15 Bom L R 1021 21 I C 783

(g) *Mohanlal v Bai Kashi* (1916) 40 Bom 477 37 I C 371 *Kishan Chand v Lakhmi Chand* (1933) 54 All 941 143 I C 450 (33) A A 15

(h) *Sundara v Ramareti* (1929) 52 Mad 521, (29) A M 4-9

in dispute on appeal to His Majesty in Council must be Rs 10 000 or upwards. The word and in the first paragraph of the section cannot be read as or (o) The words 'amount or value of the subject matter in dispute on appeal to His Majesty in Council' mean the amount or value at the date of the High Court decree under appeal (p) *A* sues *B* to recover Rs 10 800. The trial Judge passes a decree for *A* for Rs 8 250 with interest at the rate of 6 per cent per annum from the date of suit till the date of realization. *B* appeals from the decree to the High Court, and *A*'s suit is dismissed. *A* appeals for leave to appeal to His Majesty in Council. If interest were to be added to the decretal amount Rs 8 250 the valuation of the proposed appeal to the Privy Council would be over Rs 10 000. Is *A* entitled to add the interest? The Allahabad Court has held that he is not (q).

A mortgages his property to *B*. *C* claims that a portion of the property of the value of about Rs 6 000 belongs to him and that it did not belong to *A*. *B* then sues *A* on the mortgage, the mortgage debt being Rs 38,000, and joins *C* as a defendant. A decree is passed in favour of *B* on the mortgage. *C*'s claim is allowed in part by the Court of first instance but it is disallowed altogether by the High Court. Is *C* entitled to appeal to the King in Council? No, because though the amount of the decree passed in favour of *A* exceeds Rs 10 000 the value of *C*'s claim is less than Rs 10,000, (r). Note that *C* ought not to have been joined as a party to the suit at all [see notes to O 34, r 1, "Persons having an interest, etc."]

Single decree in several appeals.—*A*, claiming to be the next reversioner on the death of a Hindu widow, sues *B*, *C* and *D*, being alienees of separate items of the estate of the last male holder, and obtains a decree against them. *B*, *C* and *D* prefer separate appeals which are all disposed of by one decree. *A* applies for leave to appeal to His Majesty in Council from the decision as to the items in possession of *B* and *D*. The claims against the several alienees being based on really different causes of action, the fact that only one appellate decree was drawn up does not affect the requirements of this section, and consequently no leave can be granted in such of the appeals in which the value of the subject matter was below Rs. 10,000 (s).

Abandonment of appeal in part after grant of certificate.—*A* obtains a decree against *B* for Rs 11,000. *B* applies for leave to appeal from the decree to the Privy Council, and a certificate is granted. Afterwards in the printed case and at the hearing *B* withdraws part of his appeal reducing by so doing the amount in dispute to Rs 9,000. Does this render the appeal incompetent? No, if *B* had a *bona fide* intention, when he applied for a certificate, to appeal in respect of the whole amount of the decree (t).

Claim to property of value of Rs 10,000 or upwards

"Or the decree or final order must involve, directly or indirectly, some claim or question to property of the value of Rs. 10 000 or upwards"—The decree or final order referred to in the second paragraph of the section is the decree or final order from which the appeal is to be preferred to the Privy Council. The material date for determining the value of the "property" under this paragraph is the date of that decree or order (u).

Note that the expression used in the second paragraph of this section is "property" while that used in the first paragraph is 'subject matter of the suit' and "subject matter in dispute on appeal to His Majesty in Council". It has been held by the High

(o) *Moti Chand v. Canga Prasad* (1907) 24 All 14 251 A 40

(p) *Goodeoprasad v. Jugutichander* (1860) 8 M I 166

(q) *Pam Kumar v. Muhammad* (1920) 42 All 445 551 C 96

(r) *Patla Kunwar v. Pooti Singh* (1916) 33 All 484 431 A 187 351 C 333

(s) *Taitil Singh v. Somasundaram* (1919) 42 Mad 228 491 C 434

(t) *Kaila Singh v. Joras Pam* (1895) 22 Cal 434 221 A 65

(u) *Surendra Nath v. Dwarka Nath* (1917) 44 Cal 119 251 C 605 *Pooji v. Laxmidas* (1921) 44 Bom 104 551 C 92

said where the suit is to enforce payment of an annuity of Rs 125 per annum, that the value of the subject matter of the suit is Rs 10,000 or upwards, for such an annuity cannot by any reasonable method of valuation be worth Rs. 10,000 (g) Where the sole question was as to the destination of the income of the residue until the residuary attained twenty five, and the aggregate amount of the income was less than Rs 10,000 it was held that the value of the subject matter (namely, income) was less than Rs 10,000, though the value of the residue was over Rs 10,000 (h)

Value as laid in the plaint—If the plaint is not required to be valued for purposes of Court fee according to the real or market value but upon some other basis the doctrine of 'approve and reprobate' does not apply and the plaintiff may shew when applying for a certificate of leave to appeal that the value exceeded Rs 10,000 although Court fee was paid on a lesser amount (i) But if the Court fee is payable on the market value the plaintiff who has paid Court fee on a smaller amount cannot maintain the contention that the suit should be treated for the purpose of an appeal to the Privy Council as involving over Rs 10,000 (j)

A defendant who has adopted the value given by the plaintiff in an appeal to the High Court cannot, when applying for leave to appeal to the Privy Council, contest the plaintiff's valuation, for he cannot both approve and reprobate (k)

A plaintiff who sues in a Court which would have no jurisdiction if the value of the suit exceeded Rs 10,000 debars himself from claiming at a later stage to have the value of the subject matter of the suit for purposes of an appeal to the Privy Council, treated as exceeding Rs 10,000. Whether the judgment be in his favour or against him he has adopted a course of litigation as appropriate to the case and cannot claim a right of appeal which is inconsistent with the course adopted (l) But a suit for a declaration and injunction may be brought according to the value put upon the relief by the plaintiff in a Court whose jurisdiction is limited to Rs 5,000 and the plaintiff may shew that the value of the property involved is over Rs 10,000. This is because the value as laid in the plaint is not the real but the fiscal value and the case is under the second paragraph of section 110 (m)

In a suit for a general account against a trustee which charges him also with specific items of malversation, each item of malversation does not constitute a distinct subject matter (n)

Value of subject matter in dispute on appeal to Privy Council.

"The amount or value of the subject matter in dispute on appeal to His Majesty in Council."—Not only the amount or value of the subject matter of the

51.

1

1

1

1

1

1

1

1

1

1

1

1

- (g) See the observations of Banka L.J. in *Ushendranarayan v Janakinath* (1931) 58 Cal 65 *supra* and *Hirjibhai v Jamshedji* (1913) 13 Bom L R 1021, 11 I L 753.
- (h) *Mohanlal v Bai Fanki* (1916) 40 Bom 477 37 I C 371. *Aithen Chand v Lachhmi Chand* (1933) 54 All 941, 143 I C 450 (33) A A 15.
- (i) *Sundara v Natharela* (1920) 22 Mad 521, (22) A M 4-2.

Committee said Their Lordships think that this is not *really consequential on the present decree and too remote* to be entitled to the description of being property indirectly involved in the issue of this suit. It follows that the indirect relation must not be too remote, and so it has been held that the phrase 'directly or indirectly' refers to suits in existence and cannot be stretched to cover suits *in gremio futuri* (g). It refers to questions arising between the parties to the suit and not to suits which may hereafter be brought and which are not then pending (h) and the indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote (i). On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata* (j).

A sues B for a declaration that he is entitled to a one third share in the property in suit and for a decree for partition and for delivery of his share to him. The property exceeds Rs 10 000 in value, but the share claimed by A is of a value less than Rs 10 000. A decree is passed for A as prayed. B then applies for leave to appeal to His Majesty in Council. Does the decree involve a claim or question to property of a value exceeding Rs 10,000? Yes, according to the Calcutta (k) and Allahabad (l) High Courts. No, according to the Bombay High Court, unless there be other property outside the subject matter in dispute which can be affected by the decision (m). In one of the Bombay cases (n) Jenkins, C J, held that in order to determine the value prescribed by this section, the decree has to be looked at as it affects the interests of the parties prejudiced by it, and, where the detriment to the party seeking relief is estimated at less than Rs 10,000, then the value of the matter in dispute in appeal is not of the prescribed value, and the decree itself does not involve any claim or question to, or respecting property of, the prescribed value, and the case does not fulfil the requirements of the section. The Patna (o) and Rangoon (p) High Courts have followed the Bombay decisions. The High Court of Bombay has also held that in a suit by a partner for accounts and for recovery of his share, it is the value of the plaintiff's share that must be looked to, and not the value of the whole of the partnership assets (q). It appears, however, from a judgment of the same High Court in the undermentioned case (r) that if A sues B claiming the exclusive user of a well and compound valued at Rs 10,000 odd, and the High Court holds that A and B are equally entitled to the user, the decree must be deemed to involve property of the value of Rs 10,000 odd so as to entitle A to a certificate for leave to appeal to His Majesty in Council.

In a suit for an easement of light and air claimed by the owner of property A against the owner of property B, it is the value of the easement, and not the value of property A, that determines the appealable value (s). The claim must be one to or respecting property of the value of Rs 10,000 or upwards and not a claim merely affecting such property. So when the claim was to a channel for the irrigation of fields the value of the claim was not the value of the fields but the detriment or injury the plaintiff would suffer if the right

(g) *Hanuman Prasad v Bhagwati Prasad* (1902) 24 All 236

(h)

(i)

(j)

(k)

(l) *Mohammad Ashgar v Mast Abida* (1933) 54 All 558, 134 I C 670 (33) A 4 177

(m) *De Silva v De Silva* (1904) 6 Bom L R

403, *Raoji v Laxmibai* (1900) 41 Bom 104 55 I C 97

(n) (1904) 6 Bom L R 403 *supra*

(o) *Gosain Bhavnath v Bihari Lal* (1919) 4 Pat L J 415 52 I C 723

(p) *Gnanamanikkam v S R Samson* (1931) 9 Rang 5, 130 I C 280 (31) A R 158

(q) *Nariman v Hasham* (1915) 49 Bom 119 85 I C 191 (25) A B 137

(r) *Appaya v Lakhamparda* (1923) 25 Bom L R 77, 72 I C 127 (23) A B 176

(s) *Mansul v Banubai* (1921) 23 Bom L R 374 63 I C 588 (21) A B 266 *Lallubhai v Bhimbai* (1909) 53 Lon 552, 113 I C 782, (19) A B 541 distinguishing *Appaya v Lakhamparda* (1923) 25 Bom L R 77, 72 I C 127 (23) A B 176

were negatived (t). In a Bombay case *A* sued *B* for possession under the Bombay Rent Act 2 of 1918. The rent of the portion occupied by *B* was Rs 275 per month. The High Court on appeal decreed *A*'s suit. It was held that as the rent capitalized at 20 years' purchase amounted to upwards of Rs. 10,000, the decree involved indirectly a claim respecting property of the value of over Rs. 10,000, and that *B* was entitled to leave to appeal to His Majesty in Council (u). In a Lahore case, however, where *A* sued to eject *B* alleging that *B* was a tenant at-will, and *B* contended that he was a permanent tenant paying an annual rent of Rs. 1,200 the Court held that the issue in the suit, namely whether *B* was a permanent tenant or a tenant at-will did not involve any question respecting property of the value of Rs. 10,000 or upwards (v). Again when the subject matter of the suit was a widow's right of residence, the Bombay High Court held that the value of the claim was the value of the premises the appellant was required to vacate (u).

Where subject matter of suit not capable of valuation.

Where the matter is under the appealable value or is not capable of valuation.—In such a case, a party desirous of appealing to the Privy Council may apply for a certificate that the case is "a fit one for appeal" to His Majesty in Council under s 109, cl (c) (x). See notes to s 109, "Certificate as to fitness"

Decree of affirmance.

"Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree."—In this case it is not enough that the appeal involves some substantial question of law. It is also necessary that the amount of the subject matter of the suit and of the subject matter in dispute on appeal must be Rs 10,000 or upwards, or that the decree must involve some claim to property of like amount. The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this section (y). This is clear from the word "and" with which the last paragraph of this section begins

The Privy Council have held that the decision of the suit, and cannot, like statement of the grounds on which from this that in order to "affirm" appellate Court affirms the decree of the Court below, it need not also affirm the grounds of fact on which the judgment was passed. Thus where the decree of the appellate Court was that "the appeal be dismissed," but the reasons given were not the same as those of the lower Court in respect of some matters of fact, it was held that the decision of the Court below was "affirmed" within the meaning of this section, and that no certificate should be granted unless the appeal involved a substantial question of law (z). Nor is it necessary in order to "affirm" the decision of the Court below that the finding

| | |
|---|---|
| (t) <i>Appala Raja v Rangappa Naicker</i> (1917) 33 Mad L J 491, 40 I C 680 | <i>Khatredji</i> (1904) 6 Bom J R 286 <i>Morla Newaz v Sayid innissa Bibi</i> (1831) 18 Cal 37 |
| (v) | (y) <i>Danarsi Prasad v Kashi Krishna</i> (1901) 23 All 227 28 I A 11, <i>Ratha Krishna Das v Jas Krishna Chaud</i> (1901) 23 All 415, 28 I A 182 |
| (w) | (z) |
| (x) | (a) |

security for costs (b) or for want of prosecution the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called for hearing, is a decree 'affirming' the decision of the Court below (c)

The Calcutta Case of *Sree Nath Roy v. Secretary of State* (d) seemed to lay down the principle that a decree was a decree of affirmance if both the Courts were agreed as to the subject matter of the proposed appeal to the Privy Council. That was a case under the Land Acquisition Act and the applicant claimed Rs. 77,000 and odd as compensation, but the Collector awarded him Rs. 28,287. The Judge on reference to him upheld the Collector's award. The applicant then appealed to the High Court valuing the appeal at Rs. 49,000 and odd being the difference between the two sums. The High Court increased the amount of compensation by about Rs. 7,000. It was held that the decree of the High Court was an affirming decree and leave to appeal to the Privy Council was refused. But in *Annapurnabai v. Rup Rao* (e) A alleging that he was adopted by the senior widow of one Shanker sued the junior widow and another for possession of property of over Rs. 10,000 in value. The junior widow denied the adoption, and further, she claimed to be entitled to Rs. 3,000 per annum for her maintenance. The first Court held that the plaintiff's adoption was proved but decreed to the widow Rs. 800 per annum as maintenance. The Appellate Court increased the maintenance to Rs. 1,200 per annum but in all other respects affirmed the decision of the first Court. The defendants applied for leave to appeal to the Privy Council but the application was rejected. The defendants then applied to the Privy Council for special leave to appeal. It was argued on behalf of the defendants that the value of the subject matter of the suit exceeded Rs. 10,000 as also did the subject matter of the proposed appeal, and that even if the maintenance alone was regarded as in dispute its value, having regard to the widow's prospects of life, exceeded Rs. 10,000. This contention was upheld and special leave to appeal was granted. It is true that the appeal was limited to the question of maintenance but that was because the petitioners desired to appeal only as to the amount of maintenance. Rankin, C. J., considers that this judgment of the Privy Council has the effect of overruling the particular application of the principle of *Sree Nath Roy's* case that only the subject matter of the appeal to the Privy Council is to be regarded when deciding whether the decree is or is not one of affirmance (f), but that it is not in itself of sufficient authority to justify the abandonment of the rule which had been acted upon that you must look to the substance and see what is the subject matter of the appeal to the Privy Council. In accordance with this rule it has been held that the decree is a decree of affirmance if the appellate Court agrees with the findings of the lower Court on the merits but varies the order as to costs (g) or as to interest (h) or allows a cross appeal modifying the decree (i). The Allahabad High Court had also held that if the decree varies the decree of the lower Court to the prejudice of the applicant it is not a decree of affirmance (j), but that it is a decree of affirmance if the variance is in favour of the applicant (k). A subsequent Full Bench case of the Allahabad High Court holds, following *Annapurnabai's* case that any modification prevents a decree from being one of affirmance (l).

In a suit by A against B a decree is passed in A's favour. B appeals from the decree but the appeal is dismissed by the lower appellate Court. B then appeals to the High

- | | | |
|-----|---|---|
| (b) | " | A L. 554 |
| (c) | " | (i) <i>Ramanathan v. Subramanian</i> (1906) 51 Mad L. J. 265 9 th I C 59 th (-6) A M 10 4 |
| (d) | " | (j) <i>Bhagwan Singh v. The Allahabad Bank</i> (1921) 43 All. 900 64 I C 3 (21) A A 20 |
| (e) | " | 20 <i>Jamuna J raised v. Jagannath</i> (1929) 117 I C 193 (29) A I 561 |
| (f) | <i>Sarendra Lal v. Gopendra</i> (1907) 31 C W N 57-103 I C 65 (2) A C 543 | (k) |
| (g) | <i>Chaitanya v. Mohamed</i> (1921) 34 Cal L. J. 299 66 I C 40 th (-) A C 316 | (l) |
| (h) | <i>Bhagat Singh v. Jai Ram</i> (1913) P. T. 22 26 I C 40 th <i>Am Fam v. Kulkarni Chand</i> (1930) 11 Lah. 465 123 I C 523, (30) | |

were negatived (t) In a Bombay case *A* sued *B* for possession under the Bombay Rent Act 2 of 1918 The rent of the portion occupied by *B* was Rs. 275 per month The High Court on appeal decreed *A*'s suit It was held that as the rent capitalized at 20 years' purchase amounted to upwards of Rs 10 000, the decree involved indirectly a claim respecting property of the value of over Rs 10 000, and that *B* was entitled to leave to appeal to His Majesty in Council (u) In a Lahore case, however, where *A* sued to eject *B* alleging that *B* was a tenant at will, and *B* contended that he was a permanent tenant paying an annual rent of Rs 1,200 the Court held that the issue in the suit, namely whether *B* was a permanent tenant or a tenant at will did not involve any question respecting property of the value of Rs 10 000 or upwards (v) Again when the subject matter of the suit was a widow's right of residence, the Bombay High Court held that the value of the claim was the value of the premises the appellant was required to vacate (w)

If here subject matter of suit not capable of valuation

Where the matter is under the appealable value or is not capable of valuation—In such a case, a party desirous of appealing to the Privy Council may apply for a certificate that the case is 'a fit one for appeal' to His Majesty in Council under s 109, cl (c) (x) See notes to s 109, "Certificate as to fitness"

Decree of affirmance

"Where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree"—In this case it is not enough that the appeal involves some substantial question of law It is also necessary that the amount of the subject matter of the suit and of the subject matter in dispute on appeal must be Rs 10,000 or upwards, or that the decree must involve some claim to property of like amount The existence of a question of law of itself does not give a right of appeal in the ordinary course of procedure under this section (y) This is clear from the word 'and' with which the last paragraph of this section begins

The Privy Council have held that the word 'decision' in this clause means merely the decision of the suit and cannot like the word 'judgment,' be defined as meaning the statement of the *grounds* on which the Court proceeds to pass the decree It follows from this that in order to 'affirm' the decision of the Court below it is sufficient if the appellate Court affirms the *decree* of the Court below, it need not also affirm the *grounds of fact* on which the judgment was passed Thus where the decree of the appellate Court was that "the appeal be dismissed, but the reasons given were not the same as those of the lower Court in respect of some matters of fact, it was held that the decision of the Court below was 'affirmed' within the meaning of this section, and that no certificate should be granted unless the appeal involved a substantial question of law (z) Nor is it necessary in order to 'affirm' the decision of the Court below that the finding of the appellate Court should coincide in terms with that of the Court below it is sufficient if the findings of fact of the two Courts are in effect the same (a) And it has been held that a decree of the High Court dismissing an appeal for the appellants failure to furnish

- | | |
|-----|---|
| (t) | <i>Kharadji</i> (1904) 6 Bom L R 286 <i>Mo is Nenas v Saj dunnissa Bibi</i> (1891) 18 Cal 37 |
| (u) | <i>Da arsi Prasad v Fashi Krishna</i> (1901) 23 All 277 <i>S I A 11 Radha Krishna Das v Jai Krishna Chand</i> (1901) 23 All 415 28 I A 18 |
| (v) | <i>Tasaddiq v Kashi Ram</i> (1903) 25 All 109 30 I A 35 <i>Chunni Lal v Amin Chand</i> (1933) 14 Lah 609 114 I C 18 (33) A L 690 <i>AshgharReza v Hyder Reza</i> (1889) 18 Cal 287 would seem to be no longer law |
| (w) | <i>Zhoi pran v Calcutta Tea buyers Co</i> (1894) 21 Cal 523 |
| (x) | |
| (y) | |
| (z) | |
| (a) | |

security for costs (b) or for want of prosecution the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called for hearing, is a decree 'affirming' the decision of the Court below (c)

The Calcutta Case of *Sree Nath Roy v Secretary of State* (d) seemed to lay down the principle that a decree was a decree of affirmance if both the Courts were agreed as to the subject matter of the proposed appeal to the Privy Council. That was a case under the Land Acquisition Act and the applicant claimed Rs. 77,000 and odd as compensation, but the Collector awarded him Rs. 28,257. The Judge on reference to him upheld the Collector's award. The applicant then appealed to the High Court valuing the appeal at Rs. 49,000 and odd being the difference between the two sums. The High Court increased the amount of compensation by about Rs. 7,000. It was held that the decree of the High Court was an affirming decree and leave to appeal to the Privy Council was refused. But in *Innapurnabi v Ruprai* (e) A alleging that he was adopted by the senior widow of one Shanker sued the junior widow and another for possession of property of over Rs. 10,000 in value. The junior widow denied the adoption, and further, she claimed to be entitled to Rs. 3,000 per annum for her maintenance. The first Court held that the plaintiff's adoption was proved, but decreed to the widow Rs. 800 per annum as maintenance. The Appellate Court increased the maintenance to Rs. 1,200 per annum but in all other respects affirmed the decision of the first Court. The defendants applied for leave to appeal to the Privy Council but the application was rejected. The defendants then applied to the Privy Council for special leave to appeal. It was argued on behalf of the defendants that the value of the subject matter of the suit exceeded Rs. 10,000 as also did the subject matter of the proposed appeal, and that even if the maintenance alone was regarded as in dispute, its value having regard to the widow's prospects of life exceeded Rs. 10,000. This contention was upheld and special leave to appeal was granted. It is true that the appeal was limited to the question of maintenance but that was because the petitioners desired to appeal only as to the amount of maintenance. Rankin, C. J., considers that this judgment of the Privy Council has the effect of overruling the particular application of the principle of *Sree Nath Roy's* case that only the

to the substance and see what is the subject matter of the appeal to the Privy Council. In accordance with this rule it has been held that the decree is a decree of affirmance if the appellate Court agrees with the findings of the lower Court on the merits but varies the order as to costs (g) or as to interest (h) or allows a cross appeal modifying the decree (i). The Allahabad High Court had also held that if the decree varies the decree of the lower Court to the prejudice of the applicant it is not a decree of affirmance (j), but that it is a decree of affirmance if the variance is in favour of the applicant (k). A subsequent Full Bench case of the Allahabad High Court holds, following *Annapurnabai's* case that any modification prevents a decree from being one of affirmance (l).

In a suit by *A* against *B* a decree is passed in *A*'s favour. *B* appeals from the decree but the appeal is dismissed by the lower appellate Court. *B* then appeals to the High

- | | | | |
|-----|--|-----|---|
| (b) | A L 554 | (i) | Ramanathan v Subramanian (1976) 51 Mal L J 65 97 I C 522 (76) A 31 1028 |
| (c) | | (f) | Dhagwan Singh v The Allahabad Bank (1921) 43 All 200 64 I C 3 (21) A A 200 Jamuna Prasad v Jagannath (1974) 11 I C 193 (29) A P 561 |
| (d) | | (k) | Kamalnath v Bhatlasi (1972) 44 All 200 64 I C 916 (22) A A 293 Kapurji v Jannati (1973) 31 Jm L R 619 11 I C 221 (29) A H 355 |
| (e) | | (l) | Nathu Lal v Jagannath (1973) 54 All 146 135 I C 234 (22) A A 65 |
| (f) | Narendra Lal v Gopendra (1927) 31 C W N 5 2 103 I C 65 (27) A C 543 | | |
| (g) | Chaudhury v Mohamed (1921) 34 Cal L J 239 66 I C 407 (21) A C 316 | | |
| (h) | Phagat Singh v Jai Ram (1915) P F 22 26 I C 402 An Ram v Anshu Chauli (1930) 11 Lah 465, 123 I C 523, (30) | | |

Court The appeal is heard by a single Judge of the High Court who reverses the decree of the lower appellate Court From this judgment 4 appeals to the High Court under clause 15 of the Letters Patent with the result that the judgment of the single Judge is affirmed by His Majesty in Council Here the Bench of two Judges of the High Court constituted by the two Judges is the lower appellate Court, and not the Court constituted by the single Judge of the High Court This therefore is a case in which the decree appealed from affirms the decision of the Court immediately below, and no leave to appeal can therefore be granted unless the appeal involves some substantial question of law The above result follows from the fact that the Code, makes no provision for an appeal within the High Court that is to say, from a single Judge of the High Court the right of appeal from the judgment of a single Judge of the High Court is conferred by cl 15 of the Letters Patent (m) But the Lahore High Court holds that in such a case the Court 'immediately below' is the Court of the single Judge and that the decree is not one of affirmance (n) as this seems to have been assumed by the Privy Council in an old case (o)

Judicial Committee and concurrent findings of facts

Rule of Judicial Committee in cases of concurrent findings of fact when the appeal before the Committee falls on the question of law on which leave to appeal was granted—The Judicial Committee has undoubtedly the power as a Court of review to review the concurrent findings of facts of the lower Court, though the appeal before it may fail on the question of law on which leave to appeal was granted But as a general rule the Committee will not interfere with these findings on the ground that where the question in one of fact, it is a question of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance (p) The Privy Council have said that the object of the rule is to discourage bringing before the Board issues of fact on which the appellant has failed in two Courts and the rule should not be departed from unless its enforcement would work obvious injustice or the violation of some rule of procedure (q) In *Umrao Begam v Irshad Husain* (r) Lord Hobhouse in delivering the judgment of the Board said "question is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs Their Lordships would be specially

and the same conclusion is no reason for disregarding the said rule (s) "It cannot detract from the weight of concurrent findings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference" (t) The circumstance that the trial Judge based his findings on oral evidence, while the finding of the Appellate Court was based on documents, is not a ground

- (m) *Tilak Persad v Bena Jek* (1896) 23 I A 102
23 Cal 918
(p)
(q)
(r)
(s)
(t)

- (u)
(v)
(w)
(x)
(y)
(z)
(aa)
(ab)
(ac)
(ad)
(ae)
(af)
(ag)
(ah)
(ai)
(aj)
(ak)
(al)
(am)
(an)
(ao)
(ap)
(aq)
(ar)
(as)
(at)
(au)
(av)
(aw)
(ax)
(ay)
(az)
(ba)
(bb)
(bc)
(bd)
(be)
(bf)
(bg)
(bh)
(bi)
(bj)
(bk)
(bl)
(bm)
(bn)
(bo)
(bp)
(bq)
(br)
(bs)
(bt)
(bu)
(bv)
(bw)
(bx)
(by)
(bz)
(ca)
(cb)
(cc)
(cd)
(ce)
(cf)
(cg)
(ch)
(ci)
(cj)
(ck)
(cl)
(cm)
(cn)
(co)
(cp)
(cq)
(cr)
(cs)
(ct)
(cu)
(cv)
(cw)
(cx)
(cy)
(cz)
(da)
(db)
(dc)
(dd)
(de)
(df)
(dg)
(dh)
(di)
(dj)
(dk)
(dl)
(dm)
(dn)
(do)
(dp)
(dq)
(dr)
(ds)
(dt)
(du)
(dv)
(dw)
(dx)
(dy)
(dz)
(ea)
(eb)
(ec)
(ed)
(ee)
(ef)
(eg)
(eh)
(ei)
(ej)
(ek)
(el)
(em)
(en)
(eo)
(ep)
(eq)
(er)
(es)
(et)
(eu)
(ev)
(ew)
(ex)
(ey)
(ez)
(fa)
(fb)
(fc)
(fd)
(fe)
(ff)
(fg)
(fh)
(fi)
(fj)
(fk)
(fl)
(fm)
(fn)
(fo)
(fp)
(fq)
(fr)
(fs)
(ft)
(fu)
(fv)
(fw)
(fx)
(fy)
(fz)
(ga)
(gb)
(gc)
(gd)
(ge)
(gf)
(gg)
(gh)
(gi)
(gj)
(gk)
(gl)
(gm)
(gn)
(go)
(gp)
(gq)
(gr)
(gs)
(gt)
(gu)
(gv)
(gw)
(gx)
(gy)
(gz)
(ha)
(hb)
(hc)
(hd)
(he)
(hf)
(hg)
(hh)
(hi)
(hj)
(hk)
(hl)
(hm)
(hn)
(ho)
(hp)
(hq)
(hr)
(hs)
(ht)
(hu)
(hv)
(hw)
(hx)
(hy)
(hz)
(ia)
(ib)
(ic)
(id)
(ie)
(if)
(ig)
(ih)
(ii)
(ij)
(ik)
(il)
(im)
(in)
(io)
(ip)
(iq)
(ir)
(is)
(it)
(iu)
(iv)
(iw)
(ix)
(iy)
(iz)
(ja)
(jb)
(jc)
(jd)
(je)
(jf)
(jg)
(jh)
(ji)
(jj)
(jk)
(jl)
(jm)
(jn)
(jo)
(jp)
(jq)
(jr)
(js)
(jt)
(ju)
(jv)
(jw)
(jx)
(jy)
(jz)
(ka)
(kb)
(kc)
(kd)
(ke)
(kf)
(kg)
(kh)
(ki)
(kj)
(kk)
(kl)
(km)
(kn)
(ko)
(kp)
(kq)
(kr)
(ks)
(kt)
(ku)
(kv)
(kw)
(kx)
(ky)
(kz)
(la)
(lb)
(lc)
(ld)
(le)
(lf)
(lg)
(lh)
(li)
(lj)
(lk)
(ll)
(lm)
(ln)
(lo)
(lp)
(lq)
(lr)
(ls)
(lt)
(lu)
(lv)
(lw)
(lx)
(ly)
(lz)
(ma)
(mb)
(mc)
(md)
(me)
(mf)
(mg)
(mh)
(mi)
(mj)
(mk)
(ml)
(mm)
(mn)
(mo)
(mp)
(mq)
(mr)
(ms)
(mt)
(mu)
(mv)
(mw)
(mx)
(my)
(mz)
(na)
(nb)
(nc)
(nd)
(ne)
(nf)
(ng)
(nh)
(ni)
(nj)
(nk)
(nl)
(nm)
(nn)
(no)
(np)
(nq)
(nr)
(ns)
(nt)
(nu)
(nv)
(nw)
(nx)
(ny)
(nz)
(oa)
(ob)
(oc)
(od)
(oe)
(of)
(og)
(oh)
(oi)
(oj)
(ok)
(ol)
(om)
(on)
(oo)
(op)
(oq)
(or)
(os)
(ot)
(ou)
(ov)
(ow)
(ox)
(oy)
(oz)
(pa)
(pb)
(pc)
(pd)
(pe)
(pf)
(pg)
(ph)
(pi)
(pj)
(pk)
(pl)
(pm)
(pn)
(po)
(pp)
(pq)
(pr)
(ps)
(pt)
(pu)
(pv)
(pw)
(px)
(py)
(pz)
(qa)
(qb)
(qc)
(qd)
(qe)
(qf)
(qg)
(qh)
(qi)
(qj)
(qk)
(ql)
(qm)
(qn)
(qo)
(qp)
(qq)
(qr)
(qs)
(qt)
(qu)
(qv)
(qw)
(qx)
(qy)
(qz)
(ra)
(rb)
(rc)
(rd)
(re)
(rf)
(rg)
(rh)
(ri)
(rj)
(rk)
(rl)
(rm)
(rn)
(ro)
(rp)
(rq)
(rr)
(rs)
(rt)
(ru)
(rv)
(rw)
(rx)
(ry)
(rz)
(sa)
(sb)
(sc)
(sd)
(se)
(sf)
(sg)
(sh)
(si)
(sj)
(sk)
(sl)
(sm)
(sn)
(so)
(sp)
(sq)
(sr)
(ss)
(st)
(su)
(sv)
(sw)
(sx)
(sy)
(sz)
(ta)
(tb)
(tc)
(td)
(te)
(tf)
(tg)
(th)
(ti)
(tj)
(tk)
(tl)
(tm)
(tn)
(to)
(tp)
(tq)
(tr)
(ts)
(tt)
(tu)
(tv)
(tw)
(tx)
(ty)
(tz)
(ua)
(ub)
(uc)
(ud)
(ue)
(uf)
(ug)
(uh)
(ui)
(uj)
(uk)
(ul)
(um)
(un)
(uo)
(up)
(uq)
(ur)
(us)
(ut)
(uu)
(uv)
(uw)
(ux)
(uy)
(uz)
(va)
(vb)
(vc)
(vd)
(ve)
(vf)
(vg)
(vh)
(vi)
(vj)
(vk)
(vl)
(vm)
(vn)
(vo)
(vp)
(vq)
(vr)
(vs)
(vt)
(vu)
(vv)
(vw)
(vx)
(vy)
(vz)
(wa)
(wb)
(wc)
(wd)
(we)
(wf)
(wg)
(wh)
(wi)
(wj)
(wk)
(wl)
(wm)
(wn)
(wo)
(wp)
(wq)
(wr)
(ws)
(wt)
(wu)
(wv)
(ww)
(wx)
(wy)
(wz)
(xa)
(xb)
(xc)
(xd)
(xe)
(xf)
(xg)
(xh)
(xi)
(xj)
(xk)
(xl)
(xm)
(xn)
(xo)
(xp)
(xq)
(xr)
(xs)
(xt)
(xu)
(xv)
(xw)
(xx)
(xy)
(xz)
(ya)
(yb)
(yc)
(yd)
(ye)
(yf)
(yg)
(yh)
(yi)
(yj)
(yk)
(yl)
(ym)
(yn)
(yo)
(yp)
(yq)
(yr)
(ys)
(yt)
(yu)
(yv)
(yw)
(yx)
(yy)
(yz)
(za)
(zb)
(zc)
(zd)
(ze)
(zf)
(zg)
(zh)
(zi)
(zj)
(zk)
(zl)
(zm)
(zn)
(zo)
(zp)
(zq)
(zr)
(zs)
(zt)
(zu)
(zv)
(zw)
(zx)
(zy)
(zz)

- (f) *Vilmoni Singh v Kanti Chander Choudhary* (1893) 20 Cal 847, 850 20 I A 95 97

for interference (u) Sometimes the nature of the question may be such (as where the question is whether a deed of gift was executed by a Mahomedan under apprehension of death) that the Judicial Committee will not interfere with concurrent findings of the lower Courts on that question even where the evidence is such as to justify either view (v) 'The rule [above referred to] however, is not an absolute rule, it presses upon the appellant with more or less weight, according to the circumstances of the case, and no doubt the fact that the Courts have differed on some important but subordinate questions is a matter to be taken into consideration in determining whether the evidence before the lower Courts should be reviewed in detail' (w) Thus concurrent findings of facts have been allowed to be disputed where the question of fact appeared to be a good deal mixed up with law (x) They have also been allowed to be disputed where the decisions though ultimately one of fact, turned upon the admissibility or value of many subordinate facts, and involved the construction of documents and other questions of law (y) In a recent case their Lordships of the Privy Council said 'If it appears that underlying findings of fact there are questions of law on which the findings proceeded or that there is a case that the judges misdirected themselves, then the rule as to concurrent findings not being the subject of appeal does not apply to the exclusion of such grounds of law as are alluded to (z)

Where a trial Judge bases his judgment upon a finding of fact and two of three Judges constituting the appellate Court agree with the finding and conclusion, the third Judge arriving at the same result upon a different finding of fact there are concurrent findings to which the rule of practice of the Board referred to above applies (a)

The principle of concurrent findings of fact does not apply where the case is one of no evidence. The reason is that a decision that there is no evidence to support a finding is a decision of law (b) Nor does it apply to a finding as to the existence of a custom, since that is a matter of mixed law and fact (c) Nor does it apply where the question is one of inference from documents for that is a question of law (d) But if the documents are not documents of title or statements intended to have effect as claims, compromises or surrenders of legal rights but merely records of payments the construction of documents however obscure, is a question of fact and the Privy Council will not interfere if the findings are concurrent (e)

Substantial question of law

The appeal must involve some substantial question of law—No appeal lies to the Privy Council from an appellate decree when there are concurrent findings of the appellate Court and of the Court below upon questions of fact unless the appeal involves some substantial question of law (f) To grant leave to appeal on the

(i) *Phagwan Singh v. Allahbadi Bank* (1906) 53 I A 268 48 All 763, 98 I C 901 (26) A 10 125

(r) *Fatima Jibi v. Ahmed Bikkish* (1908) 53 Cal 271 35 I A 67

(s) *Chitpal Singh v. Lhasron Bikkish* (1906) 24 All 210

(t) *Lauleri v. Paulsen* (1877) 4 I A 103 1 Mal 55

(y) *Venkateswara v. Shettri* (1881) 8 I A 143 3 Mad 384

(z) *Tulshihari v. Kesha* (1905) 41 Cal L J 386 88 I C 101 (25) A 14 1

(a) *Hibbler v. Ishman v. Altif Ali* (1911) 48 I A 114 48 Cal 806, 61 I C 83 (22) A 10 153

(b) *Harindra Lal v. Haradasi* (1914) 41 Cal 9 988 41 I A 110 119 (21) C 63

(c) *Palaniswamy v. Devaswamy* (1911) 44 I A 147 40 Mal 70 39 I C 22

(d) *Chaitanya Sahasra Prashad v. Kulkarni* (1919) 46 I A 197 4 All 15, 57 I C 446

(e) *Narendra v. Abdul Hakim* (1908) 55 I A 300 111 I C 288 (28) A 14 143

(f) *Nirbhau Das v. Lank Kuar* (1894) 16 All 274 *Tulsi Persai v. Jangayk* (1896) 23 Cal 918 31 A 102 *Sukabattya v. Jibid* (1901) 28 Cal 190 *Ischambhar in re* (1890) 20 Bom 693 *Pestonji v. Queen Insurance Co* (1901) 25 Bom 332 [suit for damages for nullity proceedings]

Purshottam v. Hirya (1911) 43 All 513 63 I C 837 (21) A 214 (stay of sale) *Jai Ab Kham v. Surjan* (1903) 45 All 667 75 I C 108 (24) A A

66 *Ischambhar v. Mchinnal* (1904) 46 All 79 71 I C 213 (24) A A 509 (conviction of a deceased)

Anant Lal v. Suryamull (1911) 46 Mal L J 119 78 I C 165 (24) A 16 616

[acknowledged within the meaning of the Statute] *Chaitanya Sahasra Prashad* (1919) 46 I A 197 (24) A L 473 [trust in of present 11th]

*Judicial Committee and appeals from India***Rules of the Judicial Committee in appeals from India :—**

- (1) A point not raised in the plaint before the District Judge, or before the High Court, cannot be raised before the Judicial Committee (y)
- (2) The Judicial Committee will not disturb the findings of the Court below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage in the reception or in the appreciation of evidence (z)
- (3) In appeal from second appeals the findings of facts by the first Court are binding on the Judicial Committee, unless special leave to appeal from the decision of the first Court has been given (a)
- (4) The Judicial Committee will not criticise with any strictness opinions as to the credibility of witnesses, which is eminently a question for the Courts in India (b)
- (5) As to the circumstances in which the Judicial Committee will allow a re hearing, see the undermentioned cases (c)
- (6) In appeals involving questions of valuation, the decree complained of will not be interfered with by the Privy Council unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied (d).

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

Bar of certain appeals

- (a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being ; or
- (b) from any decree from which under section 102 no second appeal lies.

Amendment—The words and figure “or the Government of India Act, 1915,” were inserted in the section by the Amending Act 13 of 1916

- | | |
|---|--|
| (y) <i>Sumbhu Nath v. Surjimoni</i> (1898) 25 Cal 187, 241 A 191 | ALL 581 |
| (z) <i>Pickardson v. Government</i> (1864) 1 W R P C 47. <i>Cheyfani v. Choudhree Mombut Lam</i> (1858) 7 M L A 20 | (c) <i>Fajundernaraia Paj v. Pujat Gorind Sing</i> (1836) 1 Moo P C 117. <i>Venkata Narasimha v. Court of Hards</i> (1886) 11 App Cas 660. <i>Lam Narayan Singh v. Adhindra Nath</i> (1917) 44 I A 87, 44 Cal 384, 35 L C 932. |
| (a) <i>Anangamanjiri v. Tr para</i> (1887) 14 Cal 740 141 A 101. <i>Luchmon Singh v. Tuna</i> (1887) 16 Cal 754 161 A 125 | (d) <i>Almarum v. Collector of Narpore</i> (1929) 42 Cal L J 358, 1141 C 587, (29) A PC, 92. |
| (b) <i>Shafiq-un-nissa v. Shaban Ali</i> (1904) 26 | |

Decree or order—In cl (a) the words 'decree or order' have been substituted for the word 'judgment' which occurred in the corresponding sec 597 of the Code of 1882

Appeal from a decree of the District Court

Calcutta case (e) In the course of the judgment the learned Judge said — Section 111 of the Code however definitely prohibits an appeal to the Privy Council from a single Judge and to this extent overrides clause 39 of the Letters Patent. The section is not a mere provision that nothing in the previous section shall be deemed to give a right of appeal from the decision of a single Judge. The provisions of clause (a) of section 111 may have been motivated originally by the existence of the right of Letters Patent appeal [cf *Sabhapathi Chetti v Narayanasami Chetti*] (f) or by the opinion that it is not reasonable in Indian cases that the Privy Council should be called upon to decide cases until a Bench has dealt with them. But in any case the effect of section 111 upon clause 39 of the Letters Patent cannot now be controlled by such considerations [*Satyana nara jana Varaprasada v Venkata Bhasya Karla*] (g). It appears to me therefore that the new clause in the Letters Patent takes away in all second appeals decided by a single Judge (without his giving a certificate that the case is a fit one for appeal) the right to go to the Privy Council under the ordinary law though the right of the Judicial Committee to give special leave is not of course affected. That right was a limited and a qualified right but such as it was it was open to the party prior to the 14th January 1928.

112. [S 616] (1) Nothing contained in this Code shall be deemed—

Savings

- (a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or
- (b) to interfere with any rules made by the Judicial Committee of the Privy Council and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts

Clause (1) (a)—See notes to sec 109 Prerogative of the Crown

(e) *Salar Ali v Dinda* (1939) 56 Cal 519 519-520 113 J C 49 (1939) A C 640
Hanmant v Shrivara (1931) 33 Bom L R 1106 134 I C 1161 (1931) A B 503

(f) (1901) 25 Mad 505 558

(g) (1939) 46 Mad 958 3 I C 604 (1941) A M 399

PART VIII.

Reference, Review and Revision

113. [S 617] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit

Reference to High Court

Reference to High Court—See O 46 below

Benares State Court.—The High Court of Allahabad has no power to entertain a reference on an application submitted to His Highness the Maharaja of Benares, in a civil case from the Benares State Court (A)

114. [S 623] Subject as aforesaid, any person considering himself aggrieved—

Review

- (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred
- (b) by a decree or order from which no appeal is allowed by this Code, or
- (c) by a decision on a reference from a Court of Small Causes,

may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit

See notes to O 47 r 1 below As to rules of procedure see O 47 below

115. [S 622.] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

Revision

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

Code of 1882, s. 622.—This section corresponds with sec 622 of the Code of 1882. There is no material alteration in the section

Limits of revisional jurisdiction.—The jurisdiction exercised by the High Court under this section is called Revisional Jurisdiction. The powers of the High Court under this section can only be invoked in cases in which no appeal lies to the High Court provided the case has been decided by any Court subordinate to such High Court and such subordinate Court appears—

- (1) to have exercised a jurisdiction not vested in it by law, or
- (2) to have failed to exercise a jurisdiction vested in it by law, or
- (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity

The High Court has no power to interfere in revision under this section except in the three cases mentioned above. Whether a particular order is *expedient* or not is not a ground on which the High Court can interfere under this section (1). Further, in the exercise of revisional powers, it is not the province of the High Court to enter into the merits of the evidence, it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order (2). If the High Court finds that the external conditions of jurisdiction, of investigation and of command have been satisfied by the inferior Court, it should not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court, in any matter committed by the Legislature to the discretion of the inferior Court (3).

Exercise of revisional jurisdiction is discretionary.—The section gives a discretionary power to the High Court to interfere or not (4). The High Court will not usually interfere if the result of an irregularity of the lower Court has been to promote justice (5). In a case where the District Court acted outside the scope of its jurisdiction in allowing an appeal and reversing an erroneous order of a Munsiff, the High Court declined to make an order which would have the effect of re-establishing the Munsiff's decision (6). The High Court will not act under this section if the matter is sub judice in an appeal filed by another party (7).

High Courts' powers of superintendence.—A case may not fall under this section, and yet it may fall under sec 15 of the Charter Act, 1861, now sec 107 of the Government of India Act 1915.

Certiorari.—The provisions of this section are not exhaustive. Cases may be imagined though rare ones which do not fall under this section. For such cases it cannot be said that the powers of the High Courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of certiorari have been

(1) C. L. R. 100, 101 of the collection
(2) " "
(3) " "
(4) " "
(5) " "
(6) " "

IC 373 (33) A C 20
(m) *G. P. Cooke v. The Equitable Coal Co*
(1914) 8 C W N 671 624
(n) *Mast Kiti v. Jitendra Nath* (1931) 35 C
W N 31 131 I C 661 (31) A C 425
(o) *Secretary of State v. Sohan Singh* (1933) 14
Lah 51, 14 I C 738 (33) A L 317

taken away by the provisions of this section (p) The High Court of Madras issued a writ of certiorari on the Board of Revenue on the ground that though it is an executive body yet it may have judicial functions to perform (q)

Bombay Regulation 2 of 1827.—The High Court of Bombay has power independently of sec 115 of the Code, to call for the proceedings of any subordinate civil Court and to issue orders thereon under Bombay Regulation 2 of 1827, Ch 1, s. 5 (2) (r)

"In which no appeal lies".—The High Court cannot act under this section in any case in which an appeal lies to that Court (s) Nor can an application for revision be entertained if a second appeal to the High Court is available (t) On the other hand the Rangoon High Court, in an exceptional case held that it could revise an order of a Subordinate Judge although an appeal lay to the District Court, and a second appeal to the High Court (u)

Memorandum of appeal may be treated as application for revision and vice versa.—Where an appeal is preferred in a case in which no appeal lies, the High Court may in a proper case treat the memorandum of appeal as an application for revision and deal with it on that footing (v) Similarly if an application for revision is made in a case in which an appeal lies, the application may be converted into an appeal (w)

Interlocutory orders.—To give the High Court jurisdiction to revise an interlocutory order it is necessary among other things that it must be a 'case decided' with in the meaning of this section, and, further that no appeal lies to the High Court from that order For the purposes of this section interlocutory orders fall into two classes, namely—

A Those from which an appeal lies under s 104 (1) These are orders made by the Court of first instance

B Those from which no appeal lies These may be—

(a) orders made by the Court of first instance from which no appeal is allowed under s 104 (1) or

(b) orders passed in first appeal from which no second appeal lies having regard to the provisions of s 104 (2)

As regards interlocutory orders falling under class A the High Court has no jurisdiction to revise them as they are appealable orders (x)

As regards interlocutory orders falling under class B there is a conflict of opinion whether they are subject to revision under this section The conflict turns mainly on the word case and the word may in the section Does the word case include

(p) *Besant v. Adocate General of Madras* (1919) 46 I A 176 190 43 Mad 148 159 52 I C 409

(q) .

(r) .

(s) *Ali Ahmed v. Iqbal Kunwar* (193) 54 All 428 178 I C 361 (3) A A 336 *Brown v. Hanson* (1133) 52 B M I R 360 144 I C 897 (33) A R 185

(t) *Tirupathi v. Visam* (181) 20 Mad 155 *Mathura Nath v. Umash Chandra* (182) 1 C W N 66 631 *Jamunpal v. Narendranath* (11) 43 Cal I J 81 115 I C 308 (12) A C 26

(u) *Daw Min Law v. A. I. P. L. Chettiar* (1935) 11 Rang 134 144 I C 163 (33) A R 64

(v) *Merali v. Sheriff* (1912) 36 Bom 102 107 12 I C 68 *Baikanta Nath v. Sita Nath* (1911) 38 Cal 41 424 9 I C 296 *Iqbal Venkata Ramayya v. Venkayamma* (1918) 41 Mad 554 553 45 I C 471 *Mohani v. Panday* (193) 3 C W N 271 80 I C 210 (4) A C 48 *Hanka Behari v. Barendra Nath* (193) 55 (al) 19 I 3 I C 84 (2) A C 850 *Abdul Hakim v. Erasmund n* (196) 49 Mad 52 90 I C (6) A M 503 *Nakarna B h v. Stephens* (196) 4 Rang 197 I C 1025 (6) A R 3

(w) *Tun Balalpur v. Pajrungi* (194) 3 Pat 344 8 I C 45 (25) A P 16 *Sikandar v. Ialand* (1927) 8 Lah 61 (27) A L 435

(x) See 1st instance *Narendra v. Palkhadas* (1925) 41 Cal L J 226 79 I C 351 (25) A C 510

an issue or part of a case? If it does not, the passing of an interlocutory order is not deciding a "case," and it is not capable of revision. It has been held by some Courts that the word "case" includes part of a case, and by others that it does not.

Assuming that the word "case" includes part of a case, in other words, includes interlocutory orders, and assuming further, that the other conditions laid down by the section are fulfilled, there is no doubt that the High Court *can* interfere in revision with such orders. There is also no doubt that though the High Court *can* revise such orders, it is not bound to do so, for the section says that the High Court *may* call for the record of any case, it being discretionary with the Court to call for the record. The matter being one of discretion the question has arisen (and on this point there is another divergence of opinion)—in what cases is it proper for the Court in the exercise of its discretion to revise interlocutory orders? To appreciate the different views on the subject, it is necessary to bear in mind that though an interlocutory order may not be appealable under sec 104, it may be challenged in the appeal from the final decree under sec 105 provided the order is one 'affecting the decision of the case'. Again there are some interlocutory orders from which an injured party is given a right of suit to set aside the order as stated in the note below, Alternative remedy by way of suit or otherwise". It has been held in some cases that if a party aggrieved by an interlocutory order has the alternative remedy of challenging the order in an appeal from the final decree under sec 105, or if he has the alternative remedy by way of suit, the High Court should not in the exercise of its discretion interfere in revision with such order, the power to interfere being exercisable only where there is no other remedy. For instance, no appeal lies from an order of a District Court made on appeal granting a temporary injunction [s 104 (2)], further, any error in such order cannot be objected to in an appeal from the final decree as it cannot possibly affect the decision of the case within the meaning of sec 105, nor does a suit lie to set aside such an order, the High Court may therefore interfere in revision with the order (y). Similarly where a Court asks a plaintiff to pay additional Court fee before his suit can be entertained, the High Court may interfere in revision with the order as the order in effect amounts to a denial of jurisdiction (z). But why, it has been asked, and asked pertinently in a large majority of cases, should the discretion of the High Court be fettered with such a hard and fast rule? Why should the High Court refuse to interfere in every case in which the injured party has another remedy open to him? Why should not the High Court revise an order even if there is another remedy open to the injured party, if its non interference might lead to failure of justice or irreparable injury? This last consideration has weighed with many judges and it has accordingly been held in some cases that the High Court may in a proper case interfere in revision even if there is another remedy open to the aggrieved party. With these prefatory remarks the views of the different High Courts on the subject may now be considered.

Before a Full Bench decision of the Allahabad High Court to be presently noted it was held by that Court that interlocutory orders were not subject to revision, first, because an interlocutory order cannot be said to be a "case" within the meaning of this section, and, secondly, because a party aggrieved by such order, though he cannot appeal from the order, has another remedy open to him under sec 105, namely, to make the order a ground of appeal from the final decree in the suit (a). In *Budhu Lal v Mewa Ram* (b) decided in 1921, a Full Bench of the Allahabad High Court held that the word "case

(y) *Bal Ahirani v Deepsing* (1916) 40 Bom. 22.
 1917 C 358

(z)

in this section does not include an issue or part of a case, that it does not therefore include

that though the suit proceeds, it puts an end to the arbitration as an effective proceeding (d) Again in later decisions a single Judge of the Allahabad High Court so decided, as it virtually Division Bench has held to cross-examine is a

On the other hand it has been held by the Calcutta (e), Madras (f), Patna (g) and

Calcutta and Madras have in revision directed a plaint to be amended reversing an order refusing amendment (j) In another case where the question was whether an election petition was maintainable at all and the lower Court held that it was, the Madras

- | | |
|--|--|
| <p>(c) (1924) 5 Lah 288 84 I C 259 (24) A L 425 (t B) <i>Kam Sarup v Mohan Lal</i> (1933) 14 Lah 715, 143 I C 309 (33) A L 692</p> <p>(d) <i>Punjab Marwar Chamber of Commerce v Ram Lal</i> (1932) 13 Lah 59, 132 I C 850 (31) A L 644</p> <p>(d1) <i>Kishanlal v Pam Chandra</i> (1933) 55 All 206 (33) A A 374</p> <p>(12) <i>Purshoram v Henleys Telegraph Works</i> (1933) 55 All 719, 145 I C 812 (33) A A 5-3</p> <p>(e) <i>Dhany v Ram Pershad</i> (1887) 14 Cal 769</p> <p><i>Gotind v Kunja</i> (1903) 14 C W N 147 4 I C 364 <i>Amfol Ali v Ali Hussain</i> (1910) 15 C W N 353 6 I C 574</p> <p><i>Jatindra Nath v Hari</i> (1914) 20 Cal L J 426 433 26 I C 954 <i>Srisprasad v Tricomilus</i> (1915) 4 Cal 926 932 27 I C 917 <i>Smt Srimadula v Mahant</i> (1924) 28 C W N 931, 82 I C 1008 (25) A L 204 <i>Priyansu Jyabati</i> (1924) 52 Cal L J 136, 80 I C 870 (25) A L 320 <i>Lut see Nizam Chaud v Thapann Das</i> (1926) 53 Cal 76 88 I C 615 (26) A L 114</p> <p>(f) <i>Karim v Tirukkaravelu</i> (1951) 48 Mad L J 341 87 I C 90 (25) A M 503 <i>Jaganathan v Verghese</i> (1951) 48 Mad L J</p> | <p>451, 87 I C 113 (25) A M 707 <i>Shri</i></p> <p>(g) <i>Nauratan v Huford</i> (1919) 4 Pat L J 191, 44 I C 831 <i>Lanley v Pam Bahadur</i> (1919) 4 Pat L J 195, 50 I C 570 <i>Mani Lal v Durga Prasad</i> (1924) 3 Pat 930, 50 I C 667, (24) A P 673</p> <p>(h)</p> <p>(i)</p> <p>(j)</p> <p>(k) (1951) 48 Mad L J 341 87 I C 90 (25) A M 503</p> <p>(l) <i>Jaganathan v Verghese</i> (1925) 48 Mad L J 451 87 I C 113 (25) A M 707</p> |
|--|--|

exercise of its discretion interfere only in cases where there would otherwise be no remedy or whether it may interfere even if the injured party has another remedy open to him by an appeal from the final decree under sec 105 or by way of suit. On the one hand, it was laid down by a Full Bench in *Shiva Nathaji v Joma* (l) decided in 1883, that though the High Court will not ordinarily interfere in revision with interlocutory orders where the aggrieved party has another remedy open to him either by an appeal from the final decree under sec 105 or by suit, it will interfere if the appeal would manifestly be ineffectual and non interference would result in a defeat of law and a grave wrong to the aggrieved party. On the other hand, a Divisional Bench consisting of Sargent, C J., and Candy, J., held in *Motilal v Nana* (m), decided in 1894, that the High Court should not in the exercise of its discretion interfere in revision with interlocutory orders except in cases where the injured party had no other remedy open to him. No reference was made in the judgment to the Full Bench decision in *Shiva Nathaji's* case. The decision in *Motilal v. Nana* was disapproved by a Divisional Bench of the same High Court in *Secretary of State v Narsimhai* (n), decided in 1924 and the Court followed the principle laid down in the Full Bench ruling. In the course of his judgment Koyajee, J., observed that the section did not make the absence of another remedy a necessary condition of its applicability. But in a case decided in 1928 another Divisional Bench distinguished *Secretary of State v Narsimhai* on the ground that it involved a question of jurisdiction and said that the overwhelming balance of authority is in support of the view that a finding on an interlocutory matter followed by an order is not a case decided within the meaning of sec 115 and that the High Court will not interfere in a case where the party aggrieved has another remedy open to him by way of appeal (o).

The distinction between the decisions of the High Courts of Allahabad and Lahore on the one hand and those of the other High Courts on the other hand as to the meaning of the term "case" is brought out by the following case. A institutes a suit against B in Court X. One of the issues in the suit is whether Court X has jurisdiction to try the suit. The Court holds that it has and that the suit must proceed. B applies to the High Court for a revision of the order of Court X. Has the High Court power to interfere

result in unnecessary waste of time and money.

As regards orders made on an application for leave to sue *in forma pauperis*, a distinction has been made by the Allahabad High Court between an order granting the application and an order rejecting the application. An order rejecting the application, it has been held, amounts to a decision of the case and is therefore open to revision, but an order granting the application is not a decision of the case, but a mere interlocutory

(l) (1883) 7 Bom 341, 357 372 (F B), 1 Ind 610 v. *Lakshmi* (1886) 10 Bom 610 616 (F B), *Somchand v Chhaganlal*

(m)

(n) (1924) 48 Bom 43, 77 I C 241, (24) A B 63

(o) *Senaji v Pannaji* (1931) 33 Bom L R 1538 135 I C 815, (32) A B 81

(p) *Boddhu Lal v Yewa Rani* (1921) 43 All 564, 63 I C 15, (21) A A 1 (F B)

(q) *Lalchand v Pehru Lal* (1924) 5 Lah 238 84 I C 259 (24) A L 425 (F B)

(r) *Secretary of State v Narsimhai* (1924) 48 Bom 43 77 I C 241, (24) A B 63

(s) *Janardhanan v Vengalase* (1925) 48 M L J 431 87 I C 113 (25) A B 707 See also *Rajani v Rajnani* (1924) 52 Cal 123, 136, 85 I C 870 (25) A C 320

exceptional cases " (k) Thus where the lower Court refused the application of a decreeholder for rateable distribution under sec 73 on the ground that there was another property of the judgment debtor available for the satisfaction of his claim, the High Court of Madras interfered on revision under this section, though the applicant had clearly a remedy by suit Miller, J, said "I do not depart from the view . . . that where a party has a remedy elsewhere than in the High Court, the High Court should not except in special cases interfere under [this section] But here we have a case in which there is no doubt as to the rights of the parties, and no remedy if I do not interfere, except by a suit to which there can be no defence, and which therefore would merely multiply proceedings In such a case the lesser evil, at any rate, is interference under [this section]" (l) When the Court on an erroneous view of the law refused to proceed with the suit until the Court fee was paid, the Madras High Court interfered with the interlocutory order as this would give more complete and efficacious relief and avoid unnecessary hardship and multiplicity of proceedings (j) In a Patna case, Manuk, J, said "When the High Court can by interfering under section 115 in appropriate cases terminate the litigation the mere fact that another remedy by suit only lies should not *per se* be a reason for non interference" (k) The following are instances of exceptional cases which have been held to justify revision although a remedy by suit was available an order refusing to inquire into an objection to an attachment when the applicant was under the impression that the attachment had ceased and that it was not necessary to file a suit under O 21, r 63 (l), an order dispossessing a judgment debtor under O 21, r 98, although the decree holder purchaser had agreed to allow him to remain in possession (m), a decree under sec 9 of the Specific Relief Act, 1877, when the Court had no jurisdiction at all, the summary suit being barred by the provisions of the Agra Tenancy Act (n), when the Court actually refused jurisdiction to entertain an application for review based on an allegation of fraud (o) Accordingly the Allahabad High Court interfered in revision with an order refusing an amendment, although the order could under sec 105 have been made a ground of objection in appeal (ol). Exceptional cases are so numerous that a Full Bench of the Allahabad High Court has said that it cannot be laid down as a general proposition that the High Court has no power of interference when there is another remedy by way of suit and that each case must be considered on its merits (p)

Whether High Court may of its own motion call for record—The powers of revision given by this section are very wide, and the High Court may of its own motion call for any record under this section, if it appears desirable so to do to that Court (q) It is not necessary to the exercise of its powers under this section that it should be put into motion by the party aggrieved by the proceeding complained of It has been so held by the High Courts of Calcutta, Allahabad and Madras (r) In a Bombay case, however, where a Collector applied to the High Court to revise a decision of a Mamlatdar, the High Court declined to interfere, stating that in so doing it

Trust Tribunal acting as a Court under the Land Acquisition Act is subject to revision (l) A District Judge acting under s 57 of the Madras Local Boards Act 14 of 1920 has been held to be a Court within the meaning of this section (l) In this case it was said that the use of the term 'Judge' instead of 'Court' is not sufficient to imply that he acts as a *persona designata*. But in the case of *Sholapur Municipality v Tuljaram (n)* Patkar, J, said that when a Judge or presiding officer of a Court, as distinguished from the Court itself, is directed to perform any function of an authority created by statute he should be considered a *persona designata* and not a Court

The High Court of Kumaun is not a Court subordinate to the High Court of Allahabad (n) But the Court of the Resident at Aden is subordinate to the High Court of Bombay in reference to cases to be stated by the Resident for the decision of the High Court under s 8 of the Aden Courts Act 2 of 1864 (o) The Bombay High Court has therefore jurisdiction to revise an order of the Judicial Assistant at Aden (p) His Britannic Majesty's Courts in Zanzibar are also subordinate to the High Court of Bombay (q) A Collector exercising judicial functions under the Bombay Mamlatdar's Courts Act II of 1906 is a Court within the meaning of this section (r) And so is a Civil Court acting or purporting to act under the provisions of s 10 of the Religious Endowments Act 20 of 1863 (s) It has been held by the High Courts of Madras, Allahabad and Bombay that when an application is made to the Collector for a reference to the Civil Court under s 18 of the Land Acquisition Act, 1894, and the application is rejected the Collector does not act as a Court and his order is not subject to revision by the High Court (t) A contrary view has been taken by the Calcutta (u) and Lucknow (v) High Courts The Patna (w) and Calcutta (x) High Courts have held that a Collector acting under the second proviso to s 49 of that Act is a 'Court,' and an order made by him refusing to refer to the Civil Court a question under that proviso is subject to revision by the High Court The High Court of Calcutta has held that a Collector acting under s 11 of that Act is not a "Court" within the meaning of this section (y)

Decision of a single judge of a Chartered High Court—A Judge of a chartered High Court sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court, there is, therefore, no revision from his decision under this section (z)

Decision of a single Judge of the Chief Court of Oudh—The Court of a single Judge of the Chief Court of Oudh sitting to hear and determine a suit of which the value

(k) *Adjar v Radha* (1932) 36 Cal W N 370, 139 I C 180, (32) A C 660

(l) *Ramaswami v Mathu* (1923) 46 Mad 536 71 I C 1039 (23) A M 192 *Ahamad v Isvara* (1923) 46 Mad 123 72 I C 902 (23) A M 254

(m) (1931) 55 Bom 544 134 I C 1240, (31) A B 582

(n) *Sadar Singh v Amar Singh* (1922) 35 All 222 21 I C 200 21 A A 201

(o)

(p)

(q)

(r) *Prashottam v Mahadu* (1913) 37 Bom 114 17 I C 676

(s)

(t)

A M 44-1-22 v Land Acquisition Collector I C 114 (1919) 42 Mad 231 49 I C 659, *Kashu*

Prasadi v Adified Area (1932) 54 All 282 (32) A A 598 *Balkrishna v The Collector of Bombay* (1921) 47 Bom 659 73 I C 354 (23) A B 290 *Bhagnani Lal v Secretary of State* (1932) 54 All 1085 141 I C 587 (32) A A 568

(u) *Administrator General of Bengal v The Land Acquisition Collector* (1907) 12 C W N 441

(v) *Ahmed Ali v Secretary of State* (1932) 7 Luck 578 137 I C 68 (32) A O 189 citing however the overruled case 42 Mad 331

(w) *Srinivasa v The Land Acquisition Deputy Collector* (1917) 2 Pat L J 204 39 I C 650

(x) *Krishna Das v The Land Acquisition Collector of Jaitna* (1912) 16 C W N 327, 13 I C 470

(y) *British India Steam Navigation Company v Secretary of State* (1911) 38 Cal 250, 8 I C 107

(z) *Deo Ira Nath v Bhisichen Ira* (1916) 43 Cal 90, 34 33 I C 745 See also *Jamuna Dass v Sabapathy Chetty* (1913) 39 Mad 134 12 I C 521

is more than Rupees five lacs as provided by sec 7 of the Oudh Courts Act 4 of 1925, is not a subordinate Court to the Chief Court which is the High Court referred to therein and, therefore, no revision lies against its order (a)

"Jurisdiction"—Jurisdiction has been explained in the notes to s 21. The expression "jurisdiction" is not confined to the jurisdiction to entertain a suit or appeal. A Court may have jurisdiction to entertain a suit or appeal, and yet it may have no jurisdiction to pass a particular order in the suit or appeal. If it does so, the case is one under clause (a) of the section, and the High Court is entitled to interfere in revision. This follows from the rulings of the Judicial Committee in *Lachmi Narain v Balmalund* (b), dealt with in the note below. 'The same topic continued,' and in *Birj Mohun v Rai Uma Nath* (c)

Exercise by Court of jurisdiction not vested in it by law—If a Court assumes jurisdiction which, by reason of the pecuniary or territorial limits of the jurisdiction of such Court or by reason of the subject matter of the suit or other proceedings instituted in it, is not vested in it by law, the High Court to which such Court is subordinate has power under clause (a) to interfere in revision under this section. It will not, however, do so unless the facts from which absence of jurisdiction may be inferred are patent upon the face of the record (d). Similarly the High Court has power to interfere in revision under clause (a), if the lower Court decrees a suit for possession under s 9 of the Specific Relief Act when the plaintiff has not been dispossessed otherwise than

or if the lower Court demands search fee on an application for copies of records in addition to the stamps for copies (i). When an insolvency Court ordered a distribution of assets after the insolvency had been annulled, the Court was held to have acted without jurisdiction (j). The rules of the Calcutta High Court empower a single Judge to hear revisional applications in cases of the value of Rs 1000 and so when a single Judge granted a rule for revision of an order in a suit of more than that value the rule was discharged for want of jurisdiction (k).

For other cases under this head see notes below. The same topic continues, "and 'Wrong decision of lower appellate Court as to jurisdiction of trial Court'."

Failure to exercise jurisdiction—Where a Court having jurisdiction in a matter declines jurisdiction, clause (b) applies and when a Court refuses to exercise a jurisdiction vested in it by law under a misapprehension of the law or an erroneous construction of a statute the High Court will interfere in revision (l). Thus where a Court has jurisdiction to accept a plaint (m) or to execute a decree (n), or to give a judgment (o), but refuses to accept the plaint or to execute the decree or to give a judgment on the ground that it has no jurisdiction, the High Court will interfere under this section. When a Subordinate Judge refused to allow an assignee to execute a decree

- (a) *Pani Parni v Minor son of Matho Singh* (1902) 2 Luck 1 93 I C 547 (—) A O 53
(b) (1904) 51 I A 321 41st 61 81 I C 747 (—) A 1 C 194
(c) (1893) 21 Cal 8 101 A 154
(d) *Mahr Ali v Mahamud Hussain* (1902) 14 All 413
(e) *Pirpanda Kuer v Mohiuddin* (1931) 53 All 414 1—1 C 55+ (31) A A 205
(f) *Ell Mann v Incluldil* (1903) 21 Bom L R 14—1 C 56 (—) A B 14 (ruler number 0—1 r 101)
(g) *Kancha v Kancha* (1911) 41 46 All 3 2 3 I C 363 (—) A A 56
(h) *Maunji Tun v Maunji* (1907) 1 Ran.

- 265 61 C 501 (23) A 1 1
(i) *Raja Sahab v Sub Collector* (1902) 59 108 I C 638 (2) A 1
(j) *Janna Lal v Official* (1902) 313 134 I C 844 (1) A 1
(k) *Nanda v Lard* (1902) 129 I C 367 (1) A 1
(l) *Kanai Lal v* (1902) 129 I C 367 (1) A 1
(m) *Zamirun v* (1902) 129 I C 367 (1) A 1
(n) *Ladams v* (1902) 129 I C 367 (1) A 1
(o) *Shamrao v* (1902) 129 I C 367 (1) A 1
(p) *Shamrao v* (1902) 129 I C 367 (1) A 1
(q) *Shamrao v* (1902) 129 I C 367 (1) A 1
(r) *Shamrao v* (1902) 129 I C 367 (1) A 1
(s) *Shamrao v* (1902) 129 I C 367 (1) A 1
(t) *Shamrao v* (1902) 129 I C 367 (1) A 1
(u) *Shamrao v* (1902) 129 I C 367 (1) A 1
(v) *Shamrao v* (1902) 129 I C 367 (1) A 1
(w) *Shamrao v* (1902) 129 I C 367 (1) A 1
(x) *Shamrao v* (1902) 129 I C 367 (1) A 1
(y) *Shamrao v* (1902) 129 I C 367 (1) A 1
(z) *Shamrao v* (1902) 129 I C 367 (1) A 1

will be recorded, this was said to be no order at all and the Court was directed in revision to hear and dispose of it on the merits (g). Similarly where a Court refused to confirm a sale under s 312 of the Code of 1882 [now O 21, r 92] believing that it had no power to do so if the purchaser objected to the sale on the ground of misrepresentation, it was held by their Lordships of the Privy Council that the case was one in which the Court had failed to exercise a jurisdiction vested in it by law, and that the decision was therefore subject to revision under the present section (r). Again when a Court refused to enter an application to set aside an *ex parte* decree under O 34 r 6, on the erroneous ground that it was an execution proceeding the order was subject to revision (s). The rejection of an application for fixing a standard rent on the ground that the provisions of the Calcutta Rent Act, 1920, were not applicable to the case, is a refusal by the Rent Controller to exercise a jurisdiction conferred upon him by the Act, and is accordingly a proper case for interference under this section (t). An order returning a memorandum of appeal for presentation to another Court is also open to revision (u). Interference under this section is also appropriate where a Court has no discretionary power to refuse a relief but refuses the relief, believing that it has a discretionary power to do so. Thus where a Court refused the application of a decree holder for a rateable distribution under s 73 though according to its own finding he was clearly entitled to such distribution on the ground that there was other property of the judgment debtor available for the satisfaction of his claim, the High Court of Madras interfered under this section (v). But where a Court has a discretion in a matter, a wrong exercise of such discretion is not a proper ground for interference under this section (w).

For other cases under this head, see notes below, 'The same topic continued, and Wrong decision of lower appellate Court as to jurisdiction of trial Court

Where a Court in the exercise of its jurisdiction has acted illegally or with material irregularity—Cl (c) of the section contemplates cases other than those referred to in cls (a) and (b). This clause clearly excludes clause (b) for a Court cannot refuse to exercise its jurisdiction and act in the exercise of it with material irregularity (x). The clause refers to cases where the Court *having jurisdiction and exercising it* has acted illegally or with material irregularity in the exercise of such jurisdiction (y). The words 'acted in the exercise of its jurisdiction illegally or with material irregularity,' have given rise to a conflict of decisions. It is therefore best first to state how much is settled law, and then to deal with the various interpretations put on the words 'illegally' and 'with material irregularity' by the various High Courts.

What is not illegality or material irregularity—It is settled even if it be on a point of law that where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law.—The leading case on the subject is *Amir Hassan Khan v Sheo Baksh Singh* (z).

(p) *Ram Sahay v Madan Lal* (1926) 48 All

(q)

(r)

(s)

(t)

(u)

(v)

(r) 32 Mad 334 4 I C 509

(x)

(y)

(z)

(p)

(q)

(r)

(z) (1885) 11 Cal 6 11 I A 237 *Muhammad Ius Khan v Abdul Rahman Khan* (1889) 16 Cal 749 16 I A 164 *Parasurama v Settler* (1904) 2 Mad 504

decided by their Lordships of the Privy Council in 1884. In that case it was laid down by their Lordships that where a Court *has* jurisdiction to decide the question before it and in fact decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity, *merely because its decision is erroneous*. The mere fact that the decision of the Court is wrong affords no ground for the interference of the High Court under this section. In the course of the judgment, their Lordships said: "The question then is, did the Judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they *had* perfect jurisdiction to decide the question which was before them [namely, whether the suit was barred as *res judicata*], and they did decide it. Whether they decided it *rightly or wrongly*, they had jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." Following this decision, it has been held that the High Court will not interfere under this section, merely because the lower Court allowed an application which was barred by limitation (a), or wrongly decided that a suit was barred by limitation (b), or that it was barred as *res judicata* (c), or because the lower Court proceeded upon an erroneous construction of the sections of an Act (d), or misunderstood the effect of a document in evidence (e), or excluded evidence which it ought to have admitted (f) except where such admission was in direct contravention of a statutory provision (g), or held, though incorrectly, that there was no relation of landlord and tenant between the parties to a suit or proceeding (h), or that it was not necessary to give notice to a railway company under sec. 77 of the Railways Act (i), or that the procedure under sec. 61 of the Presidency Small Cause Courts Act was not followed (j), or that an application to set aside a sale was not timed barred (k), or that it wrongly applied secs. 130 and 131 of the Transfer of Property Act (l). Similarly no revision lies from an order passed in appeal remanding a case under O. 41, r. 23 below (m), though such order may be erroneous in law. In these cases the Court considered the question and came to an erroneous conclusion. But if the Court does not adjudicate upon the question and entertains an application which is on the face of it barred by limitation it acts with material irregularity and its order is revisable (n). When however as in the cases previously cited the Court has considered a question which it has jurisdiction to decide and comes to an erroneous conclusion that is not open to revision as a mere error of law is not an illegality within the meaning of the section. In such cases the High Court might well have said in the words of their Lordships of the Privy Council in another case (o): "It [the lower Court] made a sad mistake it is true, but a Court *has* jurisdiction to decide wrong as well as right." The point was further emphasized by their

(a) *Babu Ram v. Munna Lal* (1917) 49 All. 454, 100 I. C. 638, (27) A. A. 358.

(b) *Sundar Singh v. Doru Shanlur* (1894) 20 All. 78, *Ramgopal v. Joharnall* (1912) 39 Cal. 473, 15 I. C. 547, *Jhotu Lal v. Ganouri* (1915) 3 Pat. L. J. 376, 46 I. C. 176.

(c) *Amrutha v. Balkrishna* (1887) 11 Bom. 488, *Latulabai v. Vasudev* (1931) 31 Bom. L. R. 1596, 135 I. C. 815, (32) A. D. 81.

(d) *Polabai v. Aoorjehan* (1886) 13 Cal. 90, *Krishna v. Kedarnath* (1888) 15 Cal. 446, *Aali Charan v. Sarat Chunder* (1903) 30 Cal. 397, *Ganraj Charan v. Shashi Bhushan* (1906) 32 Cal. 572, *Ram Singh v. Satgurun* (1906) 34 All. 84, *Mallorjun v. Narhari* (1901) 25 Bom. 337, 347, 27 I. C. 216.

(e) *Dazarnth Rai v. Sheolun* (1894) 16 All. 39, (f) *Matharnio v. Gulababai* (1892) 13 Ind. 177, *East Montal v. Jloram* (1890) 3 C. W. N. 581. But see *Bhawan v. Profulla* (1921) 48 Cal. 11, 60 I. C. 211, (21) A. C. 251 (setting out evidence).

(g) *East Indian Ry. Co. v. Kanai Lal* (1923) 28 C. W. N. 292, 234, 80 I. C. 205, (24) A. C. 493.

(h) *Shew Prosod v. Ramchunder* (1914) 41 Cal. 323, 23 I. C. 977.

(i) *East Indian Ry. Co. v. Kanai Lal* (1923) 28 C. W. N. 292, 80 I. C. 205, (24) A. C. 493.

(j) *Tops v. Karnani Bank* (1932) 59 Cal. 311, 138 I. C. 96, (32) A. C. 441.

(k) *Munammal Bibi v. Paras Nath* (1923) 2 Pat. 800, 75 I. C. 430, (24) A. I. 37.

(l) *Sant Singh v. Mubarak* (1928) 9 Lah. 304, 106 I. C. 901, (28) A. L. 140.

(m) *Chhubu Mian v. Harcharan Das* (1912) P. R. no. 11, p. 406, 18 I. C. 529.

(n) *Tara v. Laxmuddin* (1915) 19 C. W. N. 970, 23 I. C. 476.

(o) *Malkarjun v. Narhari* (1901) 25 Bom. 337, 347, 27 I. C. 216, *Jaywant Prasad v. Jam Jnan* (1915) 42 I. A. 171, 176, 37 All. 485, 494, 495, 30 I. C. 849.

Lordships of the Privy Council in *Balakrishna v Vasudeva* (p) Referring to this section their Lordships said —

“It will be observed that the section applies to jurisdiction alone, the irregular exercise or non exercise of it or the illegal assumption of it The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved” (q)

The rule laid down in *Balakrishna*’s case has been interpreted, or rather applied differently by different High Courts This may be explained by an illustration *A* applies under O 21, r 89, to set aside a sale in execution of a decree The lower Court places a wrong interpretation on r 89, and holds that *A* is not a person entitled to apply under that rule, and the application is dismissed *A* then applies to the High Court for a revision of the order of the lower Court Can the High Court interfere in revision? It has been held by the Patna High Court (r) that it can, the reason given being that the case is one of a *refusal to exercise a jurisdiction* vested by law in the lower Court, and therefore within this section In the course of his judgment Mulla, J said “The Court’s decision upon the point whether the applicant has the necessary legal character is clearly a question involving jurisdiction An erroneous decision on a question of law or fact *after* jurisdiction has been once legally assumed would not be a ground for interference under section 115 of the Code of Civil Procedure, but if the decision is the *very basis and foundation of jurisdiction* in its limited sense as distinguished from powers it at once comes within the purview of the section The judgment of their Lordships of the Privy Council in *Balakrishna v Vasudeva* is in my opinion authority for this view” The same view has been taken by a Full Bench of the Madras High Court (s) These decisions have been dissented from by a Full Bench of the Allahabad High Court (t) In the Allahabad case Banerji, J, after referring to *Balakrishna*’s case, said “In the present case the Court was competent to determine whether [*A*] was entitled to make an application under O 21, r 89, and it had jurisdiction to decide that question, and it decided it adversely to [*A*] The Court may have been wrong in its decision, but it cannot be said that in the exercise of its jurisdiction it acted illegally or with material irregularity in the sense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships” The substantial point of difference between these two divergent views is that the Patna and Madras High Courts treat the refusal by the lower Court to entertain the application as a *refusal to exercise a jurisdiction* vested in it by law while the High Court of Allahabad regards the refusal as no more than a decision, though erroneous on a point of law in the exercise of the lower Court’s jurisdiction There is no difference of opinion between these Courts on the point that where the lower Court assumes jurisdiction or refuses jurisdiction on an erroneous construction of a statute, the High Court can interfere in revision The difference arises on the question—*is it a case of a refusal to exercise jurisdiction or a case merely of a wrong decision on a point of law in the exercise of the Court’s jurisdiction?* According to the Patna and Madras High Courts, it is the former, according to the Allahabad High Court, it is the latter

Following its Full Bench ruling, the Madras High Court has held that though an erroneous decision on a point of limitation is not a ground for interference under this section, the High Court can and will interfere if the Small Cause Court refuses to entertain an application for retrial of a suit tried by a single judge of that

(p) (1917) 44 I A 261 40 Mal 793 40 I C 640

(q) “ ”

(r) “ ”

(s) “ ”

(t) “ ”

(r) *Musa ni at Dh n n n n v Sra Sankar* (1919) 4 Pat L J 340 51 I C 83

(s) *S n d r n n v M r s a* (1911) 44 Mad 531 63 I C 917 (21) A M 15 [F B]

(t) *1 a t R a m v S n r r S n g h* (1923) 45 All 425 41 I C 778 (23) A A 39-[1 B]

Court, where such refusal proceeds on a wrong view of a question of limitation (u) It has similarly been held by that Court that where a District Judge, on an erroneous construction of a statutory rule, assumes jurisdiction to declare whether a person elected as a President of a Local Board is duly elected or not, and assuming such jurisdiction declares his election to be void, the High Court has the power to interfere under this section (t) The same High Court interfered in revision where a Subordinate Judge misconstrued the legal position in the case and refused to release the property under attachment as he should have done (w), also where the result of an erroneous decision was likely to perpetuate the error and to give rise to a multiplicity of suits not for one year but for all time (x)

The High Court of Calcutta has held that where a Judge has misdirected himself as to the meaning and effect of a section or of a rule under the Code, the High Court can interfere in revision Thus where a plaintiff was allowed to withdraw his suit under O 23, r 1 with liberty to bring a fresh suit on the same cause of action on the ground of a formal defect in the frame of the suit after the suit had been heard and decided against him on the merits, the High Court interfered in revision (y) In another case the High Court interfered in revision on the ground that the Munsif had not directed his attention properly to the provisions of O 21, r 60 (z) A Presidency Small Cause Court has only revisional jurisdiction under sec 38 of the Presidency Small Cause Courts Act, and when the Court purporting to act under that section interfered on a question of fact the Calcutta High Court held that it had no jurisdiction to make the order (a) The Calcutta High Court also interfered when the lower Court settled the share which a co sharer landlord was entitled to pre empt arbitrarily and without regard to any principle (b) The Oudh Court interfered in revision where the lower Court allowed the plaintiff to withdraw the suit with liberty to institute a fresh suit, the object of the withdrawal being to produce evidence in the new suit which he had omitted to produce at the right time (c) The High Court of Rangoon has held that if the lower Court fails to take into account some proposition of law or some material fact in evidence it acts illegally and its decision may be revised by the High Court but that if the lower Court has applied its mind to the case and duly considered the facts and the law applicable then although its decision may be erroneous the High Court cannot interfere in revision (d)

The same topic continued—The decision in *Amir Hassan Khan's* case presupposes jurisdiction in the Court whose decision is sought to be revised on the ground that it is erroneous Hence the principle of that decision does not apply where a Court erroneously assumes a jurisdiction which is not vested in it by law (e) Thus if a Court proceeding upon an erroneous construction of a section of an Act assumes a jurisdiction which is not vested in it by law, the High Court will interfere in revision and set aside the decree of the lower Court as one passed without jurisdiction (f) Similarly if a Court wrongly decides that a suit is of a civil nature and entertains the suit on that basis the decision is open to revision under clause (a) of this section for no civil Court is competent to entertain a suit which is not of a civil nature (g) see sec 9 above Likewise if a Court,

(u) *British Ind a Steam Navigation Co v*

(r) " " " " " "

(w) *Gangayya v Venkataramayya* (1903) 43 Mad L J 80

(x) *Suryanarayana v Sree Raja Venkata* (1909) 56 Mad L J 273

(y) *Pam Saran v Indha* (1904) 55 Cal 106 113 I C 84 (29) A C 85

(z) *Paikhor v Mahaboudh* (1904) 49 Cal L J 51 115 I C 36 (29) A C 295

(a) *Paldeotas Lohia v Lalmutund* (1930) 57

(b) Cal 612 (30) A C 808

(c) " " " " " "

(d) " " " " " "

(e) " " " " " "

(f) " " " " " "

(g) " " " " " " report

proceeding upon an erroneous construction of a statute or upon a misapprehension of the law declines to exercise a jurisdiction vested in it by law, the High Court has the power to interfere under clause (b) of this section (h) These really are cases under clauses (a) and (b) of the present section They are not cases under clause (c) which is the clause now under consideration The reason why these cases are mentioned here is that it was contended in those cases that as the assumption of jurisdiction or the refusal to exercise it had proceeded upon an *error of law* the High Court had no power to interfere under this section and the decision in *Amir Hassan Khan's* case was invoked in support of that contention But the High Courts held that if the case came under either clause (a) or clause (b) it was immaterial that the assumption of jurisdiction or the refusal to exercise it proceeded upon an *error of law* The High Court also pointed out that the basis of the decision in *Amir Hassan Khan's* case was that the lower Court had jurisdiction to determine the question before it and that it *had* determined it and all that that case decided was that an *erroneous* decision of a case in the exercise of the Court's jurisdiction was no ground for interference under this section

A Court has no power to dismiss a suit after the decree is passed in the suit If it does so the question arises whether the case is one of exercise of jurisdiction not vested in the Court or one of illegality or material irregularity In *Lachmi Narain v. Balmakund* (i) the Judicial Committee held that the case was one of exercise of jurisdiction not vested in the Court In that case the High Court on appeal passed a decree by consent for a partition upon certain terms and remitted the suit to the Subordinate Judge for disposal under the decree The plaintiff failed to appear on the day appointed by the Subordinate Judge to proceed with the matter and the Judge dismissed the suit under O 17 r 2 and O 9 r 8 The plaintiff applied to the High Court in revision The High Court decided that the case came both under clause (a) and clause (c) of this section and set aside the order of the Subordinate Judge and ordered the case to be restored to his file The defendants appealed from this order to the Privy Council on the ground that the High Court had no power to interfere in revision Their Lordships affirmed the decision of the High Court and said Their Lordships do not think it necessary to determine that the case came under para (c) of sec 115 But they think that the order which the Subordinate Judge made was one which he *had not jurisdiction* to make The order of the Subordinate Judge was not merely wrong in law, it was an order which he had no jurisdiction to make

Besides the cases mentioned above there are cases in which the action of the lower Court has been held *not* to amount to illegality or material irregularity, e.g., failure to

important (f)

What is illegality or material irregularity—*Amir Hassan Khan's* case decides what is *not* an illegality or material irregularity What is it then which *does* constitute an illegality or material irregularity within the meaning of this section? The Courts have taken *Amir Hassan Khan's* case as the key to the solution of this question, but at different Judges have put different interpretations upon the case there are many

(A) *Jagobundhu v. Jaddi* (1888) 15 Cal 47
Maharajah of Sivania v. Aghora (1911)
 15 C W N 8 10 I C 50 *Rolan v*
Rajabala (1904) 32 Cal 108 85 I C 870
 (23) A C 300

(B) (1904) 51 I A 321, 4 Pat 81 81 I C 417
 (24) A FC. 193

(C) *Ganhu v. Pampulab* (1901) 45 Bom 390
 60 I C 113 (21) A B 219

(D) *Haridas v. Rataney* (1900) 48 Bom 56 60
 I C 952 (10) A D 140

(E) *Srinivas v. Official Assignee* (1907) 30 Mad
 891, 103 I C 377 (27) A M 641

conflicting decisions as to the meaning of the words of which the following are the leading examples —

1 The words "acted in the exercise of its jurisdiction illegally or with material irregularity" refer only to an *error of jurisdiction* (m) and apply only to cases of the kind contemplated by cl. (a) and (b) of this section (m). As against this view it has been said that the words in question did not occur in the Code of 1877, that they were first introduced by the amending Act of 1879, that errors of jurisdiction had already been provided for by the first two clauses of the section, and that the words in question must refer therefore to something other than errors of jurisdiction (n).

2 The words refer to *errors of procedure* only as distinguished from errors of *law* (o). This view proceeds mainly on the word "acted". In a Calcutta case Jenkins C.J. said: "It appears to me that section 113 can only be called in aid when the failure of justice (if any) has been due to one or other of the *faults of procedure* indicated in that section. If there was an error committed [by the Small Cause Court Judge] it was an error of *law* and not of *procedure*, and in my opinion Mr. Justice Fletcher had no power to interfere." (p) This view is supported by the recent decision of the Privy Council that it is a material irregularity to decide a case in the absence of a necessary party (q).

3 The words apply to cases where there is a *wilful disregard or conscious violation* by a judge of a rule of law or procedure (r). As against this view it has been said that it engrafts upon the Privy Council ruling a qualification to the effect that the High Court can interfere under the present section if the erroneous decision is the result of *conscious violation* by the lower Court of a rule of law or procedure, and that the distinction is in no way warranted by the language of the section (s). To this it is replied that if the section did not apply to cases where a Judge consciously violated a rule of law or procedure, a lower Court might, with impunity, wilfully disregard the decisions of the High Court, or even of the Privy Council (t).

4 The words apply to cases where the decision complained of is vitiated by a *gross and palpable error* (u). According to this view, a mistake, though of law, would, if gross and palpable, give jurisdiction to the Court under this section. But this view runs counter to the Privy Council decision (t).

5 The words "acted illegally" do not merely imply the committing of an error of procedure such as the expression "acted with material irregularity does". Those words have relation to gross and palpable errors of Subordinate Courts resulting in grave injustice (w).

It will not serve any useful purpose to discuss these conflicting views. Suffice to say, as observed by the Judicial Committee in *Balakrishna v. Vasudeva* (x), that "the section applies to jurisdiction alone, the *irregular exercise or non exercise of it*, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved". See note above, "Jurisdiction".

(m) *Majni Ram v. Jiva Lal* (1880) 7 All 338.
Badami Kuar v. Dinu Rai (1886) 8 All 111.

(n) *Kristamma v. Chapa* (1891) 17 Mad 410, 414, 415.

(o) *Kristamma v. Chapa supra*.

(p) —

(q) —

(r) —

(s) *Kristamma v. Chappa* (1891) 17 Mad 410, 420.

(t) —

(u) —

(v) —

(w) —

(x) *Jogunnesa v. Satish Chandra* (1924) 51 Cal. 690, 83 IC 438 (24) A C 643.

(y) (1917) 44 I A 261, 267, 40 Mad 793, 799, 40 I C 650.

Having noted the different interpretations put upon the words in question we proceed to note some of the decisions reported on the subject

It is an illegality to frame an issue on a point of fact expressly admitted by the defendant and to dismiss the suit on the ground that the fact is not proved (y) Similarly it is an illegality, if a Court passes a decree on an unstamped hundi. The Stamp Act expressly provides that an unstamped hundi shall not be acted upon (z) [see Stamp Act II of 1899, s 35] It is an illegality, if the appellate Court calls in question the admissibility of a document not duly stamped after the same has been admitted in evidence in the Court of first instance, such a course is manifestly against the provisions of the Stamp Act by which it is enacted that when an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the same suit (a) [see Stamp Act II of 1899, s 35] It is also an illegality to pass a decree where there is no evidence at all to support it (b) or where the evidence is obviously valueless (c) or to decide a case on personal inspection of the subject matter of the suit ignoring the evidence on record (d) It is an illegality to attach in execution of a decree the tools of an artisan contrary to sec 60 of the Code (e), or to attach money in a provident fund regulated by the Provident Funds Act (f) It is an illegality when the Court dismissed an application to set aside a sale under O 21, r 89, merely because the names of all the purchasers had not been shewn in the application (g) It is also an illegality to include in a decree costs which are not legally taxable (h)

It is a material irregularity if a decree is passed in a suit in the absence of a party in whose absence it could not possibly be made (i) It is also a material irregularity if a Court, taking a mistaken view of the question at issue proceeds to determine an issue which does not really arise in the case and bases its decision of the case on a determination of that issue (j) It is also a material irregularity to treat the delivery of a summons by post to a person who was not shown to be the defendant as good service, and to pass a decree ex parte against the defendant on that footing (k), or to attach in execution of a personal decree against a defendant property which he holds as trustee for another (l), or to transfer a suit on application under sec 24 without notice to the opposite party (m), or to make an order against a person without hearing him (n) or without giving the parties an opportunity of examining or cross examining an expert on whose report the Court has relied (o) It is also a material irregularity for a Court to decline to go into evidence when required to do so and to proceed to dispose of the suit upon the pleadings or upon allegations made in a petition (p) or to refuse to draw up its own decree, whether it be preliminary or final (q), or to refuse to grant a certificate for a refund of Court fees paid on a memorandum of appeal when a case is remanded under O 41, r 23 (r) [Court

(y) *Venkubai v Lalshman* (1898) 12 Bom 417 *Sivaprasad v Trichmala* (1913) 42
(z) *Bhansing v Chaganuram* (1914) 45 I C 552

an Act which is not applicable to it (a), or to disregard the provisions of the Evidence Act and to place the burden of proof on a wrong party (b) or to decide a case on a point of fact not raised in the pleadings (c). But if the burden of proof is placed upon the wrong party the High Court will not interfere if the irregularity does not lead to grave results (c). It is a material irregularity to invoke the inherent jurisdiction when there is a specific provision in the Code (ac). Where an application is made to set aside a sale under O. 21 r. 80 and it is followed by another application which does no more than give additional particulars of irregularity in conducting the sale, it is a material irregularity to refuse to consider the second application (x).

Wrong decision of lower appellate Court as to jurisdiction of trial Court —

The question to be considered under this head is whether the High Court has jurisdiction to interfere under this section where the lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit. Cases of this kind arise when a Court of first instance returns a plaint on the ground that it has no jurisdiction to entertain the suit, and the lower appellate Court *affirms* the order of the Court of first instance or *sets aside* the order. Has the High Court jurisdiction in such a case to revise the order of the lower appellate Court? On this point the decisions of the Allahabad High Court are not altogether consistent. In some cases (y) it was held that the error of the appellate Court was in the exercise of its jurisdiction to hear the appeal and that therefore its order is not open to revision. But even in these cases the High Court reversed the order of the Court of first instance although it might have been contended that that order was merged in the order of the lower appellate Court (z). In other cases the Allahabad High Court has held that the order of the lower appellate Court erroneously deciding that the Court of first instance should take cognizance of a case it has no jurisdiction to try (a), or should not take cognizance of a case it is competent to try (b) is open to revision for it would be anomalous if an order made by a District Court in its original jurisdiction were open to revision but not when made in its appellate jurisdiction. The Calcutta High Court held that the order of the lower appellate Court is open to revision (c), though an earlier case took the opposite view (d). In Bombay cases where the lower appellate Court confirmed the order of the Court of first instance the orders of both Courts were reversed (e). The Madras High Court holds that the order of the lower appellate Court is open to revision (f).

Ex parte decree—The Calcutta High Court interfered in revision when the lower Court professing to act under sec. 151 set aside an ex parte decree when no case under O. 9, r. 13, had been made out (g). The Allahabad High Court also interfered in such a case on the ground that the lower Court had no jurisdiction outside the provisions

- | | |
|--|---|
| <p>(a)</p> <p>(b)</p> <p>(c)</p> <p>(d)</p> <p>(e)</p> <p>(f)</p> <p>(g)</p> | <p><i>Bhagshar Prasad v. Raghubar</i> (1928) 48 All 168, 90 I C 353, (26) A A 58</p> <p>(z) See the judgment of Daniels, J., in 48 All 168, <i>supra</i></p> <p>(a)</p> <p>(b)</p> <p>(c) <i>Zamiran v. Fateh Ali</i> (1903) 32 Cal 146</p> <p>(d) <i>Mathura Nath v. Umash Chandra</i> (1896) 1 C W N 626</p> <p>(e)</p> <p>(f)</p> <p>(g)</p> |
|--|---|

Having noted the different interpretations put upon the words in question, we proceed to note some of the decisions reported on the subject

It is an "illegality" to frame an issue on a point of fact expressly *admitted* by the defendant and to dismiss the suit on the ground that the fact is not proved (y). Similarly it is an illegality, if a Court passes a decree on an unstamped *hundi*. The Stamp Act expressly provides that an unstamped *hundi* shall not be acted upon (z) [see Stamp Act II of 1899, s. 35]. It is an illegality, if the appellate Court calls in question the admissibility of a document not duly stamped after the same has been admitted in evidence in the Court of first instance, such a course is manifestly against the provisions of the Stamp Act by which it is enacted that when an instrument has been admitted in evidence, such admission shall not be called in question at any stage of the same suit (a) [see Stamp Act II of 1899, s. 35]. It is also an illegality to pass a decree where there is no evidence at all to support it (b) or where the evidence is obviously valueless (c), or to decide a case on personal inspection of the subject matter of the suit ignoring the evidence on record (d). It is an illegality to attach in execution of a decree the tools of an artisan contrary to sec. 60 of the Code (e), or to attach money in a provident fund regulated by the Provident Funds Act (f). It is an illegality when the Court dismissed an application to set aside a sale under O. 21, r. 89, merely because the names of all the purchasers had not been shewn in the application (g). It is also an illegality to include in a decree costs which are not legally taxable (h).

It is a 'material irregularity' if a decree is passed in a suit in the absence of a party in whose absence it could not possibly be made (i). It is also a material irregularity if a Court, taking a mistaken view of the question at issue proceeds to determine an issue which does not really arise in the case, and bases its decision of the case on a determination of that issue (j). It is also a material irregularity to treat the delivery of a summons by post to a person who was not shown to be the defendant as good service, and to pass a decree *ex parte* against the defendant on that footing (k), or to attach in execution of a personal decree against a defendant property which he holds as trustee for another (l), or to transfer a suit on application under sec. 24 without notice to the opposite party (m), or to make an order against a person without hearing him (n) or without giving the parties an opportunity of examining or cross examining an expert on whose report the Court has relied (o). It is also a material irregularity for a Court to decline to go into evidence when required to do so, and to proceed to dispose of the suit upon the pleadings or upon allegations made in a petition (p), or to refuse to draw up its own decree, whether it be preliminary or final (q), or to refuse to grant a certificate for a refund of Court fees

of
—

18,

11
ut
8)

12)

(j) *Venkubai v. Lalshman* (1888) 12 Bom 617 *Sivaprasad v. Tricundas* (1915) 42 (r) *Dhauweng v. Chaganiram* (1918) 42 M. 5
45 I. C. 552

an Act which is not applicable to it (x) or to disregard the provisions of the Evidence Act and to place the burden of proof on a wrong party (y) or to decide a case on a point of fact not raised in the pleadings (w). But if the burden of proof is placed upon the wrong party the High Court will not interfere if the irregularity does not lead to grave results (c). It is a material irregularity to invoke the inherent jurisdiction when there is a specific provision in the Code (x). Where an application is made to set aside a sale under O 21, r 85, and it is followed by another application which does no more than give additional particulars of irregularity in conducting the sale, it is a material irregularity to refuse to consider the second application (z).

Wrong decision of lower appellate Court as to jurisdiction of trial Court — The question to be considered under this head is whether the High Court has jurisdiction to interfere under this section where the lower appellate Court erroneously decides in the exercise of its limited jurisdiction as an appellate Court that the Court of first instance had or had not jurisdiction to entertain a suit. Cases of this kind arise when a Court of first instance returns a plaint on the ground that it has no jurisdiction to entertain the suit and the lower appellate Court *affirms* the order of the Court of first instance *ex parte* the order. Has the High Court jurisdiction in such a case to revise the order of the *lower appellate Court*? On this point the decisions of the Allahabad High Court are not altogether consistent. In some cases (y) it was held that the error of the appellate Court was in the exercise of its jurisdiction to hear the appeal and that therefore its order is not open to revision. But even in these cases the High Court reversed the order of the Court of first instance although it might have been contended that that order was merged in the order of the lower appellate Court (z). In other cases the Allahabad High Court has held that the order of the lower appellate Court erroneously deciding that the Court of first instance should take cognizance of a case it has no jurisdiction to try (a), or should not take cognizance of a case it is competent to try (b) is open to revision for it would be anomalous if an order made by a District Court in its original jurisdiction were open to revision but not when made in its appellate jurisdiction. The Calcutta High Court held that the order of the lower appellate Court is open to revision (c), though an earlier case took the opposite view (d). In Bombay cases where the lower appellate Court confirmed the order of the Court of first instance the orders of both Courts were reversed (e). The Madras High Court holds that the order of the lower appellate Court is open to revision (f).

Ex parte decree — The Calcutta High Court interfered in revision when the lower Court professing to act under sec 151 set aside an *ex parte* decree when no case under O 9, r 13, had been made out (g). The Allahabad High Court also interfered in such a case on the ground that the lower Court had no jurisdiction outside the provisions

- | | |
|-----|---|
| (d) | <i>Bisheshwar Prasad v Paghbar</i> (1926) 48 All 168 90 I C 353 (26) A A 58 |
| (z) | See the judgment of Daniels J in 48 All 168 <i>supra</i> |
| (a) | <i>Abdul Halim v Mularram</i> (1929) 27 All L J 1157, 124 I C 478 (30) A A 158 |
| (b) | <i>Ram Iqbal v Telesari</i> (1931) 53 All 75, 127 I C 434 (30) A A 713 F B |
| (c) | <i>Zamiran v Fateh Ali</i> (1905) 32 Cal 146 |
| (d) | <i>Mathara Nath v Lmesh Chandra</i> (1896) 1 C W N 626 |
| (e) | <i>Vishvanath v Rambhat</i> (1891) 15 Bom 148 <i>Nandlal v Kwanil</i> (1925) 30 Bom L R 1331 1121 C 734 (28) A B 548 |
| (f) | <i>Achayya v Sri Seetharamachandra</i> (1916) 39 Mad 195 181 C 555 F B <i>Meenatchi v Ananthanarayana</i> (1903) 26 Mad 221 <i>Kattiya v Jamaswamiya</i> (1929) 56 Mad L J 394 1191 C 35 (29) A M 396 |
| (g) | <i>K B Dutt v Shamsuddin</i> (1930) 34 C W N 419, 128 I C 94, (30) A C 488 |

of O 9, r 13 to direct a case to be reheard (A) In one case the Lahore High Court interfered in revision when the lower Court set aside an ex parte decree even though the application to set it aside was barred by limitation (s)

Order refusing review.—Where the lower Court refuses to entertain an application for review based on an allegation of fraud, the High Court has power to interfere under this section (j) The section, however, does not apply to an order refusing to grant a review (l) When the lower Court has rightly refused to restore an execution application under O 9 the High Court has no power under this section to direct it to treat the application as one in review (l)

Order granting review.—An order granting a review may be set aside in revision (m)

Award.—See notes to Schedule II, paras 1, 5 15 and 16, under the heading Revision

Lunacy.—As to the power of the High Court to interfere in lunacy proceedings, see the undermentioned case (n)

No revision from discretionary orders.—The High Court will not interfere in revision with an order which it is in the discretion of the lower Court to make (o) unless the order is not supported by any consideration of justice or by any provision of law (p) The lower appellate Court allowed a plaintiff to withdraw his suit and appeal without leave to bring a fresh suit on the same cause of action with the result that the defendant was deprived of the benefit of a judgment in his favour The case went to the Calcutta High Court in revision but the High Court while disapproving of the order, declined to interfere with the discretion of the Court (q)

Court fee.—An order demanding improper Court fee, if unfavourable to the plaintiff, is equivalent to telling the plaintiff that the Court will not proceed with the trial although the plaintiff has in fact paid the proper Court fee It is therefore a refusal to exercise jurisdiction and the High Court will interfere in revision (r) But if such an order is favourable to the plaintiff though it may cause detriment to the revenue does not prejudice the defendant and is no ground for revision (s) The Calcutta High Court has held that an order that the plaintiff's valuation is correct is not open to revision (t) But if plaintiff's valuation is too low it can be revised, otherwise, says the Patna High Court, the plaintiff would be able to drag the defendant into any Court he pleased (u)

| | |
|---|--|
| (A) <i>Ram Sarup v Gayn Prasad</i> (1926) 48 All 15 90 I C 180 (25) A A 610 <i>Radha Mohan v Abbas Ali</i> (1931) 63 All 612 133 I C 129 (31) A A 294 | (D) <i>Syed Sadiq v Asaf Kader</i> (1931) 34 C W N 58 127 I C 549 (31) A C 604 (q) <i>Sahabjan Bibi v Gopal</i> (1930) 34 C W N 265 127 I C 71 (30) A C 424 |
| (C) | (r) |
| (D) | |
| (E) | |
| (F) <i>Safiannessa v Megh Lal</i> (1926) 43 Cal 1 J 235 94 I C 172 (26) A C 735 | (s) |
| (M) | |
| (N) | |
| (O) | (t) |
| | |
| | (u) |

shall lie to the High Court from the judgment of one Judge of the High Court or one Judge of any Division Court pursuant to sec 13 of the Charter Act. Now sec 13 of the Charter Act provides for the exercise by the Judges of the High Court of the original and appellate jurisdiction vested in the High Court. This gave rise to the question whether the division of jurisdiction into (1) original and (2) appellate was exhaustive or not. If the division was exhaustive, revisional jurisdiction must be treated as comprised in appellate jurisdiction, so that an appeal would lie under cl 15 from the judgment of a single Judge exercising revisional jurisdiction. If the division was not exhaustive so that revisional jurisdiction was something outside the original and appellate jurisdiction, the case would not fall within sec 13 of the Charter Act, and no appeal could therefore lie under cl 15 of the Letters Patent. It was held by the High Courts of Madras (b), and Calcutta (c) that the division of the jurisdiction of High Courts into original and appellate was exhaustive and that revisional jurisdiction was included in appellate jurisdiction, and that an appeal therefore lay under cl 15 of the Letters Patent from an order of a single Judge made under the present section, provided such order amounted to a 'judgment' within the meaning of that clause. The contrary was held by the High Court of Bombay (d), it does not, however, appear that there was any 'judgment' in the Bombay case (e).

Laches—An application for revision will not be entertained unless it is made without unreasonable delay (f).

(b) *Chappan v Moidin* (1899) 22 Mad 63. *Tuljaram v Alagappa* (1912) 35 Mad 1. 8 I C 340. *Srinivasa v Ramaswami* (1916) 39 Mad 235. 29 I C 846.

(c) *Shew Prasad v Ram Chunder* (1914) 41 Cal 323. 23 I C 977. *Debedranath v Bibu dhendra* (1916) 43 Cal 90. 33 I C 745.

(d) *Hirajal v Bai As* (1898) 20 Bom 691. See also *Nisar Ali v Ali Ali* (1906) 23 All 133.

(e) See (1914) 41 Cal 223. 335. 23 I C 947, *supra*.

(f) *Durga I rasad v Sico Charan* (1882) 4 All 154. *Dalmakund v Shro Jatan* (1884) 6 All 125.

PART IX.

Special Provisions relating to the
Chartered High Courts.

116. [S 631] This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act 1861, or the Government of India Act, 1915

Part to apply only to
certain High Courts

The words and figures of the Government of India Act 1915 were inserted in the section by the Amending Act 17 of 1916

117. [S 632] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts

Application of Code to
High Courts

Save as provided in this Part—See s 120

Save as provided in Part X—See s 120

Rules — Rules means rules contained in the First Schedule or made under s 122 or s 125 see s 2 (18) see also O 41, r 7

118. [S 634] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith except as to so much thereof as relates to the costs,

Execution of decree be
fore ascertainment of costs

and as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation

119. [S 635] Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates vakils and attorneys

Unauthorized persons not
to address Court

See Letters Patent cls 9 and 10

120. [Ss. 638, 639.] The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

Provisions not applicable to High Court in original civil or insolvent jurisdiction.

As to *Rules* not applicable to Chartered High Courts, see O 49, r 3

Sub section (2) of this section by which it was provided that "nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court" has been repealed by the Presidency Towns Insolvency Act III of 1909, s 127

PART X.

Rules.

121. [New] The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part

Effect of rules in First Schedule

The whole of this Part is new except ss 120, 130 and 131, which correspond to s 65^a paras 2, 3 and 4 of the Code of 1882

As to annulment and alterations of rules see s 124

122. [New Cf S 652, first para.] High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court of Oudh, may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule

Power of certain High Courts to make rules

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916. The words and the Chief Court of Oudh were added by the Oudh Courts Act 4 of 1920.

Rules made under this section by the various High Courts are set out in Appendices at the end of this work

Sections 120 to 128 excepting s 120 provide for rules to be made by Chartered High Courts for regulating their own procedure and the procedure of the Civil Courts subject to their superintendence—that is Courts subject to their appellate jurisdiction—see High Courts Act 1861 s 15 and the Government of India Act 1915 s 107. These rules must not be inconsistent with the provisions in the body of the Code (see s 128). Further they are subject to the previous approval of the authorities mentioned in s 126. Sec 129 provides for rules to be made by Chartered High Courts as to their *original* civil procedure. These rules may be inconsistent with the provisions in the body of the Code but they must not be inconsistent with the Letters Patent establishing those Courts.

Rules in the First Schedule—Rules made under s 122 may alter and annul the rules in the First Schedule. The Allahabad High Court has framed rules to be added to the rules in O 21 see Appendix V. Rule 1 of these rules is inconsistent with the First Schedule rule 43 of Order 21 which by inadvertence was not altered. It was held however that the effect was to alter rule 43 by implication (g).

Rules and limitation—None of the Courts empowered under this section to frame rules has power by any rule which it may make to alter the period of limitation prescribed by the Indian Limitation Act (h)

An appellant is entitled as of right under sec 12 of the Indian Limitation Act, 1908, to exclude the time requisite for obtaining copies of the decree or order appealed from and of the judgment on which such decree may be or is founded. This right is not affected by any rules made by any High Court that such copies need not accompany the memorandum of appeal (i)

123. [New] (1) A Committee, to be called the Rule Committee, shall be constituted at the town which is the usual place of sitting of each of the High Courts and the Chief Court referred to in section 122

Constitution of Rule Committees in certain Provinces

(2) Each such Committee shall consist of the following persons, namely —

- (a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or a Divisional Judge for three years,
- (b) a barrister practising in that Court,
- (c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,
- (d) a Judge of a Civil Court subordinate to the High Court, and
- (e) in the towns of Calcutta, Madras and Bombay, an attorney

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf, and whenever any member

(A) *Naraingh v Sheo Prasad* (1918) 40 All 1 12-1 C 161 (30) A R 8
7 42 1 C 855 [E B] *Shah v Abdul* (1) J 50 / 5 Chelton (11 8) 55 I A 161
Ganny v I M R (1910) 8 Rang 380 8 Rang 30 1001 C 1 (1912) A PC 103

retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

The words "the town which is the usual place of sitting of each of the High Courts referred to in section 122, in sub sec (1) were substituted for the words, "each of the towns of Calcutta Madras, Bombay, Allahabad, Lahore and Rangoon," by the Amending Act 13 of 1916 The words, "and the Chief Court," after the words "High Courts, were added by the Oudh Courts Act 4 of 1925

124. [New] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration

Committee to report to High Court

The provisions as to Rule Committees apply to rules to be made under sec 122 Rules under that section can only be made after the Chartered High Courts have taken the opinion of the Rule Committee attached to them

125. [New] High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as, in the case of the Court of the Judicial Commissioner of Oudh, the Governor General in Council, and, in other cases, the Local Government, may determine

Power of other High Courts to make rules

Provided that any such High Court may, after publication, make a rule extending within the limits of its jurisdiction any rules which have been made by the High Court

Rules under this section should not be inconsistent with the provisions of this Code See sec 128 and contrast sec 129 As to exercise of power

126. [New] Rules made under the foregoing provisions shall be subject to the previous approval of the following authorities, namely —

Rules subject to sanction

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, to the approval of the authority prescribed by the proviso to section 107 of the latter Act for rules made under that section,

(b) if the rule is made by any other High Court, to the approval of the Local Government

The word approval in the section was substituted for the word sanction by the Amending Act 13 of 1916

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916. The words and figures the proviso to section 107 of the latter Act were substituted for the words and figures section 15 of that Act also by that Act

Approval—This section requires in the case of rules to be made by Chartered High Courts the same sanction as is required by sec 107 of the Government of India Act 1915 the object being that the rule making power should correspond with the power conferred under section 107 of that Act. That section empowers the Chartered High Courts to make and issue general rules for regulating the practice and proceedings of Courts subject to their appellate jurisdiction subject to the previous approval in the case of the High Court of Calcutta of the Governor General in Council and in other cases of the local Government

127. [New] Rules so made and approved shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule

Publication of rules

The word approved was substituted for the word sanctioned by the Repealing and Amending Act 24 of 1917 sch. I

128. [New] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts

Matters for which rules may provide

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely.—

- (a) the service of summonses, notices and other process by post or in any other manner either generally or in any specified areas and the proof of such service,
- (b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale;
- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction (j);
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not (k),
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—
 - on a contract express or implied, or
 - on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or
 - on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only, or
 - on a trust, or

(j) See *Ahmat Kasi v. Fhat in Bibi* (1939) 59 Cal. 833 141 I C 6, 9 (33) A C 27. (k) See *Balmukund v. Bussendoyal* (1919) 46 Cal. 48 50 I C 51.

- (ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant,
- (g) procedure by way of originating summons,
- (h) consolidation of suits, appeals and other proceedings,
- (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties, and
- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts

129. [S 52, third para] Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may make such rules not inconsistent with the Letters

Power of Chartered High Courts to make rules as to their original civil procedure

Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code

The words and figures or the Government of India Act 1915 were inserted in the section by the Amending Act 13 of 1916

Rules as to original civil procedure of Chartered High Courts—Rules made under s 122 must not be inconsistent with the provisions in the body of this Code Under this section any Chartered High Court may make rules to regulate its own procedure in the exercise of its original civil jurisdiction Such rules may not be consistent with the provisions in the body of the Code but they must not be inconsistent with the Letters Patent establishing it The Letters Patent here referred to are the Letters Patent of 1865 those being the Letters Patent in force when the present Code was enacted and not the Letters Patent of 1860 (i)

Where a rule has been made by a High Court under this section the provisions of the Code do not apply Thus the rules of the Calcutta High Court contain provisions for default of payment by an auction purchaser at a sale under a mortgage decree on the originals de of the High Court and therefore O 21 r 86, does not apply to such sales (ii) But as the Calcutta rules contain no provision for setting aside a sale on deposit the provisions of O 21 r 89 do apply (n)

(i) *L'lou Cha I v Fhetasdas* (1904) 51 Cal 80, 908, 911 81 I C 1048 (1914) A C 10-5
(m) *Go'el Das v L chm's Cha I* (1930) 57 Cal

(n) 106 195 I C 591 (30) A C 394
ryuban Dass v Buses car Lal (1901) 43 Cal 69 60 I C 406 (1914) A C 160

130. [S 652, ~~second para~~] A High Court not established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, may, with the previous approval of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 or section 107 respectively of those Acts, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town

Power of the High Courts to make rules as to matters other than procedure

The words and figures 'or the Government of India Act, 1915' were inserted in the section by the Amending Act 13 of 1916. The words 'or section 107 respectively of those Acts' were substituted for the words 'of that Act' also by that Act.

The word 'approval' was substituted for the word "sanction" by the repealing and Amending Act 24 of 1917, Sch. I.

131. [S 652, ~~fourth para~~] Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law

Publication of rules

Date of publication.—The rules referred to in this section have the force of law from the date of publication (a)

(a) *Bajjnath v. D. Iars* (1928) 50 All. 805, 110 I. C. 719 (28) A. A. 708

PART XI.

Miscellaneous.

132. [S 640] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court

Exemption of certain
women from personal
appearance

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code

Appearance in Court—This section provides for exemption of purdanasheen ladies from personal appearance in Court but not from attendance in Court. The word appearance means that a purdanasheen lady shall not be compelled to come forth into view or to become visible to the public gaze. The Court therefore has power to order a purdanasheen lady to give evidence in Court provided she is not compelled to come forth into view or to become visible to the public gaze (p). See notes to O 26 r 1. Persons exempted from attending Court

On the other hand the Allahabad High Court has held that the words personal appearance mean personal attendance and that a purdanasheen lady cannot be compelled to attend Court either as a party or as a witness (p1)

133. [S 641] (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank in the opinion of such Government, entitles him to the privilege of exemption

Exemption of other
persons

(2) The names and residences of the persons, so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs

See O 26 r 1

134. [New] The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code

Arrest other than in execution of decree

This section is new It applies an omission

135. [S 642] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court

Exemption from arrest under civil process

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal

(3) Nothing in sub section (2) shall enable a judgment debtor to claim exemption from arrest under an order for immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree

Alterations in the Section —

1 The words other than process issued by such tribunal for contempt of Court in sub s (2) have been added to give effect to a Calcutta decision (q)

2 Sub section (3) is new It has been substituted for the words except as provided in section 337A sub section (5) and sections 256 and 643 which occurred at the commencement of sub section (2) in the Code of 1882

Grounds of exemption from arrest—The exemption here conferred is not for the personal benefit of the individual but for the furthering of public interests and the better administration of justice In other words the exemption is not the privilege of the person attending the Court but that of the Court which he attends If therefore, a witness does not believe *bona fide* that his attendance was required there is no privilege (r) For the same reason where a writ of attachment for contempt of Court has been issued against a party to a suit he cannot claim privilege from arrest while proceeding to Court for the purpose of attending the hearing of the suit (s)

While going to or attending and while returning from Court—A party to a suit is exempt from arrest under this section while going to or attending the Court before which the suit is pending and while returning from such Court The word while

(q) *John v Carter* (18 0) 4 L R O C 90

(r) *Hooma Churn v Teel* (18 5) 14 B L R

App 13 *Samarpuri v Larry & Co*

(1890) 13 Mai 15) 158 O rdalull in the v t r of (1b 6) 1 (al 8 J)

(s) *John v Carter* (18 0) 4 B L J O C 90

implies that there is a period of exemption and what period is reasonable is a question of fact to be determined by the Court in each case (t) The following are the leading cases bearing on this part of the section —

(1) Where a plaintiff who was a native of Patna and who had instituted a suit in the High Court of Madras left Patna on receiving a letter from his solicitors that his presence was required and arrived at Madras on 24th October, and the suit having come on for hearing on the 27th of October was adjourned till the 25th of December and he was arrested in execution of a decree against him on the 10th of November it was held by the High Court of Madras that he was privileged from arrest (u) This decision was disapproved by the Allahabad High Court (v) in the case cited in ill (2) below, but it is in accordance with the decision of the House of Lords in the under mentioned case (w)

(2) A, residing in Bombay, goes to Benares to prosecute an application to set aside an ex parte decree passed against him by the Benares Court, and puts up at a Dak bungalow in Benares On the date fixed for the hearing of the application A attends the Court when his application is heard and dismissed He then leaves the Court returns to the Dak bungalow, and thence proceeds to the railway station where he is arrested in execution of the decree while actually seated in the train It is found on evidence that A had taken a ticket for Allahabad when arrested On the above facts the High Court of Allahabad held that A's arrest was legal The Court said In the present case [A] had left the Court and had returned to the place where [he] was staying in Benares, he had then left that place and [was] actually on his way to Allahabad which is not his home In these circumstances we cannot hold that he at the time of arrest, was returning from a tribunal within the meaning of section 135 (c)

(3) The exemption from arrest continues during such period as is reasonably occupied in going to attending at, and returning from the place of trial (y) But if there is a deviation, the privilege is forfeited A party to a suit was arrested at an office in the same compound as the Court house an hour after the Court had risen for the day and as it was not shewn that he was returning to his residence the arrest was held to be legal (z) But it is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from and a less crowded and more convenient road adopted (a)

(4) A debtor who is released from jail under an order of the Court on the ground that the order under which he was committed was illegal may be arrested under civil process immediately after he is released He is not privileged from arrest as returning from Court It does not follow because imprisonment followed on an order which was illegal that he should be treated when released from jail as returning from Court (b)

(5) A is arrested in execution of a decree obtained against him by B and is brought before the Court While he is in the custody of the Court's officers he is arrested in execution of a decree obtained against him by C A is not exempt from arrest in execution of C's decree It cannot be said that A, while he was under arrest in execution of B's decree, was voluntarily in Court in connection with the execution of B's decree (c)

(t) *Felarnath v. Nona Bhai* (1911) 50 Bom 612 131 I C 467 (31) A B 175

(u) *S. R. B. v. in the matter of* (1880) 4 Mad 317

(v) *Ardeshirji v. Jolyandas* (1910) 32 All 3 6 3 I C 46

(w) *Perse v. Jernse* (1856) 5 H I C 61 Hals 1 r Vol 5 p 818

(x) *Ardeshrji v. Jolyandas* (1910) 30 All 3 3 I C 46

(y) *Appasamy v. Gornien* (1868) 4 Mad H C 145

(z) *Ram I rased v. Emperor* (1930) 36 C W A 10 1 141 I C 605 (33) A C 11

(a) *Sorendro Nath in the matter of* (1880) 5 Cal 106 *Emperor v. B. H. ri* (19 4) 46 All 603 84 I C 64 (24) A A 6 6

(b) *S. Narayani v. Parry & Co* (1890) 13 M L 150

(c) *Gornien v. The Union Bank Ltd* (19 4) 47 M L L J 6 8 84 I C 513 (24) A M 901

"Parties"—A defendant in a summary suit under O 37 [Code of 1882, chapter 34] is privileged from arrest though he has not obtained leave to defend the suit (d). An accused ordered to attend a criminal Court is entitled to the protection of this section (e).

Civil process—This section applies only to witnesses and parties arrested under writs issued by Courts to which the Code applies. It does not apply where a party is arrested under a writ issued from a Small Cause Court. As there is no provision in the Small Cause Court Act corresponding to this section questions as to exemption from arrest in the case of persons arrested under writs issued by Small Cause Courts must be governed by the principles of the English law on the subject. They are very much the same as those set forth in the present section (f).

Appeal—Where a judgment debtor arrested in execution of a decree claims exemption from arrest under this section, but the exemption is not allowed, the order is one under sec. 47, and is appealable (g).

Exemption of members of legislative bodies from arrest and detention under civil process

135A. (1) No person shall be liable to arrest or detention in prison under civil process—

- (a) if he is a member of either Chamber of the Indian Legislature or of a Legislative Council constituted under the Government of India Act, during the continuance of any meeting of such Chamber or Council,
- (b) if he is a member of any committee of such Chamber or Council, during the continuance of any meeting of such committee,
- (c) if he is a member of either Chamber of the Indian Legislature, during the continuance of a joint sitting of the Chambers, or of a meeting of a conference or joint committee of the Chambers of which he is a member,

and during the fourteen days before and after such meeting or sitting

(2) A person released from detention under sub section (1) shall, subject to the provisions of the said sub section, be liable to re arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub section (1)

This section was added by sec. 3 of Act 23 of 1925

(d) *Soorendra Nath in the matter of* (1880) 5 Cal 106

(e) *Cursetji v. Hargorind* (1909) 5 Luck 302 119 I C 367 (29) A O 4 8

(f) *Soorendra Nath in the matter of* (1880) 5 Cal 106

(g) *Gorindasamy v. The Union Bank Ltd* (1944) 47 Mad 1 J 678 84 I C 513 (4) A M 200

136. [S 648] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides

Procedure where person to be arrested or property to be attached is outside district

or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment

(2) The District Court, shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court

Arrest and attachment otherwise than in execution of decree—This section prescribes the procedure to be followed where a person is to be arrested or where property is to be attached otherwise than in execution of a decree. The Court may
 u 1 The procedure enacted in this section attach before judgment property outside the

local limits of its jurisdiction and may also under O 21, r 28, read with O 38, r 8, order the removal of the attachment (A)

Order of arrest for contempt of Court.—It has been held in Calcutta that a Judge of the Calcutta High Court sitting on its original side has no power to direct a mofussil Court to execute a warrant of arrest for contempt of Court. But if he grants an injunction and the order is disobeyed he may direct the arrest and detention of the offender under O 39 r 2 in which case the present section will apply (i)

The Madras High Court has held that when an injunction issued by a Division Bench of the High Court on the Appellate Side is disobeyed by a party residing in the mofussil the Bench has the power to send to the appropriate mofussil Court the warrant of arrest for execution whether this section applies in terms or not, and the mofussil Court on receipt of the warrant must proceed as provided in this section (j). In the Madras case the Court treated the disobedience of the injunction as contempt of Court. It is difficult to understand why when an injunction had actually been granted the Court did not proceed under O 39 r 2, in which case there could have been no doubt as to the applicability of the present section to the case.

137. [S 645] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs

Language of subordinate Courts

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English, but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him, and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation

Sub section (3) is new

138 [S 185A] (1) The Local Government may, by notification in the local official Gazette, direct, with respect to any Judge specified in the notification or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed

Power for Local Government to require evidence to be recorded in English

(A) *Firm M S M M v Ma ng Sein* (1931) 9 Rang 561 185 I C 326 (31) A R 279
(i) *Salamechand v Joogul Kishore* (1928) 55 Cal 777 107 I C 65 (28) A C 462 A Milton

d Co v Opha Automobile Co (1930) 57 Cal 1280 130 I C 252 (31) A C 279
(j) *Adakkala v Imperial Bank* (1926) 50 Mad L J 401 95 I C 196 (26) A M 574

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court

Oath on affidavit by whom to be administered **139. [S 197]** In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent

The words or other person in cl (b) are new

140. [S 645 A] (1) In any Admiralty or Vice Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed

141. [S 647] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction

This section does not apply to proceedings in execution—Sec 647 of the Code of 1882 as it stood when that Code was first enacted ran as follows—

The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals

The question arose under that section whether the words proceedings other than suits and appeals included proceedings in execution in other words whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree On the one hand the High Courts of Allahabad (1) and Bombay (2) held that that section applied to applications for execution

(1) *Asfayat Ali v Ram Singh* (1885) 7 All 353; *Surja Prasad v Suda Jan* (1888) 10 All 71; *Fakirullah v Thakur Prasad* (1890) 12 All 179; *Padma Charan v Man Singh* (1890) 12 All 390
(2) *Pirjade v Pirjade* (1887) 6 Bom 631

of decrees, so that the procedure relating to suits was applicable to applications for execution. On the other hand, the High Court of Calcutta held that that section did not apply to proceedings in execution (m). In this state of authorities the Legislature intervened, and an Explanation was added to the section by the Civil Procedure Code Amendment Act 6 of 1892, which ran as follows —

“*Explanation*—This section does not apply to applications for the execution of decrees which are proceedings in suits.”

The effect of the above Explanation was to supersede, the Allahabad and Bombay rulings above referred to, and to give legislative sanction to the Calcutta decision.

In the meantime one of the Allahabad cases referred to above, namely, the case of *Fakir ullah v. Thakur Prasad* (n), was taken up to the Privy Council, and that tribunal held, in the year 1894, that independently of the Explanation, sec. 647 did not apply to applications for execution, but only to original matters in the nature of suits, such as proceedings in probates, guardianships, and so forth, thus overruling the Allahabad and Bombay cases (o). This decision, if it had come three years earlier, would have rendered the Explanation unnecessary. The Privy Council decision and the recognition of the rule that sec. 647 does not apply to execution proceedings render the explanation unnecessary, and it has accordingly been omitted in the present section (p). At the same time two alterations have been made in the section, namely, (1) the words “in regard to suits” have been added, and (2) the words “other than suits and appeals” have been omitted. In so doing the Legislature has now done what it could have done as well in 1892.

The reason why the words “other than suits and appeals” which occurred at the end of sec. 647 have been omitted in the present section is this. Sec. 647 applied to proceedings “other than suits and appeals.” The High Court of Allahabad held that applications for the execution of decrees were proceedings “other than suits and appeals” and that sec. 647 applied therefore to such applications (q). On the other hand, the High Court of Calcutta held that applications for the execution of decrees were not proceedings “other than suits and appeals,” *they being proceedings in suits*, and that sec. 647 did not therefore apply to such applications (r). The Legislature adopted the view of the Calcutta High Court, and enacted by way of Explanation to the section that the “section does not apply to applications for the execution of decrees *which are proceedings in suits*.” It would have been a shorter cut if the Legislature had amended sec. 647 by deleting the words “other than suits and appeals,” as those were the words that gave rise to the conflict, instead of adding into the section an Explanation which certainly was not happily worded. What the Legislature omitted to do in 1892 it did in 1908.

This section, we have said, does not apply to proceedings in execution (s). Hence the procedure provided in the Code in regard to suits does not apply to applications for execution of decrees. The following are the leading decisions on the subject —

1. The provisions of sec. 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees. But though these provisions do not in

(m) *Bunko Behary v. Nul Madhub* (1891) 18 Cal 635.

(n) (1890) 12 All 179.

(o) *Thakur Prasad v. Fakir ullah* (1895) 17 All 106, 22 I A 44.

(p) *Hari Charan v. Manmatha* (1914) 41 Cal 1 45, 19 I C 633. *Palasubramania v. Svarnammal* (1915) 39 Mad 199, 21 I C 32.

(q) *Rodha Charan v. Man Singh* (1890) 12 All 392, at p 395.

(r) *Bunko Behary v. Nul Madhub* (1891) 18 Cal

635 p 638.

(s) *Hari Charan v. Manmatha* (1914) 41 Cal 1 45, 19 I C 633. *Palasubramania v. Svarnammal* (1915) 39 Mad 199, 21 I C 32. *Babai v. Alai Adoo* (1918) 4 Pat L J 330, 47 I C 154. *Bhotu v. Ram Lal* (1921) 2 Lah 66, 60 I C 720 (21) A L 67, *Bharat v. Asghar* (1923) 45 All 148, 73 I C 453, (23) A A 460, *Narendra v. Rakhaldas* (1925) 41 Cal L J 296, 79 I C 351, (25) A C 510. *Bavaratulla v. Reazuddin* (1926) 53 Cal 670, 96 I C 705 (26) A C 773.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court

Oath on affidavit by whom to be administered **139. [S 197]** In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
- (b) any officer or other person whom a High Court may appoint in this behalf, or
- (c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent

The words or other person in cl (b) are new

140. [S 645 A] (1) In any Admiralty or Vice Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed

141. [S 647] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

This section does not apply to proceedings in execution—See 647 of the Code of 1882 as it stood when that Code was first enacted ran as follows—

The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction *other than suits and appeals*

The question arose under that sect on whether the words proceedings other than suits and appeals included proceedings in execution in other words whether that section had the effect of rendering the provisions of the Code relating to suits applicable to proceedings in execution of a decree On the one hand the High Courts of Allahabad (k) and Bombay (l) held that that section applied to applications for execution

(k) *Fif yot Alli v Ram S ngh* (1885) 7 All 353 *Sarju Prasad v Suta Ram* (1883) 10 All 71 *Fakir ullah v Trakur Prasad*

(1890) 12 All 179 *Radha Charan v Man S ngh* (1890) 12 All 397
(l) *Prjode v Prjode* (1887) 6 Bom 631

of decrees so that the procedure relating to suits was applicable to applications for execution. On the other hand the High Court of Calcutta held that that section did not apply to proceedings in execution (m). In this state of authorities the Legislature intervened, and an Explanation was added to the section by the Civil Procedure Code Amendment Act of 1892 which ran as follows —

Explanation—This section does not apply to applications for the execution of decrees which are proceedings in suits.

The effect of the above Explanation was to supersede the Allahabad and Bombay rulings above referred to and to give legislative sanction to the Calcutta decision.

In the meantime one of the Allahabad cases referred to above namely the case of *Fakirullah v. Thakur Jemad* (n) was taken up to the Privy Council and that tribunal held in the year 1894 that independently of the Explanation sec 647 did not apply to applications for execution but only to original matters in the nature of suits such as proceedings in probates, guardianships and so forth thus overruling the Allahabad and Bombay cases (). This decision if it had come three years earlier would have rendered the Explanation unnecessary. The Privy Council decision and the recognition of the rule that sec 647 does not apply to execution proceedings render the explanation unnecessary and it has accordingly been omitted in the present section (p). At the same time two alterations have been made in the section namely (1) the words "in regard to suits" have been added and (2) the words "other than suits and appeals" have been omitted. In so doing the Legislature has now done what it could have done as well in 1892.

The reason why the words "other than suits and appeals" which occurred at the end of sec 647 have been omitted in the present section is this. Sec 647 applied to proceedings other than suits and appeals. The High Court of Allahabad held that applications for the execution of decrees were proceedings other than suits and appeals and that sec 647 applied therefore to such applications (q). On the other hand the High Court of Calcutta held that applications for the execution of decrees were not proceedings other than suits and appeals *they being proceedings in suits* and that sec 647 did not therefore apply to such applications (r). The Legislature adopted the view of the Calcutta High Court and enacted by way of Explanation to the section that the section does not apply to applications for the execution of decrees *which are proceedings in suits*. It would have been a shorter cut if the Legislature had amended sec 647 by deleting the words "other than suits and appeals" as those were the words that gave rise to the conflict instead of adding into the section an Explanation which certainly was not happily worded. What the Legislature omitted to do in 1892 it did in 1908.

1. The provisions of sec 11 relating to *res judicata* in regard to suits do not apply to applications for the execution of decrees. But though these provisions do not in

(m) *Bunko Behary v. Nil Madhub* (1891) 18 Cal 635.

(n) (1890) 1^o All 179.

(o) *Thakur Prasad v. Fakirullah* (1895) 17 All 106 2 I A 44.

(p) *Hari Charan v. Manmatha* (1914) 41 Cal 1 4-5 19 IC 643. *Balasubramania v. Swarnammal* (1915) 35 Mad 199 21 IC 34.

(q) *Rudha Charan v. Man Singh* (1890) 1^o All 39 at p 395.

(r) *Bunko Behary v. Nil Madhub* (1891) 18 Cal

635 p 638.
(s) *Hari Charan v. Manmatha* (1914) 41 Cal 1 4 5 19 IC 643. *Balasubramania v. Swarnammal* (1915) 35 Mad 199 21 IC 32. *Lid v. Alakhdeo* (1918) 4 Pat LJ 330 47 IC 154. *Bholu v. Ram Lal* (1911) 2 Lah 66 60 IC 790 (21) AL 67. *Dharat v. Asghar* (1903) 45 All 148 73 IC 453 (23) AA 460. *Varendra v. Rakhaldas* (1905) 41 Cal LJ 286 79 IC 351 (25) AC 610. *Basaratulla v. Reazudin* (1906) 53 Ca 679 96 IC 05 (26) AC 773.

terms apply to applications for execution, they are governed by principles analogous to those of *res judicata*. See note to sec 11, "Orders in execution proceedings," on p 87 above

2 The provisions of O 2, r 2 [Code of 1882, s 43] do not apply to applications for execution. Hence where a decree awards two distinct reliefs, an application to enforce one relief is no bar to a subsequent application to enforce the other relief, though both reliefs are awarded by the same decree (t)

3 The provisions of O 9 [Code of 1882, ss 96 to 109] do not apply to applications for execution. Hence if the applicant fails to appear at the hearing of the application, the Court cannot dismiss the application under O 9, r 8 [Code of 1882, s 102] though it may do so under its inherent power (u). And where in the exercise of this power an application for execution is dismissed, the Court has no power to restore it to the file under O 9 r 9 [Code of 1882, s 103] (v) as that rule does not apply to execution proceedings. But though the Court has no power to restore to the file an application which has once been dismissed for default such dismissal is no bar to a fresh application for execution (w). See notes to O 9, r 9, and O 9, r 13, 'Execution proceedings'

4 The provisions of O 17, rr 23 [Code of 1882, ss 157 158] do not apply to applications for execution. Hence an order dismissing an application for default is no bar to a fresh application for execution (x)

5 The provisions of O 23 r 1 [Code of 1882 s 373] do not apply to applications for execution. Hence the withdrawal of an application though it be without the leave of the Court, is no bar to a fresh application for execution (y). See now O 23, r 4

6 See note to sec 144, 'Whether a proceeding under this section is a proceeding in execution'

7 See O 22, r 12

Other cases under this section are considered in their proper place

"Proceedings in any Court of civil jurisdiction"—The proceedings spoken of in this section refer to original matters in the nature of suits such as proceedings in probate guardianship and so forth and do not include execution (z). An application under sec 18 of the Religious Endowments Act, 1863, is a proceeding of this nature. Hence it must be verified as required by O 6 r 15 of the Code (a). But an application for settlement of rents made to a Revenue Officer under sec 105 of the Bengal Tenancy Act 8 of 1885 is not a proceeding in a Court of civil jurisdiction. Hence the petition need not be signed as required by O 6, r 14 (b). A petition by a company to the High Court under the Indian Companies Memorandum of Association Act 189, for the confirmation of a special resolution altering the Memorandum of Association of the Company, is a proceeding within the meaning of this section. Therefore where the petition was dismissed and the Company applied for leave to appeal to the Privy Council, the case was dealt with by the Court under sec 59 of the Code of 1882, [now s. 109] (c). Similarly an application to set aside an ex parte payment-order made under the Indian Companies Act 6 of 1882 is a proceeding in a Court of civil jurisdiction

(t) *Madhavji v. Madhavji* (1881) 14 C.J. 515 *Sadho*

(u) *Madhavji v. Madhavji* (1881) 14 C.J. 515

(v) *Madhavji v. Madhavji* (1881) 14 C.J. 515

(w) *Madhavji v. Madhavji* (1881) 14 C.J. 515

(x) *Tirthasami v. Annappayya* (1845) 18 M.A. 131

(y)

(z)

(a) *Amloo Miyan v. Muhammad* (1901) 21 M.A. 683 684

(b) *Hazari Lal v. Ambica* (1924) 3 Pat. 67 79
1 C 5 (24) A 1 104

(c) *Bombay Burmah Trading Corporation v. Dorabji* (1903) 27 Bom. 415 418

Hence the provisions of O 9, r 13 apply to the case (d). An application under sec 12 of the Guardians and Wards Act, 1890 is a proceeding in a Court of civil jurisdiction. Hence a receiver may be appointed in such a proceeding under O 40, r 1 (c) and the receiver so appointed will have all the powers of a receiver under the Code (f). An application under O 9, r 13 is a proceeding referred to in this section and also sec 21 as to objects in the jurisdiction applies to such an application (g). But an application for a necessary certificate under the Succession Certificate Act, 1889, is not such a proceeding.

may be appointed under O 40, r 1, pending the application (i). Disciplinary proceedings taken under sec 14 of the Legal Practitioners Act 18 of 1879 are not proceedings in any Court of civil jurisdiction within the meaning of this section, therefore the procedure provided by sec 24 of the Code does not apply to those proceedings (j). An application under para 17 of Schedule II to file an agreement to refer to arbitration comes within this section hence where an application is made under that para, the applicant may join several causes of action in the application as provided by O 2, r 3 below (k). An inquiry before a Commissioner appointed by a Court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section. Hence the provisions of O 18, r 1, apply to the proceeding (l). In a suit on a mortgage an application under O 34, r 5 (3) for a final decree (m) or under O 34, r 6 for a personal decree (n) is not a proceeding in execution but a proceeding contemplated by this section, and so the provisions of O 9 apply. See also notes to O 9, r 9, "Dismissal for default of application to restore suit."

"The procedure provided in this Code"—This section extends the procedure provided in this Code in regard to suits to proceedings in Civil Courts. It does not confer any substantive right not expressly given elsewhere by the Code, e.g., a right of appeal (o). Hence no appeal lies from an order passed in a proceeding of the kind contemplated by this section unless the order comes within the purview of O 43 (p). Nor does an appeal lie from an order returning a memorandum of appeal to the proper Court (q). Further the section does not confer upon any Court entertaining such proceedings a power not expressly given elsewhere by the Code, e.g., the power to refer questions to the High Court [s 113] (r).

142. [S 94] All orders and notices served on or given to any person under the provisions of this Code shall be in writing

Orders and notices to be in writing

(d) *Hindustan Bank v Mehra* (1900) 1 Lah 187 55 IC 820

(e) *Bai Jumnabai in re* (1910) 36 Bom 20 11 IC 554 *Chandrasekari v Jagan Nath* (1920) 7 Lah LJ 281 90 IC 611 (20) AL 489

(f) *Jyot prasad v Pyralal* (1930) 57 Cal 733 107 IC 63 (30) AL 344

(g) *Duarka Das v Pyare Lal* (1930) 5 All 947 132 IC 35 (30) AL 873

(h) *Kankha v Kanhaiya* (1924) 46 All 32 9 IC 363 (4) AL 376

(i) *Asad Ali v Mahomed* (1916) 43 Cal 986 36 IC 177 But O 40, r 1 is not confined to suits

(j) . . .

(k) . . .

(l) . . .

(m)

(n)

(o)

10 IC 89
(p) *Chandar v Durga* (1914) 46 All 538 79 IC 323 (24) AL 68 *Hara v Murari* (1920) 36 Cal LJ 184 69 IC 1003 (20) AL 57 *Habbar v Sa Annassa* (1923) 48 Cal LJ 308 7 IC 60 (24) AL 37 *Chandrasekari v Jagan Nath* (1920) 7 Lah LJ 281 90 IC 611 (20) AL 489

(q) *Gauzdar v Soroj Khar* (1918) 32 CWN 633

(r) *Danodra v Uttappa* (1913) 36 Mad 16 10 IC 819

Hence the provisions of O 9, r 13 apply to the case (d). An application under sec 12 of the Guardians and Wards Act, 1890 is a proceeding in a Court of civil jurisdiction. Hence a receiver may be appointed in such a proceeding under O 40, r 1 (e) and the receiver so appointed will have all the powers of a receiver under the Code (f). An application under O 9, r 13 is a proceeding referred to in this section and as sec 21 as to jurisdiction applies to such an application (g). But an application for a succession certificate under the Succession Certificate Act, 1889, is not such a proceeding. Hence a receiver cannot be appointed under O 40 in such a proceeding (h). An application for the appointment of a Common Manager under sec 93 of the Bengal Tenancy Act 8 of 1885 is a proceeding of the kind contemplated by this section, a receiver therefore may be appointed under O 40, r 1, pending the application (i). Disciplinary proceedings taken under sec 14 of the Legal Practitioners Act 18 of 1879 are not proceedings in any Court of civil jurisdiction within the meaning of this section, therefore the procedure provided by sec 24 of the Code does not apply to those proceedings (j). An application under para 17 of Schedule II to file an agreement to refer to arbitration comes within this section, hence where an application is made under that para, the applicant may join several causes of action in the application as provided by O 2, r 7, below (k). An inquiry before a Commissioner appointed by a Court to ascertain the amount of mesne profits payable by one party to another is a proceeding within the meaning of this section. Hence the provisions of O 18, r 1, apply to the proceeding (l). In a suit on a mortgage an application under O 34, r 5 (3) for a final decree (m), or under O 34, r 6 for a personal decree (n) is not a proceeding in execution, but a proceeding contemplated by this section, and so the provisions of O 9 apply. See also notes to O 9, r 9, "Dismissal for default of application to restore suit."

"The procedure provided in this Code"—This section extends the procedure provided in this Code in regard to suits to proceedings in Civil Courts. It does not confer any substantive right not expressly given elsewhere by the Code, e.g., a right of appeal (o). Hence no appeal lies from an order passed in a proceeding of the kind contemplated by this section unless the order comes within the purview of O 43 (p). Nor does an appeal lie from an order returning a memorandum of appeal to the proper Court (q). Further the section does not confer upon any Court entertaining such proceedings a power not expressly given elsewhere by the Code, e.g., the power to refer questions to the High Court [s 113] (r).

142. [S. 94] All orders and notices served on or given to any person under the provisions of this Code shall be in writing

Orders and notices to be in writing

- | | |
|---|--|
| (d) <i>Hindustan Bank v Mehraj</i> (1920) 1 Lah 187 55 IC 820 | (m) " |
| (e) <i>Bai Jannabai in re</i> (1912) 36 Bom 20 11 IC 554 <i>Chandrawati v Jagan Nath</i> (1925) 7 Lah LJ 281 90 IC 611, (2o) AL 483 | (n) " |
| (f) <i>Jyotiprasad v Pyarimal</i> (1930) 57 Cal 733 | (o) " |
| (g) " | (p) <i>CI</i> 10 IC 879 |
| (h) " | |
| (i) " | |
| (j) " | |
| (k) " | (q) <i>Guzdhy v Soroj Kumar</i> (19—8) 32 CWN 603 |
| (l) " | (r) <i>Damadara v Kittappa</i> (1913) 36 Mad 16, 10 IC 819 |

4

143. [S 95] Postage, where chargeable on a notice summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made

Provided that the Local Government may remit such postage, or fee, or both, or may prescribe a scale of court fees to be levied in lieu thereof

144. [S 583] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub section (1)

The old section—S 583 of the Code of 1882 ran as follows—

When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same he shall apply to the Court which passed the decree against which the appeal was preferred, and such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits

The new section—Sub sec (1) of the present section is sec 583 so recast as to give legislative recognition to the practice founded on that section

Sub sec (2) is new See notes below, Sub section (2) bar of suit and Where a decree is varied or reversed

Restitution—The word restitution in this section means restoring to a party on the variation or reversal of a decree what has been lost to him in execution of the decree or directly in consequence of that decree The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree (s) The restitution moreover must be properly consequential on the variation or reversal of the decree (t) The granting of restitution however is not discretionary The principle of the doctrine of restitution is that on the reversal of a decree in appeal the law imposes an obligation on the party to the suit who received the benefit

(s) *Ba'kuntha Nath v Prasanna Rao* (1904) 51 Cal 374 81 IC 571 (21) AC 89
Vadhar Mot v Ratan Lal (1900) 8 Lab

356 104 IC 817 (27) ALJ 805
 (t) *Arjun v Ji samrat Farbat* (1900) 44 All 697 69 IC 173 (20) ALJ 465

of the erroneous decree to make restitution to the other party for what he has lost (u). The decree of reversal, necessarily carries with it the right to restitution of all that has been under the erroneous decree, and the Court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from it (v).

The doctrine of restitution contemplates the case where property has been received by a decree holder in execution of a decree and the decree or part thereof is subsequently varied or reversed on appeal by the judgment debtor. In such a case, the procedure to be adopted by the judgment debtor is to apply under this section to the Court of first instance for restitution of the property and for consequential relief. On such application being made the Court shall cause restitution to be made to the judgment debtor (the successful appellant). The restitution to be made must be such as will so far as may be place the parties in the position which they would have occupied but for the decree appealed from or such part thereof as has been varied or reversed (w). The ordinary case for restitution is where something has been taken from a party in execution of a decree which has been varied or reversed but the section is not confined within these precise limits for a person against whom a decree for possession has been made may very well give up possession without insisting that any process of execution should be taken against him. When a person gives up possession in consequence of a decree, which is afterwards varied or reversed he is entitled to restitution under this section (x). The principle applies with equal force whether restitution has or has not been directed in the appellate decree (y). For the purpose of making such restitution as aforesaid the Court may make any orders including orders for the refund of costs (z) and for the payment of interest (a), damages (b) compensation and mesne profits (c), which are property consequential on such variation or reversal. If the applicant has paid money into Court by way of security to obtain a stay of execution he will be entitled to interest as for the use of the money of which he has been deprived although the opposite party has not withdrawn the money (d). In directing restitution it is to be noted that the parties must be placed in the same position as they were previously in irrespective of any other rights accruing to any of them during the litigation (e). Where an order is made against a party for restitution but restitution is not made the order may be enforced by sale of his property [s. 36] (f).

(u) *Dorasami v. Annasami* (1900) 23 Mal 306 311

(v) *Hurro Chunder v. Shoorodhoney* (1863) 9 W R 402

(w) (1863) 9 W R 402 *supra*

(x) *Gopal Prasad v. Swarna Prasad* (1931) 34 C W N 97 123 IC 403 (31) A C 14
Narain Singh v. Barchan Singh (1927) 8 Lah. 41 99 IC 90 (27) A L 37
Surya Datt v. Janna Datt (1920) 42 All 565 57 IC 145

(y) *Balvrat v. Sadradin* (1889) 13 Bom 485
Raja Singh v. Koodal (1894) 21 Cal 939
Bhagwan v. Ummid ul Hasnain (1896) 18 All 26 253 Mysnath D nesh
Irohad v. Shanker (1904) 9 C W N 341
Parbhu Dyal v. Ali Ahmad (1910) 32 All 79 4 IC 376

(z) *Watkins v. Mahomed* (1897) 1 C W N 456

(a) *Roller v. Comptoir d'Escompte de Paris* (1871) L R 3 IC 465
Forester v. Secretary of State (1878) 3 Cal 161 173 4 LA 137
Fahul Chand v. Shanker (1896) 20 All 439
Bhagwan v. Ummid ul Hasnain (1896) 18 All 262
Ayyavaryar v. Shastram (1896) 9 Mad 506
Collector of Ahmedabad v. Laxmi (1911) 35 Bom 250 39 IC 818 (Lani Aequilini v. A. J.)
Hirabhai v. Maneklal (1925) 27 Bom L R 445 87 IC 713, (25) A L 313 [Money paid into Court] *Indra Chait*

(b)

(c)

(f)

(e)

C W N 640

(f) *Parbhu Dyal v. Kalwan Das* (1916) 43 LA 43 33 AU 163 33 IC 505
Mahadeo v. Rama (1916) 40 Bom 194, 31 IC 305

Illustrations

(1) *A* obtains a decree against *B* for possession of immovable property [or a decree for the recovery of movable property, say timber, or a decree for a sum of money] and in execution of the decree obtains possession of the property [or obtains the timber or recovers the money] The decree is subsequently reversed in appeal *B* is entitled on an application under this section to restitution of the property [or of the timber or of the money] though there may be no direction for restitution in the decree of the appellate Court *Munshi Dinesh Prasad v Shanker* (1904) 9 C W N 381, *Bahantao v Sadrudin* (1889) 13 Bom 45, *Bhagwan v Ummat ul Hasnain* (1896) 18 All 262

(2) *A* obtains a decree against *B* for Rs 5,000, and recovers the amount in execution The decree is subsequently reversed in appeal *B* is entitled on an application under this section to a refund of the money together with interest up to the date of repayment, though the appellate decree may be silent as to interest see the cases cited in foot note (a) above In *Rodger v Comptoir d'Escompte de Paris* (9), which is the leading case on the subject, Lord Cairns, in delivering the judgment of the Privy Council, observed as follows "It is contended on the part of the respondents here [that is, *A* in the present illustration], that the principal sum being restored to the present petitioners [that is, *B* in the present illustration], they have no right to recover from them any interest It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully They will recover that sum after a lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed So far, therefore, as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination, which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, *with interest*, during the time that the money has been withheld' These observations apply equally to mesne profits which form the subject of the next illustration

(3) *A* obtains a decree against *B* for possession of certain immovable property and in execution of the decree obtains possession of the property The decree is subsequently reversed in appeal *B* is entitled to possession of the property together with *mesne profits* during the period of dispossession see the cases cited in foot note (c) on the preceding page If the property has in the meantime been let out by *A* to tenants, *B* is entitled to remove any tenant who refuses to vacate *Rohni Singh v Hodding* (1894) 21 Cal 340

Splitting of claim for restitution—It has been held by the High Courts of Patna and Madras that the provisions of O 2, r 2, do not apply to a proceeding under this section *A* obtains a decree against *B* for possession of certain immovable property, and recovers possession of the property pursuant to the decree *B* appeals from the decree, and the decree is reversed in appeal *B* then applies for restitution of the property, and the property is restored to him Subsequently *B* applies for *mesne profits* for the period during which *A* was in possession of the property Is *B* debarred from claiming mesne profits on the ground that he ought to have included the claim for mesne profits in the application for restitution of the property? No (h) Similarly a judgment debtor who applies for and obtains restitution of a sum of money on reversal by the

(1) (1871) L R 3 P C 465

(h) *Krupanidhi v Mahanta* (1918) 3 L R L 367, 47 L 47

appellate Court of the decree pursuant to which he had paid the sum to the decree holder is not precluded from making a fresh application for recovery of interest for the period during which the decree holder had the use of the money (i)

Inherent power to grant restitution—The power of a Court to grant restitution is not confined to the cases covered by the provisions of this section. It extends also to cases which do not come strictly within this section. The reason is that a Court has an inherent power under sec. 151 irrespective of this section to order restitution (j)

In *Jai Berham v. Kedar Nath Marwari* (1) their Lordships of the Privy Council said: "It is the duty of the Court under sec. 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns L.C. in *Rodger v. Comptoir d'Escompte de Paris* (2) 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, *the act of the Court*, is used it does not mean merely the act of the primary Court, or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case'. In *Jai Berham's* case a sale in execution of a decree was set aside on the ground that the sale certificate comprised property different from that which was attached. The property was applied for by the judgment debtor and the decree holder was entitled to the property. This was applied for by the judgment debtor and the decree holder was entitled to the property." (1) *Jai Berham v. Kedar Nath Marwari* (1914) 40 I.L.R. 101 (P.C.). (2) (1871) L.R. 3 P.C. 465, 475.

the application under the inherent power conferred upon it by sec. 151. Accordingly when a sale was set aside on an application under O. 21, r. 90 the judgment debtor was awarded mesne profits under sec. 151 from the decree holder purchaser for the period he

B and C (m1)

In the case of *B and C v. M* (1) the Court held that the decree holder was entitled to the property.

repay the money with interest (n). In an appeal from a preliminary decree the High Court allowed the parties to withdraw pending the appeal monies deposited to the credit of the suit up to the limit of their shares as fixed by the District Court. As a result of the appeal those shares were reduced and when the case went back to the District

- | | |
|---|--|
| (i) <i>Somasundaram v. Chokkalingam</i> (1917) 40 Mad 780 38 I.C. 808 | (k) (1922) 49 I.A. 351 355 2 Pat 10 16 69 I.C. 278 (32) A.I.C. 269 |
| (j) <i>M</i> | (l) (1871) L.R. 3 P.C. 465, 475 |
| | (m) <i>Ram Rattan v. Banarsi Lal</i> (1930) 9 Pat 685 122 I.C. 589 (30) A.P. 280 <i>Jagd p v. Holloway</i> (1917) 2 Pat L.J. 206 39 I.C. 653 <i>Siddama v. Chennayya</i> (1918) 41 Mad 467 47 I.C. 608 |
| | (m1) <i>Amba Lal v. Ramgopal</i> (1933) 55 All 201 144 I.C. 49 (33) A.A. 218 |
| | (n) <i>Alagappa v. Muthukumara</i> (1918) 41 Mad 316 42 I.C. 636, <i>Indra Chand v. Forbes</i> (1917) 2 Pat L.J. 143, 39 I.C. 22. |

Court for a final decree that Court was entitled under its inherent jurisdiction to order a refund of the amounts overdrawn (o) See notes below, "Where a decree is varied or reversed"

The granting of restitution under the inherent jurisdiction is discretionary. In a case where a decree was declared to be null and void in a separate suit so that a party had a claim to restitution as to costs restitution was refused as the party was a minor and had concealed the fact and conducted the litigation in his own name (p)

"Place the parties in the position" which they would have occupied but for such decree as has been reversed—These words have to be applied with attention to the substance and reality of the matter. The Court of first instance awarded the plaintiff Rs 49 as costs and in execution of this decree for costs two jotes were sold and purchased by the plaintiff. In appeal the decree was varied and the costs reduced to Rs 36. The defendant then claimed to recover the two jotes by way of restitution. Rankin, C J, held that he could not recover the jotes unless he shewed that the sale of the jotes was in substance and in truth a consequence of the error in the original decree. As the defendant gave no evidence that if the original decree had been for Rs 36 he would have been able to pay it and save the jotes, he was only entitled to recover the difference between the two amounts with interest (q). A party is not entitled under this section to restitution of property which was not in his possession before suit, but was in possession of the opposite party, and which therefore could not have been taken out of his possession under any estate of X. B sets up the possession of B

who locks them up in a room under seal. The High Court directs probate of the will to be granted to B. Thereafter on B's application the movables are handed over to her. Subsequently the order of the High Court is reversed by His Majesty in Council and letters of administration are directed to be granted to A. A then applies under this section for restitution of the properties to him. A is not entitled to restitution. The case is not one of restitution at all, for A was never in possession of the properties (r). Again, the plaintiff sued for redemption of a mortgage and deposited the mortgage money in Court and the Court allowed redemption but directed that the plaintiff should get possession of only three out of the four properties mortgaged. The lower appellate Court varied the decree and directed that plaintiff should have possession of the fourth property also. The plaintiff then applied for mesne profits of the fourth property from the date of deposit of the mortgage money until he got possession. The High Court held that the claim was not maintainable under sec. 144 as the plaintiff had not been in possession of the fourth property (s). But the fact that the property had been taken from a Receiver appointed by the Court does not affect the right of the true owner to restitution for the Receiver was in possession on behalf of the true owner (t).

Who may apply for restitution—"Any party entitled to any benefit by way of restitution or otherwise" may apply under this section.

(1) *Where decree proceeds on a common ground*—The expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour

(o) *Arunachalam v Pratapsingha* (1930) 60 Mad L J 79, 129 I C 63 (30) A M 928

(p) *Tarachand v Champa* (1904) 46 All 767, 84 I C 75 (23) A A 718

(q)

(s)

(t)

(r)

of such person (u). This would especially be the case where the decree appealed from proceeds on a ground common to all the plaintiffs or to all the defendants (v) see O 41, r. 4. A obtains a decree against B and C. The decree proceeds on a ground common to both B and C. B alone appeals from the decree. The decree is reversed in appeal. C is entitled to claim restitution under this section, though he was not a party to the appeal.]

(2) *Transfer of a decree*—Further, the expression "any party" includes the transferee of a decree passed in appeal. *A* obtains a decree against *B* for Rs. 5,000. *B* appeals from the decree. Pending the appeal, *A* realizes from *B* Rs. 5,000 in execution. The decree is subsequently reversed in appeal. *B* assigns the decree passed in appeal (in his favour) to *C*. *C* is entitled as transferee of *B*'s decree, to the benefit of that decree and he may apply under this section for an order directing *A* to pay to him what *B* would be entitled to, namely, Rs. 5,000 and interest (iv).

(3) *Auction purchaser* — A sale in execution of a decree may be set aside in a proper case even against a purchaser who is a stranger to the decree either in execution proceedings or in a separate suit, e.g., where the sale certificate comprises property different from that which is attached (x), or when a decree is obtained on a mortgage executed by a Hindu father on behalf of himself and his minor son, and the decree and the sale of the mortgaged property in execution of the decree are set aside in a suit by the minor against the decree holder and the auction purchaser on the ground that the mortgage does not bind the minor (y). But the auction purchaser is entitled in such cases, before restoring possession to the judgment debtor, to be paid the purchase price by the successful judgment debtor less the mesne profits, if the sale is set aside in execution proceedings, under this section (z) and, if the sale is set aside by a decree in a separate suit, under s. 47 or s. 151 (a). It has been held by the High Court of Rangoon that an auction purchaser who is not a party to the original suit or to the appeal or to the execution proceedings is not entitled to apply under this section (b).

Against whom restitution may be claimed —

(1) *Transferee of decree reversed in appeal*—In two Allahabad cases decided under the old section it was held that restitution could not be claimed by application under that section against the transferee of a decree reversed in appeal, though the transferee had obtained the full benefit of the decree by execution, unless he was joined as a party to the appeal (c). The point of the decision may be explained by an illustration. A obtains a decree against B, and assigns the decree to C. C applies for execution of the decree against B, and obtains payment of the decretal amount. B appeals from the decree, and the decree is reversed in appeal. It was held under the old section that B could not claim restitution against C by summary process under that section unless C was joined as a party to the appeal (d). But this decision has been dissented from and the High Court of Madras holds that a judgment debtor from whom the assignee of a decree has realized the decretal amount in execution is entitled to restitution when the decree is reversed on appeal (e). On the other hand in a Calcutta case A obtained an ex parte

- | | |
|--|---|
| (u) <i>Gunja Prasad v. Brojo Nath Das</i> (1908) 12 C W N 642 | (a) (1923) 45 All 369 74 I C 873, (23) A A 394 <i>supra</i> |
| (t) " " " | (b) <i>Ma Tek v. Maung Mo</i> (1925) 3 Rang 251 89 I C 603 (25) A R 216 |
| (te) " " " | (c) " " " |
| (x) <i>Jas. Berham v. Kedar Nath Marnoori</i> (1929) 49 I A 351, 21st 10 69 I C 278 (22) A 1 C 269 | (d) " " " |
| (y) <i>Bhadeshwar Prasad v. Daddal Singh</i> (1973) 45 All 369, 74 I C 873 (23) A A 394 [F B] | (e) " " " |
| (v) (1922) 49 I A 351 2 Pat 10 69 I C 278 (22) A 1 C 269 <i>supra</i> | |

decree for possession against *B* and leased the land to *C*. The *ex parte* decree was set aside and *A*'s suit dismissed. *B* then applied for restoration of possession. The Court held that he was entitled to an order as against *A* but not as against *A*'s lessee *C*. This was said to be on the principle that restitution can only be had in respect of matters done under the decree or as an immediate consequence of it and that the summary procedure under s 144 is wholly unsuited for adjudicating the complicated questions that may arise if rights which strangers may have acquired in the meantime are to be investigated (*f*)

(1a) *Attaching decree holder*—The Madras High Court has held that restitution can be claimed against a decree holder who has attached and realised in execution a decree which has been reversed on appeal (*g*). This is on the ground that the attaching decree holder is for the purposes of execution a representative of the original decree holder.

(2) *Auction purchaser*—Except in cases of the kind mentioned in case (3) under the heading "Who may apply for restitution," restitution cannot be obtained under this section against a *bona fide* purchaser for value at an auction sale held by a Court which had jurisdiction to order the sale (*h*). It is otherwise, however, where the decree holder himself is the purchaser (*i*). See note to s 65 above, "Effect of reversal of decree upon sale."

(3) *Surety*—This section applies only to the parties or their representatives and does not apply to sureties. Hence restitution cannot be claimed under this Section against a surety (*j*).

Sub section (2) Bar of suit—This sub section is new. It provides in express terms that where restitution could be obtained by application under this section, no separate suit shall be brought in respect of it. The decisions under the Code of 1852 were not uniform, it having been held in some cases that a separate suit for restitution was barred, and in others that it was not (*k*).

Under s 583 of the Code of 1852, proceedings for restitution had to be commenced by an application for execution of the appellate decree. This was required by the terms of that section. The section further directed that the appellate decree should be executed "according to the rules prescribed for the execution of decree in suits." That gave rise to the question whether the rule contained in s 244 (now s 47) which provided that all questions relating to execution should be determined by the Court executing the decree and not by a separate suit was one of the rules referred to in s 583. It was held in some cases that it was and that a separate suit for restitutions was therefore barred. In other cases it was held that it was not, and that a separate suit could be maintained for restitution. The present section simplifies matters by omitting all reference to execution. The position of the section has also been changed, it being transferred from the chapter headed "Of appeals from original decrees" to Part IX headed "Miscellaneous." A separate suit is now barred by the express terms of the section, and the application for restitution is no longer one for execution of the appellate decree. The Court is empowered to make such order as it deems proper for restitution, and the order, if not obeyed, may be enforced as a decree (*l*) [see s 36].

- | | |
|--|--|
| (f) <i>Rajabai v Faku</i> (1931) 68 Cal 1070 134 1006 (3) A C 23 | <i>Abdin v Muhammed Asgar</i> (1888) 13 I A 12 10 All 166 |
| (g) " " " " " " | (j) <i>Raghubar Singh v Jai Indra Lakshar Singh</i> (1919) 46 I A 228, 236 42 All 254 166 65 I C 650 |
| (h) " " " " " " | (k) <i>See Shroddhal v Bhawanji</i> (1907) 29 All 318 <i>Motiram v Lamkumar</i> (1904) 33 Cal 265 |
| (i) <i>Sh. Ram v. J. Ram</i> (1910) 1 C 130, <i>Sagore v. Mafatdin</i> (1910) 24 C W N 50 51 I C 859, <i>Omral Baccor v Chinnappa</i> (1926) 48 Mad | (l) <i>Parbhu Dyal v Kalyan Das</i> (1916) 43 I A 45, 38 All 163 33 I C 603, <i>Mahadeo v Pama</i> (1916) 40 Bom 194 31 I C 305 |
| (j) <i>Das</i> 767, 91 I C 16 (20) A M 78, <i>Zainul</i> | |

44

jurisdiction (x) But following the Madras view some cases have held that when an ex parte decree is set aside restitution can be had under s 144 (y) In some cases where a decree or order has been superseded s 47 has been referred to (z)

When the decree is neither varied nor reversed but a sale only is set aside on an application under O 21, r 90 the section does not apply and restitution is ordered under the inherent jurisdiction (a) See note above Inherent power to grant restitution

The question whether restitution is ordered under this section or under the inherent jurisdiction is a matter of no practical importance except when a question under sub section (2) arises as to bar of suit (b)

To claim restitution it is not necessary that the original decree should have been entirely reversed The section also provides for the case where the decree is varied Thus if A obtains a decree against B for Rs 1 000 and in execution B's property is sold and purchased by A himself and the decree is varied in appeal by reducing the amount to Rs 100 the Court has power under this section to order A to restore the property to B on payment of Rs 100 by B (c)

The Court of first instance—In a suit for ejectment under the Agra Tenancy Act 2 of 1910 [local] the Court of first instance is the Revenue Court which heard the suit and not the Court of Appeal (d) If the Court of first instance has been abolished or has ceased to have jurisdiction the phrase must be interpreted by applying the principle of s. 37 above (e)

Pecuniary jurisdiction in awarding damages under this section—The Court of first instance has jurisdiction under this section to award damages even if they exceed the pecuniary limits of its jurisdiction (f)

Whether a proceeding under this section is a proceeding in execution—An

by the High Courts of Bombay (i) and Lucknow (j) that it is while it has been held by the High Courts of Allahabad (k) Calcutta (l) and Patna (m) that it is not A single Judge of the Pangoon High Court held in 1930 that an application for restitution is not a proceeding in execution (n) But three years later a Bench of the same High Court

- | | |
|--|---|
| (x) <i>Ch nieman v Chuni Sahu</i> (1916) 1 Pat L J 43 34 I C 47 | 161 95 I C 587 (26) A M 813 |
| (y) <i>Sh bai v Yesoo</i> (1919) 43 Bom 233 239 | (f) <i>Balrantrav v Sedrud n</i> (1889) 13 Bom 485 |
| | (g) <i>Prag Nara n v Kamakhia</i> (1909) 31 All 531 36 I A 197 3 I C 798 |
| | (h) <i>Somasundaram v Chokkol ngam</i> (1916) 40 Mad 780 38 I C 806 |
| (z) <i>S</i> | (i) <i>Kurpodigouda v Ningangouda</i> (1917) 41 Bom 675 41 I C 258 <i>Ham dall v Ahmedall</i> (1911) 45 Bom 1137 67 I C 233 (21) A B 67 |
| | (j) <i>Handika v Bital</i> (1930) 6 Luck. 418 130 I C 78 (31) A O 51 |
| (a) <i>Ram Rotan v Banarsi Tal</i> (1930) 2 Pat 635 127 I C 589 (30) A P 280 <i>Jagd p v Holloway</i> (1917) 2 Pat L J 206 50 I C 653 <i>Subban na v Chennava</i> (1918) 41 Mad 467 47 I C 678 | (k) <i>Hira am v Nand Ram</i> (1900) 44 All 407 66 I C 144 (10) A A 223 <i>Da jmath v Balmakund</i> (1925) 47 All 98 87 I C 301 (25) A A 137 |
| (b) <i>See Ra jabali v Fak t</i> (1931) 58 Cal 10 0 194 I C 906 (32) A C 29 | (l) <i>Saroj Bhawan v Debendra Nath</i> (1930) 50 Cal 37 137 I C 300 (37) A C 303 |
| (c) <i>Mauing Ban Gyl v Ma Ngree Pon</i> (1900) 7 Rang 107 117 I C 350 (10) A B 157 | (m) <i>Balmakund v Basanta Kumari</i> (1904) 3 Pat 371 78 I C 700 (25) A P 117 <i>I approving Krupanidhu v Mohani</i> (1918) 31 Pat L J 367 57 I C 47 <i>Jamb Jhaur v Banky</i> (19 8) 7 Pat 94 (1) A P 595 |
| (d) <i>Kashi Prasad v Dalbhadler</i> (1902) 44 All 233 89 I C 778 (22) A A 71 | (n) <i>Ma ng Hia v Va Hn n</i> (1930) 8 Rang 271 126 I C 211 (30) A B 41 |
| (e) <i>Panchapakea v V a era</i> (1926) 51 Mad L J | |

without referring to this decision held that it was (o) This distinction is important in the following respects —

- (1) If an application under this section is one by way of execution, it would be governed by art 182 of Sch I of the Limitation Act, and, further, s 6 of that Act relating to the exclusion of the period of minority would apply to the application (p) If it is not, it would be governed by the residuary art 181 (q) If art 181 applies, the time is to be counted from the date of the decree which for the first time gave the applicant right of restitution, i.e., the decree of the lower appellate Court varying or reversing the decree of the Court of first instance, and not the date of the decree in second appeal dismissing the appeal from the decree of the lower appellate Court (r)

- (2) " " " "

is dismissed for default, it may be restored under O 9, r 9 (s)

- (3) The difference between the two views also affects the Court fee on a memorandum of appeal from an order passed under this section (t) See note below, "Court fee" See also note above, "Splitting of claim for restitution"

The Allahabad High Court has held that an application for restitution as a result of a decree of Privy Council is one to enforce an order in Council and that art 183 of sch I of the Limitation Act, 1908, applies (u)

Limitation.—See note above, "Whether a proceeding under this section is a proceeding in execution"

Applicability of s 141.—See note above, "Whether a proceeding under this section is a proceeding in execution"

Appeal—The determination of a question under this section is a decree and appealable as such (v) and this is so even if the Court exercises the power of granting restitution in its inherent jurisdiction (w), see s 2, cl (2), definition of 'decree' But the question must be one directly covered by the section, and not one incidentally connected with or collateral to the decision of any such question Thus a decision that an application under this section is time barred is a decision on a question collateral to the question of restitution and hence it is not a decree and not appealable as such (x)

Court fee—It has been held by the Allahabad and Rangoon High Courts, that an appeal from an order made on an application under this section requires to be stamped *ad valorem* under the Court Fees Act, 1870, sch I, art 1, as an appeal from a decree This

| | | | |
|-----|---------|---------|---------|
| (o) | " " " " | " " " " | " " " " |
| (p) | " " " " | " " " " | " " " " |
| (q) | " " " " | " " " " | " " " " |
| (r) | " " " " | " " " " | " " " " |
| (s) | " " " " | " " " " | " " " " |
| (t) | " " " " | " " " " | " " " " |
| (u) | " " " " | " " " " | " " " " |
| (v) | " " " " | " " " " | " " " " |
| (w) | " " " " | " " " " | " " " " |
| (x) | " " " " | " " " " | " " " " |

- 101 C 801 (20) A C 85 (1914) Punj
Farshad v Ram Chand (1914) Punj
 Rec no 10 p 27 20 I C 203
 (w) *Sushikanda v Jalil* (1931) 55 C W N 105
 134 I C 1185 (31) A C 779, *Gnanoda*
v Chandu (1927) 31 C W N 230,
 100 I C 735 (29) A C 235
 (x) *Ram Chand v Sham Farshad* (1913) Punj
 Rec no 110 p 409 22 I C 851

jurisdiction (x) But following the Madras view some cases have held that when an ex parte decree is set aside restitution can be had under s 144 (y) In some cases where a decree or order has been superseded s 47 has been referred to (z)

When the decree is neither varied nor reversed but a sale only is set aside on an application under O 21, r 90 the section does not apply and restitution is ordered under the inherent jurisdiction (a) See note above 'Inherent power to grant restitution'

The question whether restitution is ordered under this section or under the inherent jurisdiction is a matter of no practical importance except when a question under sub section (2) arises as to bar of suit (b)

To claim restitution it is not necessary that the original decree should have been entirely reversed The section also provides for the case where the decree is varied Thus if A obtains a decree against B for Rs 1 000 and in execution B's property is sold and purchased by A himself and the decree is varied in appeal by reducing the amount to Rs 100 the Court has power under this section to order A to restore the property to B on payment of Rs 100 by B (c)

The Court of first instance —In a suit for ejectment under the Agra Tenancy Act 2 of 1910 [local] the Court of first instance is the Pevvenue Court which heard the suit and not the Court of Appeal (d) If the Court of first instance has been abolished or has ceased to have jurisdiction the phrase must be interpreted by applying the principle of s 37 above (e)

Pecuniary jurisdiction in awarding damages under this section —The Court of first instance has jurisdiction under this section to award damages even if they exceed the pecuniary limits of its jurisdiction (f)

Whether a proceeding under this section is a proceeding in execution. —An application for restitution under s 583 of the Code of 1882 was held to be one by way of execution (g) There is a conflict of opinion whether a proceeding under this section is a proceeding in execution It has been held by the High Court of Madras (h) and by the High Courts of Bombay (i) and Lucknow (j) that it is while it has been held

(e) *Ch nltaman v Chums Salu* (1916) 1 Pat L J 43 34 I C 747

(g) S

(z) *Swamirao v Valenti ne* (1920) 44 Bom

161 95 I C 587 (26) A M 813

(f) *Dalantirav v Sadrud n* (1889) 13 Bom 485

(g) *Prag Nara n v Kamakh a* (1909) 31 All 501 36 I A 197 3 I C 98

(h) *Somari ndaram v Cholkal ngam* (1916) 40 Mad 780 38 I C 806

(i) *Kurgod gouda v Lingangouda* (191) 41 Bom 65 41 I C 38 Bom del I C

(j)

(a) *Ram Eatan v Banarasi Jal* (1930) 9 Pat 635 100 I C 589 (30) A I 230 *Jagd p v Holloway* (1917) 2 Pat L J 208 39 I C 653 *S dbamma v Chennavay* (1918) 41 Mad 467 47 I C 678

(f) *See Rajabali v Faku* (1931) 58 Cal 1070 134 I C 908 (32) A C 20

(g) *Mauing Ban Gyl v Ma Agwe Don* (1909) 7 Rang 107 117 I C 257 (20) A R 157

(h) *Koshi Prasad v Dalbhodder* (1900) 44 All 233 288 6 I C 708 (22) A V 71

(i) *Panchapaltes v Vasa* (1926) 51 Mad L J

(k)

(l) *Saraj Ekusan v Deb ndra Nath* (1904) Cal 31 137 I C 300 (37) A C 208

(m) *Balmayya v Bagantha Ku nari* (1904) 3 Pat 371 78 I C 200 (25) A I 1 (F M) approving *Prupasindh v Mohanlal* (1918) 51 at L J 267 57 I C 47 *Pambu Jha car v Bankry* (19 8) 7 Pat 794 (1905) A P 698

(n) *Mauing Hla v Ma Hse* (1930) 8 Rang 21 106 I C 211 (30) A R 41

proceeds on the view taken by that Court that an application under this rule is not an application for execution (y)

Enforcement of liability
of surety

145. [S 253] Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47

Provided that such notice as the Court in each case thinks sufficient has been given to the surety

The old section —The corresponding s 253 of the Code of 1882 ran as follows —

Whenever a person has before the passing of a decree in an original suit become liable as surety for the performance of the same or of any part thereof the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety

The new section —The present section differs from the old section in the following respects —

- 1 The old section applied only to surety bonds for the performance of a decree it did not apply to surety bonds for the fulfilment of a condition imposed upon a person under an order of the Court [see cl (c) of the present section] It was also doubtful whether the old section applied to suretyships for the restitution of property taken in execution of a decree [see cl (b) of the present section] The present section applies not only to surety bonds for the performances of a decree but also to surety bonds referred to above as also to bonds for the payment of money under an order of the Court See notes below
- 2 The present section applies to suretyships for the performance of any decree whether original or appellate [see cl (a)] As to the old section it was doubtful whether it applied to original decrees only or applied also to appellate decrees
- 3 The word personally has been newly added in the present section

(y) *Bainath v Balmakund* (1905) 47 All 98
 21 C 3-1, (25) A A 137 *Jaunp*
Uta v Ma H (1130) 8 Rang 271
 126 I C 211 (30) A. R 261 As t,

cases arising in Bihar and Orissa see *Soni*
Prasad v Jagdeo (1905) 4 Pat 294 90
 I C 474 (25) A 1 500

Object of the section—This section provides that where a person has become liable as surety for the performance of a decree [cl (a)] or for any of the purposes specified in cl (b) or cl (c), the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety, to the extent to which he has rendered himself *personally* liable, in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. It is no longer necessary to institute a *regular suit* to enforce the security as it was in some cases under the old section. The present section provides a summary remedy in *execution* and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable. The decree can be executed against the surety as though he were a party to the suit and the principal debtor (2).

Security for the performance of "any" decree —

1 *Ex parte decree* — A obtains an *ex parte* decree against B. The decree is set aside under O 9, r 13 [Code of 1882, s 109] on C standing surety for the performance of any decree that may be passed against B on a rehearing. The suit is reheard and a decree is passed against B. A may enforce the security by *executing* the decree against C (a). A separate *suit* is not necessary.

2 *Appellate decree* — The summary procedure contemplated by this section applies to suretyships for the performance of *any* decree, whether it be an original or an appellate decree. Under the old section there was a conflict of decisions as to whether the summary remedy provided by that section applied at all to suretyships for the performance of *appellate* decrees it being held by the High Court of Calcutta that it did not (b) and by the other High Courts that it did (c). The present section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of *appellate* decrees also. The rules that provide for security for the performance of appellate decrees are rules 5 and 6 of Order 41, corresponding to ss 545 and 546 of the Code of 1882. An illustration will make the point clear. A obtains a decree against B and applies for execution. B appeals from the decree and applies for stay of execution under O 41, r 5. Execution is stayed on C standing surety for the due performance of any decree that may be passed against B *in appeal*. A decree is eventually passed by the appellate Court against B. A may enforce the security against C by executing the appellate decree against him as if C was a party to the decree. According to the Calcutta decisions under the old section A's only remedy was by way of suit against C.

Security for restitution of property taken in execution of a decree — A obtains a decree against B for possession of certain lands. B appeals from the decree. Pending the appeal A applies for execution of the decree. The Court allows execution on C standing surety for the restitution of the lands to B in the event of the decree being reversed in *appeal* or for payment to B of the value of the property [O 41 r 6 Code of 1882, s 546]. The decree is eventually reversed in appeal. B may enforce the security by *executing* the *appellate* decree against C. According to the Calcutta decisions under the old section B could only enforce the security by a separate suit (d).

(2) *Katyanand v Pruthichand* (1932) 60 I A 45 12 Pat 195 141 I C 60 (33) A I C 52

(a) *Sonatan v D no Nath* (1909) 26 Cal 222

(b) *Tolhan v Udwant* (1895) 22 Cal 25. *Subjoo Das v Balmakund* (1896) 23 Cal 212 (s 546)

(c) *Venkapa v Basingnaga* (1888) 1st Bom 411. *Jamsetji v Bawabhai* (1901) 25 B m 409. *Janki v Sarup* (1895) 17 All 93. *Thirumalai v Ramayyar* (1890) 13 Mad 1. But see *Lakshman v Gopal* (1906) 30 Bom 506

(d) *Subjoo v Balmakund* (1896) 23 Cal 212

proceeds on the view taken by that Court that an application under this rule is not an application for execution (y)

Enforcement of liability of surety

145. [S. 253] Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable in the manner herein provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

The old section —The corresponding s 253 of the Code of 1882 ran as follows —
 'Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant

' Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety

The new section —The present section differs from the old section in the following respects —

- 1 The old section applied only to surety bonds for the performance of a decree it did not apply to surety bonds for the fulfilment of a condition imposed upon a person under an order of the Court [see cl (c) of the present section] It was also doubtful whether the old section applied to suretyships for the restitution of property taken in execution of a decree [see cl (1) of the present section] The present section applies not only to surety bonds for the performances of a decree, but also to surety bonds referred to above as also to bonds for the payment of money under an order of the Court See notes below
- 2 The present section applies to suretyships for the performance of any decree whether original or appellate [see cl (a)] As to the old section it was doubtful whether it applied to original decrees only or applied also to appellate decrees
- 3 The word "personally" has been newly added in the present section

(y) *Bainath v Balmakund* (1925) 47 All 98
 42 I C 3-1, (25) A A 137 *Maug*
Hia v Ma Hwa (1930) 8 Rang 271
 1-6 I C 211, (30) A R 241 As to

cases arising in Bihar and Orissa see *Sund*
Prasad v Jogdeo (1925) 4 I at 294 92
 I C 474 (25) A I 5

Object of the section—This section provides that where a person has become liable as surety for the performance of a decree (cl (a)) or for any of the purposes specified in cl (b) or cl (c) the party for whose benefit security has been given may enforce the security by *executing* the decree or order against the surety, to the extent to which he has rendered himself *personally* liable, in the same manner as if the surety was a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. It is no longer necessary to institute a *regular suit* to enforce the security as it was in some cases under the old section. The present section provides a summary remedy in *execution*, and dispenses with the necessity of a separate suit to the extent to which the surety has rendered himself *personally* liable. The decree can be executed against the surety as though he were a party to the suit and the principal debtor (z).

Security for the performance of "any" decree —

1 *Ex parte decree* — A obtains an ex parte decree against B. The decree is set aside under O 9, r 13 [Code of 1882, s 108] on C standing surety for the performance of any decree that may be passed against B on a rehearing. The suit is reheard and a decree is passed against B. A may enforce the security by *executing* the decree against C (a). A separate suit is not necessary.

2 *Appellate decree* — The summary procedure contemplated by this section applies to suretyships for the performance of *any* decree, whether it be an original or an appellate decree. Under the old section there was a conflict of decisions as to whether the summary remedy provided by that section applied at all to suretyships for the performance of *appellate* decrees it being held by the High Court of Calcutta that it did not (b) and by the other High Courts that it did (c). The present section makes it clear that the summary procedure contemplated by this section applies to security given for the performance of *appellate* decrees also. The rules that provide for security for the performance of appellate decrees are rules 5 and 6 of Order 41, corresponding to ss 545 and 546 of the Code of 1882. An illustration will make the point clear. A obtains a decree against B and applies for execution. B appeals from the decree and applies for stay of execution under O 41, r 5. Execution is stayed on C standing surety for the due performance of any decree that may be passed against B in appeal. A decree is eventually passed by the appellate Court against B. A may enforce the security against C by *executing* the appellate decree against him as if C was a party to the decree. According to the Calcutta decisions under the old section, A's only remedy was by way of suit against C.

Security for restitution of property taken in execution of a decree — A obtains a decree against B for possession of certain lands. B appeals from the decree. Pending the appeal A applies for execution of the decree. The Court allows execution on C standing surety for the restitution of the lands to B in the event of the decree being reversed in *appeal* or for payment to B of the value of the property [O 41 r 6 Code of 1882 s 546]. The decree is eventually reversed in appeal. B may enforce the security by *executing* the *appellate* decree against C. According to the Calcutta decisions under the old section B could only enforce the security by a separate suit (d).

(z) *Kalyanand v Prithichant* (1837) 60 I A 43 12 Pat 195 141 I C 60 (33) A 1 C 52

(a) *Sonatan v D no Nath* (1899) 26 Cal 222

(b) *Tokhan v Uduant* (1895) 22 Cal 25 *Subjoo Das v Balmakund* (1896) 23 Cal 212 (s 546)

(c) F

(d) S

"To the extent to which he has rendered himself personally liable."—A surety (1) may render himself personally liable, or he (2) may only give a charge upon his property, or he (3) may undertake a personal liability and charge his property as further security.

of the decree and other matters to be complied with."

that case the plaintiff obtained a decree for possession against the defendant. The defendant appealed from the decree. The plaintiff was on his application let into

prior to the sale transferred his equity of redemption in the property to a third person (n). The Madras High Court have held that when the security is realized under the procedure recognized in *Raghubar Singh's* case, the surety is party to the suit for the purposes of appeal (n1). The procedure is an exercise of the inherent jurisdiction of the Court and limitation is under art. 182 either from the date of the bond or the day of default by the surety (n2).

- (D) (1917) 39 All 225, 38 I C. 33, approved by Rankin J., in *Sukumari v Mugneceram* (1927) 54 Cal 1, 13, 95 I C 908 (26) A C 889.
- (m) (1919) 46 I A 228 236 42 All 158 166 85 I C 550 approving *Janki Kuar v Sarup Rai* (1895) 17 All 99. *Beti Mahalashmi v Badan Singh* (1923) 45 All 619, 74 I C 927, (24) A A 105. *Sukumari v Mugneceram* (1927) 54 Cal 1 95 I C 908, (26) A C 889, *Daw v C Dab* (1929)

- 7 Rang 352, 118 I C 632 (29) A R 126. *Kunhi Moulvi v Koman* (1933) 56 Mvd 980 145 I C 1011 (33) A M 631.
- (n) *Amur v Mahadeo* (1917) 39 All. 225, 38 I.C. 33.
- (n1) *Sivasami v Sivalakshmi* (1933) 56 Mvd 303 145 I C 871 (33) A M 780.
- (n2) *Sivamundis v Krishna* (1933) 63 Mvd. L J 337 145 I C 1004, (33) A, M, 722.

In the third case also where the security is given to the Court the property may be sold by an order of the kind made in *Raghubar Singh's* case. At the same time the applicant may relinquish his interest in the charge and proceed to enforce the personal liability in the bond by attachment and sale of the property charged (o).

Where a security bond charging his property is given by the judgment debtor

section may be given by the latter Court (r). For form of notice, see App H, form No 13

Discharge of surety.—The liability of the surety depends upon the terms of the bond and unless expressly limited to the original Court extends to the Court of Appeal (s). If the bond has reference to the ultimate issue of the suit it matters not that the suit has at one time been dismissed for default and then restored (t). A surety who has made himself liable for the performance of a decree cannot resist enforcement of the bond on the ground that a consent decree is passed on a bona fide compromise (u), nor on the ground

a payment which has not been certified under O 21, r 2, of the Code (y). The form which the contract of suretyship takes is immaterial, it may be either in favour of the Court or of the decree holder (z).

Section no bar to a regular suit against surety.—As to the old section it was held that it gave an additional, not an exclusive, remedy against a surety, and that it *did not prevent* the decree holder from bringing a regular suit on the surety bond to enforce the security (a). The present section also does not bar a regular suit (b). It simply enables a party for whose benefit security has been given to sue the surety for whose surety is to be

(o) *Mulla Prasad v Mahadeo* (1916) 38 All 327, 33 I C 982, *Ganga Deo v Joti Lal* (1917) 2 Pat L J 107, 39 I C 618.

(p) ..

(p1) ..

(q) *Tanku v Jethi* (1921) 2 Rang 567, 84 I C 998, (25) A R 135.

(r) *Lalshimshankar v Pishumal* (1905) 29 Bom 23.

(s) ..

(t) ..

(u) ..

(v) ..

(w) ..

(x) ..

(y) ..

(z) ..

(a) ..

(b) *Motilal v Thakore* (1911) 36 Ind 12 I C 549, *Shakir Hasan v Chaudhoo* (1931) 54 All 263, 134 I C 236, (31) A A 567, *Saba Singh v C I R 35 Chellur Firm* (1931) 6 Mad 434, 134 I C 509, (31) A R 200.

if an order is made in execution enforcing a claim against the surety, the surety may appeal from the order as if he was a party to the suit in which the decree or order sought to be executed was passed (c). In this respect the section gives effect to certain rulings under the old section (d). The reference, however, to sec. 47 does not import into this section the provision therein contained which bars a separate suit. A surety under this section is a party to the suit for the limited purpose mentioned in this section (e).

A surety for a deceased defendant is not liable when a decree is passed against a person who has not been adjudged to be the legal representative, and he may bring a suit to negative his liability (f).

Appeal.—An order under this section is appealable as a decree (g). See the penultimate paragraph of the section.

Limitation.—Where an appeal has been preferred from a decree for the performance whereof a person has become liable as a surety, the period of limitation for an application under this section is 3 years from the date of the appellate decree as provided by art. 182, cl. (2), Schedule I of the Limitation Act, and not 3 years from the date of the original decree (h).

146. [New] Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person,

Proceedings by or against
representatives

then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceeding by or against representatives.—The proceeding contemplated by the section includes an appeal. The expression claiming under is wide enough to cover cases of devolution, etc., mentioned in O. 22 r. 10. A sues B to establish his right to certain property. Pending the suit B mortgages the property to C. The suit is decided in A's favour. B does not appeal from the decree. C, as a person claiming under B, may appeal from the decree (i).

This section enables the legal representative of a deceased decree holder to be brought on the record to carry on a pending execution proceeding (j). An attaching decree holder who has executed the attached decree is a person claiming under the original decree holder and if the attached decree is reversed on appeal the judgment debtor may get restitution against him (k).

See notes to O. 9, r. 13, under the head 'Application by legal representative of deceased defendant'. Other cases to which the section applies have been considered in their proper place.

- | | |
|--|--|
| (c) <i>Srinibash Prasad v. Kesho Prasad</i> (1911) 39 Cal. 54 776 9 I C 862. <i>Abdul Qafar v. Mahomed Mukaram</i> (1932) 93 Bom. L. R. 1593 135 I C 812 (32) A L 77. | (g) See <i>Adhar v. Tulsi</i> (1914) 19 C. W. N. 1085, 30 I C 694. |
| (d) <i>Shek Suleman v. Shirram</i> (1898) 12 Bom. 71. <i>Akhood v. Ahmed</i> (15 I C 15 W. R. 33). | (h) <i>Cholappa v. Ramachandra</i> (1920) 44 Bom. 34 53 I C 187. |
| (e) <i>Ram Kishin v. Lalla Singh</i> (1923) 51 All. 316 112 I C 334 (25) A A 527. <i>Lamanathan v. Doranayami</i> (1930) 43 Mad. 325 50 I C 363. <i>Saba Singh v. C. I. P. M. Chettiar Firm</i> (1931) 9 Lenz. 434 134 I C 509 (31) A L 236. | (i) <i>Sitaranayami v. Lalitani</i> (1918) 41 Mad. 510 45 I C 840. |
| (f) <i>Pikhras v. Jamsatji</i> (1931) 50 Lenz. 602 100 I C 185 (27) A B 63. | (j) <i>Pengatarkalam v. Pamarayami</i> (1937) 55 Mad. 352 135 I C 561 (32) A M 73. <i>P. J. v. rollins & all vs ppr v. Vallummal</i> (1931) 50 Muz. 1 111 I C 67 (27) A M 184. |
| | (k) <i>Anjanna v. S. Maraya</i> (1930) 53 Mad. 796, 127 I C 643 (30) A M 767. |

147. [*New* R S C, O 16, r. 21] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

Consent or agreement by persons under disability

Rules of the Supreme Court O 16 r 21.—This section is new It is taken from O 16 r 21 of the rules of the Supreme Court with some alterations

Any person under disability —The section applies to consent given on behalf of persons under disability such as minors and lunatics See O 32 below

As to any proceeding —These words do not refer to the conduct of a suit

Express leave —The leave must be *express* In this respect the present section differs from the English rule

148. [*New* R S C, O 64, r 7] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

Enlargement of time

Act prescribed or allowed by this Code —The present section empowers the Court to extend the time fixed by it even after the expiry of the period originally fixed It is a legislative recognition of the rule laid down in the Bombay case of *Bhagwan Das v Haji Abu Ahmed* (m) and the cases on which that rule was based (n) In the Bombay case it was held that it was competent to the Court to extend the time fixed under sec 54 of the Code of 1882 (now O 7 r 11) even after the expiry of the time originally granted. It must however be noted that the section applies only where time is fixed for the doing of an act prescribed or allowed by this Code Code includes rules and prescribed means prescribed by the rules [see s 2 cls (1) and (16)] See for instance the following rules —

- 1 O 6 r 18 (amendment of pleadings)
- 2 O 7 r 11 (b) (requiring plaintiff to correct valuation of suit)
- 3 O 7 r 11 (requiring plaintiff to supply requisite stamp paper where the plaint is written upon paper insufficiently stamped)
- 4 O 8 r 9 (requiring written statement or additional written statement from a party)
- 5 O 21 r 17 (amendment of application for execution)
- 6 O 25 r 2 (security for costs of suit)
- 7 O 41 r 10 (security for costs of appeal)

(D) *Rhodes v Southenbank* (1889) 22 Q B D 377 | (N) *De can An r v Nandirchand* (1910) 14 C W
m) (1901) 16 Dom 263 N 85 881 61 C 4th

Act directed or allowed by a decree of Court.—This section does not apply where time is allowed for doing an act by a decree in a suit (a). But if the decree is a preliminary decree the Court keeping control over the action has full power to make any just and necessary orders therein including in appropriate cases the extension of time. So in a decree for specific performance of a contract of sale the Court may extend the time fixed in the decree for the payment of the price because the decree is in the nature of a preliminary decree (p). The form of a pre-emption decree is fixed by O 20, r 14, and there is therefore, no analogy between such a decree and a decree for specific performance of a contract of sale (q), but as to pre-emption decrees the cases are not consistent. It was held by the Allahabad High Court in *Saranjan v Ram Bihal* (r), that a Court has no power under this section to extend the time fixed by its decree under

Court, the section may be applied. In a case where an ex parte decree was set aside on condition that the defendant do pay a sum of money within a week, the Allahabad High Court held that the conditional order did not have the effect of a preliminary decree and that the lower Court should have required the money to be deposited by a certain

condition that the appellant should make a payment of rent and assessment within a stated time, an extension was allowed as there was no express direction that execution should proceed in default of payment (r2). Again when a Court of appeal remanded

see 148, but under O 41, r 3, by varying the decree of the Court of first instance. It has thus been held that if a decree is passed for pre-emption on payment of a certain sum in Court within a prescribed time, and an appeal is preferred from the decree, the

- | | |
|--|--|
| <p>(a) <i>Abdul Shaker v Abdul Rahuman</i> (1923) 46 Mad 148 72 I C 868 (23) A M 284</p> <p>(p) <i>Abdur Rahim v Tamizuddin</i> (1933) 37 C W N 337 145 I C 522 (33) A C 160</p> <p>(q) 46 Mad 148 <i>supra</i> per Wallace, J</p> <p>(r) (1913) 35 All 582 21 I C 585</p> <p>(s) (1916) 39 Mad 876 31 I C 240 <i>supra</i></p> <p>(t) <i>Abu Muhammad v Mukut Persad</i> (1916) 1 Pat L J 92, 34 I C 83</p> | <p>(u) <i>Jogannath v Kamta Prasad</i> (1914) 38 All 77 23 I C 139</p> <p>(u1) <i>Lal Krishna v Parathammil</i> (1927) 53 Mad 1 J J 424 105 I C 124 (24) A M 154</p> <p>(v) <i>Sajjadi v Dilawar</i> (1918) 40 All 579 47 I C 4 <i>Jaya Nath v Bhalara</i> (1933) 8 Luck 502 145 I C 640 (33) A O 241</p> <p><i>Jinshi v Majaharuddin</i> (1932) 30 C W N 693 141 I C 877 (33) A C 83</p> <p>(v1) <i>Khetra Mohan v Gour Mohan</i> (1933) 37 C W N 878 (34) A C 21</p> <p>(r2) <i>Subramaniam v Subbiah</i> (1933) 6 Mad 1 J J 538 143 I C 903 (33) A M 563</p> <p>(r3) <i>Sital Din v Anant Puri</i> (1933) 53 All 30 142 I C 371 (33) A C 262 I B</p> <p>(w) <i>Khetra Mohan v Gour Mohan</i> (1933) 37 C W N 878 147 I C 1022 (34) A C 21</p> <p>(z) <i>Syed Qari v Lachman</i> (1926) 5 Pat 306, 96 I C 942 (26) A P 409</p> |
|--|--|

147. [*New.* R. S. C., O. 16, r. 21.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Rules of the Supreme Court, O. 16, r. 21.—This section is new. It is taken from O. 16, r. 21, of the rules of the Supreme Court with some alterations

"Any person under disability"—The section applies to consent given on behalf of persons under disability, such as minors and lunatics. See O. 32 below

"As to any proceeding."—These words do not refer to the conduct of a suit or appeal
or appeal
of it *e.g.*,
it is done

"Express leave."—The leave must be *express*. In this respect the present section differs from the English rule

148. [*New.* R. S. C., O. 64, r. 7.] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

the Bombay case it was held that it was competent to the Court to extend the time fixed under sec. 54 of the Code of 1882 (now O. 7, r. 11) even after the expiry of the time originally fixed in the case of *Bhogwan* is based on the fact that the Court is empowered to extend the time only where it includes and (16)]

- 1 O. 6, r. 18 (amendment of pleadings)
- 2 O. 7, r. 11 (b) (requiring plaintiff to correct valuation of suit)
- 3 O. 7, r. 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon paper insufficiently stamped)
- 4 O. 8, r. 9 (requiring written statement or additional written statement from a party)
- 5 O. 21, r. 17 (amendment of application for execution)
- 6 O. 23, r. 2 (security for costs of suit)
- 7 O. 41, r. 10 (security for costs of appeal)

(1) *Rhodes v Sodenbank* (1889) 22 Q.B.D. 577 | (2) *Deewan Amir v. Nand Lal* (1910) 14 C.W.N. 842, 481 B.L. 424

Act directed or allowed by a decree of Court.—This section does not apply

fixed in the decree for the payment of the price because the decree is in the nature of a preliminary decree (p). The form of a pre-emption decree is fixed by O 20, r 14, and there is therefore, no analogy between such a decree and a decree for specific performance of a contract of sale (q). Hence the section does not

Court, the section may be applied. In a case where an ex parte decree was set aside

the Court, the section cannot be applied, either because the order operates as a decree or because there is no previous order current on which the order extending time can

erwise

week

(r1).

ce on

condition that the appellant should make a payment of rent and assessment within a stated time, an extension was allowed as there was no express direction that execution should proceed in default of payment (r2). Again when a Court of appeal remanded

sum in Court within a prescribed time, and an appeal is preferred from the decree, the

(o) L

- (p) *Abdul Shaker v. Abdul Rahimann* (1923) 40 Mad 148 72 I C 868 (23) A M 284
Abdur Rahim v. Tamizudhin (1933) 37 C W N 337 145 I C 522 (33) A C 100
 (q) 40 Mad 148 *supra* per Wallace J
 (r) (1913) 35 All 582, 21 I C 585
 (s) (1916) 39 Mwl 876 31 I C 210 *supra*
 (t) *Abu Muhammad v. Mukut Pertap* (1916) 1 Pat L. J 92, 34 I C 88

- (u) *Jagarnath v. Kamla Prasad* (1914) 35 All 77 23 I C 138
 (ul) *Balkrishna v. Parrothammal* (1927) 53 Mad 1 J 494 10, 1 C 124 (28) A M 154
 (v) *Sajjadi v. Dilawar* (1918) 40 All 579 47 I C 4
Jaya Nath v. Bhatra (1932) 8 Luck 502 145 I C 610 (33) A O 241
Danahi v. Majaharuddin (1932) 36 C W N 638 141 I C 87 (33) A C 83
 (v1) *Kabitra Mohan v. Gour Mohan* (1933) 37 C W N 878 (34) A C 21
 (v2) *Subramaniam v. Subbiah* (1933) 63 Mwl L J 538 143 I C 901 (33) A M 563
 (v3) *Sulal Din v. Anant Pami* (1933) 55 All 326 142 I C 331 (33) A A 262 F B
 (w) *Kabitra Mohan v. Gour Mohan* (1933) 37 C W N 878 147 I C 1025 (34) A C 21
 (z) *Syed Qasim v. Lachman* (1926) 5 Pat. 306 96 I C 942, (20) A P. 409

147. [*New* R S C, O 16, r. 21.] In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

Consent or agreement by persons under disability

Rules of the Supreme Court O 16 r. 21.—This section is new It is taken from O 16 r 21 of the rules of the Supreme Court with some alterations

Any person under disability —The section applies to consent given on behalf of persons under disability, such as minors and lunatics See O 32 below

As to any proceeding. —These words do not refer to the conduct of a suit or appeal A next friend or guardian *ad litem* has undoubtedly the conduct of a suit or appeal in his hands But if he does anything in the action beyond the mere conduct of it *e.g.* consents not to appeal the person under disability is not bound by it unless it is done with the express leave of the Court (1)

Express leave —The leave must be *express* In this respect the present section differs from the English rule

148. [*New* R S C, O 64, r 7] Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

Enlargement of time

an enlarges the
; fixed
'aguan
e) In
uu ... e fixed
y of the time
only where
de' includes
) and (16)]

- 1 O 6, r 18 (amendment of pleadings)
- 2 O 7, r 11 (b) (requiring plaintiff to correct valuation of suit)
- 3 O 7, r 11 (requiring plaintiff to supply requisite stamp paper, where the plaint is written upon paper insufficiently stamped)
- 4 O 8 r 9 (requiring written statement or additional written statement from a party)
- 5 O 21, r 17 (amendment of application for execution)
- 6 O 25 r 2 (security for costs of suit)
- 7 O 41 r 10 (security for costs of appeal)

been filed from the date of (g)

An application for extension of time fixed by the decree in a redemption suit for payment of the mortgage debts does not fall under this section, but under O 34, r 8 (a)

— of time for arriving for discharge —
 and the period during
 same Act provides
 order of adjudication
 is section the Court
 before the order of
 ency Act makes the
 i if s 43 (1) is mandatory it
 d that s 43 (1) is directory (c)

Period fixed by statute.—The Court has no power to extend a period fixed by statute and not fixed or granted by the Court. Therefore the Court has no power to extend the period fixed by O 21 r 85, of the Code (d), nor to extend the period prescribed by the law of limitation (e), nor the period of one month fixed by sec 55 (4) of the Code (f)

Consent order.—Where the time for doing an act has been fixed by a consent order, it cannot be enlarged except by consent (g)

Court to which application should be made for extension of time.—Where a decree is passed against a defendant requiring him to execute a kabilat in — with an appeal is preferred from the decree — the case is one under this passage the decree (h)

Appeal.—No appeal lies from an order under this section. The order is not a decree, nor is it one of the appealable orders mentioned in s 104 (i)

149. [New] Where the whole or any part of any fee

Power to make up deficiency of court fees

prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance

- (g) *Syed Qari v Ram Kishan* (1927) 2 Luck 425
 101 I C 258 (28) A O 32
 (r) *Parmanand v Kripasindhu* (1910) 37 Cal
 548 61 C 275
 (s) *Het Singh v Tula Ram* (1912) 34 All 388 14
 I C 240
 (b) *Palani Goundan v The Official Receiver*
 (1930) 53 Mad 288 124 I C 61 (30)
 A M 389 F B
 (c) (1930) 51 Mad 288 *supra* *Gopal Ram v*
Mogul Ram (19 8) 71 at 375 107 I C
 830 (28) A I 338 *Abraham v Sankidas*
 (19 3) 61 Cal 337 81 I C 504 (29) A C
 777

- (d) *Kalipada v Basanta* (1932) 50 Cal 117
 134 I C 177 (32) A C 106
 (e) *Dukhno v Munshi Sahu* (1910) 41 at 1. J
 408 52 I C 430
 (f) *Narain Chandra v Rangachari* (1906) 50 Mad
 L J 477, 95 I C 444 (20) A M 600
 (g) *Australasian Automatic Weighing Machine*
Co v Waller (1891) 15 V (189) 11
 (h) *Parmanand Das v Kripasindhu* (1910) 37
 Cal 548 61 C 275
 (i) *Saranjan v Pami Lalal* (1917) 35 All 542
 21 I C 183

L J 67-281 (33

documents chargeable with Court fee and consider the power to make good the deficiency to be subject to the discretion of the Court. The Patna High Court has held that time should be given when the amount of Court fee is a matter of doubt or if the party has made an honest attempt to comply with the law, but that time should not be extended if a litigant has deliberately and to suit his own convenience paid an insufficient Court fee. In other words the section should not be construed in such a way as to nullify the express provisions of ss. 4 or 6 of the Court Fees Act (o). The Lahore High Court also disapproves of the Bombay view and has refused to extend time when the insufficiency of the Court fee was due to the negligence of the appellant or his pleader (p). The Allahabad and Calcutta High Courts have held that when an insufficiently stamped memorandum of appeal is accepted by inadvertence time may be given to the appellant to supply the deficiency, but that if the Court is aware ab initio of the insufficiency of the stamp it ought to return the memorandum of appeal to the appellant in order that he may, if the case admits, re-present it duly stamped and apply for an extension of time under s. 5 of the Limitation Act (q).

Revision.—It has been held by the High Court of Allahabad that an order refusing to give time to a party to make up the deficiency in court fee is not capable of revision as such an order does not amount to a decision of a "case" within the meaning of s. 115 of the Code (r).

150. [New.] Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Save as otherwise provided—O 9, r 13, provides that where an ex parte decree is passed against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside. Suppose now that an ex parte decree is passed by Court P for possession of certain immovable properties and subsequently part of its territorial jurisdiction including the locality in which the properties are situated is transferred to Court A. Has Court A power under this section to entertain an application to set aside the decree under O 9, r 13? It has been held by the High Court of Madras that it has, O 9, r 13, does not say that the Court that passed the decree is the only Court that can set it aside (s).

Scope of the section—There have been conflicting decisions by the High Court of Madras as to the scope of the section. In two cases it was held that the section is not confined to the transfer of specific business from one Court to another but also included cases in which a new Court is given part of the territorial jurisdiction of an old Court and is empowered to try the business arising within it (1). But in the case of

- (c) Pansahay v. Kumar Lachmi (1918) 3 Pat
L. J. 74 Amir v. Afshan (1924) 5 Pat
337 80 L. O. 330 (24) A. F. 683 (time
further extended apparently under
s. 145)

- (p) *Gurnaran Das v The District Board* (1927)

-

Subramania v Swaminatha (u) decided in 1928, where territorial jurisdiction was transferred after the decree had been passed, the Madras High Court held that the Court to which jurisdiction had been transferred had no power to execute the decree under s 150 as that section is limited to cases where specific business is transferred. This case was approved by a Full Bench in *Pamier v Muthu* (t) also an execution case—decided in 1932 and the Court distinguished notifications which effect a change of jurisdiction in the future from those which effect a transfer of past business, and held that s 150 only applied to the latter. On the other hand *Subramania v Swaminatha* was dissented from by a single Judge of the Madras High Court in the following case (w). A money suit was filed in Court X and was transferred for trial to Court Y. The plaintiff obtained a decree in Court X, and then Court Y was abolished and its business transferred to Court Z. Where was plaintiff to apply for the execution of his decree? Under the definition in s 37 (b) Court X was the Court which passed the decree. Should the plaintiff apply to Court X, or could he apply to Court Z and was Court Z empowered by s 150 to entertain the application. The Judge held that he could apply to Court Z and that s 37 should not be read so as to deprive the decree holder of the facility provided by s 150.

In a Calcutta case (x) a preliminary decree on a mortgage for nearly Rs 2,000 was passed by a Munsiff who had jurisdiction up to Rs 2,000. The Munsiff was transferred and as his successor had not jurisdiction to that amount the final decree was passed by the Subordinate Judge. The succeeding Munsiff was then empowered to try suits up to Rs 2,000, and as the suit was taken to have been transferred to him he was held to have jurisdiction under s 150 to entertain an application for execution.

Under s 13 (2) of the Bengal and Assam Civil Courts Act 12 of 1887 business may be assigned to different Munsiffs having jurisdiction within the same local area. The Calcutta High Court has held that such an assignment of business is not a transfer within the meaning of this section (y).

151. [New] Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

Saving of inherent powers of Court

Inherent powers of Court.—The Code of Civil Procedure is not exhaustive (z). The Court has therefore in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration of which alone it exists (a). The law cannot make express provisions against all inconveniences so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a Judge to apply them not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it (b). This section does not confer any powers but only

(u) (1928) 28 Mad L.W. 885 114 IC 545 (28) A.M. 746

(v) (1932) 55 Mad 801 137 IC 305 (32) A.M. 418 P.B.

(w) *Muthu Kumara v Thirunagaravani* (1932) 61 Mad L.J. 307 137 IC 183 (32) A.M. 260

(x) *Aminuddin v Alarmani* (1930) 24 C.W. 899 57 IC 879

(y) *Munshi v Munshi* (1931) 26 C.W. 216 70 IC 210 (31) A.C. 41

(z) *Durga Dhal Das v Anoraj* (1895) 17 All 9 31 *Jogendra Chandra Sen v Wari* *dunnissa Khatri* (1907) 31 Cal. 860

(a) *Hukam Chand v Kamalanand* (1906) 33 Cal 977 931 32

(b) *Hurro Chander Roy v Shoorodhones Debis* (1863) 9 W.R. 402 406

should be assisted in prosecuting the appeal before the High Court, and they confirmed the order of the High Court. The Bombay High Court has said that the section should be applied with great caution and that a Court cannot under this section restore an application under O 21, r 89, which had been dismissed for default of appearance (c). But where the ends of justice require it, the Court has an inherent power to make such order as it may deem proper. It has thus been held that although the Code contains no express provision on the matters hereinafter mentioned the Court has an inherent power—

- (a) to consolidate suits and appeals (p) including appeals to His Majesty in Council (q),
- (b) to postpone the hearing of suits pending the decision of a selected action (q1),
- (c) to stay cross suits on the ground of convenience (r),
- (d) to ascertain whether the proper parties are before it (s),
- (e) to enquire whether a plaintiff is entitled to sue as an adult (s1),
- (f) to entertain the application of a third person to be made a party (s2),
- (g) to allow a defence *in forma pauperis* (s3),
- (h) to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parties (s4),
- (i) to remand a case to which neither O. 41, r 23, nor O 41, r 25, applies (s) See notes to O 41, r 23, "Remand in case of error, omission or irregularity," and notes to O 42, r 1, "Inherent power of High Courts to remand in second appeal,"
- (j) to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require (s5),
- (k) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay (s6),
- (l) to apply the principles of *res judicata* to cases not falling within section 11 of the Code, see notes to s 11, "Section not exhaustive, on p 85 above and "Orders in execution proceedings," on p 87 above.
- (m) to add a party (t), or to transpose parties (u),
- (n) to punish summarily by imprisonment contempts of Courts committed by the publication of a libel out of Court (v),
- (o) to decide questions of jurisdiction though, as a result of its inquiry, it may turn out that the Court has no jurisdiction over the suit (u).

| | | | |
|------|---|------|---|
| (o) | <i>Bhagwan v Dattatraya</i> (1926) 50 Bom 547, 96 IC 411 (26) A B 377 | | <i>Meekjee v Kharoyee</i> (1879) 4 Cal I R 242 |
| (p) | <i>In re Maharaja of Venkatagiri</i> (1930) 53 Mad 218 123 IC 203, (30) A M 376 F B, <i>Kali Charan v Suraj Kumar</i> (1913) 17 W N 528 15 IC 897 <i>Qura v</i> <i>Mankumar</i> (1922) 1 1st 609, 67 IC 1009, (22) A I 566 <i>Vengu Naidu v</i> <i>Dem. S. Collection</i> (1912) 74 W. N. 117 670 | (s) | <i>Muhammad Hussain v Khwalo</i> (1888) 10 All 223 F B |
| | | (s1) | <i>Beni Ram Bhut v Ram Lal</i> (1896) 13 Cal 189, 191 |
| | | (s2) | <i>Oriental Bank v Chariol</i> (1886) 12 Cal 647 |
| | | (s3) | <i>Durga Churn v Nitto Kally</i> (1880) 5 Cal 819 |
| | | (s4) | <i>Maulvi Muhammad v Muhammad Abdul</i> (1896) 24 I A 22 19 All 155 |
| | | (s5) | <i>Met. Brj Coomaree v Ramrick Dis</i> (1901) 5 Cal W N 781 "96 |
| | | (s6) | <i>Punchanan v Dwarka</i> (1905) 3 C I I J 29 <i>Hulum Chand v Kamalanand</i> (1904) 33 (a) 927 |
| (q) | | (t) | |
| (q1) | | (u) | |
| | | (r) | |
| | | (w) | |

- (p) to stay proceedings pursuant to its own order in view of an intended appeal (x),
- (q) to direct a party who has applied for leave to appeal to the King in Council to pay costs on the dismissal of his application (y),
- (r) to take cognizance of questions which cut at the root of the subject matter of controversy between the parties, *e.g.*, whether a deed of mortgage is attested as required by sec 59 of the Transfer of Property Act (z),
- (s) to amend decrees and orders in cases not covered by sec 152 (a), see notes to sec 152, 'Inherent power to amend decrees and orders,'
- (t) to set aside an order obtained by fraud practised upon the Court, *e.g.* when a pleader not engaged by the defendant at all consents to a decree on behalf of the defendant (b),
- (u) to restore a suit dismissed for default in cases not provided for by O 9 r 9, but the Courts are not agreed on this point See notes to O 9, r 9
Inherent power of Court to restore suits on other grounds, '
- (v) to cause restitution to be made on reversal of decree see notes to sec 144
Inherent power to grant restitution, '
- (w) to restrain by injunction a person from proceeding with a suit in another Court see notes to O 39 r 1, 'Powers of Chartered High Courts to restrain a party from proceeding with a suit pending in another Court,
- (x) to rehear a matter before the order passed by the Court at a previous hearing is drawn up and sealed (c)
- (y) to order a stay of execution in view of an application by a judgment debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (d),
- (z) to set aside an order of dismissal made under O 9, r 8, for non appearance of the plaintiff when the non appearance was owing to the plaintiff's death and the fact of the plaintiff's death was not brought to the notice of the Court dismissing the suit (e),
- (zz) to set aside an order dismissing without independent inquiry an application asking for an inquiry under O 32 r 15 as to the mental infirmity of a party (f)
- (aa) to vacate an order obtained by fraud as where an order is made recording the adjustment of a decree [O 21 r 2] and the adjustment has been brought about by fraud practised by one party upon another (g),
- (bb) to direct an auction purchaser in a case where he has paid the purchase money and subsequently withdrawn it from the Court on the sale to him being set aside under O 21, r 91 to pay back the money into Court on the sale being confirmed in appeal (h)

(x) *Leitch v. Darnley* in the goods of (1001)
5 C W N 381 *Darnley v. Offic. of*
Assignee (1011) 31 C W N 611 12 J I C
833 (31) 1 C 79

(y) " " " " " "

(z) " " " " " "

(b) " " " " " "

(c) " " " " " "

(d) " " " " " "

(e) " " " " " "

(f) " " " " " "

(g) " " " " " "

(h) " " " " " "

(c) " " " " " "

(d) *W. J. v. W. J. v. P. n. G. v. L. n. G. v. L. n. G.* (1012) 40 C W N 181 C 207

(e) *Debi J. v. H. v. H. v. H. v. H.* (1013) 35 All 371 40 I A 151 10 I C 100

(f) *Chakrabarty v. Harman* (1900) 50 All 335 103 I C 141 (24) A A 108

(g) *Paranjpe v. Janide* (1882) 6 Ind 118 111 I A 11 v. 111 I A (1914) 20 All 123 172 51 C 213

(h) *Sathya Das v. R. v. R. v. R.* (1917) 2 F T L J 361 31 C 61

- (cc) to restore a suit, as held by the Allahabad High Court (s), where the decree passed in the suit is set aside on the ground that the minor against whom the suit was filed was not properly represented by a guardian ad litem and to proceed with the appointment of a fit and proper person as guardian ad litem of the minor defendant; according to the Madras High Court, the decree is a nullity, and the Court has no inherent power to restore the suit (j);
- (dd) to interfere where its decree is being executed in a manner manifestly at variance with the purport and intent of the decree (k);
- (ee) to stay execution of a decree obtained by A against B pending not only the decision of a suit by B against A, but also the decision of an appeal by B against A from a decree passed against B in B's suit (l); or to stay execution of an award under the Arbitration Act pending an appeal against the order refusing to set it aside (m) See O. 21, r 29;
- (ff) to stay a suit brought by A against B in Court X, in a case where substantially the whole cause of action arose at another place, and the material witnesses and their books of account are at that place, if no injustice is caused to the plaintiff thereby and if the defendant would be subjected to such injustice in defending the suit as would amount to vexation and oppression to which he would not be subjected if the suit were brought in another and accessible Court where substantially the whole cause of action arose (n);
- (gg) to reconstruct its records as where they are lost by accident (o);
- (hh) to stay criminal proceedings started under sec. 476 of the Criminal Procedure Code against a defendant in a suit pending an appeal filed by the defendant from the decree (p);
- (ii) to strike off the defence and proceed ex parte where a suit is adjourned on the conditions that the defendant should pay the costs of the adjournment within a prescribed period and he fails to do so (q);
- (jj) to review an order of dismissal of an application under O 9, r 9 (r);
- (kk) to dismiss in appeal a suit on the ground that it is premature even if the point was not taken in the Court below (s);
- (ll) to order a refund of Court fee paid by inadvertence (t), or in a case not covered by sec 15 of the Court Fees Act (u);
- (mm) to stay a suit even if it does not come within sec 10 of the Code (v);
- (nn) to rehear objections to an execution application after they have been dismissed for default (w);

| | | | |
|-----|--|-----|--|
| (i) | | (r) | |
| (j) | | (s) | |
| (k) | | (t) | <i>In the matter of Munna Lal</i> (1930) 52 All 546 122 I C 188 (30) A A 471 <i>Chan dradhari v Tippan</i> (1918) 3 Pat L J 452, 48 I C 271 |
| (l) | | (u) | <i>Chettiar Firm v Ko Yin Gye</i> (1929) 7 Rang 88 117 I C 545, (29) A R. 158 <i>Tham mayya v Venkataramanam</i> (1932) 55 Mad 611, 134 I C 131 (32) A M 438 |
| (m) | | (v) | <i>Randu Mal v Tulak Ram</i> (1928) 10 Lah. L J 470 113 I C 783, (29) A L 12 |
| (n) | | (w) | <i>Akhoy Kumar v Krishna</i> (1932) 56 C.W.N. 367 141 I C 618 (32) A C 569 |
| (o) | | | |
| (p) | | | |
| (q) | | | |

- (oo) to set aside a sale held in a manner which contravenes a direction of the Court (x),
 (pp) to review an interlocutory order made in Chambers (y),
 (qq) to set aside an interlocutory order made by consent which is not a final order or judgment (z);
 (rr) apart from cl 15 of the Letters Patent, to hear an appeal in a matter affecting a ward of the Court (a),
 (ss) to stay execution of a final decree pending an appeal from the preliminary decree (ai)

Prevent abuse of process of Court.—A Court has inherent jurisdiction to stay any suit which is an abuse of the process of the Court (b) See notes to O 16, r 1, 'Whether witness summons may be refused.' See also the undermentioned case (c)

Where the Court is bound to grant an application and has no discretion to refuse it, it has no power to dismiss it on "so treacherous a ground of decision as an 'abuse of the process of the Court'" (d)

Appeal.—An appeal and second appeal have been held by the Madras High Court to lie from an order made under sec 151 in execution (e), but the Lahore and Patna High Courts have held that no appeal lies from an order made in the inherent jurisdiction (f) As to whether an appeal lies from an order made under sec 151 remanding an appeal see note 'Appeal from remand under inherent power' at p 1102 The Patna High Court has held that though no appeal lies the High Court has power under sec 107 of the Government of India Act, 1915 to correct Subordinate Courts if they have wrongly exercised their inherent powers (g)

152. [New. R. S. C., O 28, r. 11. Cf. S. 205.] Clerical

Amendments of judgments, decrees or orders

or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties

Amendment of decrees and orders.—This section has been taken from O 28 r 11, of the Rules of the Supreme Court

There are only two cases in which the Court can amend or vary a decree or order after it is drawn up and signed, namely —

- (i) under its inherent powers, when the decree or order does not correctly state what the Court actually decided and intended, and
- (ii) under this section, where there has been a clerical or arithmetical mistake, or an error arising from an accidental slip or omission

| | | |
|------|--|--|
| (x) | | (c) <i>Shah Velchand v Leut Liston</i> (1914) 38 Bom 638, 25 I C 371 |
| : | | (d) <i>Chhatrapat Singh v Akharag Singh</i> (1917) 44 I A 11, 14 44 Cal 535, 540 541, 39 I C 788 |
| (y) | | (e) <i>Govinda v Velu Murugayya</i> (1933) 64 Mad L J 588 143 I C 454 (33) A M 399 |
| (z) | | <i>Akshya v Govindrasayulu</i> (1924) 47 Mad L J 549 84 I C 975 (24) A M 778 |
| (a) | | (f) <i>Suktdro Dass v Rito Singh</i> (1917) 2 Lat L J 361 39 I C 763 |
| (ai) | | <i>Dari Singh v Bhalga</i> (1930) 11 Lah 93 119 I C 403 (30) A I 20 |
| (b) | | <i>Hansari Lal v Sukri Shah</i> (1933) 12 Lat 202, 142 I C 455, (33) A I 133 |
| | | (g) <i>Braja Jhusan v Sitte Chandra</i> (1919) 4 Pat L J 20 47 I C 719 |

Section 206 of the Code of 1882 made no reference to errors in judgments and under that section it was held that if the decree is in conformity with the judgment the Court has no power to vary or amend the decree (h), even if the judgment is erroneous in law (i) But this section allows clerical or arithmetical mistakes in judgments to be corrected The question then arises whether if the decree agrees with the judgment but the error has arisen at an earlier stage of the transaction, in a deed in which the property has been incorrectly described, can the mistake be corrected under this section? In one case it has been held that the section applies (j) In another that the section does not apply (k) In one case it was said that the applicant might apply for amendment of the plaint before the decree had been executed and then apply for amendment of the judgment and decree to correspond with the amended plaint (l) In yet another case the amendment was allowed under the inherent power to make corrections necessary for the ends of justice (m) In a case where there was a misdescription of the name of the defendant in the plaint, judgment and decree it was held that the decree could be corrected under O 1, r 10 (2), read with sec 151 (n)

Inherent power to amend decrees and orders—Every Court has an inherent power to vary or amend its own decree or order so as to carry out its own meaning In so doing it does nothing but exercise a power to correct a mistake of its ministerial officer by whom the decree or order was drawn up (o), it only insists that the decree drawn up in the office of the Court should correctly express the judgment given by the Court (p) "It would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister" (q) "I cannot doubt," said Lord Penzance in *Laure v Lees* (r) "that under the original powers of the Court independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning and where language has been used which is doubtful, to make it plain I think that power is inherent in every Court In *Hatton v Harris* (s), Lord Watson said 'When an error of that kind has been committed it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so to correct the record in order to bring it into harmony with the order which the Judge obviously meant to pronounce

A decree has been defined in sec 2 as the formal expression of an adjudication which completely determines the rights of the parties with regard to the matters in controversy in a suit O 20, r 6, provides that a decree shall be in conformity with the judgment Where a decree is at variance with the judgment, the Court has power to set right the decree and to bring it into conformity with the judgment (t)

Illustrations

(1) A sues B for Rs 5,000 and interest The judgment is for Rs 4,000 with out more The decree is drawn up in accordance with the judgment A then applies to amend the decree by adding an order for payment of interest The application must be refused, for the decree is not at variance with the judgment If A is aggrieved by the

- | | |
|---|--|
| (h) <i>Parameshwara v Sethagurappa</i> (1889) 22 Mad 364 | (p) <i>In re St Vazaire Co</i> (1879) 12 C D 88 |
| (i) <i>Shahab Din v Siraj ud din</i> (1913) P R 47 p 185 17 I C 418 | <i>Preston Banking Co v Allsup</i> [1895] 1 Ch 141 |
| (j) " " | (q) <i>Mellor v Swire</i> (1885) 30 Ch D 239 24* |
| (k) " " | (r) (1881) 7 App C 19 34 35 |
| (l) " " | (s) (1892) A C 54 560 |
| (m) " " | (t) <i>Karim Mahomed v Rajooma</i> (1888) 12 Bom 174 |
| (n) " " | <i>Irappa v Bhimappa</i> (1900) 4 Bom 11 R 903 |
| (o) " " | <i>Dwijratan v Jaynarain</i> (1910) 3 Cal 643 |
| (p) " " | 1 I C 86 |
| (q) " " | <i>Harmange Singh v Pim Gopal</i> (1914) 20 Cal L J 18 |
| (r) " " | 23 I C 419 |
| (s) " " | <i>Chandra Kumar v Sudhansu</i> (1914) 2 W N 83 80 I C 65 |
| (t) " " | (24) A C 895 [partition] <i>Pydel v Chathappan</i> (1891) 14 Mad 150 |

decree the proper course for him is to apply for a review of judgment or to appeal from the decree *Hasan v Sheo Prasad* (1893) 15 All 121, *Abdul v Chunia* (1886) 8 All 377

(2) *A* and *B* enter into an agreement for partition of certain properties *B* fails to convey to *A* the properties of *A*'s share *A* sues *B* for specific performance of the agreement and a decree is passed declaring only that "*A* is entitled to specific performance of the agreement" The usual form is to declare that "the agreement ought to be specifically performed, and the Court doth order and decree that the same be specifically performed [*i.e.*, both by *A* and *B*]" The decree may be amended so as to put it in the usual form *Karim Mahomed v Rajooma* (1888) 12 Bom 174 [In the above case the amendment was necessary, for the decree as drawn up did not contain any direction to *A* to convey to *B* the properties of *B*'s share, but declared only that *A* was entitled to specific performance]

(3) *A* sues *B* and *C* for Rs 5,000 The judgment awards Rs 5,000 to *A* "as prayed" (*i.e.*, as against *B* and *C*) The decree is drawn up so as to render the amount payable by *B* alone The decree may be amended and brought into conformity with the judgment *Chathappan v Pydel* (1892) 15 Mad 403, *Pherozsha v Sun Mills, Ltd* (1898) 22 Bombay 370

"Accidental omission"—This section enables the Court to correct errors arising from an accidental omission (*u*) Thus where directions as to costs were *inadvertently* omitted, the decree was set right by adding the directions (*v*) Similarly, where the date from which payment ordered to be made were to run was *inadvertently* omitted, the decree was perfected by adding the date (*w*)

"Accidental slip."—The Court has power under this section to correct accidental slips (*x*) The Court can exercise the power even in cases where the mistake could be corrected in appeal for the object of the section is to provide a speedy and inexpensive relief (*y*), and when a Court erroneously dismissed an execution application as time barred omitting to notice that the last day of presentation was a Sunday, the Court had power to readmit the application (*z*) A *bona fide* error as to the amount of interest due to the defendant may be corrected under this section (*a*) And so also an error as to the period for which an injunction is to continue (*b*)

"May."—As to this word the High Court of Calcutta said "The word 'may' in the section does not make it discretionary with the Court to order the correction but merely enlarges the power of the Court by providing that such correction can be done at any time, or, in other words, the section simply emphasizes that no lapse of time would disentitle the Court to make the correction" (*c*) The correct view, it is submitted, is the one taken by the High Court of Allahabad, namely, that under this section "there is no right in any party to have a clerical or arithmetical mistake corrected The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case" (*d*) In later cases the Calcutta High Court

tion Act the amendment has the consequence of extending the time for execution of

- | | |
|--|---|
| (u) <i>Pam Chand v Chhajju Ram</i> (19 9) 11 Lah | (b) <i>Shipwright v Clements</i> (1890) 23 W R L |
| (v) <i>L. J. 37 120 I C 176 (29) A L 217</i> | (c) <i>Chandra Kumar v Suthanku</i> (1924) 28 C |
| (w) <i>Paper (1890)</i> | (d) <i>Kishori v Chhanga</i> (1900) 47 All 44, 49 |
| (x) <i>821 C 1030 (25) A A 187</i> | (e) <i>Mukerjee v Anurupa</i> (1937) 36 C W |
| (y) <i>Railwant Singh</i> (1900) 23 All L J 518 | (f) <i>Agendranath v Ambaparan</i> (1929) 57 |
| (z) <i>519 88 I C 396 (25) A A 606</i> | |
| (a) <i>97 139 I C 523, (32) A C 603</i> | |
| (b) <i>Cul 519 (29) I C 676</i> | |

"At any time."—A decree may be amended under this section *at any time*, although the time for appealing from the decree has expired (*g*). There is no limitation for an application to amend the decree (*h*). Under the corresponding English rule, an error in a decree was in one case amended after 39 years (*i*), and in another case after 19 years (*j*). In a Bombay case, an application was made to the High Court to rectify a decree in the exercise of its inherent powers 10 years after the date of the decree, and the application was allowed (*k*). But no amendment should be allowed by the Court either under this section or in the exercise of its inherent powers if it is inexpedient or inequitable to do so as where third parties have acquired rights under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous (*l*). Further, laches may in the particular circumstances of a case disentitle a party to relief under this section (*m*).

Amendment and limitation.—If limitation is under the residuary Article 181 the amendment of the decree does not furnish a fresh starting point for limitation (*n*). If Article 182 applies clause 4 of that Article enacts that limitation for execution runs from the date of the amendment. The amendment of the decree does not however extend the time for appealing, though in such a case recourse might be had to sec 5 of the Limitation Act (*o*).

By which Court amendment could be made.—The Court to amend a decree is the Court that passed it. Where an appeal is preferred from a decree of a Court of first instance the appellate Court may—

- (1) dismiss the appeal under O 41, r 11 (1), without issuing any notice to the respondent, or it may
- (2) confirm, reverse or vary the decree of the Court of first instance [O 41, r 32]

In case (1), it has been held by the High Courts of Calcutta, Madras, Allahabad and Rangoon, that it is the appellate Court alone that can amend the decree (*p*). On the other hand, it has been held by the Bombay and Patna High Courts that it is the Court of the first instance, and not the appellate Court, that can amend the decree, the reason given being that a dismissal under O. 41, r 11, leaves the decree of the lower Court untouched (*q*). See notes to sec 36 above.

In case (2), the appellate Court alone can amend the decree (*r*). But in a case where the District Court amended a decree after it had been confirmed on appeal, the High Court in revision made the same amendment *suo motu* (*s*).

| | | | |
|-----|--|----------------------|--|
| (g) | | I C 528 (32) A C 563 | |
| (h) | | | |
| (i) | | | |
| (j) | | | |
| (k) | <i>Karim Mahomed v Rajooma</i> (1888) 12 Bom 174 183 | | |
| (l) | <i>Hutton v Harris</i> [1892] A C 547, 558, <i>Stewart v Rhodes</i> [1900] 1 Ch 386 394 395 <i>Pandurang v Narhar</i> (1925) 27 Bom L R 657, 89 I C 569 (25) A B 389 <i>Narayana v Biyani</i> (1922) 43 Mad L J 559 63 I C 977, (23) A M 57 <i>Madnapore Zemindary Co v Abdul Zail</i> (1933) 60 Cal 753 140 I C 6369 (33) A C 627 | | |
| (m) | <i>Elawari v Chhanga</i> (1925) 47 All 44 49 82 I C 1030 (25) A A 157 <i>Mukerjee v Ainuddin</i> (1932) 36 C W N 97, 139 | | |
| (n) | | | |
| (o) | | | |
| (p) | | | |
| (q) | | | |
| (r) | | | |
| (s) | <i>Bhagwant Singh v Elao Singh</i> (1932) 54 All 490, 136 I C 817, (32) A A 337. | | |

The Calcutta High Court has allowed an amendment of a clerical error in its decree after the decree had been affirmed by the Privy Council (t)

The Court which passed the decree has power to amend it even after an appeal is filed, it is only when the appellate Court passes a decree which supersedes the decree of the trial Court, that its power to amend ceases (u)

When an appeal is withdrawn the decree of the lower Court is left intact and that Court alone has power to amend (v)

An arithmetical error in the decree of the lower Court repeated in a confirming decree of the appellate Court, may, it is submitted, be corrected by the appellate Court

Where an application for *revision* of a decree of a Provincial Small Cause Court is rejected by the High Court *in limine*, the proper Court to amend the decree is the Small Cause Court, and not the High Court (w).

Revision.—A decision under this section granting an application for amendment is an order and not a decree. The decision may therefore be the subject of revision under sec 115, but it cannot be the subject of an appeal (x). It has been so held by the High Courts of Calcutta, Allahabad and Bombay in cases under the corresponding sec 206 of the Code of 1882. A different view has been taken by the High Court of Madras. According to that Court, where a decree is amended, the aggrieved party has the right to appeal from the decree as amended. Hence if no appeal is preferred within the period of limitation, he cannot afterwards apply for a revision of the order allowing the amendment (y).

Where a case is one of "accidental slip" within the meaning of this section, but the Court which passed the decree refuses to amend it on the ground that the case does not fall under this section, the refusal amounts to a failure to exercise a jurisdiction vested in the Court within the meaning of sec 115, and the High Court has power to interfere in revision (z). Similarly where the lower Court amends a decree in a case in which according to its own view the amendment should be refused, stating as a reason for the amendment that it was bound under this section to bring the decree into conformity with the judgment, the High Court is entitled to interfere in revision under sec 115 (c) of the Code (a).

Amendment when to be refused.—Where the order as drawn up represents the real decision of the Court, the Court has no jurisdiction to rehear or alter it (b). "Even when an order has been obtained by fraud, . . . the Court has no jurisdiction to rehear it. If such a jurisdiction existed it would be most mischievous" (c).

Consent-decree.—Where a decree founded on a compromise does not embody the true terms of the compromise, the only remedy is by an independent suit to set aside the decree either on the ground of mistake or fraud or some other ground *ejusdem generis* with it (d). See note to sec 96, "Procedure for setting aside consent decrees."

Successive applications for amendment—Res judicata.—See notes to s 11, on p 90 above

- (y) *Fitznathan v Ramnathan* (1901) 21 Mad. 646.
- (z) *Sahdeo v Deo Dutt* (1915) 37 All 323, 23 I C 50.
- (a) *Pitamb Lal v Balwant Singh* (1925) 23 All L J 518, 88 I C 396 (25) A.A. 536.
- (b) *Preston Braking Co v Williams Allsup and Sons* [1890] 1 Ch 141.
- (c) [1890] 1 Ch 141, 143, *supra*.
- (d) *Ram Lagan v Ram Buri* (1919) 4 Pat L J 205, 50 I C 497 (*Gulshan v Purodha* (1904) 57 Cal 154, (23) A C. 470).

Code of 1882, s. 206.—The third paragraph of sec 206 of the Code of 1882 runs as follows —

“ If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment or to correct such error. Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment ”

The above paragraph enabled the Court to amend its decree in the following two cases, namely —

- (1) Where the decree was at variance with the judgment, and
- (2) Where any clerical or arithmetical error was found in the decree

The present section corresponds with the second part of the above paragraph. The first part of the paragraph which empowered the Court to amend its decree so as to bring it into conformity with the judgment has been omitted. An application to amend a decree so as to bring it into conformity with the judgment must now be made to the Court in the exercise of its *inherent power*. Under O 20, r 7, it is the duty of the Judge to satisfy himself that the decree is in conformity with the judgment. This duty primarily rests with the Court and not with any interested party and so an application to amend a decree in conformity with the judgment may be entertained at any time (e)

Appeal.—No appeal lies from an order directing an amendment either under the Code (f) or under the Charter (g). In a case, however, where the whole method of calculation adopted by the first Court was challenged in the plaintiff's application, which purported to be an application under sec 152, and the first Court allowed the amendment, it was held that the order allowing the amendment must be regarded as one made under O 47, and that the order was therefore appealable (h).

It has been held by the High Court of Madras that though no appeal lies from an *order of amendment*, an appeal would lie from the *amended decree* (i).

153. [New. R. S. C., O. 28, r. 12.] The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

R. S. C., O. 28, r. 12.—This section is new. It is taken from the Rules of the Supreme Court, O 28, r 12. The words ‘in a suit’ after the word ‘proceeding’ do not occur in the English rule.

Scope of the section.—O 6, r 17, is confined to amendments of ‘pleadings’, and sec 152 to correcting errors in judgments, decrees or orders. The present section confers a *general* power on the Court to amend defects and errors in any proceeding in a suit and to make all necessary amendments for the purpose of determining the real question at issue between the parties to the suit. The section was referred to

- (e) *Bhagwant Singh v. Bhao Singh* (1932) 54 All 490, 136 I C 817 (32) A A 337
 (f) *Nalinakshi v. Majlisdar* (1900) 25 Cal 177
Narayanaram v. Nadera (1892) 16 Mad 424 425
 (g) *Muhammad v. Ishaq ulah Khan* (189-) 14

- All 226
 (h) *Lamji v. Giant* (1921) 3 Lah L J 341 66
 1 C 992 (21) A L 250
 (i) *Pieranthan v. Pamanathan* (1901) 24 Mad 646

in a case where an incorrect description of a property in a mortgage deed was repeated in the plaint, judgment and decree and the Court allowed an amendment of the decree and connected proceedings (j) This power is vested in the original as well as the appellate Court (k) In *Australian Steam Navigation Co v. Smith & Sons* (l), their Lordships of the Privy Council said "Their Lordships are strong advocates for amendment whenever it can be done without injustice to the other side, and even where they have been put to certain expense and delay, yet if they can be compensated for that in any way it seems to their Lordships that an amendment ought to be allowed for the purpose of raising the real question between the parties"

"Any proceeding in a suit."—The following are some of the cases under the corresponding English rule and the present rule —

Answers to interrogatories—Where it was admitted by the defendant, a solicitor, in answer to interrogatories, that his partner had paid into the banking account of the firm money received by the latter for investment, the defendant was allowed to amend the answer it being shown that the admission had been made by mistake (m) In another case where the defendant charged the plaintiff (his manager) with misconduct, and the plaintiff exhibited interrogatories of which the substance was to ask the defendant to specify the acts of misconduct on which he relied, it was said by Thesiger, L.J., that if the defendant answered the interrogatories, and it was subsequently discovered by him that there were other acts of misconduct on which he could rely, there was nothing to prevent his being allowed to amend his answers to the interrogatories (n) See as to interrogatories O 11, rr 1 11, below

Particulars—An application to amend particulars if made a reasonable time before the trial, will generally be allowed on terms (o) But leave to amend particulars, when it is applied for at the trial, will as a rule be refused (p)

Notice of motion—A notice of motion in an action for the rescission of an agreement for the sale of land was allowed to be amended at the hearing by asking for the appointment of a receiver (q)

Title of appeal—If an appeal is presented against a person who is dead at the date of presentation the Court may under this section permit the title of the appeal to be amended (r)

154. [S. 3, third para] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Saving of present right of appeal

"Any present right of appeal."—There is a conflict of decisions as to the meaning of the words "any present right of appeal" which occur in this section According to the Chief Court of the Punjab, the words "any present right of appeal" refer to a right which had actually come into existence at the commencement of this Code by virtue of the decree or order sought to be appealed from having been passed before this Code came into force (s) According to the Madras High Court, those words refer to a right which had become vested in a litigant before this Code came into force (t) Thus there are cases in which a second appeal lay under the old Code from certain orders

| | |
|------|------|
| (d) | (p) |
| (k) | (q) |
| (l) | (r) |
| (m) | (s) |
| (n) | (t) |
| (o) | (u) |
| (p) | (v) |
| (q) | (w) |
| (r) | (x) |
| (s) | (y) |
| (t) | (z) |
| (u) | (aa) |
| (v) | (ab) |
| (w) | (ac) |
| (x) | (ad) |
| (y) | (ae) |
| (z) | (af) |
| (aa) | (ag) |
| (ab) | (ah) |
| (ac) | (ai) |
| (ad) | (aj) |
| (ae) | (ak) |
| (af) | (al) |
| (ag) | (am) |
| (ah) | (an) |
| (ai) | (ao) |
| (aj) | (ap) |
| (ak) | (aq) |
| (al) | (ar) |
| (am) | (as) |
| (an) | (at) |
| (ao) | (au) |
| (ap) | (av) |
| (aq) | (aw) |
| (ar) | (ax) |
| (as) | (ay) |
| (at) | (az) |
| (au) | (ba) |
| (av) | (bb) |
| (aw) | (bc) |
| (ax) | (bd) |
| (ay) | (be) |
| (az) | (bf) |
| (ba) | (bg) |
| (bb) | (bh) |
| (bc) | (bi) |
| (bd) | (bj) |
| (be) | (bk) |
| (bf) | (bl) |
| (bg) | (bm) |
| (bh) | (bn) |
| (bi) | (bo) |
| (bj) | (bp) |
| (bk) | (bq) |
| (bl) | (br) |
| (bm) | (bs) |
| (bn) | (bt) |
| (bo) | (bu) |
| (bp) | (bv) |
| (bq) | (bw) |
| (br) | (bx) |
| (bs) | (by) |
| (bt) | (bz) |
| (bu) | (ca) |
| (bv) | (cb) |
| (bw) | (cc) |
| (bx) | (cd) |
| (by) | (ce) |
| (bz) | (cf) |
| (ca) | (cg) |
| (cb) | (ch) |
| (cc) | (ci) |
| (cd) | (cj) |
| (ce) | (ck) |
| (cf) | (cl) |
| (cg) | (cm) |
| (ch) | (cn) |
| (ci) | (co) |
| (cj) | (cp) |
| (ck) | (cq) |
| (cl) | (cr) |
| (cm) | (cs) |
| (cn) | (ct) |
| (co) | (cu) |
| (cp) | (cv) |
| (cq) | (cw) |
| (cr) | (cx) |
| (cs) | (cy) |
| (ct) | (cz) |
| (cu) | (da) |
| (cv) | (db) |
| (cw) | (dc) |
| (cx) | (dd) |
| (cy) | (de) |
| (cz) | (df) |
| (da) | (dg) |
| (db) | (dh) |
| (dc) | (di) |
| (dd) | (dj) |
| (de) | (dk) |
| (df) | (dl) |
| (dg) | (dm) |
| (dh) | (dn) |
| (di) | (do) |
| (dj) | (dp) |
| (dk) | (dq) |
| (dl) | (dr) |
| (dm) | (ds) |
| (dn) | (dt) |
| (do) | (du) |
| (dp) | (dv) |
| (dq) | (dw) |
| (dr) | (dx) |
| (ds) | (dy) |
| (dt) | (dz) |
| (du) | (ea) |
| (dv) | (eb) |
| (dw) | (ec) |
| (dx) | (ed) |
| (dy) | (ee) |
| (dz) | (ef) |
| (ea) | (eg) |
| (eb) | (eh) |
| (ec) | (ei) |
| (ed) | (ej) |
| (ee) | (ek) |
| (ef) | (el) |
| (eg) | (em) |
| (eh) | (en) |
| (ei) | (eo) |
| (ej) | (ep) |
| (ek) | (eq) |
| (el) | (er) |
| (em) | (es) |
| (en) | (et) |
| (eo) | (eu) |
| (ep) | (ev) |
| (eq) | (ew) |
| (er) | (ex) |
| (es) | (ey) |
| (et) | (ez) |
| (eu) | (fa) |
| (ev) | (fb) |
| (ew) | (fc) |
| (ex) | (fd) |
| (ey) | (fe) |
| (ez) | (ff) |
| (fa) | (fg) |
| (fb) | (fh) |
| (fc) | (fi) |
| (fd) | (fj) |
| (fe) | (fk) |
| (ff) | (fl) |
| (fg) | (fm) |
| (fh) | (fn) |
| (fi) | (fo) |
| (fj) | (fp) |
| (fk) | (fq) |
| (fl) | (fr) |
| (fm) | (fs) |
| (fn) | (ft) |
| (fo) | (fu) |
| (fp) | (fv) |
| (fq) | (fw) |
| (fr) | (fx) |
| (fs) | (fy) |
| (ft) | (fz) |
| (fu) | (ga) |
| (fv) | (gb) |
| (fw) | (gc) |
| (fx) | (gd) |
| (fy) | (ge) |
| (fz) | (gf) |
| (ga) | (gg) |
| (gb) | (gh) |
| (gc) | (gi) |
| (gd) | (gj) |
| (ge) | (gk) |
| (gf) | (gl) |
| (gg) | (gm) |
| (gh) | (gn) |
| (gi) | (go) |
| (gj) | (gp) |
| (gk) | (gq) |
| (gl) | (gr) |
| (gm) | (gs) |
| (gn) | (gt) |
| (go) | (gu) |
| (gp) | (gv) |
| (gq) | (gw) |
| (gr) | (gx) |
| (gs) | (gy) |
| (gt) | (gz) |
| (gu) | (ha) |
| (gv) | (hb) |
| (gw) | (hc) |
| (gx) | (hd) |
| (gy) | (he) |
| (gz) | (hf) |
| (ha) | (hg) |
| (hb) | (hh) |
| (hc) | (hi) |
| (hd) | (hj) |
| (he) | (hk) |
| (hf) | (hl) |
| (hg) | (hm) |
| (hh) | (hn) |
| (hi) | (ho) |
| (hj) | (hp) |
| (hk) | (hq) |
| (hl) | (hr) |
| (hm) | (hs) |
| (hn) | (ht) |
| (ho) | (hu) |
| (hp) | (hv) |
| (hq) | (hw) |
| (hr) | (hx) |
| (hs) | (hy) |
| (ht) | (hz) |
| (hu) | (ia) |
| (hv) | (ib) |
| (hw) | (ic) |
| (hx) | (id) |
| (hy) | (ie) |
| (hz) | (if) |
| (ia) | (ig) |
| (ib) | (ih) |
| (ic) | (ii) |
| (id) | (ij) |
| (ie) | (ik) |
| (if) | (il) |
| (ig) | (im) |
| (ih) | (in) |
| (ii) | (io) |
| (ij) | (ip) |
| (ik) | (iq) |
| (il) | (ir) |
| (im) | (is) |
| (in) | (it) |
| (io) | (iu) |
| (ip) | (iv) |
| (iq) | (iw) |
| (ir) | (ix) |
| (is) | (iy) |
| (it) | (iz) |
| (iu) | (ja) |
| (iv) | (jb) |
| (iw) | (jc) |
| (ix) | (jd) |
| (iy) | (je) |
| (iz) | (jf) |
| (ja) | (jg) |
| (jb) | (jh) |
| (jc) | (ji) |
| (jd) | (jj) |
| (je) | (jk) |
| (jf) | (jl) |
| (jg) | (jm) |
| (jh) | (jn) |
| (ji) | (jo) |
| (jj) | (jp) |
| (jk) | (jq) |
| (jl) | (jr) |
| (jm) | (js) |
| (jn) | (jt) |
| (jo) | (ju) |
| (jp) | (jv) |
| (jq) | (jw) |
| (jr) | (jx) |
| (js) | (jy) |
| (jt) | (jz) |
| (ju) | (ka) |
| (jv) | (kb) |
| (jw) | (kc) |
| (jx) | (kd) |
| (jy) | (ke) |
| (jz) | (kf) |
| (ka) | (kg) |
| (kb) | (kh) |
| (kc) | (ki) |
| (kd) | (kj) |
| (ke) | (kk) |
| (kf) | (kl) |
| (kg) | (km) |
| (kh) | (kn) |
| (ki) | (ko) |
| (kj) | (kp) |
| (kk) | (kq) |
| (kl) | (kr) |
| (km) | (ks) |
| (kn) | (kt) |
| (ko) | (ku) |
| (kp) | (kv) |
| (kq) | (kw) |
| (kr) | (kx) |
| (ks) | (ky) |
| (kt) | (kz) |
| (ku) | (la) |
| (kv) | (lb) |
| (kw) | (lc) |
| (kx) | (ld) |
| (ky) | (le) |
| (kz) | (lf) |
| (la) | (lg) |
| (lb) | (lh) |
| (lc) | (li) |
| (ld) | (lj) |
| (le) | (lk) |
| (lf) | (ll) |
| (lg) | (lm) |
| (lh) | (ln) |
| (li) | (lo) |
| (lj) | (lp) |
| (lk) | (lq) |
| (ll) | (lr) |
| (lm) | (ls) |
| (ln) | (lt) |
| (lo) | (lu) |
| (lp) | (lv) |
| (lq) | (lw) |
| (lr) | (lx) |
| (ls) | (ly) |
| (lt) | (lz) |
| (lu) | (ma) |
| (lv) | (mb) |
| (lw) | (mc) |
| (lx) | (md) |
| (ly) | (me) |
| (lz) | (mf) |
| (ma) | (mg) |
| (mb) | (mh) |
| (mc) | (mi) |
| (md) | (mj) |
| (me) | (mk) |
| (mf) | (ml) |
| (mg) | (mn) |
| (mh) | (mo) |
| (mi) | (mp) |
| (mj) | (mq) |
| (mk) | (mr) |
| (ml) | (ms) |
| (mn) | (mt) |
| (mo) | (mu) |
| (mp) | (mv) |
| (mq) | (mw) |
| (mr) | (mx) |
| (ms) | (my) |
| (mt) | (mz) |
| (mu) | (na) |
| (mv) | (nb) |
| (mw) | (nc) |
| (mx) | (nd) |
| (my) | (ne) |
| (mz) | (nf) |
| (na) | (ng) |
| (nb) | (nh) |
| (nc) | (ni) |
| (nd) | (nj) |
| (ne) | (nk) |
| (nf) | (nl) |
| (ng) | (nm) |
| (nh) | (nn) |
| (ni) | (no) |
| (nj) | (np) |
| (nk) | (nq) |
| (nl) | (nr) |
| (nm) | (ns) |
| (nn) | (nt) |
| (no) | (nu) |
| (np) | (nv) |
| (nq) | (nw) |
| (nr) | (nx) |
| (ns) | (ny) |
| (nt) | (nz) |
| (nu) | (oa) |
| (nv) | (ob) |
| (nw) | (oc) |
| (nx) | (od) |
| (ny) | (oe) |
| (nz) | (of) |
| (oa) | (og) |
| (ob) | (oh) |
| (oc) | (oi) |
| (od) | (oj) |
| (oe) | (ok) |
| (of) | (ol) |
| (og) | (om) |
| (oh) | (on) |
| (oi) | (oo) |
| (oj) | (op) |
| (ok) | (oq) |
| (ol) | (or) |
| (om) | (os) |
| (on) | (ot) |
| (oo) | (ou) |
| (op) | (ov) |
| (oq) | (ow) |
| (or) | (ox) |
| (os) | (oy) |
| (ot) | (oz) |
| (ou) | (pa) |
| (ov) | (pb) |
| (ow) | (pc) |
| (ox) | (pd) |
| (oy) | (pe) |
| (oz) | (pf) |
| (pa) | (pg) |
| (pb) | (ph) |
| (pc) | (pi) |
| (pd) | (pj) |
| (pe) | (pk) |
| (pf) | (pl) |
| (pg) | (pm) |
| (ph) | (pn) |
| (pi) | (po) |
| (pj) | (pp) |
| (pk) | (pq) |
| (pl) | (pr) |
| (pm) | (ps) |
| (pn) | (pt) |
| (po) | (pu) |
| (pp) | (pv) |
| (pq) | (pw) |
| (pr) | (px) |
| (ps) | (py) |
| (pt) | (pz) |
| (pu) | (qa) |
| (pv) | (qb) |
| (pw) | (qc) |
| (px) | (qd) |
| (py) | (qe) |
| (pz) | (qf) |
| (qa) | (qg) |
| (qb) | (qh) |
| (qc) | (qi) |
| (qd) | (qj) |
| (qe) | (qk) |
| (qf) | (ql) |
| (qg) | (qm) |
| (qh) | (qn) |
| (qi) | (qo) |
| (qj) | (qp) |
| (qk) | (qq) |
| (ql) | (qr) |
| (qm) | (qs) |
| (qn) | (qt) |
| (qo) | (qu) |
| (qp) | (qv) |
| (qq) | (qw) |
| (qr) | (qx) |
| (qs) | (qy) |
| (qt) | (qz) |
| (qu) | (ra) |
| (qv) | (rb) |
| (qw) | (rc) |
| (qx) | (rd) |
| (qy) | (re) |
| (qz) | (rf) |
| (ra) | (rg) |
| (rb) | (rh) |
| (rc) | (ri) |
| (rd) | (rj) |
| (re) | (rk) |
| (rf) | (rl) |
| (rg) | (rm) |
| (rh) | (rn) |
| (ri) | (ro) |
| (rj) | (rp) |
| (rk) | (rq) |
| (rl) | (rr) |
| (rm) | (rs) |
| (rn) | (rt) |
| (ro) | (ru) |
| (rp) | (rv) |
| (rq) | (rw) |
| (rr) | (rx) |
| (rs) | (ry) |
| (rt) | (rz) |
| (ru) | (sa) |
| (rv) | (sb) |
| (rw) | (sc) |
| (rx) | (sd) |
| (ry) | (se) |
| (rz) | (sf) |
| (sa) | (sg) |
| (sb) | (sh) |
| (sc) | (si) |
| (sd) | (sj) |
| (se) | (sk) |
| (sf) | (sl) |
| (sg) | (sm) |
| (sh) | (sn) |
| (si) | (so) |
| (sj) | (sp) |
| (sk) | (sq) |
| (sl) | (sr) |
| (sm) | (ss) |
| (sn) | (st) |
| (so) | (su) |
| (sp) | (sv) |
| (sq) | (sw) |
| (sr) | (sx) |
| (ss) | (sy) |
| (st) | (sz) |
| (su) | (ta) |
| (sv) | (tb) |
| (sw) | (tc) |
| (sx) | (td) |
| (sy) | (te) |
| (sz) | (tf) |
| (ta) | (tg) |
| (tb) | (th) |
| (tc) | (ti) |
| (td) | (tj) |
| (te) | (tk) |
| (tf) | (tl) |
| (tg) | (tm) |
| (th) | (tn) |
| (ti) | (to) |
| (tj) | (tp) |
| (tk) | (tq) |
| (tl) | (tr) |
| (tm) | (ts) |
| (tn) | (tt) |
| (to) | (tu) |
| (tp) | (tv) |
| (tq) | (tw) |
| (tr) | (tx) |
| (ts) | (ty) |
| (tt) | (tz) |
| (tu) | (ua) |
| (tv) | (ub) |
| (tw) | (uc) |
| (tx) | (ud) |
| (ty) | (ue) |
| (tz) | (uf) |
| (ua) | (ug) |
| (ub) | (uh) |
| (uc) | (ui) |
| (ud) | (uj) |
| (ue) | (uk) |
| (uf) | (ul) |
| (ug) | (um) |
| (uh) | (un) |
| (ui) | (uo) |
| (uj) | (up) |
| (uk) | (uq) |
| (ul) | (ur) |
| (um) | (us) |
| (un) | (ut) |
| (uo) | (uu) |
| (up) | (uv) |
| (uq) | (uw) |
| (ur) | (ux) |
| (us) | (uy) |
| (ut) | (uz) |
| (uu) | (va) |
| (uv) | (vb) |
| (uw) | (vc) |
| (ux) | (vd) |
| (uy) | (ve) |
| (uz) | (vf) |
| (va) | (vg) |
| (vb) | (vh) |
| (vc) | (vi) |
| (vd) | (vj) |
| (ve) | (vk) |
| (vf) | (vl) |
| (vg) | (vm) |
| (vh) | (vn) |
| (vi) | (vo) |
| (vj) | (vp) |
| (vk) | (vq) |
| (vl) | (vr) |
| (vm) | (vs) |
| (vn) | (vt) |
| (vo) | (vu) |
| (vp) | (vv) |
| (vq) | (vw) |
| (vr) | (vx) |
| (vs) | (vy) |
| (vt) | (vz) |
| (vu) | (wa) |
| (vv) | (wb) |
| (vw) | (wc) |
| (vx) | (wd) |
| (vy) | (we) |
| (vz) | (wf) |
| (wa) | (wg) |
| (wb) | (wh) |
| (wc) | (wi) |
| (wd) | (wj) |
| (we) | (wk) |
| (wf) | (wl) |
| (wg) | (wm) |
| (wh) | (wn) |
| (wi) | (wo) |
| (wj) | (wp) |
| (wk) | (wq) |
| (wl) | (wr) |
| (wm) | (ws) |
| (wn) | (wt) |
| (wo) | (wu) |
| (wp) | (wv) |
| (wq) | (wv) |
| (wr) | (wx) |
| (ws) | (wy) |
| (wt) | (wz) |
| (wu) | (xa) |
| (wv) | (xb) |
| (wx) | (xc) |
| (wy) | (xd) |
| (wz) | (xe) |
| (xa) | (xf) |
| (xb) | (xg) |
| (xc) | (xh) |
| (xd) | (xi) |
| (xe) | (xj) |
| (xf) | (xk) |
| (xg) | (xl) |
| (xh) | (xm) |
| (xi) | |

made in execution (the orders being treated as decrees), while no such appeal lies under the present Code. According to the Chief Court of the Panjab, no second appeal would lie in such a case from the order made in first appeal unless the *latter order* was made while the old Code was in force. According to the Madras High Court, a second appeal would lie if the *first appeal* from the order made by the Court of first instance was preferred when the old Code was in force, though the order made in first appeal was not made until after the new Code came into force (u). Similarly there are cases in which

was in force (v). According to the Madras High Court, it would seem that an appeal would lie if the *suit* in which the order was made was instituted when the old Code was in force. See s 96, sub s (3), and ss 97 and 104. See also notes to s 1.

155. [New.] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Amendment of certain Acts

156. [S. 3, first sentence.] *The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.*

Repeals

This section and the Fifth Schedule to the Code have been repealed by the Second Repealing and Amending Act 17 of 1914, s 3.

157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed, shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

Continuance of orders under repealed enactments

158. [S. 3, second para.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

Reference to Code of Civil Procedure and other repealed enactments

(u) *Kalaya v Narasimha* (1911) 21 Mad LJ 631, 9 I C 937 | (v) *Gonda Mal v Pirandits* (1913) Punj L.C. no 1 p 1, 15 LC 725

THE FIRST SCHEDULE

ORDER I.

Parties to Suits.

1. [S. 26, R. S. C., O. 16, r. 1.] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise

Who may be joined as plaintiffs

Scope of the Order.—This order deals with joinder of parties, and to a certain extent, with joinder of causes of action (w) O 2, r 3, deals exclusively with joinder of causes of action Rule 4 of this Order is to be read with rule 1

General rules.—Before considering the present rule it may be as well to note the general rules relating to the joinder of parties and of causes of action According to the Code the essentials of a suit are—(1) opposing parties, (2) a subject in dispute, (3) a cause of action, and (4) a demand of relief (x) [see O 7, r 1] All these essentials must concur in every suit properly framed Order 1 deals with the joinder of parties Order 2 deals with the frame of suits In framing a suit the following three kinds of “misjoinder” must be guarded against—

(1) *Misjoinder of plaintiffs*—Where there are more plaintiffs than one, the provisions of the present rule apply This rule relates to the joinder of plaintiffs It provides in effect that two or more persons may be joined as plaintiffs in one suit if the right to relief alleged to exist in each plaintiff arises from the same act or transaction and there is a common question of law or of fact If not, they cannot be joined as plaintiffs in one suit, and they must bring separate suits If two or more persons are joined as plaintiffs in one suit in a case not covered by O 1, r 1, the result is a misjoinder of plaintiffs The objection on the ground of misjoinder of plaintiffs should be taken at the earliest possible opportunity, if not, it will be deemed to have been waived [O 1, r 13] Where such objection is taken, and the Court finds that it is well founded, the Court should not dismiss the suit [O 1, r 9], but the plaint may be amended [O 6, r 17] by striking out the names of such persons as have been improperly joined as plaintiffs [O 1, r 10, sub r (2)], and the suit may then be proceeded with [O 1, r 9] In other words, an objection on the ground of misjoinder of plaintiffs is not fatal to the suit (y)

(2) *Misjoinder of defendants*—Where there are more defendants than one, the provisions of rule 3 of this Order apply That rule relates to the joinder of defendants It provides in effect that two or more persons may be joined as defendants in one suit if the right to relief alleged to exist against each of them arises from the same act or transaction and there is a common question of law or of fact If not, they cannot be joined as defendants in one suit, and separate suits must be brought against them If

(w) *Bullock v London General Omnibus Co* (1907) 1 K B 264 272 *Compania Samsinena v Houlder Brothers & Co* (1910) 2 K B 354, 363 367 *Harentra Neth v Iurna Chandra* (1938) 55 Cal 164

100 I C 750, (28) A C 100

(x) *Krishnappa v Shivappa* (1907) 31 Bom 333 338

(y) *Janakinath v Ramrunjun* (1870) 4 Cal 949

two or more persons are joined as defendants in one suit in a case not covered by O 1 r 3, the result is a *misjoinder of defendants*. As in the case of plaintiffs so in the case of defendants the objection on the ground of misjoinder should be taken at the earliest possible opportunity; if not, it will be deemed to have been waived (O 1 r 13). Where such objection is taken and the Court finds that it is well founded the Court should not dismiss the suit (O 1, r 9) but the plaint may be amended (O 6, r 17) by striking out the names of such persons as have not been properly joined as defendants (O 1, r 10, sub r (2)) and the suit may then be proceeded with (O 1, r 9). In other words, an objection on the ground of misjoinder of defendants is not fatal to the suit.

(iii) *Misjoinder of causes of action*—As to the meaning of cause of action, see notes to sec 20 under the head 'Cause of action'. A misjoinder of causes of action may be coupled with a misjoinder of plaintiffs or it may be coupled with a misjoinder of defendants. There may again be a misjoinder of claims founded on several causes of action. Accordingly this subject may be considered under the following three heads—

(a) *Misjoinder of plaintiffs and causes of action*—Where in a suit there are *two or more plaintiffs and two or more causes of action*, the plaintiffs should be *jointly interested* in all the causes of action. If the plaintiffs are not *jointly interested* in all the causes of action, the case is one of *misjoinder of plaintiffs and causes of action* (O 2, r 3, read with O 1, r 1, forbids such a misjoinder). The objection on the ground of misjoinder of plaintiffs and causes of action should be taken at the earliest possible opportunity (O 2, r 7). As to the procedure to be followed in the case of misjoinder of plaintiffs and causes of action, see notes to O 2, r 3, "Procedure in case of misjoinder of plaintiffs and causes of action". See also s 99 above.

(b) *Misjoinder of defendants and causes of action* *Multifariousness*—Where in a suit there are *two or more defendants and two or more causes of action* the suit will be bad for misjoinder of defendants and causes of action if different causes of action are joined against different defendants separately (O 2 r 3, and O 1, r 3). Such a misjoinder is technically called *multifariousness*. The objection on the ground of multifariousness should be taken at the earliest possible opportunity (O 2 r 7). As to the procedure to be followed in the case of multifariousness, see notes to O 2, r 3, "Procedure in case of multifariousness". See also s 99 above.

(c) *Misjoinder of claims founded on several causes of action*—See O 2, rr 4 5

Non joinder of parties—Where a person who is a necessary party to a suit is not joined as a party to the suit the case is one of *non joinder*. A suit should not be dismissed on the ground of non joinder (2). The objection for non joinder should be taken before the first hearing (O 1, r 13), and the plaint may be amended by adding the omitted party either as plaintiff or as defendant, bearing in mind that no person can be added as a *plaintiff*, though he may be added as a defendant, without his consent (2). See notes to O 1, rr 9 and 13.

Relation of this rule to O 2, r 3—O 2, r 3, is to be read subject to the provisions of this rule (a).

Changes effected in the law—Before considering O 1, r 1, in detail it should be noted that under the corresponding sec 26 of the Code of 1882, all persons could be joined in one suit as plaintiffs, provided that the right to relief alleged to exist in each plaintiff arose from the *same cause of action*. The present rule is much wider. It is a

(2) *Maphabala v Kunhanna* (1894) 21 Mad 373
(a) *Lamendra Nath v Brayendra Nath* (1918)]

reproduction, almost verbatim, of O 16, r 1 of the English rules. It enables several plaintiffs, though they have *separate causes of action*, to join in one suit, if—

- (1) the right to relief, alleged to exist in each plaintiff, arises out of the *same act or transaction*, and
- (2) there is a *common question of law or fact*

The expression 'act or transaction' used in this rule is more comprehensive than the expression 'cause of action' used in the old section, for the same act or transaction may give rise to different causes of action, as when several persons are injured by the same act of negligence on the part of a railway company. Under the old section such persons could not join as plaintiffs in one suit, the *causes of action being different*. Under the present rule, it seems, they can, as the right to relief arises out of the *same act*.

The old section.—The corresponding sec. 26 of the Code of 1852 was as follows:—

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the *same cause of action*.

The decisions on the meaning of 'cause of action' in the old section were not uniform. In some cases it was held that the expression 'cause of action' meant facts constituting the infringement of a right *plus* facts constituting the right itself (b), while in others it was held that it referred to facts constituting the *infringement of the right* but not necessarily also those *constituting the right* (c).

The following are some of the cases decided under the old section. It was held in those cases that the plaintiffs could not all join in one suit and that they should bring separate suits. Under the present rule, it is submitted, the plaintiffs may in each one of the following cases all join in one suit:—

1 In *Aldridge v Barrow* (d), the defendant, the editor and proprietor of a newspaper, published articles which referred to the 'Calcutta Police,' without naming individuals. The plaintiffs six of the members of the Calcutta Police Force, jointly sued the editor for damages, alleging that the articles were directed against them, and that they constituted a libel. Here the libel was in the same words, and in the same documents but of different persons. It was held that the plaintiffs could not all be joined in one suit. The Court said: It is true that the injury may have been caused by *one act* of the defendant as, for instance, in the case of a railway accident causing injury to several passengers, or, as is here alleged, of a collective libel on several individuals. The causes of action of the persons injured will none the less remain separate and distinct. There cannot in such cases be said to be *one or the same cause of action*.

2 In *Rajjo Kuar v Debi Dial* (e) several creditors to each of whom separate debts were owing by the same debtor, jointly sued the debtor to avoid a deed of gift executed by the debtor in favour of his daughter, on the ground that it was made fraudulently with intent to defeat their claims. The Court held that they could not join as plaintiffs in one suit on the ground that the causes of action were *separate and distinct*. Such a suit could now be properly brought by one or more creditors on behalf of themselves and others under O 1, r 8.

833 833, *Aldridge v Barrow* (1907) 34 Cal 66, 668. *Fakirappa v Indrapa* (1899) 16 Bom 118. *Farajal v Fomdat* (1902) 20 Bom 259. 263. *Janapati v Janapati* (1903) 26 Mad 647, 649.

(d) (1907) 34 Cal 662.

(e) (1898) 18 All 432.

3 In *Larajit v Ramdat* (f), A and B were assaulted by C at an interview in C's house. A and B jointly sued C for damages for assault. It was held that the assaults on A and that on B constituted *two distinct causes of action*, and the suit was therefore bad for misjoinder of plaintiffs. The Court said: 'We may go further and say that as the blows on each plaintiff were inflicted at the same time and place and must be proved by the same evidence, it would be more convenient if the law permitted the trial of the two suits together than that it should be necessary to try them separately. But this is a matter for the consideration of the Legislature.'

4 In *41s Serang v Beadon* (g), thirteen firemen, who were engaged on board a steamer, were all arrested under one warrant on a charge of desertion, and they were all tried together and sentenced to one month's imprisonment. The term of imprisonment expired on 5th May, but they were not released on that date. Thereupon all the thirteen brought a suit against the superintendent of the jail for damages for wrongful detention. It was held that the causes of action were *distinct and separate* and could not be joined in one suit.

5 In *Pamanuja v Devanayaka* (h), several trustees of a temple were removed from the office of trustees by the District Temple Committee. A suit by the trustees for a declaration that their removal was without just cause was held to be bad for misjoinder, on the ground that the dismissal of each trustee gave rise to a *distinct cause of action*.

The new Rule.—In all the cases cited above, it was held that the plaintiffs having *distinct causes of action*, they could not join in one suit, and that the proper course for them was to bring separate suits. The present rule covers such cases and allows the plaintiffs to join in *one suit* (i). Under the present rule several persons may join as plaintiffs in *one suit*, though their causes of action be *separate and distinct*, provided that—

- (1) the right to relief, alleged to exist in them, arises out of the *same act or transaction or series of acts or transactions*, and
- (2) the case is of such a character that, if such persons brought separate suits, any *common question of law or fact* would arise.

Both these conditions must be fulfilled to enable two or more persons to join as plaintiffs in one suit. The two conditions are *not alternative* (j).

Illustrations

(1) A publishes a series of books under the title of 'The Oxford and Cambridge Publications' so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them. The two Universities may join as plaintiffs in one suit to restrain A from using the title, because the publication and the belief induced are *common questions of fact* arising out of the *same series of transactions* (k).

(2) A, a shareholder in a company, sues B, C and D, the directors, to recover damages *on his own behalf* for fraudulently inducing him to purchase shares by declaring an illegal dividend, and he joins in the same suit a claim *on behalf of himself and all other shareholders* (see r 8 below) for repayment by the defendants to the company of the amount of the dividend paid out by them. A is not entitled to join both causes of action in one suit, because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders *do not arise out of the same transaction or series of transactions* (l).

(f) (1903) 26 Bom 259

(g) (1885) 11 Cal 524

(h) (1885) 8 Mad 361

(i) *Harendra Nath v Purna Chandra* (1908) 55

Cal 164 109 I C 752 (N) A C 199

(j) *Stroud v Lawton* [1898] 2 Q B 44 52 54

(k) *The Universities of Oxford and Cambridge v George Gill & Sons* [1899] 1 Ch 55

(l) *Stroud v Lawton* [1898] 2 Q B 44

1

(3) Four persons, each of whom separately took debentures on the faith of certain statements in a prospectus issued by the directors of a company, joined as co plaintiffs in one suit against the directors, claiming damages for misrepresentations contained in the prospectus. *Held* that as the several causes of action arose out of the same transaction, and the case would involve common questions of fact the suit was properly framed (m)

(4) In a suit instituted by A, B and C jointly for an injunction against D, E and F, it is alleged that all three defendants, as officers of several associations of workmen conspired to prevent all persons, not belonging to the associations, from obtaining employment in place of the members of the associations. To constitute the overt acts alleged to have been committed in furtherance of the conspiracy, it is averred that D, E and F caused A, B and C to be molested, that E used threatening language to A, and that F assaulted C. It is proved that D was not a party to the conspiracy. As the claim arises out of the same series of transactions, and involves the common question of fact and law whether the overt acts were committed in furtherance of the conspiracy, A, B and C, may join in the suit, notwithstanding that an injunction is granted against E and F only (n). See r 4 (a) below

The illustrations given above are all English cases decided under the new English rule 1 of Order 16. That rule came into operation on the 26th of October, 1896. The present rule is in the main a reproduction of the English rule. The old English rule corresponded with sec 26 of the Code of 1882, except that the words "in respect of the same cause of action" did not occur in that rule. But though those words did not occur in that rule, it was held that two or more persons could not join as plaintiffs in one suit unless the cause of action was the same. Thus in *Smurthwaite v Hannay* (o), it was held by the House of Lords that several shippers of different shipments of cotton on the same ship for the same voyage could not jointly sue the shipowner for damages for short delivery, the causes of action being distinct and separate. For the same reason it was held that persons injured by the same act of negligence could not join in one action as plaintiffs for damages against the wrong doer (p). But since the test under the new English rule as well as the present Indian rule is no longer the identity of the cause of action, but the identity of the act or transaction, such a joinder of plaintiffs would now be perfectly legitimate both in England and India (q). In *Thomas v Moore* (r), Pickford, L.J., said. Whatever the law may have been at the time when *Smurthwaite v Hannay* was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right."

Plaintiffs having different interests.—Under the old section there was a conflict of decisions as to whether, where the plaintiffs were entitled to different interests in a property, they could join in one suit to recover possession of the property from a third party if the ground on which the relief was claimed was common to all the plaintiffs. According to the Allahabad decisions, they could not (s), according to the Madras and Calcutta decisions, they could (t). Under the present rule, there is no doubt that such persons may be joined in one suit as plaintiffs.

| | |
|---|------------------------|
| (m) <i>Drinoghier v Wood</i> [1892] 1 Ch 393 and | (g) " " " " " " [1910] |
| (n) " " " " " " " | (r) " " " " " " " |
| (o) " " " " " " " | (s) " " " " " " " |
| (p) " " " " " " " | (t) " " " " " " " |
| Kijima [1895] A.C. 661, <i>Carter v Rigby</i> [1898] 2 Q.B. 113 (action by representatives of fifty miners drowned by the flooding of a mine) | |

Illustration

A succeeds to *B*'s estate by inheritance, and assigns a portion thereof to *C*. *D* is in possession of the estate, and disputes *A*'s right of succession to it. *A* and *C* may under the present rule jointly sue *D* for recovery of possession of the portions of the estate to which they are entitled, as their claims in respect thereof are based on a common ground. It does not matter that *A* claims by right of inheritance and *C* under an assignment from *A*. Both the conditions required by the rule are present in the case.

Further, having regard to the comprehensive language of this rule, plaintiffs may sue in a double capacity, if the conditions prescribed by this rule are complied with. Thus where plaintiffs were trustees of a house part of which was let out by them and the rest occupied by them as tenants, and they sued both as trustees and tenants for an injunction to restrain the defendant from committing a nuisance, it was held that there was no objection to their suing as trustees to protect the reversion and as tenants to enjoy the property free from the nuisance (u). See notes below "Jointly."

"Any right to relief."—The words "any right to relief" are wider than the words "the right to any relief" which occurred in the old section (v).

"Severally."—Where a right to relief in respect of the same act or transaction is alleged to exist in two or more persons severally, they may join as plaintiffs in one suit or they may at their option bring separate suits. The rule does not necessitate one suit. A Hindu priest raises a masonry structure upon a certain platform round a sacred tree, on which every member of the community has an individual right to perform religious rites. Here every member of the community has individually a cause of action, and any one member may therefore sue the priest for the removal of the structure. But it is not necessary that all the members should join as plaintiffs in one suit. They may so join if they choose, but the law does not say that they should all so join (w). The same rule applies when two or more persons are entitled to the same relief in the alternative see notes below, under the head "in the alternative." The rule, however, is different when two or more persons are jointly entitled to the same relief in respect of a transaction.

"Jointly."—Where two or more persons are jointly entitled to the same relief in respect of a transaction, they must all join as plaintiffs in one suit. Thus if *A*, *B* and *C* are joint owners of a property, they must all be joined as plaintiffs in a suit to recover the property (x). So in a suit to recover joint family property, all the members of the joint family must as a general rule be joined as plaintiffs (y). In a suit to recover trust property all the trustees must join as plaintiffs (z). In a suit to recover the estate of a deceased person all the executors who have proved the will of the deceased must be joined as plaintiffs (a). If any one of them does not consent to join as plaintiff, he may be joined as a defendant [r 10, sub r (2)]. The proper course is first to ask him to join as plaintiff, and if he refuses, to join him as defendant. But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (b).

A Hindu dies leaving a widow, an adopted son, and a separate brother. A dispute arises between the widow and the adopted son on the one hand and the brother on the other as regards certain lands. The widow and the adopted son allege that the lands form part of the estate of the deceased. The brother, on the other hand, alleges that the

(u) *Bai Bhicaji v Perofshaw* (1916) 40 Bom 401, 408, 33 I C 192.

(v) See *Hanray & Co v Smurthwaite* (1893) 2 Q B 412. *Account Gort v Howney* (1886) 17 Q B D 625, 635.

(w) *Batjadal v Bulakhal* (1897) 24 Cal 385.

(x) *Kattusheri v Vallolil* (1881) 3 Mad 234.

(y) *Collector of Monghyr v Hurdai Narain* (1880) 5 Cal 425.

(z) *Shannmuga v Subbayya* (1902) 42 Mad. L.J. 133, 70 I C 645, (22) A M 317.

(a) *Mohanavelu v Annamalai* (1923) 44 Mad L.J. 249, 72 I C 63 (23) A M 337.

(b) *Pyeri v Kadamath* (1899) 26 Cal. 409; *Burrough v Avelar* (1902) 24 All. 226; *Buli Mai v Shabba* (1925) 7 Lah L.J. 250, 92 I C 569, (25) A L. 504.

lands belong to him. If the widow does not dispute the adoption, a suit may be brought by her and the adopted son as co plaintiffs against the brother to recover the property from him, for the plaintiffs are jointly interested in disproving the defendant's title (c). But what if the adoption is not admitted by the widow, and she asks the Court to decide the question of adoption as between her and the adopted son, and prays that if the adoption is proved, the property may be delivered to the adopted son, or if not proved, to herself? In such a case it has been held by the High Court of Madras, that a suit by the widow and the adopted son as co plaintiffs to recover the property from the brother is defective on the ground of misjoinder of plaintiffs, for the plaintiffs having antagonistic claims it cannot be said that the right to relief exists jointly in them (d).

In the alternative.—If in the case put above, the adoption is disputed, not by the widow, but by the brother, a suit may be brought by the widow and the adopted son as co plaintiffs against the brother, claiming in the alternative to recover the property for the widow if the adoption is not valid, or for the adopted son if the adoption is valid (r). Here there is no misjoinder of plaintiffs, for the validity of the adoption is not disputed by the co plaintiff as in the preceding case, but by the defendant. See O 1 r 4 (a), below.

Plaintiff transferred to category of defendants—See notes to O 1, r 10,
under the same head

Appeal—See notes to Q 1, & 3. ' Appeal

2. [New. R. S C. O. 16, r. 1.] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient

This rule refers to a suit brought by several plaintiffs, in respect of the same act or transaction, but the causes of action are so distinct that it is not convenient to dispose of them at one trial (f) The Court may, put the plaintiffs to their election as to which of them will proceed with the suit or may order separate trials or may make such other order as may be expedient. A suit by several creditors joining as co-plaintiffs in a creditor's action, or a suit by several market gardeners claiming certain preferential rights as to stands in the market, is not a suit where the joinder could embarrass or delay the trial (g) Where plaintiff sued for possession of several properties, some in his personal capacity, and some as shewab of an idol, the Calcutta High Court ordered the suit to be treated as comprising two suits (h)

3. [S. 28, Cf. R. S. C., O. 16, r. 4] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of

(c)

(d)

(f) See *Prasasti & Puncak* (1903) 26 Mad 64⁴ *Harmoni Darsi & Lari C/ari* (1905) 26 Mad 833 *Lakshmi & Vag* (1905) 26 Mad 500 *Rudman De & Vag* (1916) 26 Mad 500 *Pun Rec* no 10.

(*) See Pinapatt & Pinapatt (1903) 26 Mad 64; *Maramoni Dass v. Mari Chinn* (1905) -- Cal 833; *Lalabharla v. Vag* (1905) 8 Mad 500; *Kulman De v. Shih Dey* (1916) Puri Rec no 10.

p. 27, 34 I C 641, 1 clappa v Chidambaram
(19-2) 43 Mad L J 77 70 I C 644
(24) A M 174

(f) See for an example *Armon v Smith* (1833)
41 C D 98, 102 per Lindley L J,
Armon v Smith (1839) 41 L D 314

(g) *Bedford v Ellis* (1903) A C 112

(A) *Harindra v Perma* (1928) 55 Cal 164 109
1 C 755 (-4) A C 113

acts or transactions is alleged to exist whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

Misjoinder of defendants. This rule is the converse of rule 1. It deals with joinder of defendants. See notes to O 1, r 1. "Misjoinder of defendants." Rule 4 of this Order is to be read with this rule.

Relation of this rule to O 2, r 3.—O 2, r 3 is to be read subject to the provisions of this rule (i).

Jurisdiction. This rule contains a provision as to joinder of parties. It assumes the existence of a suit in a proper forum, i.e., in the Court having jurisdiction to try the suit. If the Court has such jurisdiction then this rule may come into play. Hence if in a suit brought against two defendants *A* and *B* the Court has jurisdiction against *A*, but none against *B* this rule does not confer jurisdiction upon the Court to try the suit against *B* also merely because the conditions of this rule are satisfied (j). But if leave has been granted under cl. 12 of the Letters Patent a suit will lie to set aside a joint mortgage by *A* and *B* although the land of *A* is outside the local limits of the jurisdiction of the High Court for in such a case jurisdiction is derived from the leave given and the rule can come into play (k).

The old section.—The corresponding s. 25 of the Code of 1882 ran as follows:

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative in respect of the same matter."

In some cases under that section it was said that the expression "same matter" was equivalent to "same cause of action," in others that it was equivalent to "same act or transaction."

New Rule.—Under the present rule all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where if separate suits were brought against such persons, any common question of law or fact would arise. A plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants on the analogy of O 1, r 2, if it thinks it right to do so (l). "Whatever the law may have been at the time when *Smurthwaite v Hannay* (m) was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right" (n). As a general rule where claims against different parties involve or may involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters be disposed of at the same time, the Court will allow the joinder of defendants, subject to its discretion as to how the action should be tried (o) [see ill. (3) below]. See notes to O 2, r 3, "Joinder of defendants and causes of action."

(i) *Ramendra Nath v. Brajendra Nath* (1918) 45 Cal 111 411 C 914.

(j) *Bengal and North Western Ry. Co. v. Sada Ram* (1923) 49 Cal 895 70 I C 229 (22) A C 500.

(k) *Surendrakrishna v. Dhobaneshwar* (1933) 50 Cal 54 144 I C 792, (33) A C 295.

(l) *Payne v. British Time Recorder Co.* [1921]

2 K B 1. *Harendra Nath v. Purna Chandra* (1908) 55 Cal 161 109 I C 755 (28) A C 193. *Bhagvan v. Balku* (1931) 83 Hon. L.R. 1291 136 I C 497 (32) A B 1.

(m) [1891] A C 491.

(n) *Thomas v. Moore* [1918] 1 K B 555, 565.

(o) [1921] 2 K B 1 *supra*.

Illustrations

1 *A*, riding in an omnibus belonging to *B*, is injured by a collision between the omnibus and a cart belonging to *C*. *A* sues *B* and *C* for damages for personal injury charging the defendants jointly with joint negligence, and, alternatively charging separate negligence against each defendant. The suit is not bad for misjoinder of defendants, because the injury to the plaintiff arose from the same transaction or series of transactions and the case involves common questions of fact (p). It is otherwise, if the injury arises from distinct acts as in the next illustration.

2 *A* sued *B* for damage done to his house by *B*'s negligence. *B* denied negligence, and alleged that the damage was caused by the negligence of *C*. Thereupon *A* applied for an order to join *C* as defendant. Held that the order could not be made. Collins, L. J., said: "When we analyse this case, we find we are dealing with it upon the assumption that the two acts which were done, the one by [*B*] and the other by [*C*], are entirely disconnected torts—each of them a separate injury—if it be injury at all—quite distinct one from the other. The one was done recently by [*B*] by excavation, and the other at a much earlier date by [*C*, a water company] by allowing water from its main to weaken the soil in front of the plaintiff's property." *Thompson v. London County Council* (q). *Sadler v. Great Western Railway Company* (r). Referring to these two cases, Scrutton L. J. said in *Payne v. British Time Recorder Co.* (s), that neither of them would now be decided in the way they were. In that case *P* entered into a contract with *B Co.* to supply them with certain printed cards which should conform to certain specimens supplied to him by them. In order to carry out that contract *P* entered into a contract with *W Co.* to supply him with the cards, and paid for them. The cards were duly sent to *B Co.*, but *B Co.* refused to accept them on the ground that they did not conform to the specimens. *P* sued *B Co.* and *W Co.* claiming as against *B Co.* the price of the goods sold and in the alternative as against *W Co.* damages for breach of contract in not supplying the cards in accordance with the specimens. It was held that as there was a common question of fact to be tried, namely, whether the cards were in accordance with the specimens supplied, the Court would in the exercise of its discretion allow the two defendants to be joined in one action.

3 *M* mortgages certain property to *X*. After *X*'s death, *A* claiming to be the adopted son of *X* sues *M* on the mortgage, and a consent decree is passed in the suit. Subsequently *B* alleging that she is the sister and heir of *X*, sues *A* and *M* (1) for a declaration that the adoption of *A* was not validly made, and (2) that the consent-decree (to which she was not a party) is not binding on her. Held by the High Court of Bombay that the suit is bad for misjoinder (t). This decision, it is submitted, is wrong and it has been dissented from by the Calcutta High Court (u).

4 The mere fact that the relief claimed against the several defendants differs in detail is no ground for objection that the suit is bad for misjoinder of defendants provided that the suit against the defendants is in respect of the same act or transaction. *A* applies for shares in a Company on the faith of a prospectus. The shares are allotted to him, and he pays up Rs. 5,000 thereon. *A* then sues the Company and the directors alleging that the prospectus was false and calculated to mislead, claiming as against the Company cancellation of the allotment to him of his shares and the return of Rs. 5,000 with interest, and as against the directors Rs. 5,000 by way of damages. Here

with interest and that claimed against the directors is damages. The fact that the relief claimed against the two sets of defendants differs in detail does not render the suit bad for misjoinder of defendants for the suit is in respect of *one transaction*, namely, the issue of a false and fraudulent prospectus. 'In substance the shareholder has one grievance, call it a cause of action or what you like, and in substance he has one complaint, and all the persons he sues have, according to him, been guilty of conduct which gives him a right to relief in respect of *that one thing* which they have done, namely, the issuing of a prospectus.' The remedy is different as against the several defendants, *but not so much in substance as in form*' (r). See r below.

5. A is an exporter of frozen meat. B is the owner of a line of steamers. By a contract between A and B, B agrees to carry from Argentine to Europe frozen meat in steamers belonging to him or in other suitable steamers. It is subsequently agreed that frozen meat should be shipped by A on a steamer called the *Deron* procured by B and belonging to C. Meat is accordingly shipped on the *Deron*, and the master of the *Deron* signs a bill of lading in respect of it and hands it to A. A sues B and C in respect of damage to the meat alleged to have been caused by the unseaworthiness of the *Deron* claiming against B on the terms of the before mentioned contract and against C upon the bill of lading. The suit is not bad for misjoinder of defendants (r).

6. A sues B, C, D, E and F, for the recovery of certain documents of title and the goods covered thereby and in the alternative for damages. It is alleged in the plaint that the goods belonged to A, that B obtained from A the documents of title relating thereto by fraud and made them over to C, that C, knowing that B had no title either to the documents or to the goods, wrongfully dealt with them and sold the goods to D and F, that D and E wrongfully claimed to retain the goods and the documents of title; and, lastly, that one of the documents of title, namely, a railway receipt was pledged by B to F, though the goods covered by it were in the possession of D. The suit is not bad for misjoinder of defendants and causes of action (x). 'The foundation of the case, on which the rest of it depends, is the alleged fraud of B. If such fraud is proved the question is, did the defendants who all claim under B obtain any title? If the plaintiff fails to prove fraud on the part of B, the case fails against all the defendants. If he proves fraud, it may be that the defendants may have a different answer by way of defence, but that does not make the case any the less one of a common question of law and fact. *The same act or transaction* which concerns all the parties is the alleged fraud of B, and this involves a common question of law or fact. All defendants have derived title from a person who is alleged to have obtained the goods by means of fraud. By reason of this the possession of all is alleged to be wrongful. . . . Should it, however, be convenient, the Court may [*Umabai v. Ishal* (y)] direct the successive trial of the issues separately affecting different defendants. Thus the question of the alleged fraud of B touching all the defendants may be tried first. If it fails there is an end of the case' (r).

No misjoinder where some reliefs merely ancillary.—Where the relief claimed against some of the defendants is merely ancillary to the relief claimed against others, the suit is not bad for misjoinder, provided the suit is not in respect of several causes of action. A and B are co-sharers of certain lands in the occupation of C. A is entitled to two thirds of the lands and B to one third. A sues B, C and D, as against C and D that they may be ejected from his share of the lands, and as against B that the lands may, if necessary, be partitioned between him and B. The suit is not bad for misjoinder, for though the relief claimed as against C and D is for possession

(v) "The same act or transaction" (r).

(w) "The same act or transaction" (r).

(x) "The same act or transaction" (r).

45 Cal 111, 41 I C 211.

(y) (1909) 33 Bom 297 2 5 12.

(z) (1918) 45 Cal 111, 144, supra.

- 3 claimed as against *B* is for partition the latter relief is auxiliary to the principal relief which is for possession. The inclusion of *B* in this suit is merely as that of a person properly a party to the proceeding in the circumstances of the case, and not as a litigant against whom a separate claim having no necessary connection with the ejectment of *C* and *D* is made. *B*, in fact, is a necessary party to the suit, for an actual division between *A* and *B* is essential to the ejectment of *C* and *D* (a). See r 5 below.

Ship—A ship is a 'person' within the meaning of this rule, so that a suit may be instituted against a ship as a defendant (b).

"Any right to relief."—The words "any right to relief" are wider than the words "the right to any relief" which occurred in the old section (c).

Alleged to exist—The question as to joinder of parties must be decided on the allegations in the plaint and the suit must not be dismissed on a preliminary issue of misjoinder until these are disproved (d).

"Jointly."—(1) *B* and *C* simultaneously assault *A* in pursuance of a conspiracy. *A* may sue *B* and *C* in one suit for damages. see *Irayal v Ramdal* (1902) 26 Bom 259 264. Cf *O Keefe v Walsh* [1903] 2 I R 631.

(2) *A* obtains a lease of certain lands from *B* (landlord), and enters into possession of the lands. *B* then lets the lands in separate portions to *C*, *D* and *E*. Subsequently *B*, *C*, *D* and *E* forcibly dispossess *A* of the land. *A* may sue *B*, *C*, *D* and *E* in one suit for ejectment. The plaintiff being entitled to claim possession of the land as a whole, the mere fact that *C*, *D* and *E* hold specific and distinct portions of the land under different demises from *B*, does not make the suit bad for misjoinder of defendants. *Nundo v Banomali* (1902) 29 Cal 871, *Raghunath v Sarosh* (1899) 23 Bom 206.

(3) *Halters v Green* [1899] 2 Ch 696, given as ill (4) in the notes to O 1, r 1, under the head. The new Rule, ' is also an illustration under this head.

Joint wrong doers—Joint tortfeasors may be sued jointly or severally. Thus where more persons than one are concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his option. But if the person wronged elects to sue only one of several joint tortfeasors, he cannot afterwards bring a suit against the rest even though the judgment may remain unsatisfied (e).

"Severally"—(1) Certain property held by *A* is sold under the Madras Rent Recovery Act in separate lots for arrears of rent, and purchased by *B*, *C* and *D* respectively. *A* sues *B*, *C* and *D* to set aside the sale on the ground that proper notice of sale was not given. The suit is not bad for misjoinder of defendants, merely because the property was sold to different purchasers. The proceeding in which the various items [of the property] were sold was one and the ground upon which the validity of the sale was impugned is the same in each case' (f). To use the words of the present rule, the right to relief claimed is in respect of the same act or series of acts, and there is a common question of fact and law.

(2) A suit is brought by a reversionary heir, on the death of a Hindu widow, to recover from *A*, *B* and *C* three separate properties sold by the widow to *A*, *B* and *C* respectively. The ground of the suit is that the sales were made

| | |
|-----|----------|
| (a) | m L. R. |
| (b) | 30 Bhaq. |
| (c) | 11 1291, |
| (d) | 17 CP |
| (e) | 14 Bom |

without legal necessity. According to the Madras decision the suit is not bad for misjoinder (g), according to the Bombay and Allahabad decisions, it is (h). These were decisions under the old section. The question under the present rule would be whether if separate suits were brought against A, B and C, any common question of law or fact would arise. In a recent case under the old Code similar to the one above their Lordships of the Privy Council said: "Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case" (i). In a suit brought by a reversioner claiming a third share of the estate against another reversioner who was in possession of some of the property, and against three other persons, two of whom were purchasers and one a mortgagee from the widow, the Allahabad High Court said that under the new Code in any event there was no misjoinder of defendants (j).

(3) In a suit for partition of joint family property by a minor against his father, the Madras High Court held that vendees and mortgagees and others who had obtained decrees against the father, which were said to be collusive and fraudulent were proper parties (k).

"In the alternative."—(1) A executes a lease of his land to B for a period of two years. At the end of the first year A sells the land to C. C demands rent for the second year from B. B alleges payment of the whole rent for two years to A in advance. C may sue A and B, praying for a decree against A, if it be found that B paid the rent to A as alleged, or, in the alternative, against B, if it be found that B did not pay the rent to A: *Madan Mohan v. Holloway* (1886) 12 Cal 555; *Mourji v. Anverji* (1907) 31 Bom 516.

(2) A purchases certain land from B, and enters into possession. Subsequently he is dispossessed by C who claims to be the owner of the land. A may sue B and C praying for a decree against B for a refund of the purchase money if it is found that C is the owner, or a decree, in the alternative, against C for possession if it is found that C is not the owner. *Serajul Huq v. Abdul Rahaman* (1902) 29 Cal 257.

(3) A, alleging that his agent B lent Rs. 1,000 to C, and that C had denied receipt of the money from B, sues B and C, praying for a decree against B, if it is found that the amount was not paid to C, or, in the alternative, against C if it is found that the amount was paid to him. The suit is properly framed for the "transaction" in respect of which the relief is claimed is the same. *Meyappa v. Perianan* (1906) 29 Mad 50, *Arnnabhella v. Venkatswami* (1884) 7 Mad 123.

(4) A mortgages his property to B, B assigns the mortgage to C who gives notice of the assignment to A, and demands payment from A of the amount secured by the mortgage. A says he paid Rs. 200, part of the mortgage debt, to B, before the assignment of the mortgage, and that he is not therefore liable for more than the balance. B denies the alleged payment. C sues A and B praying for a mortgage decree in the first instance against A for the whole of the mortgage debt if the Rs. 200 has not been paid, and in the alternative, if the Rs. 200 have been paid, for a mortgage decree against A for the amount of the mortgage debt less the Rs. 200 and for a decree against B, for Rs. 200 by way of damages. The suit is not bad for misjoinder of defendants, for the right to the relief claimed is in respect of the same transaction. *Siyathurai v. Muhamad Meera* (1909) 31 Mad 252, *Korvuri v. Tallapragadha* (1910) 35 Mad 39, 8 I C 1037. See notes above, New Rule, ill (4).

(g) *Vasudeva v. Kuleadi* (1874) 7 M H C 290.
Mahomed v. Arunahan (1888) 11 Mal 106, *Gorindaraja v. Alagappa* (1926) 49 Mad 836, 97 I C 212 (26) A 31 911.
 (h) *Kachar v. Bai Rathore* (1893) 7 Bom 243.
Ganeshi v. Khairati (1894) 16 All 273.

(i) *Lalji Poo Narain v. Gopal Derr* (1909) 36 Cal 780 at p 798 36 I A 103 3 I C 382.
 (j) *Bai Krishana Das v. Hira Lal* (1914) 36 All 406 24 I C 93.
 (k) *Shannuka v. Arunachalam* (1922) 45 Mad 191, 69 I C 961, (22) A M 334.

Costs where relief is claimed against defendants in the alternative—Where a suit is brought by *A* against *B* and *C* in the alternative, and a decree is passed against *B* with costs, but the suit as against *C* is dismissed, the Court has jurisdiction in a proper case to order *B* (the unsuccessful defendant) to pay in addition to the costs payable by him to *A* (the plaintiff) the costs of *C* (the successful defendant). The rule has thus been stated by Vaughan Williams, L.J. "The proper way is—do not join any defendant unreasonably, if the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame" (l). In *Child v Stenning* (m) Jessel, M.R., dealing with a similar question said "It appears to me on principle, that he who was the person who caused the litigation, or whose error or representation caused it, ought to be the person to pay the costs of it."

A, representing that he is *B*'s agent, enters into a contract with *C* on *B*'s behalf, *C* demands performance of the contract from *B*. *B* denies that he employed *A* as his agent and refuses to perform the contract. *C* sues *A* and *B* for damages and claims relief against them in the alternative. The Court finds that *A* untruefully represented himself to be *B*'s agent. A decree is passed against *A* for damages, but the suit against *B* is dismissed with costs. If the Court is of opinion that *C* reasonably (n) took proceedings against *B*, the Court may direct the costs payable by *C* to *B* to be included in the damages payable by *A* to *C* (o).

Appeal—An appeal lies under cl. 15 of the Letters Patent from an order refusing to allow the plaintiff to proceed in one suit against several defendants on the ground of misjoinder and requiring the plaintiff to elect against which of the defendants he will proceed. Such an order is a "judgment" within the meaning of cl. 15 for it is in substance a decision that the suit does not lie as framed, with the result that if the plaintiff insists the suit must be dismissed (p).

Court may give judgment for or against one or more of joint parties

4. [Ss. 26, 28] Judgment may be given without any amendment—

- (a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to,
- (b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Cl. (a) of this rule is to be read with r. 1 above, and cl. (b) with r. 3 above (q).

Defendant need not be interested in all the relief claimed

5. [New R. S. C., O. 16, r. 5] It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him

- (l) "
"
"
(m) (1879) 11 Ch. D. 82, 86.
(n) See *Foss v. Davis* (1861) 1 B. & S. 200, 124.

- R. R. 530
(o) *Spredding v. Nevill* (1860) L. R. 4 G. P. 417.
Hilghes v. Grame (1864) 33 L. J. Q. B. 410. See *Indian Contract Act 1872*, s. 35.
(p) *Pamendra Nath v. Benjenira Nath* (1918) 45 Cal. 111, 41 L. C. 944. *Puri v. Chandra* (1928) 45 Cal. 164, 100 L. C. 155 (1-8).
A. C. 159

This rule is to be read with r 3 above. It provides in effect that where a suit is brought against several defendants, the fact that every defendant is not interested in all the relief claimed in the suit does not imply misjoinder of defendants. See notes to r 3 above.

6. [S. 29, R. S. C., O. 16, r. 6.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract

Several liability on a contract.—This rule is confined to suits on contracts. The liability on a contract may be either (1) several, or (2) joint and several, or (3) joint. *A and B, each for himself, agrees to pay Rs 5000 to C. Here A and B are severally liable on the contract. C may therefore bring one suit against A and B, or he may bring a separate suit against A and a separate suit against B. These suits may be brought simultaneously, or they may be brought successively one after the other. But if the suit is brought against A, and a decree is obtained against him, and the decree is satisfied, C cannot subsequently sue B on the contract. But if the decree remains unsatisfied, C is not precluded from suing B.*

Joint and several liability on a contract.—The legal consequences of a joint and several liability on a contract are the same as those of several liability. Thus if A and B pass a bond to C for Rs 5,000 and the bond provides that A and B shall jointly and severally pay the amount to C, C may sue A and B jointly, or he may sue them separately, as in the case where the liability is several.

Joint liability on a contract.—The present rule does not provide for the case of a joint liability arising on a contract or negotiable instrument. The reason is that so far as liability on a contract is concerned, sec 43 of the Indian Contract Act, 1872, makes all joint contracts joint and several. It allows a promisee to sue one or more of several joint promisors as he chooses, and excludes the right of a joint promisor to be sued along with his co-promisors (r). A partnership firm consisting of two persons, A and B, purchases from C goods worth Rs 5000. The liability of partners is joint, and A and B are therefore jointly liable to pay the price to C. But under sec 43 of the Contract Act C may sue either A or B at his option. It is not incumbent upon C to join both A and B as defendants. If C sues A alone, and a decree is passed against A, he cannot, according to English law, afterwards sue B, even though the decree against A remains unsatisfied. The reason is that there is in the case of a joint contract a single cause of action which can only be sued on once. The same view has been taken by the High Courts of Calcutta, Madras and Bombay. On the other hand, it has been held by the High Court of Allahabad, that the effect of sec 43 of the Indian Contract Act, 1872, is to make all joint contracts joint and several. Therefore, where C obtained a judgment against A upon a joint bond executed by A and B, and afterwards as the judgment was not satisfied sued B for the same money, the Allahabad Court held that the suit against B was not barred. See Pollock and Mulla's Indian Contract Act notes to sec 43, Effect of decree against some only of joint promisors.

It may be added here that if in the case put above C sues A alone, A may apply under O 1, r 10 (2), to have B joined as a defendant, and the Court may make such

(r) *Hemendro v Rajendrolall* (1878) 3 Cal 353
360, *Lukmudas v Ureshotam* (1887) 6
Bom 700 701. *Duck v Dhurys* (1901) 25
Bom 378 386. *Motilal v Ghellabhai*

(1892) 17 Bom 6 11. *Muhammad v. Iadhe Jam* (1900) 22 All 307, 315.
Narayana v Lakshmana (1898) 21 Mad
236

order as it thinks proper. In England it has been held that in an action on a joint contract against one only of the joint contractors the Court has jurisdiction, without obtaining the consent of the plaintiff, to make an order requiring the plaintiff to add the other joint contractor as a co-defendant, and that where the defendant has set up a reasonable case of joint contract, he has, in the absence of special circumstances negating it a *prima facie* right to an order requiring the plaintiff to add the other contractor as co-defendant (s).

Parties to bills of exchange—A draws a bill of exchange upon B payable to C or order. The bill is accepted by B. C then endorses the bill to D, D endorses it to E, and E to F. If the bill, while in the hands of F, is dishonoured, F may at his option sue A (the drawer), or B (the acceptor), or C (the endorser), or D (the endorser), or E (the endorser) or F may bring one action against all or any of them (t).

7. [New. R. S. C., O. 16, r. 7.] Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought

Scope of the rule—This rule applies only where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress. It does not enable a plaintiff to join *separate causes of action* against *different defendants* in one action in a case where he could not do so under r. 3 above (u). Thus if damage is caused to A's house, and he is in doubt as to whether it was caused by *excavation works* carried on by a County Council or by Water Company *allowing water from its mains to weaken the soil* in front of the house, A cannot join the Council and the Company in one action, for these are *two distinct torts*. It does not matter that the resulting damage is the same in each case, for it is not the *damage* that constitutes the cause of action, but the *injuria* or the wrong done by a tort-feasor (v). In such a case the present rule does not apply. The following, however, is a case to which the rule has been held to apply. M, purporting to act as agent for C, enters into a charter party with B for loading B's vessel with a cargo. The cargo is not loaded, and B sues M for damages, alleging that M had no authority to enter into the charter party as agent for C. Subsequently B finds, upon discovery of documents, that it is probable that C did give authority to M to bind him [C] with the charter party, and applies to add C as a defendant. The case is one within this rule and C may be added as a defendant (w).

Costs where relief is claimed against defendants in the alternative—
See notes to O. 1, r. 3, under the same head.

8. [S. 30; S. 32, fourth para. Cf. R. S. C., O. 16, r. 9]
(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in

One person may sue or defend on behalf of all in same interest

(s) *Yorbury Valtio & Co v Griffiths* [1918] 2 K B 369

(t) *Iestonjee v Mirza* (1878) 3 Cal 541

(u) *Thompson v London County Council* [1909] 1 Q B 840 844

(v) *Frankenburg v Great Horseless Carriage Co* [1900] 1 Q B 504 510 explaining *Thompson v London County Council* [1899] 1 Q B 840

(w) *Bennett & Co v Mellorant & Co* [1906] 2 Q B 464

such suit on behalf of or for the benefit of all persons so interested. But the Court shall in such case give at the plaintiff's expense notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the Court to be made a party to such suit

Object of the rule—This rule is an exception to the general rule that *all persons* interested in a suit ought to be made parties thereto (x). Given once requires that in suits where there is a community of interest amongst a large number of persons a few should be allowed to represent the whole (y) so that trouble and expense may be saved (z). But it is not obligatory to have recourse to this rule and an institution may be sued in the name of its managers (a).

Application of the rule—The provisions of this rule apply only if (1) the parties are *numerous*, (2) they have the *same interest* and (3) the necessary *privity* as on is of time and *not* *de* given.

Representative suit.—A suit filed by one or more persons under this rule on behalf of themselves and others having the same interest in the suit is a representative suit. The provisions of *Explanatory Note* section 11 (regarding attachment) apply to such a suit. But if the suit is one under Order 8 the provisions of that rule must be strictly complied with (c). See notes below. Decree in a representative suit.

Numerous parties —Fluctuating body—Thirty defendants were left to the numerous (d) The High Court of Madras has held that a suit cannot be brought under this rule on behalf of the *generis publici* (e) Following this decision the High Court of Calcutta held in one case that this rule did not apply unless the parties were capable of being ascertained and a suit could not therefore be brought under this rule on behalf of the *Hind community* as the whole Hindu community is *incapable of ascertainment* (f) This decision has been disented from by the same High Court in later cases where it was held that it was not necessary for the application of this rule that the parties should be capable of being ascertained (g) In this connection it may be observed that property may be owned by a fluctuating body of persons like the inhabitants of a village (h) or the Dholu community of Varanasi (i) and a suit may be brought on their behalf under the rule. It has also been held that a person may render himself liable to a community like the Vysia community of Mogarala by agreeing to pay a certain sum of money to it and a

- | | |
|---|--|
| (x) <i>Chudasa na v Iartapa</i> (1914) 8 B * 9 <i>Mf t</i> <i>if al na na</i> <i>foyat id n</i> (193) 13 Lah 195 13 1 C 657 (31) A L 610 | () <i>I na a el v Iamasam</i> (1933) 60 I A 78 56 Mai 657 143 I C 6 (33) A L 183 |
| (y) <i>S khanis v Ind jura n</i> (1860) 3 Ma t H C 6 | (d) <i>And eus Salmon</i> (1885) W N 10 [1 g] (e) <i>Adamson Arum jam</i> (1840) 9 Mad 463 (f) <i>Sayed v Iay v Baudjan th</i> (1893) 0 Cal 337 |
| (z) <i>H rald v Iha on</i> (1883) 5 All 60 S ni asa v <i>Iaf a</i> (190) 3 Mad 8 | (g) <i>Nonmatto Nath v Har sh Chand a</i> (1906) 33 Cal 9 5 910 91 <i>Probbat v Har s</i> (1918) 24 C W N 08 54 I C 74 |
| (a) <i>Molant Bhagran v S er tar of t te</i> (1839) 34 C W N 849 1 7 I C 54 () A L C 3 <i>Tarap s na Na e</i> (193) 36 Cal 94 143 I C 4 7 (33) A C 3 9 | (h) <i>S araman v Mutha</i> (1888) 10 Mad 241 () <i>I robat v Har s</i> (1915) 24 C W N 206 54 I C 4 |

order as it thinks proper. In England it has been held that in an action on a joint contract against one only of the joint contractors the Court has jurisdiction, without obtaining the consent of the plaintiff, to make an order requiring the plaintiff to add the other joint contractor as a co defendant, and that where the defendant has set up a reasonable case of joint contract, he has, in the absence of special circumstances negating it a *prima facie* right to an order requiring the plaintiff to add the other contractor as co defendant (a)

Parties to bills of exchange—1 draws a bill of exchange upon B payable to C or order. The bill is accepted by B. C then endorses the bill to D, D endorses it to E, and E to F. If the bill, while in the hands of F, is dishonoured, F may at his option sue A (the drawer), or B (the acceptor), or C (the endorser), or D (the endorser), or E (the endorser) or F may bring one action against all or any of them (f)

7. [New. R. S. C., O. 16, r. 7.] Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

Scope of the rule—This rule applies only where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress. It does not enable a plaintiff to join separate causes of action against different defendants in one action in a case where he could not do so under r. 3 above (u). Thus if damage is caused to A's house, and he is in doubt as to whether it was caused by excavation works carried on by a County Council or by Water Company allowing water from its mains to weaken the soil in front of the house, A cannot join the Council and the Company in one action, for these are two distinct torts. It does not matter that the resulting damage is the same in each case, for it is not the damage that constitutes the cause of action, but the injury or the wrong done by a tortfeasor (v). In such a case the present rule does not apply. The following, however, is a case to which the rule has been held to apply. M, purporting to act as agent for C, enters into a charter party with B for loading B's vessel with a cargo. The cargo is not loaded, and B sues M for damages, alleging that M had no authority to enter into the charter party as agent for C. Subsequently B finds, upon discovery of documents, that it is probable that C did give authority to M to bind him [C] with the charter party, and applies to add C as a defendant. The case is one within this rule and C may be added as a defendant (u).

Costs where relief is claimed against defendants in the alternative—See notes to O. 1, r. 3, under the same head.

8. [S. 30; S. 32, fourth para. Cf. R. S. C., O. 16, r. 9]
(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in

One person may sue or defend on behalf of all in same interest

(a) *Norbury Valtia & Co v Griffiths* [1918] 2 K B 363

(f) *Foster v Wier* (1878) 3 Cal 541

(v) *Thompson v London County Council* [1899] 1 Q B 840 844

(u) *Franklin v Great Horseless Carriage Co* [1900] 1 Q B 504 510; *Thompson v London County Council* [1900] 1 Q B 840

(u) *Bennett & Co v Mellor & Co* [1890] 2 Q B 464

such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

Object of the rule—This rule is an exception to the general rule that *all persons* interested in a suit ought to be made parties thereto (x). Convenience requires that in suits where there is a community of interest amongst a large number of persons, a few should be allowed to represent the whole (y) so that trouble and expense may be saved (z). But it is not obligatory to have recourse to this rule and an institution may be sued in the name of its managers (a).

Application of the rule—The provisions of this rule apply only if (1) the parties are *numerous*, (2) they have the *same interest*, and (3) the necessary *permission* is obtained and *notice* given.

Representative suit—A suit filed by one or more persons under this rule on behalf of themselves and others having the same interest in the suit is called a representative suit. The provisions of Explanation VI to sec 11 [res judicata] apply to such a suit. But if the suit is one under O 1, r 8 the provisions of that rule must be strictly complied with (c). See notes below, Decree in a representative suit.

"Numerous parties"—Fluctuating body—Thirty defendants were held to be numerous (d). The High Court of Madras has held that a suit cannot be brought under this rule on behalf of the *general public* (e). Following this decision the High Court of Calcutta held in one case that this rule did not apply unless the parties were capable of being *ascertained*, and a suit could not therefore be brought under this rule on behalf of the *Hindu community* as the whole Hindu community is *incapable of ascertainment* (f). This decision has been dissented from by the same High Court in later cases where it was held that it was not necessary for the application of this rule that the parties should be capable of being ascertained (g). In this connection it may be observed that property may be owned by a fluctuating body of persons like the inhabitants of a village (h) or the Dhobi community of Narainda (i), and a suit may be brought on their behalf under the rule. It has also been held that a person may render himself liable to a community like the Mysia community of Mogarala by agreeing to pay a certain sum of money to it and a

(x) *Chudasma v Kartapraj* (1904) 28 B M 209. *Mest v Alominna v Fajjulla* (1932) 13 Lah 195 13-1 C 657 (31) A L 610

(y) *Srikhanti v Inlipuram* (1896) 3 Ma 1 H C 2-6

(z) *Hiralal v Bhairon* (1883) 5 All 60-2. *Srinivas v Jagjora* (1900) 23 Ma 1 28

(a) *Mohant Bhagwanji v Secretary of State* (1930) 34 C W N 849 1-7 I C 54- (30) A 1 C 232. *Taraprasanna v Narash* (1933) 60 Cal 794 143 I C 477 (33) A C 31

(c) *Nararelu v Jamarani* (1933) 60 I A 78 36 Ma 1 657 143 I C 665 (33) A 1 C 183

(d) *Andrews v Salmon* (1898) W N 10 (1 ng)

(e) *Adamson v Arumujam* (1896) 9 Mad 463

(f) *Sayedir Iqbal v Baidjanath* (1893) 90 Cal 337

(g) *Monmotto Nath v Harish Chandra* (1906) 33 Cal 915 910 91- *Probbat v Hari* (1919) 24 C W N 906 54 I C 742

(h) *Sivaraman v Muthaia* (1888) 1 Mad 241

(i) *Probbat v Hari* (1919) 24 C W N 200, 54 I C 74-

suit to recover it may be brought by the community in the name of one or more members of the community under this rule (j)

"Same Interest"—It is essential that the parties should have the *same* interest in the suit. Thus where there are numerous legatees under a will, any one legatee may sue the executors on behalf of himself and the other legatees for a discovery of the estate of the deceased come into their hands, as they have all the same interest in having the will proved (l). Similarly, where a person dies leaving numerous creditors any one creditor may sue on behalf of himself and the other creditors, as they all have the same interest in representing the estate of the deceased to be as large as possible (l). On the same principle of the community of interest, any one *rayat* of a village may sue the proprietor of the village for himself and the other rayats for a declaration of their general rights against the proprietor (m). Similarly a villager may bring a suit on behalf of himself and his fellow villagers for a declaration of a right of way and for an injunction against the defendant for obstructing the way (n), but subject to the rule that such a suit is not maintainable without proof of special damage (o). Likewise, any one tax payer may bring a suit against a Municipality on behalf of himself and the other tax payers to restrain the Municipality from misapplying its funds (p).

In *Templeton v Russell* (q), a case under the corresponding English rule it was held that the rule applies *only* to persons who have or claim *some beneficial proprietary right* which they are asserting or defending in the suit. But this meaning of the word 'interest' was disapproved by the House of Lords in *Bedford (Duke of) v Ellis* (r). In the last mentioned case Lord Macnaghten said "But it seems to me that there is no reason whatever for so restricting the rule. Given a common interest and a common grievance a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a *beneficial proprietary interest* would be opposed to precedent, and not, I think, in accordance with common sense. Take the case of a creditor's suit, which perhaps was the earliest instance of plaintiffs being allowed to sue in a representative character. It can hardly be suggested that a creditor has a *proprietary interest* in the real or personal estate of his deceased debtor. Thus the disciples of a mutt have sufficient 'interest' within the meaning of this rule to maintain a representative suit to declare alienations made by the Mahant invalid and to have the property alienated handed over to the Mahant for the time being (s). Similarly worshippers of a temple have sufficient 'interest' to maintain a representative suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid (t), or for recovering temple property from a trespasser (u).

The expression "same interest" must be distinguished from the expression 'same transaction'. What is required under this rule is that the parties should have the *same* interest, it is not sufficient that their interests arise from the *same* transaction. Therefore, where goods of several persons are shipped under separate bills of lading the mere fact that the goods of all the persons are lost by the same cause does not entitle any one

- | | |
|---|--|
| (j) <i>Narasimhulu v Noota</i> (1923) 44 Mad L J 40 72 I C 95 (23) A M 434 | Pat 568 133 I C 463 (31) A P 413 |
| (k) <i>Geereeballa v Chunder Kunt</i> (1885) 11 Cal 213 | (p) <i>Vaman v Municipality of Sholapur</i> (1898) 22 Bom. 646 |
| (l) <i>The Oriental Bank Corporation v Gobind</i> (1883) 9 Cal 604 <i>Ebrahimhat v Faidas</i> (1902) 26 Bom 577 | (q) [1893] 1 Q B 435 |
| (m) <i>Ahmedbhai v Balkrishna</i> (1890) 19 Bom 391 | (r) [1901] A C 1 8 |
| (n) <i>Harish Chandra v Pran Nath</i> (1921) 26 C W N 687, 69 I C 910 (21) A C 405 | (s) <i>Chidambaranatha v Nallas</i> (1918) 41 Mad 124 42 I C 366 |
| (o) <i>Mahomed Din v Mast Aliraja</i> (1931) 1 | (t) <i>Seerama Channai v Soma</i> (1900) 43 Mad 410 58 I C 685 |
| | (u) <i>Rangaswami v Krishnaswami</i> (1903) 44 Mad L J 116 71 I C 463 (33) A M 270 |

3. **Fraudulent transfer.**—A suit to set aside a deed of gift or of trust on the ground that it is in fraud of creditors must be brought by or on behalf of all the creditors. Such a suit cannot be entertained if it is brought by only some of the creditors (1)

Suit by a member of a community in his own right—This rule is an enabling rule. It does not debar a member of a community from maintaining a suit in his own right, though the act complained of may also be injurious to the whole community. Thus if Mahomedans belonging to a particular sect are not allowed to use a mosque for prayer, any member of the sect entitled to use the mosque may sue as plaintiff to enforce the right. It is not necessary that the suit should be brought by him on behalf of himself and all other members of the sect entitled to use the mosque. A Mahomedan entitled to worship in a mosque may sue for a declaration that certain property alienated by the mutavali is wakf property, and for possession thereof from the alienee (2). Similarly, any member of a community may bring a suit to set aside unauthorised alienations of endowed property or of property belonging to the community, or for the removal of encroachments upon such property (3), or for maladministration of property belonging to the community (4).

When rule does not apply—The rule does not apply to an action of libel (5).

At what stage of the suit leave should be obtained—The proper course is to obtain permission before the suit is instituted, but if that is not done the rule does not forbid leave being granted afterwards. Permission under this rule may be granted even after the institution of the suit (6).

Whether the leave should be express.—It has been held by the High Court of Calcutta that the leave to sue need not be express, it is enough if it can be inferred from the proceedings (7). On the other hand, there is a dictum of Stuart, C.J., in an Allahabad case (8), that the leave to sue must be express.

Leave must be granted to definitely named persons—Where this was not done the suit was dismissed by the High Court of Calcutta (9). The other Courts would probably grant fresh leave in such a case. See notes above, "At what stage of the suit, etc."

"May be sued"—This rule applies not only to the case of numerous plaintiffs having the same interest, but also to the case of the numerous defendants having the same interest. Thus where the inhabitants of a village assert a right of way over land belonging to the plaintiff, the plaintiff may, with the permission of the Court, sue any one or more of the inhabitants on behalf of them all (10). The consent of the defendants on the record is not necessary for this purpose (11).

- | | |
|-----|---|
| (1) | 450 (m) <i>Mercantile Marine Service Association v. Toms</i> [1916] 2 K.B. 243. As to actions of debt see <i>Walker v. Sur</i> [1914] 2 K.B. 939. <i>Ideal Films Limited v. Richards</i> [1920] 1 K.B. 297. |
| (2) | (n) |
| (3) | (o) |
| (4) | (p) <i>Huralal v. Bhairon</i> (1883) 5 All. 80. (q) <i>Kali Kanta v. Gouri Prasad</i> (1893) 1 Cal. 906. But see (1917) 44 Cal. 554, 39 I.C. 333. (r) <i>Chuni Lal v. Ran Kaulen</i> (1889) 15 Cal. 460. (s) <i>Imbolum v. Bartle</i> (1913) 36 Mad. 418, 45 I.C. 519. |

"May defend"—When there are numerous defendants having the same interest, any one of them "may be sued" on his own behalf and on behalf of the others. But where this is not done, and all the defendants are on the record, any one defendant "may defend" the suit on behalf of himself and the rest with the permission of the Court.

Who should apply for permission.—(1) Where a plaintiff intends to sue on behalf of himself and others, it is the plaintiff that should apply for leave. (2) Similarly where a plaintiff intends to sue one defendant for himself and others, it is the plaintiff that should apply for leave. (3) Where numerous defendants having the same interest are all sued, and they are all on the record, and if any one defendant is appointed by the other defendants to defend the suit on behalf of all, it is that defendant who must apply for leave (f).

In *Halter v. Ser* (u) Vaughan Williams, L.J., said: "The rule, as it stands, does not purport to leave it to the mere will or choice of the plaintiff or of the defendants, nor to give a right in either case of selection at the choice of a plaintiff who wishes to sue representative members of an unincorporated society. . . . It lies with the judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorized to defend in such cause or matter on behalf of or for the benefit of all persons so interested, then the order may be made."

Notice of suit.—Where a person sues, or is sued, or defends, a suit, on behalf of himself and others, any decree that may be passed in the suit is binding upon them all (s. 11, Explanation VI), unless the decree has been obtained by fraud or collusion (Evidence Act, 1872, s. 44). It is therefore necessary that notice of the suit should be given to all the parties who would be bound by the decree, for otherwise a person might be concluded by a suit of which he was unaware. When notice contemplated by this rule was not given the Patna High Court held that a decree could only be passed against those defendants who were on the record (v). The Privy Council have held that in a suit under O. I, r. 8, the observance of all the requirements of the rule is essential and that unless its provisions are strictly complied with section 11, Explanation VI, will not be applicable, and that persons interested in the right will not be bound unless they are on the record (w). See note 'Representative Suit—Explanation I I, at p. 66.

Court shall give notice by personal service or by public advertisement.—These words show that it is the duty of the Court to cause service of the notice or cause an advertisement to be published. It is the duty of the plaintiff, however, to move the Court for that purpose. But if he omits to do so, the suit ought not to be dismissed on account of the failure of the Court to perform the duties imposed upon it by this rule. The appellate Court should in such a case remand the case to the Court of first instance so that it may issue the notice (x).

Title of suit.—When the plaintiff sues or defendant is sued on behalf of himself and others under this rule that fact should be stated in the title of the suit, and not

(f) See *London Association for Protection of Trade v. Greenlands Limited* (1916) 2 A.C. 15, 38, 39.

(u) [1914] 2 K.B. 940, 944.

(v) *Gorbadhan v. Shamakantlal* (1923) 7 Pat. 197, 198 I.C. 339 (25) A.P. 92.

(w) *Kumarswami v. Ramaswami* (1933) 60 I.A. 278, 56 Mad. 657, 144 I.C. 405 (33) A.I.C. 183 dissenting from *Appalaraju v. Subbamma* (1920) 43 Mad. 447, 55 I.C.

981 *Thanakoti v. Munappa* (1885) 8 Mad. 436. *Srinivasa v. Raghuva* (1900) 23 Ma. 1. 324 *Baiju Lal v. Bulak Lal* (1897) 24 Cal. 395. *F. A. Sahas v. Abdul Alim* (1920) 58 Cal. 474, 130 I.C. 309 (30) A.C. 767.

(x) *Mukh Lal Singh v. Jaydeo Tewari* (1903) 35 Cal. 102. *Sham Lal v. Mumamat Talvi* (1922) 44 All. 231, 65 I.C. 253, (22) A.A. 10.

merely in the plaint (y) The title of the suit where the plaintiff sues in a representative character is as follows [see Appendix A Pleadings (1) Titles of suits] —

| | |
|--|------------------|
| <i>A B on behalf of himself and all other creditors of X 1</i> | <i>Plaintiff</i> |
| <i>C D</i> | <i>Defendant</i> |

Suit in name of wrong plaintiff—*A brings a suit under this section on behalf of himself and other creditors of X. It turns out that A is not a creditor of X. Thereupon B an admitted creditor of X applies to be added as a plaintiff under O 1 r 10(1). Has the Court power to grant the application? The question arose in a recent Madras case but it was left open (z). The Madras case was not one of a bona fide mistake and it is submitted that if the suit was instituted by A by such a mistake the amendment may be allowed on terms.*

Compromise of representative suit—A plaintiff suing in a representative character cannot compromise without leave of the Court nor can he give up or alter any right of the others without their consent or the leave of the Court (a). Similarly a person authorized by the Court to defend a suit on behalf of others having the same interest cannot even if there is no defence consent to judgment against them the proper course in such a case is to submit to judgment on their behalf (b).

Adding parties—The Court will not compel the plaintiff to add the persons on whose behalf he sues as co plaintiffs. Thus where an action was brought by a plaintiff on behalf of himself and the other owners of a ship against the defendants for freight and dues for the use of the ship and the defendants applied to add the names of the other owners as plaintiffs in order that the defendants might have the liability of the other owners as plaintiffs for costs it was held that the plaintiff could not be compelled to add the other owners as co plaintiffs (c). Where a plaintiff sues on behalf of himself and others and one of the persons on whose behalf he sues objects to the plaintiff so doing he may apply to have himself added as a defendant (d). If one of the persons on whose behalf the plaintiff purports to sue is dissatisfied with an order made in the suit he may apply to be added as a defendant but he cannot appeal from the order (e). The application to be added as a defendant must be made without

joined (g) See note above Notice of suit

Addition of plaintiffs after decree—Where the plaintiffs on record neglect to execute the decree passed in a suit brought under this rule the Court may add other persons having the same interest as the plaintiffs to enable them to execute the decree (h).

Decree in a representative suit—The general rule of law is that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed binds those others only with respect to the property of those others which he can in law represent and although the party on record *eo nomine* may be made

(y) *Re Tottenham* (1896) 1 Ch 68
Arushana v Iacha yappa (1924) 47 Mad. L J
 540 8° I C 492 (24) A.M. 883

(a) " *See A Com*

(b)

Faser v Cooper Hale & Co (188) 21
 Ch D 718 *May v Newton* (1897) 34
 Ch D 347 349

(c)
 (f)
 (g)

(h)

9 so far as regards the rights and interests of the parties actually before it

Misjoinder of parties—A misjoinder or non joinder of parties is not fatal to the suit (s). Where there is a *misjoinder* of parties, the name of the plaintiff or the defendant who has been improperly joined, may be struck out under r 10, sub r (2) below, and the case may be proceeded with. See s 99 above.

Non joinder of parties—As regards non joinder of parties, a distinction has been drawn between the non joinder of a person *who ought to have been joined* as a party and the non joinder of a person whose joinder is only a matter of convenience or expediency [see O 1, r 10 (2)]. This is because O 1, r 9, is a rule of procedure which does not affect the substantive law. If the decree cannot be effective without the absent parties the suit is liable to be dismissed. So when a decree for a partnership account was made without joining some of the partners the suit was dismissed on appeal as limitation as against the absent partners had expired, and the Court had no jurisdiction to make a decree for an account when some of the parties were not before it (i). Similarly a suit by executors, trustees, co owners of immovable property or partners for the recovery of property in which they are jointly interested will not lie unless all the parties interested are joined. If such a suit is filed by some only of the parties interested the Court will allow an amendment and join the absent parties as co plaintiffs (u). But if the plaintiff in spite of objection raised persists in the suit without joining the absent parties the suit will be dismissed (v), and he will not be allowed to remedy the defect in the course of an appeal to the Privy Council (u). In a suit against executors for an account all the executors should be made parties, but it is not necessary to join legal representatives of deceased executors (x). If one of the surviving executors who has taken no part in the management is not joined, and objection is not taken at the settlement of issues, the objection will be deemed to have been waived (y).

No decree can be made in an administration suit if the legal personal representative of the deceased is not made a party. The omission is not a technical defect but goes to the substance of the action (z).

In cases where the joinder of a person as a party is only a matter of convenience, the absent party may be added or the suit may be tried without him (a).

O 34, r 1, is subject to O 1, r 9—O 34, rule 1, requires all persons interested in the mortgage security to be joined as parties in a suit relating to the mortgage, but as that rule has been held to be subject to r 9 of O 1, a prior mortgagee may sue for sale without joining a puisne mortgagee as the puisne mortgagee is a proper but not a necessary party (b). This has been extended to the case of a part mortgagee who has been allowed to sue for sale of his proportionate share when the other part mortgagee is not joined or fully represented (c). See Mulla's Transfer of Property Act notes on sec 67, at

(s)

(x) *Kartuchandra v Radha Rahman* (1930) 34 C W N 275 197 F C 59 (30) A C 461

p 301. On the other hand a later Calcutta case takes the opposite view without reference to the authorities cited (d)

Easement.—All persons entitled to an easement are not necessary parties to a suit for infringement of an easement where the cause of action is only against those who have infringed the plaintiff's right (c)

As to when objections to misjoinder and non joinder of parties should be taken see r 13 below

10. [Ss 27, 32, 33, R. S. C., O 16, rr. 2, 11, 39] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any state of the suit, if satisfied that the suit has been instituted through a *bona-fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent

(4) Where a defendant is added, the plaint shall unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant

(d) *Gound v Jamal Khan* (1933) 60 Cal 777
140 I C 239 (33) A C 61

(e) *Surja v Chandra* (194) 40 Cal 1 J 74

84 I C 467 (24) A C 1050 dissenting
from *Haran v Hamesh* (190) 25 C
W N 249 6-1 C 45

- 10 (5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons

SUB RULE (1)

Sub-rule (1) is the equivalent of sec. 27 of the Code of 1882 It corresponds to R S C, O 16, r 2

Scope of sub rule (1) —Sub rule (1) contemplates cases in which a suit is brought by a plaintiff, and he subsequently discovers that he cannot get full relief without joining some other person as co plaintiff (f), or, where it is found that some other person and not the original plaintiff is entitled to the relief claimed In the former case the application (which must be made by the original plaintiff) will be for *adding* and in the latter for *substituting* that other person as plaintiff But the Court must be satisfied before the application is granted that the amendment has become necessary through a *bona fide* mistake on the part of the original plaintiff. The mistake may be either one of fact (g) or of law (h) Where the point is doubtful, it is in itself evidence of a *bona fide* mistake (i) Again where the Court of first instance takes one view of the law and the Court of Appeal takes another, that in itself is evidence of a *bona fide* mistake (j)

Amendment allowed.—(1) The Official Assignee of Madras constitutes A B, Official Assignee of Bombay, his attorney to institute a suit on his behalf in Bombay A B instead of suing as ' constituted attorney of the Official Assignee of Madras sues by mistake as ' Official Assignee of Bombay The plaint may be amended under sub rule (1) by substituting the former description for the latter *Sardarmal v Arandamal* (1897) 21 Bom 200

(2) A joint Hindu family firm files a suit in the name of the firm although O 30 does not apply to such a firm The plaintiffs may be allowed, on payment of costs to amend the plaint by substituting the names of the members of the joint family firm *Amulakchand v Dabu Lal* (1933) 35 Bom L R 569 147 I C 786, (33) A B 304

(3) A Hindu appoints A guardian of the property of his minor son under his will but appoints no executor A believing that his appointment as guardian has the effect of constituting him executor of the will by implication sues B to recover certain property belonging to the estate of the deceased. The Court finds that A is not executor by implication The plaint may be amended by substituting the son as plaintiff *Seshamma v Chennappa* (1897) 20 Mad 467 [In this case the amendment was allowed in second appeal.]

(4) A sues B for work done under a contract B contends that the contract has been assigned by A to C, and A therefore has no right to sue A admits the assignment but says that the assignment is not absolute but by way of charge only and that he has therefore a right to sue It is found that the assignment to C is absolute and that

— was by
H igles

(f)
(g)

- (h) *H igles v P mp House Hotel Co* (1901) 2 K B 485
(i) *Doaba Park v Hiralal* (1909) 2 Lah L J 409
(j) [1901] 2 K B 485 at p 486 *supra*

In the last mentioned case, *B* objected to the amendment on the ground that, as the assignment was found to be absolute, *A* had *no cause of action* at the time the action was brought, but the objection was overruled. *Coxens Hardy, J. & J.*, said: "It is said that the rule does not apply where it is shown that the plaintiff has *no right of action*; but there are abundant authorities to the contrary effect." The cases cited in the judgment in that case clearly show that the plaint would have been allowed to be amended, if that was the application, by adding *C* as plaintiff. This interpretation of O. 16, r. 2, of the English Rules, which corresponds in wording with sub rule (1) of this rule, would seem to be opposed to the view taken by the High Court of Bombay. It would seem that the Bombay Court would not allow an amendment if the original plaintiff had *no right of action* at the time the suit was brought (1). But this view, it is submitted, is not correct, and one of the cases cited by that Court in support of its view affirms the contrary (2). In a recent case, the High Court of Madras expressly held that the fact that the original plaintiff has *no cause of action* does not take away the jurisdiction of the Court to order the substitution of another person as plaintiff (3).

Amendment not allowed.—It would seem that no amendment should be allowed under sub rule (1), if the rights in dispute between the *new plaintiff* and the defendant would not be the same as those in dispute between the *original plaintiff* and the defendant. A suit is brought by an importer of "Roskopf Patent" watches for infringement of trade mark, alleging that he has got the *exclusive right to use* the trade mark in India. The trade mark belongs to the manufacturer, and *not to the importer*. The importer is subsequently advised that he cannot sue on the *manufacturer's* trade mark, and he thereupon applies that the manufacturer may be either added or substituted as plaintiff. If the manufacturer is made a party, his claim will raise questions as to how far he is entitled to the trade mark in the *country of its origin*, and consequently in India. That would be a case wholly different from that of the importer. Can the manufacturer be made a party under these circumstances? The question arose in a Bombay case (4). Batty, J., said that the point was one on which there seemed to be considerable room for doubt. Eventually the application was refused on the ground that it was made too late. In another case the original plaintiff having a hopelessly bad suit joined a new plaintiff who sued on a different title. The Lower Court had erroneously allowed the amendment but on appeal the High Court dismissed the suit with liberty to the second plaintiff to file a properly framed suit on her own title (5).

Upon such terms as the Court thinks fit.—Liberty to amend may be given upon the terms that the plaintiff should pay to the defendant his costs of the suit upto and including the order of amendment, and that the new plaintiff should only be entitled to such relief as he could have claimed if the suit had been commenced at the date on which he was added as a party (6).

Consent.—No person can be added or substituted as plaintiff under sub rule (1) without his consent. Thus a company cannot be made a plaintiff in a suit without its consent (7). See sub rule (3).

Limitation.—Section 22 of the Limitation Act provides that when after the institution of a suit, a party is *substituted or added* as a plaintiff or defendant, the date of *substitution or addition* is to be deemed, as regards that party, as the date of institution

- | | |
|-----|---|
| (k) | (o) <i>Borogomoff v Manmathanath</i> (1931) 58 Cal 561 129 I C 860 (31) A C 76 |
| (l) | (p) <i>Ayscough v Bullar</i> (1889) 41 Ch. D 341, 346 |
| (m) | <i>Borogomoff v Manmathanath</i> (1931) 58 Cal 561 <i>supra</i> <i>Attorney-General v Ionypudd Water Works Co</i> [1908] 1 Ch 388 |
| (n) | (q) <i>Ram Narain v Ram Kishan</i> (1911) Punj Rec no 46, p 165, 10 I C 515 |

It has been held that this provision of the law relates only to the addition of parties under sub rule (2), and not under sub rule (1). The result is that a party may be substituted or added under sub rule (1) even after the period of limitation. Thus where an agent sued in his own name, and subsequently, at a time when a new suit would have been barred by limitation, his principals were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation (r).

SUB RULES (2) to (5).

Sub rules (2), (3) and (5) correspond to s. 32 of the Code of 1882 and to R. S. C. O. 16, r. 11. Sub rule (4) corresponds to s. 33 of the Code of 1882.

Old section.—Under the old section 32 there was a distinction between the power of the Court to *strike out* parties and the power to *add* parties. Under that section the power to *strike out* parties could only be exercised on the application of a party, and that too if the application was made on or before the first hearing. But the power to *add* parties could be exercised by the Court at any time, and even without any application. Under sub rule (2), the power to *strike out* as well as to *add* parties may be exercised by the Court at any stage of the proceedings, and even without any application by a party.

"At any stage of the proceedings"—The power to strike out or add parties may be exercised at any stage of the proceedings. Thus fresh parties were added in one case after a decree had been passed and a reference made to the Commissioner to take accounts and sell the property (s). In another case fresh parties were added after a suit had been reinstated under s. 108 of the Code of 1882 [now O. 9, r. 13] (t). In a Calcutta case a fresh party was added in a suit for partition after the preliminary decree had been passed and the Commissioner had made his report, but before the drawing up of the final decree (u). A Court can add parties after the suit has been remanded to it by the Court of appeal (v). Under the corresponding English rule it has been held that the Court has jurisdiction to allow amendment even after final judgment, so long as anything remains to be done in the action, though it be only assessment of damages (u).

Parties when added—Under this rule a person may be added as a party to a suit in the following two cases—

- (1) when he ought to have been joined as plaintiff or defendant, and not so joined, or
- (2) when, without his presence, the questions in the suit cannot be completely decided.

There is no jurisdiction to add a party in any other case (x). Thus a person should not be added as a defendant merely because he would be incidentally affected by the judgment (y). The Secretary of State is not a proper or necessary party in every suit in which a statute is challenged as ultra vires (z). But the Secretary of State was added as a party in a case where a petition for grant of letters of administration was entertained without notice to him (a).

Parties cannot be added so as to introduce quite a new cause of action.—A purchased goods from B by sample. The bulk did not correspond with the sample, and A thereupon sued B for damages. B contended that he had purchased

(r) *Barjaya Mahadev* (1898) 22 Bom. 672.
(s) *Jakatchand v. Advocate General* (1871) 8 B. H. C. 96.

(w) *The Duke of Buccleuch* [1892] F. 201.
(x) *McCheane v. Gyles* (No. 2) [1907] 1 Ch. 911, 915.

(y) *Moser v. Marsden* [1892] 1 Ch. 48.
(z) *Jathalinga v. Sadasiva* (1926) 50 Mad. 34. 35 I. C. 214, (20) A. M. 836.
(a) *In the goods of Bhola Nath Pal* (1911) 54 Cal. 801, 134 I. C. 127, (31) A. C. 580.

the goods in question from *X* by sample, an application that *X* should be added as a party to the suit, as the question between him (*B*) and *A* was the same as the question between him (*B*) and *X* (viz. whether the goods were according to the sample), so as to relieve him (*B*) from the necessity of bringing a fresh suit against *X* in the event of the Court holding that the goods were not according to the sample. *Held*, refusing *B*'s application, that *X* was not a person who "ought" to be joined as a party to the suit, nor was his presence necessary to decide "the questions involve in the suit." In this case *A* had nothing to do with *X*, and to add *X* as a party would be to introduce a new cause of action which existed only as between *B* and *X*. The Court would then have to inquire into the circumstances under which *B*'s agreement with *X* was entered into, an inquiry with which *A* had nothing to do (*b*).

Parties cannot be added so as to alter the nature of the suit.—*A* sued for his share of the estate of a deceased relative. On an application to have other persons interested in the said estate added as parties to the suit, it was held that the Court could not add them as parties, as to do so would be to alter the nature of the suit by converting it into a general administration suit (*c*). It has similarly been held that parties should not be added in a suit for rent so as to change it into a suit for title though questions of title may be incidentally investigated in a suit for arrears of rent, *e.g.*, where the tenant disputes the extent of the title of the plaintiff to the arrears claimed by the plaintiff (*d*).

Transposing defendant as plaintiff.—The Court has power under sub r (2) to transfer a defendant to the category of plaintiffs. A zemindar obtained judgment for compensation for an infringement of his sub soil rights, but his brothers who were jointly interested were pro forma defendants. The Privy Council said that if there were a technical objection to passing a decree in favour of the zemindar, the defect could be remedied by adding the pro forma defendants as plaintiffs. Their Lordships added that such a course should always be adopted where it was necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings (*e*). Thus where *A* and *B* are trustees of certain property, and *A* brings a suit to recover the property from *C* impleading *B* as a defendant, the Court may on *A*'s death transpose *B* as plaintiff for the further conduct of the suit (*f*). In a Bombay case *A* brought a partnership suit for accounts against 12 defendants. He then settled with most of the defendants,

ceeded with. The Court granted the application (*g*). *A* sues *B* to recover money borrowed by *B* from *C* who is dead, alleging that *C* had created a trust of the money and that he was appointed trustee of the money. *C*'s widow is impleaded as a co defendant in the suit. It is found that the money sued for was not trust money but it belonged absolutely to *C*. This is a proper case in which the Court should remove the widow from the array of defendants and bring her in the array of plaintiffs (*h*). A defendant may be transferred to the category of plaintiffs on his application even after a preliminary decree for accounts has been passed (*i*). But the Court should not make an order transferring a defendant to the category of plaintiffs if it results in changing the character of the suit (*j*). *A* sues *B* to recover a sum of money, and impleads *C*, who says that he and

- | | | |
|-----|--|-------------------------------------|
| (b) | | 59 Cal 80 132 I C 610 (31) A FC 162 |
| (c) | | (f) |
| | | (g) |
| (d) | <i>Abul Gafur v. Ali Miah</i> (1923) 28 C W N 805, 82 I C 363 (23) A C 26 <i>Pravot v. Amulja</i> (1927) 45 Cal L J 140, 101 I C 527, (27) A C 340 | (h) |
| | | (i) |
| (e) | <i>Bhupendra v. Rajeswar</i> (1931) 58 I A 228 | (j) |

- 10 It has been held that this provision of the law relates only to the addition of parties under sub rule (2), and not under sub rule (1). The result is that a party may be substituted or added under sub rule (1) even after the period of limitation. Thus where an agent sued in his own name, and subsequently, at a time when a new suit would have been barred by limitation, his principals were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation (r).

SUB RULES (2) to (5).

Sub rules (2), (3) and (5) correspond to s. 32 of the Code of 1882 and to R. S. C., O. 16, r. 11. Sub rule (4) corresponds to s. 33 of the Code of 1882.

Old section.—Under the old section 32 there was a distinction between the power of the Court to *strike out* parties and the power to *add* parties. Under that section the power to *strike out* parties could only be exercised on the application of a party, and that too if the application was made *on or before the first hearing*. But the power to *add* parties could be exercised by the Court *at any time*, and *even without any application*. Under sub rule (2), the power to *strike out* as well as to *add* parties may be exercised by the Court *at any stage of the proceedings*, and *even without any application* by a party.

‘At any stage of the proceedings’—The power to strike out or add parties may be exercised *at any stage of the proceedings*. Thus fresh parties were added in one case after a decree had been passed and a reference made to the Commissioner to take accounts and sell the property (s). In another case fresh parties were added after a suit had been reinstated under s. 103 of the Code of 1882 [now O. 9, r. 13] (t). In a Calcutta case a fresh party was added in a suit for partition after the preliminary decree had been passed and the Commissioner had made his report, but before the drawing up of the final decree (u). A Court can add parties after the suit has been remanded to it by the Court of appeal (v). Under the corresponding English rule it has been held that the Court has jurisdiction to allow amendment even after final judgment, *so long as anything remains to be done in the action*, though it be only assessment of damages (w).

Parties when added—Under this rule a person may be added as a party to a suit in the following two cases—

- (1) when he *ought* to have been joined as plaintiff or defendant, and not so joined or
- (2) when, without his presence, the questions in the suit cannot be completely decided.

There is no jurisdiction to add a party in any other case (x). Thus a person should not be added as a defendant merely because he would be *incidentally* affected by the judgment (y). The Secretary of State is not a proper or necessary party in every suit in which a statute is challenged as ultra vires (z). But the Secretary of State was added as a party in a case where a petition for grant of letters of administration was entertained without notice to him (a).

Parties cannot be added so as to introduce quite a new cause of action.—A purchased goods from B by sample. The bulk did not correspond with the sample, and A thereupon sued B for damages. B contended that he had purchased

(r) *Raoji v. Mahadeo* (1898) 22 Bom. 672.
(s) *Lakatchand v. Advocate General* (1871) 8 B. H. C. 98.

(t) *Tilam Singh v. Khushroo* (1898) 20 All. 188.
(u) *Adnan v. Bejoh* (1905) 33 Cal. 483.
(v) *Quinlan v. Ma. Ws.* (1926) 3 Bang. 474.
(w) *11 C. 125 (26) A. R. 9, Ipparao v. Ma. Ws.* (1931) 33 Bom. 1 R. 608, 131 Cal. 165 (31) A. R. 408.

(x) *The Duke of Buccleuch* [1897] 1 Ch. 201.
(y) *Mc-Cheane v. Giles* (No. 2) [1902] 1 Ch. 911.

(z) *Mosser v. Maraden* [1902] 1 Ch. 497.
(a) *Nadhirama v. Sadanra* (1926) 50 Mad. 34. See 1 C. 214, (26) A. R. 830.
(b) *In the goods of Bholanath Pat* (1911) 58 Cal. 801, 131 I. (1279, (31) A. C. 561.

the goods in question from A by sample, and applied that X should be added as a party to the suit, as the question between him (B) and A was the same as the question between him (B) and X (viz., whether the goods were according to the sample) so as to relieve him (B) from the necessity of bringing a fresh suit against X in the event of the Court holding that the goods were not according to the sample. *Held*, refusing B's application that X was not a person who ought to be joined as a party to the suit, nor was his presence necessary to decide the questions involved in the suit. In this case A had nothing to do with X, and to add X as a party would be to introduce a new cause of action which existed only as between B and X. The Court would then have to inquire into the circumstances under which B's agreement with X was entered into, an inquiry with which A had nothing to do (b).

Parties cannot be added so as to alter the nature of the suit.—A sued for his share of the estate of a deceased relative. On an application to have other persons interested in the said estate added as parties to the suit, it was held that the Court could not add them as parties, as to do so would be to alter the nature of the suit by converting it into a general administration suit (c). It has similarly been held that parties should not be added in a suit for rent so as to change it into a suit for title though questions of title may be incidentally investigated in a suit for arrears of rent, *et seq.*, where the tenant disputes the extent of the title of the plaintiff to the arrears claimed by the plaintiff (d).

Transposing defendant as plaintiff.—The Court has power under sub r (2) to transfer a defendant to the category of plaintiffs. A zemindar obtained judgment for compensation for an infringement of his sub soil rights, but his brothers who were jointly interested were pro forma defendants. The Privy Council said that if there were a technical objection to passing a decree in favour of the zemindar the defect could be remedied by adding the pro forma defendants as plaintiffs. Their Lordships added that such a course should always be adopted where it was necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings (e). Thus where A and B are trustees of certain property, and A brings a suit to recover the property from C impleading B as a defendant, the Court may on A's death transpose B as plaintiff for the further conduct of the suit (f). In a Bombay case A brought a partnership suit for accounts against 12 defendants. He then settled with most of the defendants

ceeded with. The Court granted the application (g). A sues B to recover money borrowed by B from C who is dead, alleging that C had created a trust of the money and that he was appointed trustee of the money. C's widow is impleaded as a co defendant in the suit. It is found that the money sued for was not trust money but it belonged also wholly to C. This is a proper case in which the Court should remove the widow from the array of defendants and bring her in the array of plaintiffs (h). A defendant may be transferred to the category of plaintiffs on his application even after a preliminary decree for accounts has been passed (i). But the Court should not make an order transferring a defendant to the category of plaintiffs if it results in changing the character of the suit (j). A sues B to recover a sum of money, and impleads C who says that he and

| | | |
|-----|--------------|-----|
| (b) | | (f) |
| (c) | | (g) |
| (d) | At 1000 1000 | (h) |
| | | (i) |
| (e) | | (j) |

so that if his claim is established the suit will be dismissed. It was held that the Court can allow him to be added as a defendant in the suit in order to prevent multiplicity of suits and such person need not be compelled to file a separate suit to establish his status (w). For the same reason a person claiming to be the real tenant was allowed to intervene and was joined as a party in a rent suit (x). Again in a partnership suit strangers intervened and claimed that part of the property under partition was held in trust for them and the Court joined them as parties in order to completely adjudicate and settle all questions involved in the suit (y). See notes above, "Who ought to have been joined."

"Questions involved in the suit."—"Questions involved in the suit" refer only to questions between parties to the suit (z). Further, they refer only to questions as between plaintiffs and defendants and not to questions which may arise between co-plaintiffs or between co-defendants *inter se* (a).

Improper addition of plaintiff or defendant.—Sub rule (2) does not enable a Court to override the effect of O. 2, r. 3. Hence if the joinder of a person as plaintiff would result in a misjoinder of plaintiffs and causes of action, or the joinder of a person as defendant would result in a misjoinder of defendants and causes of action, the application should be refused (b). Similarly if the joinder of a person as plaintiff is not possible under O. 1, r. 1, it does not become possible under this rule (c).

Joint contractors.—See notes to O. 1, r. 6, "Joint liability on a contract."

Consent of person added as plaintiff.—If any person who ought to have been joined as plaintiff does not consent to join as plaintiff, he may be made a defendant in the suit. The proper course is first to require him to join as plaintiff, and if he refuses to join as plaintiff, then to join him as defendant. But the suit should not be dismissed merely because he is joined as defendant without being first called upon to join as plaintiff (d).

Suit against a dead person.—Where a suit is brought against a person who is found to have died before its institution the plaint cannot be amended by bringing his legal representative on the record, though the suit may have been filed in ignorance of his death. The reason is that a suit against a dead man is a nullity from the first (e). But if a suit is against several defendants one of whom is found to have died before its institution, the suit should not be dismissed. It should proceed against the other defendants and the legal representatives of the deceased should be joined if he was a necessary party (f).

Limitation Act, sec. 22, provides amongst other things that when, after the institution of a suit, a party is added as a plaintiff or defendant, the date of addition is to be considered as regards that party as the date of the institution of the suit. It has been held under this section that where necessary parties are not joined within the period of limitation, the suit must be dismissed. Necessary parties mean parties necessary to the constitution of the suit (g), that is, persons whose joinder is necessary to enable the Court to award such relief as may be given in the suit as framed (h). Thus in a suit by one of several joint promisees the other promisees are necessary parties for no relief can be given to one of them. The suit is not properly constituted unless all the co-promisees join for the plaintiff can only enforce his claim in conjunction with them.

(w) *Maung Tin v Maung Po* (1900) 5 Rang 159 103 I C 22 (27) A R 192

(x) " " " " " " " " " " " "

(y) " " " " " " " " " " " "

(z) " " " " " " " " " " " "

(a) " " " " " " " " " " " "

(b) " " " " " " " " " " " "

(c) " " " " " " " " " " " "

834

(d) *Pyari v Kedarnath* (1899) 26 Cal 409 *Birs Singh v Nasal* (1902) 24 All 226

(e) " " " " " " " " " " " "

(f) " " " " " " " " " " " "

(g) " " " " " " " " " " " "

(h) *Kishan Prasad v Har Narain Singh* (1911) 33 All 272 276 9 I C 739 [P C]

(i) *Guruvayya v Anant* (1904) 25 Bom 11, 17

If in such a suit the other promisees are not joined within the period of limitation the suit must be dismissed (i) Similarly where *A, B* and *C* were three partners and *A* sued *B* only for partnership accounts, and *C* was added as a defendant after the period of limitation, the suit was dismissed (j) On the same ground, where a member of a joint Hindu family sued in his own name for a joint debt without making the other members parties to the suit, and the defendant raised an objection on the ground of non joinder, and the period of limitation had by that time expired, it was held that it was too late to join the other members as co plaintiffs, as the claim was at that date time barred, and the suit was accordingly dismissed (l) And the suit must likewise be dismissed, even if the Court of its own motion adds the other members as plaintiffs in circumstances such as those mentioned above The mere fact that the Court of its own motion orders that the name of any person be added as a party does not render the provisions of s 22 inapplicable to the case (l) There is nothing in sub rule (2) which frees the Court when acting of its own motion from the restrictions of the Limitation Act, in other words, a Court acting under sub rule (2) is bound by the provisions of s 22 of the Limitation Act (m) and the rights which parties may have acquired under the Limitation Act are therefore safeguarded (n) On the other hand, when a suit can be, and is, constituted without joining certain persons as parties and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation, the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed to such a case the provisions of s 22 do not apply (o) Thus where a promissory note is passed to the manager of a joint Hindu family, he may sue the promisor without joining the other members of the family as co plaintiffs In such a case if the other members are joined as plaintiffs after the statutory period has expired their joinder, being unnecessary, does not prevent the suit as originally constituted from being in time (p) It has similarly been held that, that section does not apply when a person is added as a party merely to enable the Court effectually and completely to adjudicate upon the questions involved in the suit without any relief being claimed against him (q) Further the section does not apply where an assignee from a party to a suit, the assignment having been made pending the suit is joined as a party to the suit (r) It has also been held that that section does not apply where a person is joined as a defendant in a suit and he is subsequently added as a plaintiff (s) In a case before the Privy Council where relief was claimed against a debtor's estate, but none of the defendants was impleaded as representing the estate, and subsequently, though after the expiration of the period of limitation prescribed for the suit, one of the defendants [i.e., a person already a party to the suit] was impleaded as *shewast* and as representing the estate it was held that s 22

- | | |
|--|--|
| (i) <i>Zamsuck v Randall</i> (1881) 6 Cal 815 <i>Sobhandra v Parthasirathi</i> (1932) 62 Mad L J 154 137 IC 274 (3-) A M 593 | 38 Mad 89 842, 2- IC 878 <i>Irchand v Kondu</i> (1915) 39 Bom T-3 31 f 180 <i>Shahasaheb v Salasir</i> (1919) 43 Bom 575 580-581 51 f 2 3 <i>Contra Mathewson v Ram Anani</i> (1904) 36 Cal 6 5 637 639 1 IC 6 6 84 <i>Shahdeochar</i> (1901) 45 Bom 1809 1013 61 f C 590 (-1) A B 152 <i>Coorji Mulla v Vallabhdas</i> (1907) 27 Bom LR 1168 94 IC 6 5 (2-) A D 547 |
| (j) <i>Pamodai v Juhmejo</i> (1889) 14 Cal 791 | (p) <i>Kusien Parshad v Har Narain</i> (1911) 33 IA 45 53 AD 27- 9 IC 39 |
| (k) <i>Kal das v Nathu</i> (1888) 7 Bom 21 <i>Fatmaba v Jirba</i> (1897) 11 J 11 580 <i>Seklan v Veera</i> (1909) 32 Mad 284 4 IC 28 | (q) <i>Mahamed Isaq v Sheikh Akramul</i> (1909) 12 C W N 84 |
| (l) <i>Ismail bin Din v Liladhar</i> (1892) 14 All 504 | (r) <i>Arinachella v Orr</i> (1917) 40 Mad 7-0 29 IC 634 <i>See Abdul Rahman v</i> |
| (m) <i>I</i> " " " " | (s) " " " " |
| (n) <i>Cf</i> " " " " | |
| (o) <i>Gu</i> " " " " | |

of the Limitation Act did not apply to the case (f). Where a suit is originally brought against a firm in the name of the firm but subsequently the title of the plaint is amended by substituting the names of the members of the defendant's family on its being brought to the notice of the plaintiff that the defendant is not a firm but an undivided Hindu family, the suit is not affected by the provisions of sec. 22(1) of the Indian Limitation Act since there is no addition of parties but only a substituting in order to correct a misdescription (g).

Party may be added at any stage of suit.—Subject to the provisions of the Limitation Act referred to above a person may be added as a party to a suit at any stage of the suit and even at the time of passing the decree (r). If a decree framing a scheme for the administration of a joint family trust has reserve to the parties liberty to apply the Court may join any party interested in order to enable him to apply (r).

Misdescription.—Where there is a misdescription of a defendant in the title of a suit there is complete power in the Court to make the necessary correction without regard to lapse of time. In this class of cases it is material to ascertain against whom the relief is claimed. If sued the Municipal Committee of Lucknow through the Secretary instead of suing the Committee through the President as ought to have been done. The relief claimed is against the Committee. *No personal relief* is sought against the Secretary. The case is one of misdescription and the plaint may be amended though the application for amendment is made after the expiry of the period of limitation (x). If sued 'The Agent B B & C I L Co., Ltd.' The relief claimed is against the railway company. *No personal relief* is claimed against the Agent. It applies for amendment of the plaint after the expiry of the statutory period by striking out the word 'Agent'. The amendment should be allowed, the suit being substantially against the company (y). But if the relief claimed was as against the Agent *personal*, the amendment can be allowed only if there is no question of limitation (z) but not after the expiry of the period of limitation for the suit (a). Where a suit is brought by or against a joint Hindu family firm in the name of the firm the title of the plaint may be amended by substituting the names of the members of the joint family even after the period of limitation prescribed for the institution of the suit (b). But if an alternative claim is made by an amendment suing them as a firm under O 30 that alternative case will be subject to the provisions of sec. 22 of the Limitation Act (c). Where a partner in a firm carrying on business out of British India and to which O 30 does not apply files a suit in the name of the firm and applies afterwards to amend the plaint by adding the names of the partners, the case is not one of misdescription but of substitution within sub rule (1) of this rule (d). But this decision has been criticised on the ground that a foreign firm being an entity not recognised by Indian law the suit was by a non-existent party and should have been dismissed as the rule refers to misdescription of existing persons (e).

Appeal.—No appeal lies under this Code from any order made under this rule. But where the name of a defendant is struck out under this rule on the ground that the plaint does not disclose any cause of action against him the order operates as a

- (f) *Peary Mohan v. Narendra Nath* (1905) 32 Cal 582 affirmed (1909) 3 Cal 37
1 A 27 51 C 404
- (g) *Jamprasad v. Shrinivas* (1935) 11 Bom 1 R 11 90 I C 685 (3) A B 5
- (r) *Krishna v. Motilal* (1929) 31 Bom 1 R 476 (23) A B 337 *Bharnal v. Basu* (1933) 35 Bom 1 R 365 144 I C 901 (33) A B 200
- (e) *Kadri v. Khulmji* (1931) 33 Bom L R 546 133 I C 83 (31) A B 348
- (r) *Mann v. Crooke* (1880) 1 All 496
- (y) *Saraspur Man faruk Co. v. B B & C I L Co* (1933) 47 B 785 73 I C 107 (23) A B 45
- (z) *India General S N & R Co. Ltd. v. Lal*

- (a) "
- (b) *Pamprasad v. Shrinivas* (1935) 11 Bom L R 11 90 I C 685 (3) A B 527 *Amulakhand v. Babulal* (1933) 35 Bom L R 563 147 I C 86 (33) A B 304
- (c) *Bhahan Berdas v. Brj Lal* (1931) 33 Bom L R 1355 (31) A B 590
- (d) *Venkatesh Oji v. Velmahomed* (1928) 30 Bom L R 117 103 I C 93 (28) A B 191
- (e) *Amulakhand v. Babulal* (1933) 35 Bom L R 563 147 I C 786, (33) A B 304

decree and is appealable as such (f). Similarly if in a suit for partition the name of one of the defendants is struck out on the ground that he has no interest in the properties the subject matter of the suit, he may appeal from the order, as the order operates as a decree against him (g)

Revision—In an old Calcutta case the lower Court refused to join a party in an interpleader suit because his claim was not admitted by the plaintiff. The High Court held that as this refusal was based on an erroneous construction of sec 32 of the Code of 1882, it was not open to revision as it was not a case of failure to exercise jurisdiction but simply putting an erroneous construction on the provisions of an Act (h). The Patna High Court has followed this case and has held that an order refusing to add a party is not subject to revision, though the High Court may interfere under sec 107 of the Government of India Act, 1915, if there is a denial of the right of fair trial (i). The Calcutta case has, however, been doubted in subsequent Calcutta cases which have held that the High Court is entitled to interfere in revision if the Court below has improperly refused to join a party (j). In another Calcutta case the High Court in revision ordered a person preferring an objection to be joined as a party in probate proceedings (k). In a Bombay case the High Court held that persons interested applying for the amendment of a scheme should be joined as parties to the suit in order to enable them to apply, but left them to apply to the lower Court (l). It does not however, appear that an application had been made to the lower Court and refused, before the suit came before the High Court in revision. The Allahabad High Court, in accordance with its view that an interlocutory order is not open to revision, has held that an order refusing to join a party is not a case decided and cannot be revised (m). The Privy Council have held that when a Court refused to join a necessary party it acted with material irregularity and that the decree was rightly reversed in revision (n). This, however, was not a revision of the order but of the decree consequent on the order.

11. [S. 32, 6th para. Cf. R. S. C., O. 16, r. 39] The Court may give the conduct of the suit to such person as it deems proper.

Conduct of suit

‘Person’—The word person refers to a party to the suit and the Court cannot give the conduct of the suit to a stranger (o)

12. [S. 35] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

Appearance of one of several plaintiffs or defendants for others

| | | | |
|-----|--|-----|--|
| (n) | | (k) | Y O 549 Kettaramoni v Shyama Churn (1894) 21 Cal 519 reversed on facts in Shyama Churn v Kettaramoni 21 Cal 531 |
| (g) | | (l) | |
| (h) | | (m) | |
| (i) | | (n) | |
| (j) | | (o) | |

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. [S. 34.] All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to non-joinder or misjoinder
Scope of the rule—This rule refers to two kinds of objections, the one for non-joinder of parties and the other for misjoinder of parties. These objections must be taken at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, otherwise the objection will be deemed to have been waived (p). Where an objection to non joinder (q) or misjoinder (r) of parties is not taken in the Court of first instance, it will be disallowed in appeal. The Privy Council referred to this rule when disallowing an objection on the ground of misjoinder which was raised for the first time before them (s). See notes to O. 1, r 9, above. See also sec. 99.

"Unless the ground of objection has subsequently arisen"—These words are new. When the ground of objection has arisen subsequent to the settlement of issues, the objection may be taken even after the settlement of issues. In fact, it was so held under the old section though the words "unless the ground of objection has subsequently arisen" did not occur in that section. Thus if a coparcener or a reversioner or a remainderman is born *after* the settlement of issues in a suit to which he is a necessary party, and the plaintiff does not make him a party, the defendant may object to his non joinder, though issues have already been settled. Thus in a partition suit all coparceners must be joined as parties, even though some of them may be born after the institution of the suit. Similarly, where a woman who is a party to a suit is married *after* the settlement of issues and the nature of the suit is such that the husband is a necessary party, the plaintiff should make the husband a party and the defendant may raise this objection though it be *after* the settlement of issues (t).

As to misjoinder of causes of action, see O. 2, r 7

ORDER II.

Frame of Suit.

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

- Frame of suit.*
 (p) *Obhay v Hury Churn* (1887) 8 Cal 277.
Paramasiva v Krishna (1891) 14 Mad 498,
Purshottam v Kala (1902) 26 Bom 301.
 (q) *Purshottam v Kala* (1902) 26 Bom 301.
Paramasiva v Krishna (1891) 14 Mad 498

- (r) *Fakirapa v Rudrapa* (1891) 16 Bom 119
 122
 (s) *Adyas Coal Co v Panna Lal* (1930) 57
 I A 144 57 Cal. 1341, 133 I C 726
 (30) A I C 113
 (t) *Modhe v Dongre* (1891) 5 Bom 609

From this rule read with r 2 below, the intention of the Legislature appears to be that as far as possible all matters in dispute between the parties relating to the same transaction should be disposed of in the same suit (u)

2. [S 43] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court

Suit to include the whole claim

(2) Where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished

Relinquishment of part of claim

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted

Option to sue for one of several reliefs

Explanation—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action

Illustration

A lets a house to B at a yearly rent of Rs. 1200. The rent for the whole of the years 1906, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1906 or 1907.

Changes in the section—The words obtained before the first hearing after the words the leave of the Court [see sub rule (3)] have been omitted. The words and successive claims arising under the same obligation have been added to the Explanation. The illustration has been expanded so as to comprise the case of rent due for a period subsequent to the one for which the suit is brought.

Cause of action—In *Pulapur Raja v Suriya Rau* (v) their Lordships of the Privy Council referring to the expression cause of action in this rule said that it meant the cause of action for which the suit was brought. Referring to this decision their Lordships said in the recent case of *Muhammad Hafiz v Muhammad Zakariya* (w) Their Lordships see no reason to attempt to qualify or to extend those words because they are in fact nothing but a repetition of the exact words of the Code the cause of

(v) *Saral Chand v Mohun Bhai* (1898) 25 (a) 371. See also *Jamasuami v Puthanna* (1903) 28 Mad 760. 64 766. *Wasilama n v Thiruvengadam* (1904) 31 Mad

385 394 396
(r) (1888) 8 Mad 500 504 10 I A 116 119
(u) (19) 40 I A 9 14 44 All 101 106
11 70 (20) A 11 23

action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings." Again in *Naba Kumar v. Pritashyam* (x) where the plaintiff obtained a decree for the conveyance to them of properties purchased by a trustee, and then afterwards sued for mesne profits for the time the trustee was in possession, their Lordships said that the suit was barred under O. 2, r. 2, as the cause of action was the same as in the previous suit, i.e., the right to have the purchase declared a purchase for them. See notes to s. 20, 'Cause of action.'

Splitting of claim—This and the preceding rule are aimed against a multiplicity of suits in respect of the same cause of action (y). The object of the present rule is, to use the language of r. 1 of this order, "to prevent further litigation." For that purpose the rule provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action. He is not entitled to split his cause of action into parts, and bring separate suits in respect of each part. If he omits to sue in respect of, or intentionally relinquishes, any portion of the claim arising from the same cause of action, he will be precluded from suing in respect of the portion so omitted or relinquished, even though he states in his plaint that he intends to bring a second suit for the portion omitted (z). But it cannot be said of a plaintiff that he has omitted to sue in respect of a portion of his claim, unless he was, at some time prior to the suit, aware or informed of the claim or of the facts which would give him a cause of action (a). If the plaintiff was aware of the claim, and omitted to sue in respect thereof, he could not afterwards sue in respect thereof, though the omission was accidental or involuntary (b). For the definition of cause of action, see notes to s. 20, "Cause of action."

Illustrations

(1) *Relinquishment*—A owes B Rs. 2,200. B may relinquish Rs. 200 to bring his suit within the jurisdiction of a Presidency Small Cause Court, and may sue A in that Court for Rs. 2,000 only. Here the relinquishment being intentional, B cannot afterwards sue A for Rs. 200, the portion relinquished. But if the suit is transferred, on A's application, to the High Court, B may add Rs. 200 to his claim, the High Court having jurisdiction over the entire claim. *Ramlall v. Bhayahari* (1896) 1 C. W. N. 32.

(2) *Accidental omission*—A Mahomedan wife sues her husband to recover property belonging to her including Government paper of the value of Rs. 10,000, and a decree is passed in her favour. She afterwards sues the husband to recover from him Government paper of the value of Rs. 500, alleging that she omitted to include it in the previous suit by an oversight. The suit is barred, for she was aware of her claim when she brought the previous suit. *Buzloor Rukhem v. Shumsoonnessa* (1867) 11 M. I. A. 551.

(2a) *Deliberate omission*—A and his adoptive mother B execute in favour of C a deed of gift of property X which is invalid for want of attestation. A sues B to recover all the property of his adoptive father including property X. He joins in the suit C to whom B had improperly alienated property Y. In this suit, A made no claim against C as regards property X. A consent decree is passed against B for all the property including X and Y. A decree is passed after contest against C for property X. No decree is passed against C for property Y and when A attempts to take possession of X he is resisted.

- (x) (1931) 35 C. W. N. 977 134 I. C. 634 (31)
A. I. C. 221
(y) *Maug Pe v. Ma Lon* (1911) 34 I. A. 140
145 39 Cal. 6. 11 I. C. 437
(z) *Makrud v. Narqi* (1893) 20 Cal. 322
(a) *Venkata v. Krishnasami* (1884) 6 Mad. 544

- Amanat v. Imdad Hossain* (1889) 15 Cal. 600 15 I. A. 106 *Sankaran v. Parathal* (1838) 1 J. Mat. 145 *Batal Kunwar v. Munni Lal* (1910) 3. All. 6-5 71 I. C. 285
(b) *Buzloor Rukhem v. Shumsoonnessa* (1867) 11 M. I. A. 551 604 605

2 by C. A then sues C for possession of A. The suit is barred for he omitted to claim this relief against C in the previous suit *Anant v Mahbleswar* (1930) 32 Bom L R 1473, 129 I C 937, (31) A B 114.

(3) *Instalments*—Where a promissory note is payable by instalments, and two or more instalments have become due, and the holder of the note sues only for one of the instalments and omits to sue for the other instalments, he cannot afterwards sue for those instalments *Mackintosh v Gill* (1874) 12 B L R 37, *Narayan v Mumba* (1906) 8 Bom L R 547. Similarly if a promissory note is made payable by instalments, and it is provided that in default of payment of any one instalment the whole of the balance shall be payable immediately, a suit for recovery of the unpaid instalment will bar a subsequent suit for the balance *Shrinivas v Chambasapagouda* (1923) 25 Bom L R 203, 72 I C 290, (23) A B 201. In a Madras case it was said that there was no bar if the default clause gave the obligee the option of recovering the whole balance due at once, as where the words used were "when required" or "when you require," or "if you choose" or "you will be at liberty to sue" *Mulyaprana v Kalu* (1928) 112 I C 270, (28) A.M. 705. The *Mulyaprana*'s case was considered by the same High Court in *Rego v Philip* (1929) 56 Mad L J 580, 120 I C 853, (29) A. M. 371.

(4) *Two promises for one debt*—A accompanies B, a pleader, to Hardwar, as B's medical attendant, for which Rs. 1,500 become due to him as his fees. B passes a promissory note to A for Rs. 700, and agrees as for the balance of Rs. 600 to do certain legal work for A. B dies without doing the legal work undertaken by him. A sues C, B's son, upon the promissory note, and a decree is passed for him. He then brings another suit against C to recover the Rs. 600, alleging that the legal work which B had agreed to do for him had not been done. The suit for the recovery of Rs. 600 is barred *Preonath v Bisnath* (1907) 29 All 256. The above decision has been dissented from by the High Court of Madras, on the ground that if several promissory notes are executed for portions of the same debt, each promissory note creates a distinct cause of action on which a separate suit may be brought *Anantanarayana v Sarithra* (1913) 36 Mad 151, 152 13 LC 458.

(5) *Set off*—A sues B for Rs. 200. As against the said claim, B claims to set off Rs. 200, being part of a sum of Rs. 1,200 alleged to be due to him by A, but omits to counterclaim from A the balance of Rs. 1,000. B cannot afterwards sue A to recover Rs. 1,000 *Naubut v Mahesh* (1905) 32 Cal. 654.

(6) *Continuous account*—When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous so that one item if not paid shall be united with another and form one continuous demand the whole together forms but one cause of action and cannot be divided *Bonney v Wordsworth* (1856) 18 C.B. 325, 334, *Kedar Nath v Dinabandhu* (1915) 42 Cal. 1043, 31 I C. 626.

(7) *Omission of portion of a claim in a suit against one of several promisors*—The omission of a portion of a claim in a suit against one of several promisors is no bar to a subsequent suit against another promisor in respect of the portion so omitted. A lets a house to B and C at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 for the rent due for 1907. A cannot afterwards sue B for the rent due for 1905 or 1906, but he can sue C for the rent due for those two years (c). See the illustration to the present rule.

(8) A suit for redemption of two out of three plots comprised in one mortgage is a bar to a subsequent suit for redemption of the third plot *Bhau Daji v Pallu* (1922) 24 Bom L R 1157, 73 I C 862, (23) A B 63.

(c) *Ramanjulu v Aravamudan* (1910) 33 Mad 517, 51 I C. 735.

(9) A suit by a receiver, not against A to recover two out of three properties alienated to him by a Hindu wife having a limited interest is a bar to a subsequent suit against him to recover the third. *Dubari v. G. Dind* (1924) 46 All. 822, 60 I C 31, (24) A A 102.

(10) A suit by a coparcener that a mortgage of one property is not binding on him bars a suit for a similar relief as to another property included in the same mortgage: *Abhaidat v. Pagla* (1925) 1 Luck. 1, 91 I C 976, (25) A O. 77. See also *Abhaidat Singh v. Pagla* (1926) 1 Luck. 1, 91 I C 976, (26) A O. 77.

(11) If a mortgage and a lease are one transaction, a suit for rent will bar a suit to recover the mortgage money. *Dewan Chand v. Patti Ram* (1926) 8 Lah. L. J. 381, 97 I C 396 (26) A L. 590. But not so if the transactions are separate: *Gurdial v. Dewan Chand* (1928) 112 I C 15, (28) A L. 732.

Explanation to the Rule—

A Obligation and collateral security for its performance.—The Explanation to the present rule is not intended to be an illustration of the foregoing provision, but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule (d). In a recent case their Lordships of the Privy Council said (e): "The illustration given shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as *one and the same cause of action*. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here." See notes below, "First suit for interest due under a mortgage, second suit for principal," and "Exceptions to the rule against splitting of reliefs."

B Successive claims arising under the same obligation constitute a single cause of action—The words "successive claims arising under the same obligation" have been added into the Explanation, and the illustration to the rule has been expanded, to give effect to a Calcutta decision where it was held that a claim in respect of *all* arrears of rent constitutes a *single* cause of action (f). The illustration shows that if rent has become due for the years 1905, 1906 and 1907, the landlord can bring only one suit for the whole of the rent in arrears, and that if he sues for the rent due for a particular year only, he will be precluded from suing for the rent due for the other years. It must, however, be noted that though this rule precludes the landlord from bringing a *fresh* suit for rent not included in the former suit, it does not prevent him from adopting any other remedy the law gives him to recover the rent. Thus though in the case put in the illustration the landlord cannot sue for the rent due for the year 1905 or 1907, he can *distrain* for the rent due for those years (g). On the same principle as in the illustration, a suit for an annuity for the year 1917 is a bar to a subsequent suit for annuity for the years 1914, 1915 and 1916 (h). See also ill. (7) above.

Interest accruing due from time to time under a mortgage deed, maintenance, *malkana*, &c., are other instances of "successive claims arising under the same obligation."

(d) *Payasa v. Pana Lana* (1914) 41 I A 142, 148, 26 I C. 228

(e) *Kushan Narain v. Pala Mal* (1923) 50 I A 115, 117, 4 Lah. 32, 34, 72 I C 187, (22) A FC 412

(f) *Taruck Chunder v. Paschu* (1881) 6 Cal. 791, *Mahomedbhai v. Adamji* (1922) 46

Bom. 229, 235, 64 I C 919, (22) A B

(g)

(h) *Abdul Karim v. Muhammad* (1922) 44 All. 663, 68 I C 970, (22) A A 379

2 by C. A then sues C for possession of X. The suit is barred for he omitted to claim this relief against C in the previous suit. *Anant v. Mahabeshwar* (1930) 32 Bom L.R. 1473, 129 I.C. 977, (31) A.B. 114

(3) *Instalments*—Where a promissory note is payable by instalments and two or more instalments have become due, and the holder of the note sues only for one of the instalments and omits to sue for the other instalments, he cannot afterwards sue for those instalments. *Mackintosh v. Gill* (1874) 12 B.L.R. 37; *Narayan v. Mamba* (1900) 8 B.M.L.R. 517. Similarly if a promissory note is made payable by instalments and it is provided that in default of payment of any one instalment the whole of the balance shall be payable immediately, a suit for recovery of the unpaid instalment will bar a subsequent suit for the balance. *Akrishnas v. Channasapagueda* (1927) 23 B.M.L.R. 207, 72 I.C. 240, (23) A.B. 201. In a Madras case it was said that there was no bar if the default clause gave the obligee the option of recovering the whole balance due at once, as where the words used were "when required" or "when you require," or "if you choose" or "you will be at liberty to sue"; *Mulayaprana v. Kalu* (1928) 112 L.C. 270, (29) A.M. 705. The *Mulayaprana's* case was considered by the same High Court in *Rego v. Philip* (1929) 56 Mad.L.J. 580, 120 I.C. 853, (29) A.M. 371.

(4) *Two promises for one debt*—I accompanies B, a pleader, to Hardwar, as B's medical attendant, for which Rs. 1,300 become due to him as his fees. B passes a promissory note to A for Rs. 700, and agrees as for the balance of Rs. 600 to do certain legal work for A. B dies without doing the legal work undertaken by him. A sues C, B's son, upon the promissory note and a decree is passed for him. He then brings another suit against C to recover the Rs. 600, alleging that the legal work which B had agreed to do for him had not been done. The suit for the recovery of Rs. 600 is barred. *Prasanth v. Bisnath* (1907) 29 All. 256. The above decision has been dissented from by the High Court of Madras, on the ground that if several promissory notes are executed for portions of the same debt, each promissory note creates a distinct cause of action on which a separate suit may be brought. *Anantanarayana v. Sarithri* (1913) 38 Mad. 151, 133 I.C. 458.

(5) *Set off*—A sues B for Rs. 200. As against the said claim, B claims to set off Rs. 200, being part of a sum of Rs. 1,200 alleged to be due to him by A, but omits to counterclaim from A the balance of Rs. 1,000. B cannot afterwards sue A to recover Rs. 1,000. *Narbut v. Mahesh* (1905) 32 Cal. 654.

(6) *Continuous account*—When a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. *Bowsey v. Wordsworth* (1856) 18 C.B. 325, 334, *Kedar Nath v. Dinabandhu* (1915) 42 Cal. 1043, 31 I.C. 626.

(7) *Omission of portion of a claim in a suit against one of several promisors*—The omission of a portion of a claim in a suit against one of several promisors is no bar to a subsequent suit against another promisor in respect of the portion so omitted. A lets a house to B and C at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 for the rent due for 1907. A cannot afterwards sue B for the rent due for 1905 or 1906, but he can sue C for the rent due for those two years (c). See the illustration to the present rule.

(8) A suit for redemption of two out of three plots comprised in one mortgage is a bar to a subsequent suit for redemption of the third plot. *Bhau Daji v. Parlu* (1922) 24 Bom.L.R. 1157, 73 I.C. 862, (23) A.B. 63.

(c) *Ramanjulu v. Araramudu* (1910) 33 Mad. 317, 5 I.C. 755.

(9) A suit by a reversioner against A to recover two out of three properties alienated to him by a Hindu will leaving a limited interest is a bar to a subsequent suit against him to recover the third. *Durbani v. G. Jind* (1924) 40 All 822 80 I C 71 (24) A A 1902.

(10) A suit by a coparcener that a mortgage of one property is not binding on him bars a suit for a similar relief as to another property included in the same mortgage. *Ahmadat v. Jagho* (1923) 1 Luck 1 91 I C 976 (2) A O 77. See also *Ahmadat Singh v. Jagho* (1926) 1 Luck 1 91 I C 976 (2) A O 77.

(11) If a mortgage and a lease are one transaction a suit for rent will bar a suit to recover the mortgage money. *Duran Chand v. Lilla Lam* (1926) 8 Lah L. 1 781, 97 I C 396 (26) A L 549. But not so if the transactions are separate. *Gurdial v. Duran Chand* (1928) 112 I C 15 (28) A L 732.

Explanation to the Rule—

4. *Obligation and collateral security for its performance*—The Explanation to the present rule is not intended to be an illustration of the foregoing provision but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule (d). In a recent case their Lordships of the Privy Council said (e).

The illustration given shows that a personal claim for the mortgage money under a mortgage and the enforcement of the security for the debt are to be regarded as *one and the same cause of action*. This provision is in marked distinction to the law of this country, where a mortgagee is at liberty to appoint a receiver under his deed to sue for the debt and to take proceedings for sale or foreclosure independently and at the same time. It is important, therefore, in considering the effect of the Code to bear in mind that its obvious intention is to establish a rule of law different from that accepted here. See notes below. First suit for interest due under a mortgage second suit for principal and “Exceptions to the rule against splitting of reliefs”

B. *Successive claims arising under the same obligation constitute a single cause of action*—The words “successive claims arising under the same obligation” have been added into the Explanation and the illustration to the rule has been expanded to give effect to a Calcutta decision where it was held that a claim in respect of all arrears of rent constitutes a *single cause of action* (f). The illustration shows that if rent has become due for the years 1905, 1906 and 1907 the landlord can bring only one suit for the whole of the rent in arrears, and that if he sues for the rent due for a particular year only, he will be precluded from suing for the rent due for the other years. It must, however, be noted that though this rule precludes the landlord from bringing a *fresh suit* for rent not included in the former suit it does not prevent him from adopting any other remedy the law gives him to recover the rent. Thus though in the case put in the illustration the landlord cannot sue for the rent due for the year 1905 or 1907, he can *distrain* for the rent due for those years (g). On the same principle as in the illustration a suit for an annuity for the year 1917 is a bar to a subsequent suit for annuity for the years 1914, 1915 and 1916 (h). See also ill. (7) above.

Interest accruing due from time to time under a mortgage deed maintenance *malikana* &c. are other instances of *successive claims* arising under the same obligation.

(d) *Payana v. Pana Lana* (1914) 41 I A 142 148 26 I C 24

(e) *Kushan Varma v. Pala Mal* (1903) 50 I A 115 117 4 Lah 3 34 72 I C 187 (22) A PC 412

(f) *Taruck Chunder v. Panchi* (1881) 6 Cal 791 *Mahomedbhai v. Adami* (1909) 46

Bom 299 235 64 I C 910 (92) A B 152 *Cohen v. Paruk* (1933) 37 C W N 730 146 I C 351 (33) A C 831

(g) *Esvara Doss v. Venkataroy* (1898) 21 Mad 236

(h) *Abdul Karim v. Muhammad* (1922) 44 All 663 68 I C 970 (22) A A 379

2

Distinct causes of action.—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred (i) What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action. As observed by their Lordships in *Angim v. Iana Lana* (4) the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction. One great criterion, when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions (i). For the meaning of cause of action, see notes above. Cause of action.

Illustrations

(1) Different properties, different defendants.—A, claiming as his father's heir, sues B for possession of a certain piece of land. He then sues C, also as his father's heir, for possession of another piece of land. The fact that both pieces of land are claimed by A under the same title does not preclude A from maintaining separate suits against B and C. *Dampanaboyina v. Addala* (1902) 25 Mad 736, *Narayan v. Shamrao* (1903) 27 Bom 379, *Lamchandra v. Ganjanan* (1920) 44 Bom 352, 362, 56 I C 349.

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging jointly to the family and strangers. *Purshottam v. Atmaram* (1899) 23 Bom 597.

(3) A sues B for specific performance of an agreement for the sale to him of B's land, and obtains a decree. In execution of the decree A is put in possession of a portion only of the land as it is found that the rest of the land did not belong to B, but to B's son. A subsequent suit by A against B for recovery of an aliquot portion of the price to the extent of the son's share is not barred under this rule, the cause of action being entirely distinct. *Ienlatarama v. Ienlatia* (1901) 24 Mad 27, *Parangodan v. Perumodula* (1904) 27 Mad. 380.

(4) A suit by a Mahomedan widow for dower is no bar to a subsequent suit by her for a declaration of her right to possess for life her husbands' estate in accordance with a proved local custom. *Mahomed v. Hasm Bann* (1894) 21 Cal 157, 20 I A. 153.

(5) A suit to eject a tenant holding under a lease is no bar to a subsequent suit against him for rent under the same lease. *Subraya v. Rathnalsu* (1909) 32 Mad. 330, 2 I C 313.

(6) The dismissal of a suit for a declaration of title under sec. 42 of the Specific Relief Act, 1877, on the ground that the plaintiff, not being in possession, ought to have asked for possession also, is no bar to a subsequent suit for a declaration of title and for possession. *Darbo v. Keshorai* (1879) 2 All 356, *Sarsuti v. Kunj Behari Lal* (1883) 5 All 315, *Jibunt Nath v. Shih Nath* (1882) 8 Cal 819, *Nonoo Singh v. Anand* (1885) 12 Cal 201, *Mohan Lal v. Bilaso* (1892) 14 All 512, *Sayed Suliman v. Bontala* (1915) 38 Mad 247, 20 I C. 418.

(a)

(b)

Jalmeja v. Askar (19-3) 9 Lah 431
108 I C 613 (23) A. L. 239, *Rohini v. Jaduvardan* (1926) 30 C W N 873
97 I C 73 (26) A C 1022
(1) (1914) 41 I A 142 148 29 I C 218
(2) *Sonu v. Bahinibai* (1916) 40 Bom 351, 355
33 I C 950, *Muhammad Umar v. Muhammad* (1923) 45 AU 376 71 I C 965
(23) A A 311, *Mawna Pe v. Ma Jan*
(1911) 38 I A 140, 145 11 I C 497

Similarly the dismissal of a suit for an injunction to restrain the defendant from interfering with the plaintiff's possession of certain lands on the ground that the plaintiff was not in possession is no bar to a subsequent suit for possession. *Indo Ali v G Lal Mior* (1912) 74 All 172 13 I C 154

(7) *Promissory note—original cause of action*—A sues B upon a promissory note, but the action fails owing to a material allegation in the note. A is not precluded from subsequently suing B on the original cause of action, i.e. from suing B to recover the consideration for which the note was given. The two causes of action are quite distinct. *Pavana v Pana Lana* (1914) 41 I A 142 26 I C 228. *Bens Lam v Lam Chandar* (1914) 30 All 560 26 I C 302. See also *Blag Bari v Gujar Mal* (1917) Punj Rec no 63, p 230 35 I C 623.

(8) A alleging that he is entitled to one moiety of a piece of land and that B is entitled to the other moiety and that B falsely claiming the ownership of the whole land demolished the structures standing on A's moiety of the land and dispossessed A of his moiety, sues B for damages for demolition of the structures and appropriation of the materials. A decree is passed in the suit for A. Subsequently A, alleging that since the demolition of the structures B has been occupying the entire property to the exclusion of A by denying A's title thereto, sues B for a declaration of title to one moiety of the land and for separate possession thereof. Here the cause of action is the act of dispossession and it being the same in both the suits, the second suit is barred under this rule. *Akhardah Company, Ltd v Durga Charan* (1919) 46 Cal 640, 58 I C 636.

(9) A suit by A against B to recover immovable property in consequence of having been improperly turned out of possession, is no bar to a subsequent suit to recover from the same defendant movable property in consequence of its wrongful detention. *Pattajur Paja v Suriya Pau* (1884) 8 Mad 520 12 I A 116.

(10) A suit by reversioners against a Hindu widow for a declaratory decree and for an injunction forbidding alienations of her husband's property is no bar to a subsequent suit by them for a declaration that a gift made by her of the property is inoperative and cannot affect their reversionary rights. *Chand Kour v Partab Singh* (1888) 15 I A 156 16 Cal 98.

(11) The dismissal of a suit for specific performance by a purchaser is no bar to a subsequent suit by him for the recovery of earnest money. *Munni Babu v Kunwar Kamla* (1923) 45 All 378 72 I C 86, (23) A A 321.

(12) The dismissal of a suit for rent on the ground that the plaintiff was not the landlord but that he and the defendant held the land as tenants in common, is no bar to a subsequent suit by the same plaintiff against the same defendant for partition of the land. *Timappa v Manjamma* (1923) 25 Bom L.R. 491, 73 I C 424 (23) A B 440.

(13) The dismissal of a suit for possession by A against B on the ground that B held the property as a mortgagee, is no bar to a subsequent suit by A against B for redemption. *Jaimal v Ganeshi Mal* (1923) 4 Lah 187, 75 I C 528, (24) A L 143.

(14) A mortgage deed contains a stipulation conferring upon the mortgagee the option to sue for interest or for possession in the event of the mortgagor's failure to pay interest at the stipulated time. The mortgagor fails to pay interest, and the mortgagee sues him for the interest. The mortgagor again fails to pay interest, and the mortgagee brings a suit against him for possession. The previous suit is not a bar to the subsequent suit. *Parmeshri Das v Fakira* (1920) 1 Lah 457 59 I C 71 [F B].

(15) The dismissal of a suit for rent at an enhanced rate is no bar to a subsequent suit for rent at the rate originally fixed. *Sadr-uddin v Banu* (1888) 15 Cal 145. Nor is a decree for the plaintiff in a suit for arrears of rent at the old rate a bar to a suit to

2

Distinct causes of action—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred (i) What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action, and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant (j) As observed by their Lordships of the Privy Council in *Payina v. Pana Lana* (k) the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction One great criterion when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit, is whether the same evidence will maintain both actions (l) For the meaning of cause of action, see notes above, 'Cause of action'

Illustrations

(1) *Different properties, different defendants*—A, claiming as his father's heir, sues B for possession of a certain piece of land He then sues C, also as his father's heir, for possession of another piece of land The fact that both pieces of land are claimed by A under the same title does not preclude A from maintaining separate suits against B and C *Damparaboyana v. Adala* (1902) 23 Mad 736, *Narayan v. Shamrao* (1903) 27 Bom. 379 *Amchandra v. Gajanan* (1920) 44 Bom 302, 362, 56 I C 349

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging jointly to the family and strangers *Parshottam v. Almaram* (1839) 23 Bom. 597

(3) A sues B for specific performance of an agreement for the sale to him of B's land, and obtains a decree In execution of the decree A is put in possession of a portion only of the land as it is found that the rest of the land did not belong to B, but to B's son A subsequent suit by A against B for recovery of an aliquot portion of the price to the extent of the son's share is not barred under this rule the cause of action being entirely distinct *Enkatarama v. Enkatta* (1901) 24 Mad. 27, *Parangodan v. Perumtolula* (1904) 27 Mad. 390

(4) A suit by a Mahomedan widow for dower is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband's estate in accordance with a proved local custom *Mahomed v. Hasin Banu* (1894) 21 Cal 157, 20 I A 153

(5) A suit to eject a tenant holding under a lease is no bar to a subsequent suit against him for rent under the same lease *Subraya v. Rathnarelu* (1909) 32 Mad. 330 2 I C 313

(6) The dismissal of a suit for a declaration of title under sec 42 of the Specific Relief Act, 1877, on the ground that the plaintiff, not being in possession, ought to have asked

Jibunti
Mohan

Inf v. Bilaso (1892) 14 All. 512, *Sayed Suliman v. Bontala* (1915) 38 Mad. 241 20 I C 418.

- | | |
|-----|---|
| (i) | <p><i>Jalmeja v. Askaur</i> (1923) 9 Lah. 451, 108 I C 613 (28) A. L. 238</p> <p><i>Jadunandan</i> (1906) 30 C. W. N. 83</p> <p>97 I C 73 (26) A C 1002</p> |
| (j) | <p>(k) (1914) 41 I A 142 148 20 I C 208</p> <p>(l) <i>Sonu v. Bahinabai</i> (1916) 40 Bom 351 355</p> <p>33 I C 950 <i>Muhammad Umar v. Imamatul</i> (1931) 45 All 376 71 I C 965</p> <p>(23) A. A. 311 <i>Mauna Jee v. Ma Lon</i> (1911) 33 I A 140 145 11 I C 497</p> |

Distinct causes of action—If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred (i). What the rule requires is that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action which the plaintiff may have against the defendant (j). As observed by their Lordships of the Privy Council in *Pugana v. Pana Lana* (k) the rule is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action of different causes of action even though they arise from the same transaction. One great criterion when the question arises as to whether the cause of action in the subsequent suit is identical with that in the first suit is whether the same evidence will maintain both actions (l). For the meaning of cause of action, see notes above. Cause of action.

Illustrations

(1) *Different properties different defendants* — I, claiming as his father's heir, sues B for possession of a certain piece of land. He then sues C, also as his father's heir, for possession of another piece of land. The fact that both pieces of land are claimed by I under the same title does not preclude I from maintaining separate suits against B and C. *Dampanaboyina v. Adjala* (1902) 20 Mad 736, *Narayan v. Shamrao* (1903) 27 Bom 379, *Lamchandra v. Gayanar* (1920) 44 Bom 302, 302, 56 I C 341.

(2) A suit brought by some members of a joint Hindu family against other members of the same family for partition of joint family property does not bar a second suit by the same plaintiffs for partition of other property belonging jointly to the family and strangers
Purshottam v. Atmaram (1899) 23 Bom 597

(3) *A* sues *B* for specific performance of an agreement for the sale to him of *B*'s land, and obtains a decree. In execution of the decree *A* is put in possession of a portion only of the land as it is found that the rest of the land did not belong to *B*, but to *B*'s son. A subsequent suit by *A* against *B* for recovery of an aliquot portion of the price to the extent of the son's share is not barred under this rule, the cause of action being entirely distinct. *I enkatarama v I enkatta* (1901) 24 Mad. 27, *Parangodan v Perumthodula* (1904) 27 Mad. 380.

(4) A suit by a Mahomedan widow for *dower* is no bar to a subsequent suit by her for a declaration of her right to possess for life her husband's estate in accordance with a proved local custom. *Mahomed v. Hasan Bano* (1894) 21 Cal. 157, 20 I.A. 153.

(5) A suit to eject a tenant holding under a lease is no bar to a subsequent suit against him for rent under the same lease. *Subraya v Rathnavelu* (1909) 32 Mad. 330, 2 IC 313.

(6) The dismissal of a suit for a declaration of title under sec. 42 of the Specific Relief Act, 1877, on the ground that the plaintiff, not being in possession ought to have asked for possession also is no bar to a subsequent suit for a declaration of title and for possession. *Darbo v. Keshorao* (1879) 2 All. 36, *Sarsuti v. Kunj Behari Lal* (1883) 5 All. 345, *Jibunti Nath v. Shib Nath* (1882) 8 Cal. 819, *Donoo Singh v. Anand* (1885) 12 Cal. 291, *Mohan Lal v. Bulao* (1892) 14 All. 512, *Sajed Suliman v. Bontala* (1915) 38 Mad. 247 20 I.C. 418.

Figure 1 consists of two scatter plots, (a) and (b), showing the relationship between the number of eggs (n) and the number of eggs per egg (n). Plot (a) shows a positive correlation for Jalmiya v Askaur (1993) and Jalmiya v Askaur (1994). Plot (b) shows a positive correlation for Jalmiya v Askaur (1993) and Jalmiya v Askaur (1994).

recover the difference between rent at the old rate and that at the enhanced rate for the same period if the plaintiff had obtained a decree that he was entitled to rent at an enhanced rate *Deb Narain v Raja Jagadish* (1928) 32 C.W.N. 870, 110 I.C. 395, (28) A.C. 684

For other cases see foot note (r1)

First suit for possession, subsequent suit for mesne profits prior to suit—It has been held by the High Courts of Calcutta (n), Madras (o), Bombay (l) and Rangoon (q), that a suit for possession of land is not a bar to a subsequent suit for mesne profits of such land accrued due prior to the institution of the suit for possession (r), the reason given being that the cause of action for possession is quite distinct from the cause of action for mesne profits and, conversely, a suit for mesne profits is not a bar to a subsequent suit for possession (s). The Patna High Court also holds that a suit for mesne profits is no bar to a subsequent suit for possession (t). On the other hand, the High Court of Allahabad (u) has held that a suit for possession is a bar to a subsequent suit for mesne profits accrued due prior to the date of the suit. As regards mesne profits accrued due subsequent to a suit for possession a Full Bench of the Allahabad High Court (v), and the Oudh Court (w) hold that the suit for possession is no bar. See O. 20, r. 12, see also notes to s. 11, on p. 84 above.

First suit for interest due under a mortgage, second suit for principal—Where the principal secured by a mortgage has become due, and the mortgagee sues for interest only, a suit for interest alone will bar a subsequent suit for principal (x) unless there is a separate covenant for the payment of interest secured in a separate manner, e.g., a covenant enabling the mortgagee to sue for overdue interest without calling in the principal after the date fixed for the payment of principal (y). But there is no bar at all if the principal had not become due at the date of the first suit (z).

(m) *Hansraj v Lalji* (1904) 28 Bom. 447

(n)
(o)

(p) *Ramchandra v Lodha* (1904) 26 Bom. L.R. 288 80 I.C. 259 (24) A.B. 363

(r)
(s)

(t) *Loknath v Dharilada* (1931) 10 Pat. 329 133 I.C. 766 (31) A.P. 233

(u) *Mewa Kuar v Banarsi Prasad* (1895) 17 All. 533

(v)

(w)
(x)
(y)

(z) *Sita Subramania v Nagappa* (1907) 52 Mad. L.J. 636 102 I.C. 187 (27) A.M. 580
Joseph v Joseph (1928) 6 Rang. 71, 115 I.C. 671 (29) A.R. 71

In *Muhammad Hafiz v. Muhammad Zafar* (a) I executed a simple mortgage in 1910. The mortgage provided by cl. 2 that the interest should be paid monthly, and that if it was not paid for 6 months the mortgagee could realize either the unpaid interest only, or both the principal and interest, by filing a suit without waiting for the expiration of the time provided for repayment of the principal. By cl. 7 it was provided that if the principal with interest was not paid within 3 years the mortgagee should be entitled to sue for principal and interest. In 1914 the mortgagee sued in respect of the interest due and obtained a decree. In 1915 he brought a second suit in respect of the principal and the interest then due. Their Lordships of the Privy Council held that the second suit could not be maintained, having regard to the provisions of this rule. Their Lordships said: "What was the cause of action that the plaintiffs possessed when the proceedings were first instituted? It was the cause of action due either to the fact that the interest had been unpaid for more than six months, or that the three years had elapsed, and the principal was also unpaid, and in either case they could have sued for realisation of the whole amount secured by the deed." Not having done so, they were debarred from instituting the second suit.

The question came up again before their Lordships of the Privy Council in *Kishan Varma v. Pata Mal* (b). The rule to be deduced from that decision may be stated thus: If a mortgage deed provides for the payment of principal and interest as *independent obligations*, a suit for a *personal* decree for the interest due is no bar to a subsequent suit to realize the principal. In such a case the two causes of action are distinct. But if the mortgage deed in default of payment of interest gives the mortgagee the right to realize both the principal and interest, and the mortgagee, upon a default occurring, sues to realize the interest *from the property*, according to the provisions of O. 2, r. 2, he is precluded from afterwards suing to realize the principal due, even though his plaint in the first suit has purported to reserve the right to do so. The reason is that in such a case the cause of action—the non payment of the interest—gives rise to two forms of relief which the Code provides shall not be split, see the Explanation to the Rule. Their Lordships observed that if the mortgagee in their first suit claimed only a *personal* relief in respect of the unpaid interest, their case "would be on surer ground." But their claim in the first suit was for a decree for interest *recoverable from the mortgaged property*.

Under the rule explained in the two Privy Council cases cited above a suit for interest has been held to be a bar to a suit on the mortgage in some cases (c), and not in others (d).

First suit for produce payable under a mortgage, second suit for possession—A mortgage bond provides that the mortgagor shall pay a share of the produce of the mortgaged land to the mortgagee every year, and that in default the mortgagee shall be entitled to take possession of the land. The mortgagor fails to pay the produce for the year 1896. In 1897 the mortgagee sues for the value of the produce for 1896, but he does not claim possession of the land as he was entitled to do under the bond. This suit is a bar to a subsequent suit for possession on the mortgagor's failure to pay the produce for subsequent years. The mortgagee ought to have claimed possession in the first suit (e). See notes below, "Omission to sue for one of several reliefs," ill (1).

(a) (1922) 49 I A 9, 44 All 121, 65 I C. 79 (22)

(b)

(c) *Mest Nando v. Pandit Ram* (1930) 5 Luck

(d)

(e)

Properties held under separate titles—A plaintiff is not bound to include in the same suit separate properties held by different persons under different titles (f) But he is bound to include in the same suit all properties held by the same defendant though under different titles (g)

Different causes of action arising from the same transaction—This rule does not require that when several causes of action arise from *one transaction*, the plaintiff should sue for all of them in one suit. What the rule lays down is that where there is *one entire cause of action*, the plaintiff cannot split the cause of action into parts so as to bring separate suits in respect of those parts. As observed by their Lordships of the Privy Council in *Payana v. Pana Lana* (h), the rule “is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, *even though they arise from the same transactions*.” It was held in that case that a suit upon a promissory note, the suit failing owing to a material alteration in the note, was not a bar to a subsequent suit to recover the consideration for which the promissory note was given. A suit to declare a sale invalid will not bar a suit for possession of the property invalidly sold for the plaintiff could not have asked for possession until the sale was set aside (i).

In *Anderson v. Kalagirla* (j), A agreed to purchase 10 bales of yarn from B. A took delivery of 7 bales, but failed to pay the price of those bales, and as regards the remaining 3 bales refused to take delivery thereof. Garth, C.J., expressed the opinion that a suit by B against A to recover damages for failure to take delivery of the three bales was not a bar to a subsequent suit by B to recover from A the price of the 7 bales. The learned Judge observed that a claim for the price of goods sold, was a cause of action of a different nature from a claim for damages for the non acceptance of goods and the fact that both claims arose under the same contract did not constitute them *one and the same cause of action*. Wilson J., expressed a different opinion, stating that the claims having arisen under the same contract, the cause of action was but one, and that the subsequent suit was therefore barred. The opinion of Wilson, J., was followed in *Duncan v. Jeetmull* (k), which also was a case of breach of one and the same contract. These two cases show that all existing breaches of the same contract must be joined in the same suit, but they have been held not to apply to the case where there are *separate contracts*, though contained in the same instrument (l). Thus where it is expressly provided by an indent that each monthly shipment and item should be treated as a separate contract, the plaintiff is entitled to bring a separate suit for damages in respect of each shipment (m). Conversely, where goods are delivered under separate orders each order and delivery of goods is a separate contract, and gives rise to a separate cause of action unless it be proved that all the goods were delivered as under a *single contract* (n). See notes below, “He shall not afterwards sue in respect of the portion so omitted.”

Closely connected with this question is a point which was left open by their Lordships of the Privy Council, namely, whether a mortgagee who holds *several mortgages on the same property*, can treat them, with respect to the provisions of this rule, as separate causes of action, or whether he must bring one suit on all the mortgages (o). This subject has already been considered in the notes to s.c. 11 under the head, ‘Application of the above rules to suits on mortgage.’

- (f) *Badu Dbi v. Ram Chandra* (1919) 41 All 583 50 I C 905
 (g) *Murti v. Bhola Ram* (1894) 16 All 165 [F B]
 (h) (1914) 41 I A 142 148 26 I C 228
 (i) *Kesharilal v. Sakhiidas* (1933) 57 Bom 456, (33) A B 399
 (j) (1886) 12 Cal 329
 (k) (1892) 19 Cal 372. See also *Raja Bahadur v. Rajerappa* (1909) 11 Bom L R 46, 1 I C 319
 (l) *Yashwant v. Fithal* (1897) 21 Bom 267, 271,

(m)

- 209
 (n) *Almed v. Fakir* (1923) 1 Rang 694 79 I C 755 (24) A R 145
 (o) *Sri Gopal v. Pirthi Singh* (1902) 24 All 429, 29 I A 118

* Omits to sue in respect of any portion of his claim.—This rule refers to cases where a suit has been filed and the plaintiff omits in such suit to sue in respect of a portion of the claim (p). It does not apply where no suit has been filed at all, as where a plaintiff is returned to the plaintiff for presentation to the proper Court and the plaintiff does nothing further in the matter (q). nor does it apply where a suit is filed and is subsequently withdrawn under O 23, r 1 (1) below (r).

"He shall not afterwards sue in respect of the portion so omitted"—The bar is not avoided by an express declaration to sue again (s). Nor is it avoided by obtaining leave to sue in respect of the portion so omitted, the reason is that the leave contemplated by this section is the leave to sue for one of several reliefs, referred to in sub r (1) it does not relate to the portion so omitted referred to in sub r (2) (t).

The rule says he shall not afterwards sue. It does not therefore apply where the suits are simultaneous and not successive (u). But fractions of a day are recognized, and in the presumption that suits filed on the same day, are filed in the order of their numbers in the register it has been held that the suit of the subsequent number is barred (v). But that presumption has been doubted and the plaintiff allowed to elect which suit shall be held to be barred under this rule (w).

It has been held by the Calcutta High Court that the present rule refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree has been passed in that suit. So long as no decree is passed, a second suit in respect of the portion so omitted is not barred. It follows from this that where a suit brought in respect only of a portion of a cause of action has not been heard and decided, the Court may allow the plaintiff in the suit to be amended by adding the omitted portion of the claim (x). Similarly if such a suit is withdrawn under O 23, r 1 (2), with liberty to bring a fresh suit the plaintiff may include in the fresh suit the portion that was omitted in the suit withdrawn by him (y).

A sues B in respect of a portion only of a cause of action. Pending this suit A brings another suit against B in respect of the remaining portion of the same cause of action. According to the Calcutta decision cited above neither suit is a bar to the other so long as no decree is passed in either suit. It is open, therefore, to A to rectify his error in bringing two suits in respect of the same cause of action by applying for leave to amend the plaintiff in either suit by adding the omitted portion which forms the subject matter of the other suit, and then withdrawing the other suit under O 23, r 1 (1). The Chief Court of the Punjab has gone further and held that if in such a case a person is allowed to withdraw either suit with liberty to bring a fresh suit under a. 23, r 1 (2), he is entitled to bring a fresh suit by virtue of the leave granted to him, though the other suit has been carried to a decision (z).

Omitting to sue for one of several "reliefs"—Where a person is entitled to more than one relief in respect of the same cause of action, he may sue for all the reliefs or he may sue for one or more of them and reserve his right with the leave of the Court to sue for the rest (a). If no such leave is obtained, he will be precluded from afterwards suing for any relief so omitted (b). But if the right to the relief in respect of which a

- (p) *Uppendy v Janaki* (1918) 45 Cal 305 315,
47 I C 129
(q) *Subba v Lama* (1917) 40 Mad 291, 32 I C
899
(r) *Venkata v Ranga* (1887) 10 Mad 160
(s) *Makrud v Naray* (1893) 20 Cal 322
(t) *Raja Bahadur Shival v Rajappa* (1909)
11 Bom L R 46 1 I C 310
(u) *Ishu v Narayan* (1868) 5 Bom H C A C
30 *Kuleshar v Jayan* (1878) 1 All 650
Appasami v Ramasami (1846) 9 Mad 279
(v) *Murti v Bhole Ram* (1894) 16 All 165

- (w) 172 173
(x) "
(y) "
(z) *Ghulam Muhammad v Aur Khan* (1917)
10unj Rec no 65 p 237 41 I C 897
(a) *Pertanya v Abdul* (1881) 5 Bom 463
(b) *Abd l Ilahum v Karan Singh* (1915) 37 All
648 30 I C 951

further suit is brought did not exist at the date of the institution of the former suit, the subsequent suit is not barred (c) The words in s. 43 of the Code of 1882 were "with the leave of the Court obtained before the first hearing" Those words were construed literally, and it was held that leave might be applied for and obtained when the case was called on for first hearing and before anything had been done towards the hearing of the suit (d) The italicized words have been omitted with the result that the leave may now be granted at any stage of the suit The leave, however, must be obtained from the Court before which the original suit was pending The leave, if granted, is good even if the pecuniary value of the relief allowed to be omitted from the suit exceeds the pecuniary limits of the jurisdiction of the Court granting the leave (e)

Illustrations

(1) *Rent and possession*—*A* lets his land to *B* for a period of five years, on condition that if *B* fails to pay the rent every year, the lease shall be void *B* fails to pay the rent due for the second year Here *A* is entitled to two reliefs, namely, to sue *B* (1) for recovery of the rent, and (2) also for possession of the land on the ground that the lease has become void and he may sue for both these reliefs If he sues for rent only, and does not reserve his right with the leave of the Court to sue for possession he cannot afterwards sue for possession *Subbaraya v Krishna* (1883) 6 Mad 159 Similarly if he sues for possession only, and does not reserve his right with the leave of the Court to sue for arrears of rent, he cannot afterwards sue for the rent *Kashinath v Nathoo* (1914) 38 Bom 444 25 I C 73

(2) *Specific performance and possession*—*A* agrees to sell his land to *B* *B* sues *A* for specific performance of the agreement, and obtains a decree *B* then sues *A* for possession of the land Is the suit for possession barred under this rule? Yes according to the decision in *Narayana v Kandasami* (1899) 22 Mad 24 the reason given being that the right to possession arises coincidentally with the right to the execution of conveyance No according to the decision in *Nathu v Budhu* (1894) 18 Bom 537,

(1920) 5 Lah LJ 315 317

(3) *Possession and specific performance*—On 1st March 1905 *A* enters into an agreement with *B* for the sale of his lands to *B*, the sale to be completed on 1st August 1905 It is agreed that *B* shall pay part of the purchase money on the date of the agreement, and that *A* shall on such payment being made, put *B* in possession of the land *B* pays part of the purchase money and *A* puts him in possession of the land The sale

B cannot afterwards sue *A* for specific performance *Rangayya v Nanjappa* (1901) 24 Mad. 491, 28 I A 221, with facts slightly varied

(4) *A* agrees to sell his property to *B* He then enters into a contract to sell it to *C* *B* sues *A* for a permanent injunction restraining *A* from selling the property to *C* The suit is dismissed on the ground that such a suit did not lie A subsequent suit by *B* against *A* for specific performance of the agreement is not barred *Sardar Mal v Hirde Nath* (1925) 6 Lah 384, 87 I C 994 (25) A L 459

(c) *Parsi v Fikah Ram* (1881) 3 All 857
(d) *Pestonji v Abdool* (1881) 5 Bom 463

(e) *Muhammadd Faraz v Kallu Singh* (1911) 7 All L J 1201 51 C 689

Exceptions to the rule against splitting of reliefs —

1. *Order 34 rule 14* — Rule (3) provides that where a person obtains a decree more than one relief in respect of the same cause of action cannot be granted *except with the leave of the Court*. One for all and all for one. He cannot afterwards sue for any relief omitted. According to this rule if a mortgagor sues the mortgagee in the *joint and several* covenant to repay the mortgage debt and to institute a *sale of the mortgaged property*, he cannot afterwards *if made well as he has exercised his right to do with the leave of the Court*. To this effect even if there is an exception being that contained in *O 34 r 14*. The latter rule may be stated thus: a mortgagee sues the mortgagee to recover the mortgage debt from the mortgage *jointly and severally* and obtains a decree. He then applies for the attachment and sale of the *mortgaged property* in execution of the decree. The mortgaged property may be attached but it *cannot be sold in execution of the decree*. The only mode of bringing it to sale is by instituting a *fresh suit for sale*. *O 34 r 14* says that the mortgagee may institute a *suit for the sale of anything contained in O 2 r 2(f)*. The suit will be governed by the Transfer of Property Act 1882. It must however be noted that although *O 34 r 14* allows a mortgagee to split his remedy it does not allow a plaintiff to split his claim (g).

Order 34 refers only to immovable property and so the exception in *O 34 r 14* does not apply if the mortgage is of movable property. If the mortgagee has obtained a personal judgment and the mortgage is of movables he will be debarred from enforcing the mortgage security if he has not obtained leave under *O 2 r 2(3)(k)*. If the plaintiff has a charge on the assets of a company for money lent in trust by the company and obtains a money decree against the company *for the amount without reserving leave to sue on his charge*, he cannot after the insolvency of the company enforce his charge against the Official Assignee (i).

2. *Order 34 rule 6* — The effect of this rule is that where a mortgagee has obtained a decree for sale of the mortgaged property and the property is sold but the net sale proceeds are not sufficient to pay the mortgage debt he may subsequently apply for a

3. *Deccan Agriculturists' Relief Act 1879 (as amended by Act XXII of 1884)* s. 10A — The effect of the said section is to allow a mortgagor to split his remedies by providing in effect that if he sues the mortgagee for an account he will not be precluded from suing him subsequently for redemption (k).

Leave to sue. — See notes above. He shall not afterwards sue in respect of the portion so omitted and Oniss notes for one of several reliefs.

Amendment of plaint. — See notes above. He shall not afterwards sue in respect of the portion so omitted.

Withdrawal of one of two pending suits. — See notes above. If split suit afterwards sue in respect of the portion so omitted.

Minors. — The provisions of this rule apply to adults as well as minors. If a suit by a minor by his guardian and next friend for rent due for 1903 and 1904 is barred a subsequent suit by the minor on attaining majority for the rent due for 1904 and 1905. The acts of a guardian in the conduct of a suit must be upheld until shown that they were unreasonable or improper (l) or that the suit or suit is not properly safeguarded (n).

(f) *Indrapal v. Meera Lal* (1914) 36 All 404

(g) *11 C 400*

(i)

(j)

(k)

B 437
(j) *Munshab v. Inayat*
Hamidi Inayat
386
(l) *See Inayat v. Inayat* (i)
(n) *Gopal v. Inayat*
(m) *Shankar v. Inayat*
8114 2/4

Official Assignee—This rule merely bars a second suit. Therefore the Official Assignee cannot by an application to the Insolvency Court ask for a declaration on behalf of the insolvent mortgagee that the right of the mortgagee to sue for the principal is barred under this rule (n)

Execution proceedings—The present rule does not apply to proceedings in execution of a decree. A decree holder may therefore present successive applications for realizing different portions of his decree. Thus if a decree gives reliefs for possession and costs there is nothing in the Code which prevents separate and successive applications for execution as regards either of them (o). But in the case of money decrees the Bombay High Court has held that piecemeal execution is not permissible and that if the decree holder applies for execution for less than the full amount he must be taken to waive his right to execution for the balance (p).

Village Courts—The present rule does not apply to Village Courts in Madras but there is a similar provision in sec 18 of the Village Courts Act (1 of 1889). Therefore if the plaintiff has obtained a decree in a Village Court for a part of the amount due on a promissory note, he will be precluded from suing on the notes (p1)

3. [S 45 Cf R S.C., O. 18, r. 1.] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly, and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject matters at the date of instituting the suit

Scope of the rule—O 1, r 1, deals with joinder of plaintiffs. O 1, r 3 deals with joinder of defendants. The present rule deals with joinder of causes of actions. It is to be read subject to the provisions of rr 4 and 5 below, as is shown by the words save as otherwise provided (q). It is also to be read subject to the provisions of O 1, rr 1 and 3. The frame of a suit may not be supported by this rule and yet it may be justified by O 1, r 1, or O 1, r 3 (r). Rules 6 and 7 of this Order are to be read with this rule.

Cause of action—See notes to s 20. Cause of action

One plaintiff one defendant and two or more causes of action—Where there is only one plaintiff and only one defendant, the rule says that the plaintiff may unite in the same suit several causes of action against the same defendant provided, of course that the provisions of rr 4 and 5 of this Order, are not contravened

(n) *Sarany Rao v Official Assignee* (1905) 48 Mad 703 91 IC 403 (25) A M 1100

(o) *Radha Kishen v Radha Prasad* (1891) 18

(p1)

(q)

(r)

(p)

If the causes of action are so disconnected that they cannot be conveniently tried together, the Court may order separate trials under r 6 (1) (a). These trials, however, will not be distinct suits, but they will be in the nature of suits under the title and number of the principal suit from which they spring. (i) In *Saxena's Application, 113 v. 114* (1) the plaintiff corporations the owners of twenty-three patents for saccharine sued the defendant for alleged infringement of all the trade marks. There were thus twenty-three causes of action united in one suit. It was ordered that the suit should be confined in the first instance to any three of the patents which the plaintiffs might select. (2) *Callina M. R.* said: "Now we start here with a writ launched covering twenty-three causes of action. *Prima facie* in all days one cause of action was thought to be enough. That was gradually more or less relaxed, and one cause of action was all wed to be coupled with one or two subordinate or necessarily connected causes of action. Then came by the rules under the Judicature Acts, a still further relaxation, but always subject to the one underlying principle, namely, that the burden lay on the plaintiff to prove his case, and that no extra burden should be imposed on the defendant through the plaintiff needlessly enlarging the area of the dispute. *Prima facie* a dozen causes of action cannot be combined in one writ, they must be so intimately connected as to justify their being included in one writ, but when one finds no less than twenty-three, that seems to me to be an outrageous extension of the latitude given by the rules to a plaintiff." (3) *Coxon Hardy, L.J.*, said: "The action strikes me as almost an abuse of the process of the Court." (4)

The rule that a plaintiff may unite in the same suit several causes of action against the same defendant does not apply to suits for rent under the Agra Tenancy Act. Hence a plaintiff cannot join in one suit claims for arrears of rent of occupancy and non-occupancy holdings, though the claims may be against the same defendant. (5) In a case under the Bengal Tenancy Act 8 of 1885 the Privy Council held that a plaintiff may join in one suit claims against a defendant in respect of more than one tenure. (6)

Misjoinder of plaintiffs and causes of action—Where there are two or more plaintiffs and two or more causes of action, the rule says that "any plaintiffs having causes of action in which they are jointly interested against the same defendant may unite such causes of action in the same suit." But the rule is to be read subject to the provisions of O 1, r 1. The result is that where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit if the right to the relief and the causes of action arise from the same act or transaction and that there is a common question of law or fact, though they may not all be jointly interested in all the causes of action. But if the right to the relief claimed does not arise from the same act or transaction or if there is no common question of law or fact, the plaintiffs cannot all join in one suit unless they are jointly interested in the causes of action as provided by this rule. (7) See notes to O 1, r 1, "The new Rule," (1) to (4).

Where the plaintiffs are not jointly interested in the causes of action arising in a suit, the suit is said to be bad for misjoinder of plaintiffs and causes of action. (8) To Y two plots of land adjoining each other, one of which is claimed by A by adverse possession and the other by B by adverse possession. Under the *Code of Procedure* A and B could not join together as plaintiffs in one suit against X and Y, for the same reason—adverse possession by A would not be evidence of adverse possession by B. (9)

(i) *Khadarsahab v. Chaudhri* (1884) 8 Bom. 616.
 (ii) [1903] 1 Ch. 410.
 (iii) [1903] 1 Ch. 410 p. 422 *supra*.
 (iv) *Id.*, p. 427.
 (v) *Jaganнат v. Tore* (1905) 3 All. J. J. 610.
 (vi) *Hira Lal v. Hota Lal* (1924) 2 All. L.J.

459 701 (1) *Id.* p. 459.
 (x) *Profulla Nath v. Sarda* (1905) 58 I.A. 274, 22 A. & L. 111.
 618 (2) *Id.* p. 618.
 (y) *Ramendra Nath v. Sarda* (1905) Cal. 111, 122 A. & L. 111.

(c) (1882) (2). This would also be the case under this Code. Similarly where five plain-
tiffs contract separately to sell cotton though to the same defendant, they cannot all
join in one suit for damages for breach of the five contracts (a)

Procedure in case of misjoinder of plaintiffs and causes of action.—
Under the Code of 1882 where a plaint was presented which was bad for misjoinder
of plaintiffs and cause of action, the Judge to whom the plaint was presented might
return it for amendment under s. 57. If the plaint, having been returned for
amendment was not amended it might be rejected under s. 54, cl (d). If the defect
was not noticed when the plaint was presented, but was brought to the notice
of the Court at a later stage the Court might grant leave to the plaintiffs to amend the
plaint within a time fixed by the Court, and might order that if the amendment was
not made within the time prescribed the suit should stand dismissed with costs. Where
leave to amend was granted the plaintiffs had to elect as to which of them should pro-
ceed with the suit and the plaint had then to be amended by striking out the names of
the other plaintiffs and making consequential amendments (b). At the same time liberty
was given to the defendant to amend his written statement to meet the case of the par-
ticular plaintiff who had elected to proceed with the suit (c). It was also held in some
cases under that Code that where a suit was bad for misjoinder of plaintiffs and causes
of action it was not proper to dismiss the suit without giving the plaintiff an opportunity
of amendment (d). If the suit was dismissed and the plaintiffs appealed, the appellate
Court might set aside the decree and remand the case to the lower Court with a direc-
tion to that Court to return the plaint for amendment (e). As to the procedure to be
followed under the present Code, see notes to r. 7 below.

Where the defendant objects to the frame of a suit on the ground that the suit is
bad for misjoinder of plaintiffs and causes of action, but the objection is overruled, and
a decree is passed for the plaintiffs and the defendant appeals from the decree on the
ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and
causes of action, the appellate Court, if it found there had been such a misjoinder, should
not interfere with the decree, unless the misjoinder has affected the merits of the case.
This is the effect of the provisions of s. 99 of this Code which enjoin *inter alia* that no
decree shall be reversed or substantially varied in appeal on account of any *misjoinder*
of parties or causes of action, where such misjoinder does not affect the merits of the case.
The italicized words are new. They did not occur in the corresponding s. 578 of the Code
of 1882. They have been added into s. 99 to supersede the practice followed under the
old Code. Under that Code, where a decree was passed for the plaintiffs in a suit involving
a misjoinder of plaintiffs and causes of action, the course adopted by the appellate
Court was to reverse the decree in appeal, and remand the case to the lower Court with the
directions to that Court to return the plaint to the plaintiffs for amendment, so that the
plaintiffs might elect as to which of them should continue as plaintiffs in the suit (f).

Under the present Code, where a decree is passed for the plaintiffs and causes of
action, and the defendant appeals from the decree on the ground that the suit ought to
have been held to be bad for misjoinder of plaintiffs and causes of action, the appellate
Court, if it finds that there has been such a misjoinder, should not interfere with the
decree, unless the misjoinder has affected the merits of the case. The effect of the
provisions of s. 99 of this Code is to supersede the practice followed under the old
Code.

- (a) *Aiyara v Vellaya* (1911) 34 Mad 55 G I C
15
(b) *Chandulal v Dasgupta* (1925) 27 Bom L R
472 87 I C 435 (25) A R 312.
(c) *Aldridge v Barron* (1907) 34 Cal 662
(d) *Rajalal v Ramdatt* (1902) 26 Bom 237
246 *Raj Nath v Chhokara* (1904) 26
431 218
(e) *Aldridge v Barron* (1907) 34 Cal 662, 671
(f) *Netaridul v Kodu Ram* (1893) 15 All. 320
(g) *Ramanuja v Deranayaka* (1895) 8 Mad
362, *Lehara Lal v Kodu Ram* (1895)

15 All 350

(f)

- (g) *Tarajid v Ramdatt* (1902) 26 Bom 237
at p 266 *Mokma Chandra v Abdul*
Chandra (1907) 24 Cal 540, at p 544

misjoinder of plaintiffs and causes of action and remanding the case to the lower Court as was done under the old Code, unless the misjoinder has affected the merits of the case.

Misjoinder of defendants and causes of action—Where there are two or more defendants and two or more causes of action, the rule says that the "plaintiff may unite in the same suit several causes of action against the same defendants jointly." "Joint interest in the main question raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants" (A). If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action, and is technically multifarious (1). "There is no provision in the Code all wing distinct causes of action against distinct sets of defendants, that is to say, causes of action in which the defendants are not all jointly interested to be united in one suit" (2). This rule, however, is to be read subject to the provisions of O 1, r 3, which relates to joinder of defendants. Hence two or more defendants may be joined as parties in one suit, though there are two or more causes of action, provided the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact, and this is as although they may not all be jointly interested in all the causes of action. But if the right to the relief claimed does not arise from the same act or transaction, or if there be no common question of law or fact the defendants cannot all be joined in one suit unless they are jointly interested in the causes of action as provided by this rule (3). See notes to O 1, r 3, "New Rule," illa. (4), (5) and (6). The following are instances of cases in which it was held that the suit was bad for misjoinder of defendants and causes of action:

Suits held to be multifarious

1. *B agrees to sell certain lands to A. A sues B and a third person C on the averment that B was willing to execute the deed of sale, but was unable to do so, as C held possession of the title deeds under a false claim of an equitable lien upon the lands and refused to part with them. As against B, A claims specific performance of the contract, and as against C he asks for a declaration that he has no lien upon the lands and for delivery of the title deeds. The suit is bad for misjoinder of defendants and causes of action. The two causes of action are entirely distinct: they do not arise from the same transaction, nor would their trial involve any common question of law or fact.* *Luckumsey v Fazulla* (1881) 5 Bom 177, following *De Houghton v. Money* (1876) L.R. 2 Ch App 166, distinguished in *Arishnaswami v Sundarappayyar* (1895) 18 Mad. 415.

The rule in *De Houghton v. Money* and *Luckumsey v. Fazulla* is that if on the face of the plaint, or of the plaintiff's case, it appears that a third party, who was not a party to the contract upon which the suit was brought, had a distinct interest, but which interest is sought to be declared null and void upon some equitable ground, such a claim against the said third party could not be made a part of the suit. In the case of *De Houghton v. Money* it was admitted by the plaintiff that there was a conveyance in favour of Money, but it was said that that conveyance was executed under such circumstances as would make it a voidable one, and in the case of *Luckumsey v. Fazulla*, it was clearly admitted by the plaintiff that the third party, who was not a party to the contract, had a distinct interest" (4). The case is different, however, where A (purchaser) sues B (vendor) and C (vendor's benamidar), claiming specific performance against B and a declaration against

(A) *Bhagwadi Prasad v. Binleshari* (1884) 6 All 106, 108. The principle stands, though the actual decision has been dissented from in *Harbans v. Tata Sahu* (1910) 32 All 14, 31 C 735.

(B) *Narsing Das v. Mangal Dubey* (1883) 5 All 163 171.

(C) *Mullick Kefat Hossein v. Sheo Pershad Singh*

(1896) 23 Cal 821 826. *Emabai v. Bhaui Bilwat* (1908) 34 Bom 354 31 C 165.

(K) *Rimendra Nath v. Brindendra Nath* (1915) 45 Cal 111 122 123 41 C 944. But see *Compania Sannanna v. Houlder Brothers & Co* (1910) 2 K. B. 354 362.

(I) *Mokund Lal v. Chotay Lal* (1884) 10 Cal 1061 1068.

vice versa (z) This would also be the case under this Code. Similarly where five plaintiffs contract separately to sell cotton, though to the same defendant, they cannot all join in one suit for damages for breach of the five contracts (a)

Procedure in case of misjoinder of plaintiffs and causes of action— Under the Code of 1882 where a plaint was presented which was bad for misjoinder of plaintiffs and cause of action, the Judge to whom the plaint was presented might return it for amendment under s 53. If the plaint, having been returned for amendment was not amended, it might be rejected under s 54, cl (d). If the defect was not noticed, when the plaint was presented, but was brought to the notice of the Court at a later stage, the Court might grant leave to the plaintiffs to amend the plaint within a time fixed by the Court, and might order that if the amendment was not made within the time prescribed, the suit should stand dismissed with costs. Where leave to amend was granted the plaintiffs had to elect as to which of them should proceed with the suit, and the plaint had then to be amended by striking out the names of the other plaintiffs and making consequential amendments (b). At the same time liberty was given to the defendant to amend his written statement to meet the case of the particular plaintiff who had elected to proceed with the suit (c). It was also held in some cases under that Code that where a suit was bad for misjoinder of plaintiffs and causes of action, it was not proper to dismiss the suit without giving the plaintiff an opportunity of amendment (d). If the suit was dismissed and the plaintiffs appealed, the appellate Court might set aside the decree and remand the case to the lower Court with a direction to that Court to return the plaint for amendment (e). As to the procedure to be followed under the present Code, see notes to r 7 below.

Where the defendant objects to the frame of a suit on the ground that the suit is bad for misjoinder of plaintiffs and causes of action, but the objection is overruled, and a decree is passed for the plaintiffs, and the defendant appeals from the decree on the ground that the suit ought to have been held to be bad for misjoinder of plaintiffs and causes of action the appellate Court, if it found there had been such a misjoinder, should not interfere with the decree, unless the misjoinder has affected the merits of the case. This is the effect of the provisions of s 99 of this Code which enjoin *inter alia* that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties or causes of action, where such misjoinder does not affect the merits of the case. The italicized words are new. They did not occur in the corresponding s 578 of the Code of 1882. They have been added into s 99 to supersede the practice followed under the old Code. Under that Code, where a decree was passed for the plaintiffs in a suit involving a misjoinder of plaintiffs and causes of action, the course adopted by the appellate Court was to reverse the decree in appeal and remand the case to the lower Court with the directions to that Court to return the plaint to the plaintiffs for amendment, so that the plaintiffs might elect as to which of them should continue as plaintiffs in the suit (f). Such a course would not have been necessary if a misjoinder of plaintiffs and causes of action was an irregularity such as could be condoned under s 578. But the practice referred to developed as the cases were against the application of s 578 (g). The effect of section 99 is to preclude the appellate Court from reversing a decree on the ground of

- (z) *Ayara v Vellaya* (1911) 34 Mal 55, 61 C 15
 (a) *Chandulal v Dagdi* (1925) 27 Bom L R 472, 87 I C 435, (2a) A B 342
 (b) *Aldridge v Parrow* (1907) 34 Cal 662, *Varajal v Ramlat* (1902) 26 Bom 259, 266, *Barj Nath v Chlouara* (1904) 26 All 218
 (c) *Aldridge v Parrow* (1907) 34 Cal 662, 671
 (d) *Behar Lal v Kodu Ram* (1893) 15 All 380
 (e) *Raman ja v Deivanayala* (1885) 8 Mad 361, *Behar Lal v Kodu Ram* (1893)

15 All 380

- (f) ~
 (g) *Varajal v Ramlat* (1902) 26 Bom 259 at p 266, *Mohama Chandra v Afal Chandra* (1897) 24 Cal 540 at p 544

may be by plaintiffs and causes of action and remaining the case to the latter Court as was done under the old Code, unless the misjoinder has affected the merits of the case.

Misjoinder of defendants and causes of action—Where there are two or more defendants and two or more causes of action the rule says that the plaintiff may unite in the same suit several causes of action against the same defendants jointly. Joint interest in the main question raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants. (A) If the causes of action alleged are separate and the defendants are arrayed in different sets the suit is bad for misjoinder of defendants and causes of action and is technically multifarious. (i) There may be provision in the Code all wing distinct causes of action against distinct sets of defendants that is to say causes of action in which the defendants are not all jointly interested to be united in one suit. (j) This rule however is to be read subject to the provisions of Order 3 which relates to joinder of defendants. Hence two or more defendants may be joined as parties in one suit though there are two or more causes of action, provided the right to the relief claimed arises from the same act or transaction and there is a common question of law or fact and this is so although they may not all be jointly interested in all the causes of action. But if the right to the relief claimed does not arise from the same act or transaction or if there be no common question of law or fact the defendants cannot all be joined in one suit unless they are jointly interested in the causes of action as provided by this rule. (k) See notes to Order 3, New Rule, Rules (4) (i) and (f). The following are instances of cases in which it was held that the suit was bad for misjoinder of defendants and causes of action.

Suits held to be multifarious

1. *Bagroo* to sell certain lands to A. A sues B and a third person C in the agreement that B was willing to execute the deed of sale but was unable to do so as C held possession of the title deeds under a false claim of an equitable lien upon the lands and refused to part with them. As against B A claims specific performance of the contract, and as against C he asks for a declaration that he has no lien upon the lands and for delivery of the title deeds. The suit is bad for misjoinder of defendants and causes of action. The two causes of action are entirely distinct they do not arise from the same transaction, nor would their trial involve any common question of law or fact. *Luckumsey v Faulla* (1881) 5 Bom 177, following *De Houghton v Money* (1876) L.R. 2 Ch App 166, distinguished in *Krishnaswami v Sundarappayyar* (1895) 18 Mad 415.

The rule in *De Houghton v Money* and *Luckumsey v Faulla* is that if on the face of the plaint, or of the plaintiff's case, it appears that a third party, who was not a party to the contract upon which the suit was brought, had a distinct interest, but which interest is sought to be declared null and void upon some equitable ground, such a claim against the said third party could not be made a part of the suit. In the case of *De Houghton v Money* it was admitted by the plaintiff that there was a conveyance in favour of Money, but it was said that that conveyance was executed under such circumstances as would make it a voidable one, and in the case of *Luckumsey v Faulla* it was clearly admitted by the plaintiff that the third party, who was not a party to the contract, had a distinct interest. (l) The case is different, however, where A (purchaser) sues B (vendor) and C (vendor's benamidar) claiming specific performance against B and a declaration against

(h) *Bhagwati Prasad v Bhatnagar* (1884) 8 All 106 108. The principle stands, though the actual decision has been disavowed in *Harbans v Tola Sahu* (1910) 32 All 14 31 C 735.

(i) *Narsing Das v Mangal Dubey* (1893) 5 All 163 171.

(j) *Mullick Keshit Hossein v Siroj Ershad Singh*

(1896) 23 Cal 8-11 876. *Imbai v Bhau Bilwat* (1908) 34 Bom 358 31 C 165.

(k) *Ramendra Nath v Brajeendra Nath* (1915) 45 Cal 111 1-123 41 1 C 944. But see *Compagnie Sarrinena v Hoslder Brothers & Co* (1910) 2 K B 354 362.

(l) *Mokund Lall v Chotay Lall* (1884) 10 Cal 1061 1068.

C that *C* is a mere benamidar for there the two defendants are identical and here is but one cause of action and no misjoinder *Mokunl Lall v Chotaly Lall* (1884) 10 Cal 1061 1065 1067

2 Seven different salt manufacturers enter into seven different contracts with *A* to manufacture salt for *A* and to deliver it in his factory *A*, alleging that all the seven persons had failed to deliver salt according to the terms of the agreement with them brings one suit against them for a decree that they might be directed to deliver the salt to him The suit is bad for multifariousness for the breach of each contract gives rise to a distinct cause of action and no one defendant is interested in any of the causes of action arising from the breach of contract with the other defendants *Namaswamy v Kadir Ammal* (1814) 17 Mad 168

3 *A* and *B* at Madura enter into an agreement to carry on business in partnership at Silangoor and they send *C* as their agent to Silangoor to conduct the business there *A* alleging that *C* had failed to carry out his instructions and to furnish accounts and that *B* was colluding with *C* sues *B* and *C* claiming dissolution of partnership as against *B* and damages for breach of contract as agent as against *C* The suit is bad for multifariousness for there are two distinct causes of action and neither defendant is liable in respect of the cause of action against the other *Muthappa v Muthu* (1904) 27 Mad. 80 See this case commented upon in *Ajithkuras v Muhamad Meera* (1908) 18 Mad. L.J. 236 243 244

4 A joint Hindu family consisting of 3 members *A*, *B* and *C* owns several properties *A* agrees to sell his share to *P* *A* fails to execute the necessary sale deed *P* sues for specific performance and includes in the suit a claim for partition and possession against all the members of the family namely *A*, *B* and *C* The suit is bad for misjoinder The claim for partition cannot be joined with the claim for specific performance as at the date of the suit the plaintiff had no right to sue for partition not having completed his title by a sale deed Wallis C.J. said The other members of the family were no parties to the alleged contract and therefore were not proper parties to the suit in so far as it is a suit for specific performance and it would in my opinion be a distinct hardship to them to force them to defend a suit for partition which would not be if the plaintiff failed to prove his contract *Rangayya v Subramania* (1917) 40 Mad. 365 40 L.C. 429 [F.B.] See ill. (1) above

In ill. (1) and (3) what were really two suits were combined into one In ill. (2) what were really seven suits were united in one suit In all these cases it was held that the suit was bad for misjoinder of defendants and causes of action The reason why the law forbids a joinder in one suit of distinct causes of action against different defendants each of whom is unconnected with the cause of action against the others may thus be stated in the words of Peacock C.J. (m) Such a joinder complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him though admissible against one or more of the others Moreover it is vexatious and harassing to the different defendants Such a procedure renders it almost compulsory on all the defendants to be present either in person or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested and, moreover it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants as it renders it necessary for the witnesses of each to be present, and to be detained whilst the case of the others is being heard and determined For further illustrations, see notes to O 1, r 3 under the heads New Rule and Severally

Procedure in case of multifariousness that is, misjoinder of defendants and causes of action. Under the Code of 1882 where a plaint was presented which was bad for misjoinder of defendants and causes of action, the Judge to whom the plaint was presented might return it for amendment under s. 53. If the plaint having been returned for amendment was not amended, it might be rejected under sec. 54, cl. (d). If the defect was not noticed when the plaint was presented, but was brought to the notice of the Court at a later stage, the Court might, on the application of the plaintiff and on such terms as to costs as the Court thought proper, permit the plaintiff to withdraw from the suit against those defendants who were not interested in the cause of action in respect of which he elected to proceed and grant leave to bring a fresh suit or suits against them (n) [(1) 23 r. 1] or allow the plaintiff to amend the plaint by striking out the names of those defendants and making consequential amendments. Where leave to amend was granted to the plaintiff, and the plaintiff did not amend within the time fixed by the Court, and the suit was dismissed, the appellate Court might confirm the decree if it found that the suit was multifarious (o). As to the procedure to be followed under the present Code, see notes to r. 7 below.

Where the defendants object to the frame of a suit on the ground that the suit is multifarious, but the objection is overruled, and a decree is passed for the plaintiff, and the defendants appeal from the decree on the ground that the suit ought to have been held to be multifarious, the appellate Court, even if it finds the suit to be multifarious, should not interfere with the decree, unless the misjoinder has affected the merits of the case. This is the effect of s. 99, which declares *inter alia* that no decree shall be reversed or substantially varied in appeal on account of any misjoinder of parties or causes of action where such misjoinder does not affect the merits of the case. The words italicized are new. They did not occur in the corresponding s. 578 of the Code of 1882. They have been inserted in s. 99 to supersede the practice followed by the Courts under the old Code. Under that Code, where a decree was passed for the plaintiffs in a suit which was bad for multifariousness, the course adopted by the appellate Court was either to reverse the decree of the lower Court and dismiss the plaintiff's suit (p), or to sustain the decree of the lower Court as against a particular set of defendants in respect of the causes of action in which they were jointly interested, and grant permission to the plaintiff to withdraw from the suit against the other defendants with liberty to bring a fresh suit or suits against them (q). Such a course would not have been necessary had the Court held that a misjoinder of defendants and causes of action was an irregularity such as could be cured by s. 578. But it was held that the section did not apply to a misjoinder of this kind, and that even if it did apply, the misjoinder should be regarded as a defect that *must* affect the merits of the case within the meaning of that section (r). The insertion of the words 'on account of any misjoinder of parties or causes of action' in s. 99 makes it quite clear that the appellate Court should not interfere with a decree if the only objection to the decree is that of multifariousness, unless the misjoinder has affected the merits of the case.

Two or more defendants and one cause of action.—Every case of multifariousness presupposes *more than one* cause of action. Hence where there is only one cause of action, there can be no multifariousness.

Suits held not to be multifarious

1. A alleging that his brother B mortgaged his (A's) share in his father's property to C without his knowledge and consent, and that C was in possession as mortgagee,

- | | | | | |
|-----|---|----|-----|--|
| (n) | " | 1" | (q) | <i>Ganesh Lal v Khairati Singh</i> (1891) 16 All 279 283 |
| (o) | | | (r) | <i>Ganesh Lal v Khairati Singh</i> (1891) 16 All 279 283 |
| (p) | | | | <i>Nanavaty v Kaur</i> (1894) 17 Mad 164 170 |
| | | | | <i>Mathappa v Muthu</i> (1904) 27 Mad 80 84 |

sues *B* and *C* for a declaration of title to his share of the property, and for possession of the share. The suit is not bad for multifariousness, for there are not two causes of action but only one, namely, the infringement of *A*'s right of ownership by *B*. The mortgage and dispossession are both acts evidencing the infringement of *A*'s right. *Indur Kuar v Gur Prasad* (1889) 11 All 33, *Mazhar Ali v Sajjid Hussain* (1902) 24 All 358, *Kulra Jan v Ram Bahi* (1908) 30 All 560.

2. *A* sells three properties by private contract to *B*. After the sale to *B*, all the three properties are attached in execution of a decree held by *C* against *A*, and they are sold in execution to *D*, *E* and *F*, respectively. A suit by *B* against *A* (the vendor) *C* (the decree holder) and *D*, *E* and *F* (execution purchasers) to set aside the execution sale is not bad for multifariousness. *Haranul v Prosunno Chunder* (1893) 9 Cal 763, *Gunams v Ram Charan* (1878) 1 All 555.

Note—In the Calcutta case cited above Garth, C.J., said: "The plaintiff has but one object, namely, to establish his private purchase as against the claim in execution, and the defendants, who contest his claim have but one defence, which is common to them all viz. that the plaintiff's purchase is invalid."

Unnecessary parties added as defendants—Where persons who are not necessary parties are joined as defendants, they should not be reckoned as parties in considering whether or not the suit is bad for multifariousness. *A* and *B* are two co-sharers of a village. *A* and *B* sell their respective shares to *C* by two separate deeds of sale. *D*, alleging that he is entitled to pre-empt the property, sues *A*, *B* and *C* for pre-emption. Here the suit is not bad for multifariousness for *A* and *B* being vendors they are not necessary parties to a suit for pre-emption. The suit is really against the vendee, *C* (s).

Suit for ejectment by real owner against holders under derivative titles from a trespasser as the common source—In a suit for possession all persons claiming by derivative titles from a trespasser as the common source may be joined as defendants. *A* obtains a lease of a piece of land from *B*, and enters into possession of the land. Subsequently *B*, ignoring the lease lets the land in separate portions and by separate leases to *C*, *D* and *E*. *A* sues *B*, *C*, *D* and *E* to eject them from the land. The suit is not bad for multifariousness. In this as in every action of ejectment, there is but one cause of action, namely, dispossession. It is immaterial that *C*, *D* and *E* claim under different titles. The title by which they claim forms no part of the plaintiff's cause of action (t). The case is different if the defendants do not all claim under the same trespasser, and the plaintiff does not allege any joint action or community of interest. Thus if *A* owns lands, and he is dispossessed of one portion by *B*, of another portion by *C* and of a third portion by *D*, *A* cannot bring one suit for possession against *B*, *C* and *D* (u).

Where two or more persons conspire together to commit a wrong or to commit a breach of several contracts entered into with them separately by the plaintiff, they may all be joined as defendants in one suit. The reason is that the plaintiff has in such a case but one cause of action against all the defendants namely, a conspiracy to do the act complained of. Thus if in ill (2) on p. 496 above, the seven salt manufacturers had conspired together not to deliver the salt to *A*, *A* could have brought one suit against them all. Similarly, if *A* and *B* conspire together to assault *C*, *C* may bring one suit against them for damages for assault (t).

(s) *Harbans v Tota Sahu* (1910) 32 All 14. 3 I C 735. *Piara Ram v Kesho Nath* (1924) 6 Lah L J 349. 82 I C 603. (24) A L 358.

31 Bom 293. 1 I C 120. *Rath Math v*

(u)

(v)

Upon the same joint title where A obtained a decree against B for possession of certain lands in which 50 persons had distinct and separate tenures, and these 50 persons combined together to keep A out of possession and declined to pay the rent to him, it was held that A might join the 50 tenants as defendants in one suit for a declaration of his proprietary right to the lands (x). But separate suits could be brought if there is no collusion or combination between the tenants (x).

Two or more plaintiffs, two or more defendants, and two or more causes of action.—In such a case the plaintiffs must be *jointly* interested in the causes of action, and the defendants also must be *jointly* interested in the causes of action. The rule says:—Any plaintiffs having causes of action in which they are *jointly* interested against the same defendants *jointly* may unite such causes of action in the same suit. If the plaintiffs are not *jointly* interested in the causes of action, the suit will be bad for misjoinder of plaintiffs and causes of action. If the plaintiffs are jointly interested in the several causes of action, but the defendants are not, the suit will be bad for multifariousness. And if neither the plaintiffs nor the defendants are jointly interested in the causes of action, the suit will be bad for a double misjoinder, namely, misjoinder of plaintiffs and causes of action and misjoinder of defendants and causes of action. Thus if I agree to sell and deliver salt to B, and C agrees to sell and deliver salt to D and B and D sue A and C for damages for breach of the contracts entered into with them respectively, the suit is bad for a double misjoinder. Neither plaintiff has any interest in the cause of action of the other, nor has either defendant any interest in the cause of action against the other. But if two contracts are entered into each between B and D of the one part and A and C of the other part, B and D may bring one suit against A and C on the two contracts.

Jurisdiction—Where a plaintiff combines several causes of action against the same defendant in one suit, the jurisdiction of the Court as regards the suit depends on the value of the *aggregate* subject matters (y). See sub r (2).

Revision—It has been held by the High Court of Madras that a decision on the question whether a suit is bad for misjoinder of parties and causes of action is subject to revision (z).

4. [S. 44, R. S. C., O. 18, r. 2.] No cause of action shall unless with the leave of the Court, be joined with a suit for the recovery of immovable property except—

Only certain claims to be joined for recovery of immovable property

- (a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held , and
- (c) claims in which the relief sought is based on the same cause of action :

(w) *Loke Nath v. Keshab Ram* (1886) 13 Cal 147

(x) *Ram Narain v. Annola* (1887) 14 Cal 681, *S. Aranda v. D. rga* (1887) 14 Cal 435

(y) *Ch. ragh Din v. Bhagwan Das* (1915) 1 unj Rec no 100 p 400 321 C 40

(z)

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

Old section This rule corresponds with s. c 44, C P C, 1882, except in the following particulars —

- 1 The rule contained in s. c 44 applied to (1) suits for the *recovery* of immovable property and to (2) suits to obtain a *declaration of title* to immovable property. The words, or to obtain a declaration of title to immovable property have been omitted in this rule, so that the operation of the present rule is confined only to those cases where a cause of action is sought to be joined with a suit for the *recovery* of immovable property
- 2 Clause (c) of the rule is new. See notes below, 'Claims in which the relief sought is based on the same cause of action'
- 3 The proviso to the rule is also new. It is taken from R S C, O 18, r 2

Joinder of claims—This rule deals with what may be called *joinder of claims*. It declares that no claims other than those specified in the three exceptions shall be joined *without the leave* of the Court with a suit for the *recovery of immovable property*. The object of the rule is to prevent a joinder with a claim for the recovery of immovable property of claims of *other and dissimilar* character. If it is sought to join such claims with a claim for the recovery of immovable property, the leave of the Court must first be obtained and such leave may be granted if the two classes of claims can be conveniently disposed of in one suit. But no leave is necessary where claims are joined in which the relief sought is based on the *same cause of action* [see cl (c)]

This rule does not apply to a joinder of several claims all for the recovery of immovable property. A plaintiff may therefore bring one suit for possession of several immovable properties without the leave of the Court. Thus if A owns 20 parcels of land, and he is dispossessed of all of them by B, A may *without the leave* of the Court, bring one suit against B for the recovery of all the plots. Here there is a joinder of 20 claims, but they are all claims for the *recovery of immovable property* (a). Similarly if A owns two plots of land in respect of which B is entitled to pre-emption, and A sells both the plots to C on the same day by two separate deeds of sale, B may claim pre-emption of both the plots in one suit *without the leave* of the Court (b). On the same principle, a mortgagee holding two mortgage deeds over separate properties from the same person may join both in one suit for *sale or foreclosure*, *without the leave* of the Court (c).

Suit for recovery of immovable property—An action to *establish title* to immovable property not claiming possession, is not an action for the *recovery of immovable property* within the meaning of this rule so as to require the leave of the Court for its joinder with another cause of action (d). Similarly, an action to *restrain trespass* on immovable property is not an action for the *recovery of immovable property* (e). A suit for a declaration that an alleged mortgage is not a mortgage and for possession, or in the alternative for an account and for redemption, does not require the leave of the Court under this rule. 'In either case he [plaintiff] asks for possession—possession at once if there is no valid mortgage, and possession upon payment of what may be found due if the mortgage is valid' (f). A suit for *recovery of a mortgage debt* with an

(a) *Chudambara v Ramasami* (1882) 5 Mac 161

(b) *Ambika Bai v Nani* (1895) 17 All 274

(c) *Naghubar v Junia* (1903) 25 All 229

(d) *Gledhill v Hunter* (1830) 14 C D 492

(e) *Spear's Glass Works Ltd v Spear* (1902) 87

L J 278

(f) *Hunt v Horsfield* [1890] 2 Ch. 224 2.3

alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immovable property within the meaning of this rule (g)

Claims in which the relief sought is based on the same cause of action —

1. *Joinder of claims for recovery both of movable and immovable property*—This rule is to be read with r. 2 above which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action (h). Hence there is nothing irregular in seeking to recover immovable and movable property in one suit without the leave of the Court, if the cause of action is the same in respect of both. In a suit for possession of an impartible estate a claim to recover the rents, royalties and other monies collected by the defendant since the death of the late Raja can be joined without leave of the Court as it is based on the same cause of action (i). Indeed if the plaintiff who is entitled to sue for the recovery of movable and immovable property in one suit, sues for the one only, he will be precluded from suing for the other by virtue of the provisions of r. 2 above. Thus where a Mahomedan died leaving two heirs A and B, and C purchased from A certain immovable property which had come to A's share and from B certain movable property which had come to B's share, and both the properties were at the time of purchase in the wrongful possession of D, it was held that not only could C sue D for the recovery of both the movable and immovable property in one suit without the leave of the Court, but that if he did not do so, he would be precluded from afterwards suing for the property omitted in the first suit (j). In the above case the cause of action in respect of both the properties was the same, namely, *dispossession and refusal to deliver the property on demand*. But if the cause of action is not the same, a claim for the recovery of movable property may not be joined with a claim for the recovery of immovable property without the leave of the Court (k). Thus a claim against an administrator for damages for malfeasance under secs 146 and 147 of the Probate and Administration Act, 1881, cannot be joined with a claim for recovery by the plaintiff of his share of immovable properties alleged to have been bought by the administrator with moneys belonging jointly to the plaintiff and the administrator (l). No leave is necessary in the case of a suit for the administration of the estate of a deceased person though it may comprise both movable and immovable property (m).

2. A plaintiff may join, without the leave of the Court, in an action for the recovery of immovable property, other claims, such as a claim for a declaration of title, for an account of the rents and profits, for the appointment of a receiver, and for an injunction to restrain the defendant from receiving the rents, provided such claims do not amount to a new cause of action, and are "mere machinery" (n).

Proviso to the Rule—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure and possession (o).

Leave of Court—Objection as to misjoinder.—Leave should be obtained before the plaint is filed (p). But the leave under this rule is not a condition precedent to jurisdiction, and it may therefore be granted on good cause shown even after the institution of the suit (q). Under sec. 44 of the Code of 1882 it was held that an objection that the plaintiff had joined together claims which, under that section could not be joined together

(g) *Govinda v Mana Vikraman* (1891) 14 Mad 284

(h) *Giyana v Kandasami* (1887) 10 Mad 375, 506

(i) *Shiba Prasad v Pryag Kumari* (1932) 59 I A 331, 59 Cal 1399, 138 I C 861, (32) A PC 216

(j) *Ganesh v Jewach* (1904) 31 Cal 262, 31 I A 10, *C Cook v Enchmarch* (1876) 2 C D 111

(k) *Hingra Lal v Baldeo Ram* (1902) 24 All 553

(l) *Jgnardan v Jankubati* (1917) 2 Pat L J 642, 650, 40 I C 860

(m)

(n)

(o)

(p)

(q)

4 Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

Old section —This rule corresponds with sec 44, C P C, 1882, except in the following particulars —

- 1 The rule contained in sec 44 applied to (1) suits for the *recovery* of immovable property, and to (2) suits to obtain a *declaration of title* to immovable property. The words, or to obtain a declaration of title to immovable property, have been omitted in this rule so that the operation of the present rule is confined only to those cases where a cause of action is sought to be joined with a suit for the *recovery* of immovable property.
- 2 Clause (c) of the rule is new. See notes below, 'Claims in which the relief sought is based on the same cause of action'
- 3 The proviso to the rule is also new. It is taken from R S C, O 18 r 2

Joinder of claims—This rule deals with what may be called *joinder of claims*. It declares that no claims other than those specified in the three exceptions shall be joined *without the leave* of the Court with a suit for the *recovery* of immovable property. The object of the rule is to prevent a joinder with a claim for the *recovery* of immovable property of claims of *other and dissimilar* character. If it is sought to join such claims with a claim for the *recovery* of immovable property, the leave of the Court must first be obtained, and such leave may be granted if the two classes of claims can be conveniently disposed of in one suit. But no leave is necessary where claims are joined in which the relief sought is based on the *same cause of action* [see cl (c)]

This rule does not apply to a *joinder of several claims* all for the *recovery* of immovable property. A plaintiff may therefore bring one suit for possession of several immovable properties without the leave of the Court. Thus if A owns 29 parcels of land, and he is dispossessed of all of them by B, A may *without the leave* of the Court, bring one suit against B for the *recovery* of all the plots. Here there is a joinder of 29 claims, but they are all claims for the *recovery* of immovable property (a). Similarly if A owns two plots of land in respect of which B is entitled to pre-emption, and A sells both the plots to C on the same day by two separate deeds of sale, B may claim pre-emption of *both* the plots in one suit *without the leave* of the Court (b). On the same principle, a mortgagee holding two mortgage deeds over separate properties from the same person may join both in one suit for *sale or foreclosure*, *without the leave* of the Court (c).

Suit for recovery of immovable property—An action to *establish title* to immovable property *not claiming possession*, is not an action for the *recovery* of immovable property within the meaning of this rule so as to require the leave of the Court for its joinder with another cause of action (d). Similarly, an action to *restrain trespass* on immovable property is not an action for the *recovery* of immovable property (e). A suit for a declaration that an alleged mortgage is not a mortgage and for possession or in the alternative for an account and for redemption, does not require the leave of the Court under this rule. "In either case he [plaintiff] asks for *possession*—possession at once if there is no valid mortgage, and possession upon payment of what may be found due if the mortgage is valid (f). A suit for recovery of a mortgage debt, with an

(a) *Chidambaram v Ramasami* (1882) 5 Mad 161
 (b) *Ambika Datt v Ram Datt* (1895) 17 All 274
 (c) *1 aghubar v Juwala* (1903) 25 All 239

(d) *Gledhill v Hunter* (1880) 14 C D 492
 (e) *Spear & Glass Works Ltd v Spear* (1902) 37 L J 578
 (f) *Hunt v Horsfold* [1896] 2 Ch 224 228

alternative prayer for sale of the mortgaged property, is not a suit for the recovery of immovable property within the meaning of this rule (g)

Claims in which the relief sought is based on the same cause of action —

1 *Joinder of claims for recovery both of movable and immovable property*—This rule is to be read with r 2 above which directs that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the same cause of action (h). Hence there is nothing irregular in seeking to recover immovable and movable property in one suit *without* the leave of the Court, if the cause of action is the same in respect of both. In a suit for possession of an impartible estate a claim to recover the rents, royalties and other monies collected by the defendant since the death of the late Paja can be joined without leave of the Court as it is based on the same cause of action (i). Indeed if the plaintiff who is entitled to sue for the recovery of movable and immovable property in one suit sues for the one only, he will be precluded from suing for the other by virtue of the provisions of r 2 above. Thus where a Mahomedan died leaving two heirs A and B and C purchased from A certain immovable property which had come to A's share and from B certain movable property which had come to B's share, and both the properties were at the time of purchase in the wrongful possession of D, it was held that not only could C sue D for the recovery of both the movable and immovable property in one suit without the leave of the Court, but that if he did not do so, he would be precluded from afterwards suing for the property omitted in the first suit (j). In the above case the cause of action in respect of both the properties was the same, namely, *dispossession and refusal to deliver* the property on demand. But if the cause of action is not the same, a claim for the recovery of movable property may *not* be joined with a claim for the recovery of immovable property *without* the leave of the Court (k). Thus a claim against an administrator for damages for malfeasance under secs 146 and 147 of the Probate and Administration Act, 1881, cannot be joined with a claim for recovery by the plaintiff of his share of immovable properties alleged to have been bought by the administrator with moneys belonging jointly to the plaintiff and the administrator (l). No leave is necessary in the case of a suit for the administration of the estate of a deceased person though it may comprise both movable and immovable property (m).

2 A plaintiff may join, *without the leave of* the Court, in an action for the recovery of immovable property, other claims, such as a claim for a declaration of title, for an account of the rents and profits, for the appointment of a receiver, and for an injunction to restrain the defendant from receiving the rents, *provided such claims do not amount to a new cause of action*, and are mere machinery (n).

Proviso to the Rule—The proviso to the rule enables a plaintiff to claim in one suit redemption or foreclosure and possession (o).

Leave of Court—Objection as to misjoinder—Leave should be obtained *before* the plaint is filed (p). But the leave under this rule is not a *condition precedent* to jurisdiction, and it may therefore be granted on good cause shown *even after* the institution of the suit (q). Under sec 44 of the Code of 1882 it was held that an objection that the plaintiff had joined together claims which, under that section could not be joined together

(g) *Govinda v Mana Iskraman* (1891) 14 Mad 284

(h) *Giyana v Kandasami* (1887) 10 Mad 375

(i) *Shiba Prasad v Prayag Kumari* (1932) 59 I A 331 59 Cal 1393 138 I C 861 (32) A 1 C 216

(j) *Ganesh v Jewach* (1904) 31 Cal 96 31 I A 19 C Cook v Fackmarch (1846) 2 C D 111

(k) *Hingra Lal v Baldeo Ram* (1900) 24 All 553

(l) *Janardin v Jankubati* (1917) 2 lat L J 64- 650 40 I C 860

(m) *Natarani v Nundo Lal* (1899) 26 Cal 891 92 Nalubhai v Narayanacharya (1974) 51 Ik m 800 104 I C 764 (27) A B 470

(n) *Cledit II v Hunter* (1880) 14 C D 49- 500

(o) *Khub Lal v Shaps* (19-4) 3 Pat 244, 78 I C 84 (24) A P 613

(p) *Fulcher v Hinds* (1879) 11 C D 905

(q) *See Lloyd v Great Western and Metropolitan Dairies Co Ltd* (1907) 23 Times Rep 570

without the leave of the Court should be taken in the Court of first instance and that if it was not so taken it should be regarded as waived, and it should not be entertained by the Court of appeal (r). Under this Code the objection should be taken at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement if it is not so taken it will be deemed to have been waived (r 7 below). And even if the objection is taken in time and disallowed the appellate Court should not interfere with the decree in appeal merely on the ground that claims which ought not to be joined under this rule have been joined in one suit unless the misjoinder has affected the merits of the case (s 99 above).

Where a claim cannot be joined with a claim for the recovery of immovable property *without the leave of the Court* it is optional with the plaintiff either to obtain the leave and bring *one* suit in respect of both the claims or to bring *separate* suits in respect of each of them. The plaintiff is not confined to the first only of these two courses (s).

Counterclaim—This rule applies to a counterclaim as well as to an original action (t).

Appeal—No appeal lies from an order under this rule rejecting an application for leave to join a claim with a claim for the recovery of immovable property (u). See s 99 above.

Revision—See notes to r 3. **Revision**

5. [S 44, R S C, O 18, r 5] No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Scope of the rule—This rule provides that no claim by a person in his *representative character* shall be joined in the same suit with claims by him *personally* nor shall claims against a person in his representative character be joined with claims against him personally—

- (1) unless the claims by or against him personally arise with reference to the *estate* which he represents or
- (2) unless he was entitled to or liable for those claims *jointly* with the deceased person whom he represents.

The object of the rule is to prevent an executor or administrator from intermingling the assets of his testator with his own monies (t).

Illustrations

(a) A is a tenant for life of certain property and B is the remainderman. A gives a lease of the property to C. A dies leaving a will of which B is the sole executor. Some months after A's death, B sues C (1) for arrears of rent due to the *estate* of A and (2) for rent due to him *personally* subsequent to A's death. Here the first claim is by C *as executor* and the second claim is by him *personally* as remainderman. The claim by

(r)

(s)

(t) *Compton v. Pardon* (1880) 11 D. C. 133.
Clark v. Wray (1885) 31 C. D. 63.

(u) *Bandhan v. Solhu* (1886) 8 All. 191.

(v) *Tredegar v. Roberts* [1914] 1 K. B. 233. 23

C personally does not arise with reference to the estate of A of which C is executor. The two claims therefore cannot be joined together in the same suit. *Tredgar v J Jests* [1914] 1 K B 283.

(1) A dies leaving a will of which B is the executor. By his will A directs B to continue his business. The executor purchases for the purpose of A's business certain goods from C in his own name. C may in such a case sue B for the price of the goods and he may claim the price against B personally or, in the alternative, against him as executor. The reason is that the personal claim against B arises with reference to the estate of which he is the executor. But if B purchased certain goods from C as executor in the course of the administration of A's estate and other goods under a separate contract altogether in his own name and expressly for the purpose of his own business C cannot join both claims against B in one suit (w).

(c) A and B carry on business in partnership. A dies leaving a son S who obtains letters of administration to his father's estate. After A's death S and B continue the business in partnership with the old partnership assets. S, as administrator, sues B for the accounts of the partnership between his father A and B. He also claims dissolution of the partnership between him personally and B, and for his share in the partnership. The suit does not offend the provisions of this rule, as the personal claim of S in respect of the partnership between him and B arises with reference to the estate in respect of which he is suing as administrator. *Arunachallam v Arunachallam* (1922) 43 Mad L J 218 69 I C 966 (22) A M 430.

(cc) The suit is against A, as executor of I deceased for administration of the estate of I and also for an account of a partnership which had been carried on by I and A. The suit is not bad for misjoinder of causes of action for O 2 r 5 all was a claim against an executor, as such to be joined with a claim against him personally which is alleged to arise out of the estate in respect of which the executor is sued. *Nithidas v Narayana Charya* (1927) 51 Bom 890 104 I C 764 (27) A B 470.

(d) The second branch of the rule may be illustrated by the following case. A and B jointly purchase goods from C. A dies leaving a will of which B is the executor. Here A and B are jointly liable for the price of the goods. C may therefore sue B for the price in his (B's) personal as well as representative character. If A and B had purchased goods from C under separate contracts, C ought to bring two separate suits against B, one as A's executor to recover the price of goods sold to A and the other against B personally to recover the price of the goods sold to him (B).

Heir as such.—An heir may sue or be sued in his *personal* capacity or he may sue or be sued in his *representative* capacity [see notes to O 7 r 4]. The words "claim by an heir as such" in this rule refer to a claim by him in his *representative* capacity that is, as representing the estate of the deceased whose heir he claims to be (x).

Illustrations

1. A Mahomedan dies leaving a widow and daughters by a predeceased wife. The widow sues the daughters (1) for her dower, and (2) for her share of the inheritance in her husband's estate. It is contended on behalf of the daughters that the first claim is by the widow personally and that the second claim is by her as an heir and that the two claims cannot be joined in one suit. This contention is not sound for the second claim cannot be said to be by an heir as such. The claim is made by the widow not as representing her husband's estate and for the benefit of the estate but for her own and personal benefit. The two claims may therefore be joined in one suit. *Ahmad ud din v Sikander* (1896) 18 All 206.

(w) See *Padwick v Scott* (1882) 2 Ch D 735 743.
Wadsworth v Darbshire (1893) 41 W R 317.

(x) *Ahmad ud-din v Sikander* (1896) 18 All 256.

H f 2 100 v Mahomed (1907) 31 Bom 105
 (representing from *Ash bai v Haji Tyeb*
 (1884) 6 Ik m 390.

2 A Hindu widow sues her husband's executors to recover (1) certain ornaments forming part of her *stridhana*, and (2) her share in her husband's estate. The suit is properly constituted see *Hafi-aboo v Mahomed* (1907) 31 Bom 105, dissenting from *Ashabai v Haji Tyeb* (1882) 6 Bom 390, *Jankibai v Shrinivas* (1914) 38 Bom 120, 20 I C 533, [suit against husband's coparceners for *stridhana* and maintenance]

Procedure—Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them, and the suit may then be proceeded with (y)

Objection as to misjoinder when to be taken—See r 7 below.

Appeal—See s 99 above

Revision—See notes to r 3, "Revision"

6. [S. 45, 2nd para, R. S. C., O. 18, r. 1.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient

Power of Court to order separate trials

This rule does not apply to cases of *misjoinder*, but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (z) See notes to r 3, 'One plaintiff, one defendant, and two or more causes of action'

7. [New] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder

Objections as to misjoinder of causes of action—This rule is new. It places objections on the ground of misjoinder of causes of action on the same footing as objections on the ground of non joinder and misjoinder of parties [O 1, r 13]. Such objections must be taken at the earliest possible opportunity, and any such objection not so taken is to be deemed to have been waived (a). Sec 99 provides that no decree shall be reversed or varied on account of any misjoinder of causes of action not affecting the merits of the case or the jurisdiction of the Court.

Under the Code of 1882 when a plaint was presented which was bad for misjoinder of causes of action, it could be returned for amendment under s 53 at any time before the settlement of issues. If the plaint was not amended, it could be rejected under s 54, cl (d). These provisions have not been re-enacted in this Code. The Court, however, may under this Code allow an amendment under O 6, r 17, if the plaintiff

(y) *Ashabai v Haji Tyeb* (1882) 6 Bom 390
394, *Tredejar v Roberts* (1914) 1 K B
283
(z) *Muthappa v Mithu* (1904) 27 Mad 80 84
(a) *Sathubhai v Narayanacharya* (1927) 51

Bom 800 104 I C 764, (27) A B 470,
Joint Hindu Family v Ghulam Hussain
(1928) 10 Lah J 40 103 I C 52 (28)
A L 289 *Tariner Churn v Hissman*
(1873) 20 W R 240

applies for it. It may also direct the plaintiff under the same rule to amend the plaint on the application of the defendant or where there are two or more defendants on the application of any one of them. O. C. r. 18 deals with failure to amend after order.

As under the old Code so under this Code the Court may, where a suit is bad for misjoinder of plaintiffs and causes of action direct the plaintiffs to elect as to which of them shall proceed with the suit and where a suit is bad for misjoinder of defendants and causes of action direct them to elect against which defendants they will proceed and direct all necessary amendments to be made within a time to be prescribed by the Court. If the plaintiff does not comply with the order and amend the plaint, the Court may stay the action.

The misjoinder of causes of action referred to in this rule is not only the misjoinder contemplated by r. 3 above but also that contemplated by rr. 4 and 5 above.

ORDER III

Recognized Agents and Pleaders

1. [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by a pleader appearing applying or acting on his behalf.

Appearance etc. may be in person by recognized agent or by pleader

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Amendments—The words appearing applying or acting were substituted for the words duly appointed to act by the Code of Civil Procedure (Second Amendment) Act 1926.

Appearing applying or acting—These words as stated above have been substituted for the words duly appointed to act which occurred in the original rule. The changes made in rule 4 below provide for the various purposes for which a pleader may be appointed. The words duly appointed to act appear in the proviso to the amended r. 4 (5) below. See notes to r. 4 below, Pleaders appointed to act and pleaders engaged only to plead.

Appearance—If a recognized agent although able to do so does not conduct the case on behalf of his principal his mere presence in Court is not an appearance in the suit within the meaning of r. 6 or 8 of O. 9 (b). See O. 9 below and notes to O. 9 r. 9. Meaning of Appearance.

Appearance by party in person—A Court is not justified in ordering a party to appear in person under this rule except for very good reason. If one party desires the appearance of the opposite party for examination as a witness he should take out a witness summons under O. 16 (b1). See O. 5 r. 3.

Application for leave to sue in forma pauperis—Such an application cannot be made by a recognized agent (c). See O. 33 r. 3.

(b) *Soonderlal v. Goorprasad* (1899) 23 Ik. m. 414.

(51) *Apparao v. Sornammal* (1913) 60 Mad. L. J.

31 146 I. C. 536 (33) A. M. 81

(c) *Devgurusu ex parte* (1869) 4 D. H. C. A. C. 91

2 A Hindu widow sues her husband's executors to recover (1) certain ornaments forming part of her *stridhana*, and (2) her share in her husband's estate. The suit is properly constituted *see Hafizaboo v Mahomed* (1907) 31 Bom 105, dissenting from *Ashabai v Haji Tyeb* (1882) 6 Bom 390; *Jankibai v Shrinivas* (1914) 38 Bom 120, 20 I. C 533, [suit against husband's coparceners for *stridhana* and maintenance]

Procedure.—Where two claims which this rule does not allow to be joined are joined in one suit, the practice is to amend the plaint by striking out one of them, and the suit may then be proceeded with (y)

Objection as to misjoinder when to be taken—See r. 7 below.

Appeal—See s 99 above

Revision—See notes to r 3, "Revision"

6. [S. 45, 2nd para, R. S. C., O. 18, r. 1.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials

This rule does not apply to cases of *misjoinder*, but to cases where several causes of action have been *properly* joined in one suit and the causes of action so joined cannot be conveniently tried together (z). See notes to r 3, "One plaintiff, one defendant, and two or more causes of action"

7. [New.] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder

Objections as to misjoinder of causes of action—This rule is new. It places objections on the ground of misjoinder of causes of action on the same footing as objections on the ground of non joinder and misjoinder of parties [O 1, r 13]. Such objections must be taken at the earliest possible opportunity, and any such objection not so taken is to be deemed to have been waived (a). See 99 provides that no decree shall be reversed or varied on account of any misjoinder of causes of action not affecting the merits of the case or the jurisdiction of the Court

Under the Code of 1882 when a plaint was presented which was bad for misjoinder of causes of action, it could be returned for amendment under s 53 at any time before the settlement of issues. If the plaint was not amended, it could be rejected under s 54, cl (d). These provisions have not been re enacted in this Code. The Court, however, may under this Code allow an amendment under O 6, r 17, if the plaintiff

(y) *Ashabai v Haji Tyeb* (1882) 6 Bom 390
394 *Tredegar v Roberts* (1914) 1 K B 287
() *Muthappa v Muthu* (1904) 27 Mad 80 84
(a) *Nathubhai v Narayanacharya* (1927) 51

Bom 800 104 I C 764 (27) A B 470
Joint Hindu Family v Ghulam Hussain
(1928) 10 Lah L J 40 108 I C 52 (28)
A L 280 *Tarinee Churn v Hunnman*
(1873) 10 W R 240

applies for it. It may also direct the plaintiff under the same rule to amend the plaint on the application of the defendant or, where there are two or more defendants, on the application of any one of them. O. C. r. 18 deals with failure to amend after order.

As under the old Code, so under this Code, the Court may, where a suit is laid for many under of plaintiffs and causes of action, direct the plaintiffs to elect as to which of them shall proceed with the suit, and where a suit is laid for many under of defendants and causes of action, direct them to elect against which defendants they will proceed, and direct all necessary amendments to be made within a time to be prescribed by the Court. If the plaintiff does not comply with the order and amend the plaint, the Court may stay the action.

The many under of causes of action referred to in this rule is not only the many under contemplated by r. 3 above, but also that contemplated by rr. 4 and 5 above.

ORDER III

Recognized Agents and Pleaders

1. [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by a pleader appearing, applying or acting on his behalf.

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Amendments—The words "appearing, applying or acting" were substituted for the words "duly appointed to act" by the Code of Civil Procedure (Second Amendment) Act, 1926.

Appearing, applying or acting—These words as stated above have been substituted for the words "duly appointed to act" which occurred in the original rule. The changes made in rule 4 below provide for the various purposes for which a pleader may be appointed. The words "duly appointed to act" appear in the proviso to the amended r. 4 (5) below. See notes to r. 4 below. Pleadings appointed to act and pleaders engaged only to plead.

Appearance—If a recognized agent although able to do so, does not conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit within the meaning of r. 6 or 8 of O. 9 (b). See O. 9 below and notes to O. 9, r. 9. **Meaning of Appearance**

Appearance by party in person—A Court is not justified in ordering a party to appear in person under this rule except for very good reason. If one party desires the appearance of the opposite party for examination as a witness, he should take out a witness summons under O. 16 (b1). See O. 5 r. 3.

Application for leave to sue in forma pauperis—Such an application cannot be made by a recognized agent (c). See O. 33, r. 3.

(b) *Soonderlal v. Goorprasad* (1899) 23 Bom. 414.

(51) *Apparao v. Sornammal* (1933) 65 Mad. L.J.

(c) 34 146 I.C. 536 (33) A.M. 801.
(c) *Deyyaguru ex parte* (1869) 4 B.H.C.A.C. 91.

2. [S. 37.] The recognized agents of parties by whom
such appearances, applications and acts
may be made or done are—

Recognized agents

- (a) persons holding powers-
them to make and do
cations and acts on behalf,
- (b) persons carrying on trade or business for and in
the names of parties not resident within the local
limits of the jurisdiction of the Court within which
limits the appearance, application or act is made or
done, in matters connected with such trade or
business only, where no other agent is expressly
authorized to make and do such appearances,
applications and acts.

Clause (a)—The plaintiff who was of age presented a plaint by his mother acting as guardian and describing him as a minor. The plaintiff was himself present at the presentation and the Court believing that he had acted in good faith held that the defective presentation was an irregularity which did not affect the jurisdiction of the Court to accept the plaint (d)

Clause (a) has been amended by the Bombay High Court under s 122—See Appendix IV below, Rules made by the High Court of Bombay. Where a power of attorney, instead of being a general power as required by r 2 (a) as amended by the Bombay High Court, was a special power, it was held that it was a defect not affecting the merits of the case within the meaning of s 99, and that the decree should not be disturbed in appeal (e). If such a defect is discovered at the hearing, the plaintiff may sign the plaint himself and the suit will proceed (f) even though the period of limitation has expired (g).

Clause (b)—Where a plaint is signed and presented by the plaintiff's clerk who has no authority from the plaintiff to carry on business in the plaintiff's name the plaint cannot be said to have been signed by the plaintiff's "recognized agent." In such a case the Court may rightly dismiss the suit (k).

3. [S. 38.] (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs

Service of process on
recognized agent

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

| | |
|-----|--|
| (d) | A B 511 |
| (e) | (g) <i>Nanyibhas v Popatlal</i> (1932) 34 Bom L R 628, 138 I C 797, (32) A B 367 |
| (f) | (h) <i>Uttamram v Thekordas</i> (1922) 46 Bom 150 64 I C 55, (22) A B 113 |

Service of process on recognized agent.—A person holding a power of attorney is not bound to accept service of summons. He may refuse to do so if he is not bound to act under the power (i)

4. [S. 39] (1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of moneys paid into the Court in connection with the suit shall be deemed to be proceedings in the suit

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

- (a) the names of the parties to the suit
- (b) the name of the party for whom he appears and
- (c) the name of the person by whom he is authorised to appear

4 Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

Old rule—The present rule was substituted for the old rule 4 by the Code of Civil Procedure (Second Amendment) Act, 1926. The old rule was as follows—

“(1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power of attorney to act in this behalf

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act 1861, or of any Chief Court and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act

Amendment of the rule—This rule is as amended by the Code of Civil Procedure (Second Amendment) Act, 1926. Sub rules (1) and (2) correspond with the previous sub-rules (1) and (2) except that in sub rule (2) the words ‘when accepted by a pleader’ which occurred after the words ‘every such appointment,’ have been omitted. Under the old rule which required an acceptance, it was held that the acceptance need not be in writing, but that if the rules of the Court required a written acceptance the pleader would not be heard unless it was in writing (j). Sub rules (3) to (5) and the proviso are new

Pleaders appointed to act and pleaders engaged only to plead—Under the rule as it stood originally every pleader had to be appointed by a writing signed by the party or by his recognized agent, etc. Under the present rule a distinction is drawn between—

(1) a pleader appointed to act in Court,

(2) a pleader engaged for the purpose of pleading only, and

(3) a pleader engaged to plead by a pleader duly appointed to act in Court

(1) As regards a pleader appointed to act in Court, it is provided by sub rule (1) that he cannot act for any person in any Court unless he is appointed by such person by a document in writing signed by such person or his recognized agent, etc. It is only if the appointment is made by a writing signed by the party, etc., that he can act, and it is only where he is so appointed that he can be said to be ‘duly appointed to act’ See the proviso to sub rule (5)

meaning of this rule, though no sanction has been obtained under the Indian Companies

(i) *M*

Bidha Ram v. Kalu Ram (1925) 6 Lah 461, 91 I C 30 (26) A L 32

(k) *Sam Narain v. Raghu* (1892) 19 Cal 678, 19 I A 135

Act for the appointment of the pleader (f) Where a party to a suit authorises an agent by a special power-of-attorney to appoint a pleader to sign execution petitions, a pleader appointed by the agent to support a petition verified by the agent is a pleader duly appointed to act on the party's behalf (m) Omission to file a vakalatnamah together with the memorandum of appeal does not prevent the appeal from being an appeal properly preferred (n)

A pleader duly appointed by a person to act in Court on his behalf may appear, or make an application or otherwise act for him

(2) A pleader engaged for the purpose of pleading only has to file a memorandum of appearance signed by himself as provided by sub-rule (5) In a Calcutta case (o) the Court expressed the opinion that a pleader can only be engaged under sub-rule (5) without a document signed by the party when there is a personal appearance in the suit by the party himself or an appearance by a pleader appointed to act The actual decision however was based on the rules framed by the Calcutta High Court under cl. 77 of its Letters Patent

(3) A pleader engaged to plead on behalf of a party by any other pleader who has been duly appointed to act has not to file either a vakalatnamah or a memorandum

Rules of Courts—This rule does not give an absolute right to any practitioner to appear in any Court in any matter he chooses It is subject to the rules governing the admission of different classes of practitioners in different Courts and to rules framed by the High Court (p)

Advocates—See original sub-rule (3) and the undermentioned case (q)

Signed—See sec. 2 (20)

Bombay Pleaders Act, 1920—See 10 and Form C in Schedule II of the Bombay Pleaders Acts have been repealed by the Code of Civil Procedure (Second Amendment) Act, 1926

Delegation of authority by pleader—Where a pleader cannot attend, he has no power to delegate his authority to another pleader (r)

‘Until determined with the leave of Court.’—A pleader cannot determine his appointment without the leave of the Court and after reasonable notice to the client (s) An attorney's retainer cannot be revoked by his client by a mere letter, it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court as provided in this rule (t) Nor can the client determine a pleader's appointment without the leave of the Court (u) A judge of the Bombay High Court however, while conceding that an attorney whose costs are unpaid has a right to retain his client's documents and papers has held that a litigant may change his attorney when he likes and that the leave of the Court is only a matter of office convenience (v) No formality is necessary about the leave of the Court (w)

- | | |
|---|---|
| <p>(f) <i>Kathwar and Ahmedabad Banking Corporation Ltd v Girdas</i> (1924) 5 Lah 414 84 I C 510 (25) A L J 2</p> <p>(m) <i>Thiruvengatasami v Iyadasi Iyayi</i> (1921) 48 I A 574 44 Mad 736 70 I C 281 (22) A I C 225</p> <p>(n) <i>Mahomed v Sheikh Ahmed</i> (1926) 28 B M I R 538 95 I C 666 (26) A B 336</p> <p>(o) <i>In re Ram Dayal De</i> (1912) 59 Cal 370 135 I C 789 (32) A C 1</p> <p>(p) <i>Veerappa v Sundaresa</i> (1925) 48 Mad 876 9 I C 300 (22) A M 1201 <i>In re The Leaders of the High Court</i> (1884) 8 Bom 105</p> | <p>(q) <i>La rentis v Dhukis</i> (1905) 4 Pat 766 92 I C 179 (20) A P 73</p> <p>(r) <i>Shri dayal v Khetu</i> (1896) 20 Bom 293</p> <p>(s) <i>Emperor v Rajani</i> (1922) 49 Cal 732 71 I C 81 (22) A C 515</p> <p>(t) <i>Atul Chunder v Lakshman</i> (1909) 36 Cal 609 21 C 830</p> <p>(u) <i>Babji Radhika v Pamasray</i> (1930) 9 Pat 865 128 I C 350 (30) A I 403</p> <p>(v) <i>Dharmadas v Kachadas</i> (1933) 35 Bom LR 208 144 I C 628 (33) A B 182</p> <p>(w) <i>Man ekram v Mahudam</i> (1924) 47 Mad 810 82 I C 102 (25) A M 21 [F B]</p> |
|---|---|

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.

Old rule—The present rule was substituted for the old rule 4 by the Code of Civil Procedure (Second Amendment) Act, 1926. The old rule was as follows—

"(1) The appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power of attorney to act in this behalf

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act "

Amendment of the rule—This rule is as amended by the Code of Civil Procedure (Second Amendment) Act, 1926. Sub rules (1) and (2) correspond with the previous sub rules (1) and (2) except that in sub rule (2) the words "when accepted by a pleader" which occurred after the words "every such appointment," have been omitted. Under the old rule which required an acceptance, it was held that the acceptance need not be in writing, but that if the rules of the Court required a written acceptance the pleader would not be heard unless it was in writing (2). Sub rules (3) to (5) and the proviso are new

When a pleader is appointed to act and pleaders engaged only to plead—Under the new rule, a writing signed by the pleader is required, and the distinction is drawn between—

- (1) a pleader appointed to act in Court,
- (2) a pleader engaged for the purpose of pleading only, and
- (3) a pleader engaged to plead by a pleader duly appointed to act in Court

(1) As regards a pleader appointed to *act in Court*, it is provided by sub rule (1) that he cannot act for any person in any Court unless he is appointed by such person by a *document in writing signed* by such person or his recognized agent, etc. It is only if the appointment is made by a writing signed by the party, etc., that he can act, and it is only where he is so appointed that he can be said to be "duly appointed to act". See the proviso to sub rule (5)

When a suit is instituted by a plaintiff through an agent, the Court has the power to

Act for the appointment of the pleader (f) Where a party to a suit authorizes an agent by a special power-of-attorney to appoint a pleader to sign execution petitions, a pleader appointed by the agent to support a petition verified by the agent is a pleader duly appointed to act on the party's behalf (m) Omission to file a vakalatnamah together with the memorandum of appeal does not prevent the appeal from being an appeal properly preferred (n)

A pleader duly appointed by a person to act in Court on his behalf may appear, or make an application, or otherwise act for him

(2) A pleader engaged for the purpose of pleading only has to file a memorandum of appearance signed by himself as provided by sub-rule (1) In a Calcutta case (o) the Court expressed the opinion that a pleader can only be engaged under sub-rule (5) without a document signed by the party when there is a personal appearance in the suit by the party himself or an appearance by a pleader appointed to act The actual decision however was based on the rules framed by the Calcutta High Court under cl 37 of its Letters Patent

(3) A pleader engaged to plead on behalf of a party by any other pleader who has been duly appointed to act has not to file either a vakalatnamah or a memorandum

Rules of Courts—This rule does not give an absolute right to any practitioner to appear in any Court in any matter he chooses It is subject to the rules governing the admission of different classes of practitioners in different Courts and to rules framed by the High Court (p)

Advocates—See original sub-rule (3) and the undermentioned case (q)

Signed—See sec 2 (20)

Bombay Pleaders Act 1920—See 10 and Form C in Schedule II of the Bombay Pleaders Acts have been repealed by the Code of Civil Procedure (Second Amendment) Act 1926

Delegation of authority by pleader—Where a pleader cannot attend he has no power to delegate his authority to another pleader (r)

'Until determined with the leave of Court'—A pleader cannot determine his appointment without the leave of the Court and after reasonable notice to the client (s) An attorney's retainer cannot be revoked by his client by a mere letter, it can only be revoked with the leave of the Court by a writing signed by the client and filed in Court as provided in this rule (t) Nor can the client determine a pleader's appointment without the leave of the Court (u) A judge of the Bombay High Court however while conceding that an attorney whose costs are unpaid has a right to retain his client's documents and papers has held that a litigant may change his attorney when he likes and that the leave of the Court is only a matter of office convenience (v) No formality is necessary about the leave of the Court (w)

- | | |
|--|--|
| <p>(f) <i>Kathiawar and Ahmedabad Banking Corporation Ltd v Gurlas</i> (1945) 5 Lah 414 84 IC 510 (95) A L "</p> <p>(m) <i>Thiruvencatasami v Jayadas Iyaz</i> (1914) 48 IA 534 44 Mad 736 70 IC 281 (2-) A IC 25</p> <p>(n) <i>Mahomed v Sheikh Ahmed</i> (1908) 98 Bom LR 538 95 IC 265 (26) A B 336</p> <p>(o) <i>In re Ram Dayal De</i> (1937) 59 Cal 370 155 IC 782 (1) A C 1</p> <p>(p) <i>Feerozappa v Sundaresa</i> (1945) 48 Mad 678 90 IC 300 (2-) A M 1201 <i>In re The Pleaders of the High Court</i> (1884) 8 Bor 105</p> | <p>(q) <i>Laurentius v Dhuki</i> (1905) 4 Pat 766 82 IC 19 (26) A P 73</p> <p>(r) <i>Shardayal v Khetu</i> (1896) 20 Bom 293</p> <p>(s) <i>Emperor v Rajani</i> (1922) 49 Cal 730 71 IC 81 (2-) A C 515</p> <p>(t) <i>Atul Chunderv Lakshman</i> (1909) 36 Cal 609 2 IC 830</p> <p>(u) <i>Babul Radhika v Ramasray</i> (1930) 9 Pat 865 178 IC 350 (30) A I 403</p> <p>(v) <i>Dharmdas v Fachadas</i> (1933) 35 Bom LR 298 144 IC 678 (33) A B 182</p> <p>(w) <i>Manickram v Mahudam</i> (1924) 47 Mad 819 8- IC 10- (25) A M 21 [F B]</p> |
|--|--|

But no order granting leave should be made where the costs of the attorney have not been provided for unless it be a case where the attorney has discharged himself by his own misconduct (x) An appeal lies from an order granting leave under cl 15 of the Letters Patent (y)

* Until all proceedings in the suit are ended —Where a suit is dismissed for default, a pleader engaged to act in Court must not require a fresh power of attorney for the purpose of applying for the restoration of the case (z)

5. [S 40] Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person

6. [S 41] (1) Besides the recognised agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court

ORDER IV

Institution of Suits

1. [S 48] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable

(x) *Pakanj Kumar v Sudhir Kumar* (1933) 37 C W N 1139 (34) A C 175

(y) 37 C W N 1139 *supra*

(z) *Abdul Aziz v Punjab National Bank Ltd* (1929) 10 Lah L J 570 114 I C 76 (29) A L 96

Plaint presented to judge at club after office hours—There is nothing in this rule to show that the presentation of the plaint must be during office hours or must be to the officer appointed at the Court or at any particular place. A judge therefore may accept a plaint at his residence or at his club after office hours if presented to him at that place. In so doing the judge constitutes himself an officer to receive the plaint (a)

2. [S 58] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plants are admitted

ORDER V

Issue and Service of Summons

ISSUE OF SUMMONS

1. [S 64] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim

(2) A defendant to whom a summons has been issued under sub rule (1) may appear—

- (a) in person, or
- (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or
- (c) by a pleader accompanied by some person able to answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court

(a) *Sattaya v Soundarthach* (194) 47 Mad 310 9 IC 1017 (4) A M 448 *Thakur D n Ram v Harid* (1910) 34 All 48

14 IC 744 [Memorandum of appeal presented at Judge's residence]

Decree without issue of summons—The proviso to sub r (1) contemplates cases where a decree may be passed against a defendant without issue or service of summons upon him (b)

Bombay High Court Rule 96—Under this rule as soon as a suit is instituted the defendant, or any person representing himself to be an attorney of the defendant, is entitled to be furnished with a copy of the plaint and exhibits annexed thereto even before he has filed an appearance in Court (c)

2. [S. 65.] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Copy or statement annexed to summons

3. [S. 66.] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

Court may order defendant or plaintiff to appear in person

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

Consequence of non attendance—As to the consequence of non attendance in person, see O 9, r 12

Non attendance of party on adjourned date—Where an order is made under this rule for the personal appearance of a party on a specified day, he is not bound to appear personally on any adjourned date unless a fresh order is made requiring his appearance on that date. Where no fresh order is made, and the Court disposes of the suit under O 9, r 12, the order is one made without jurisdiction (d)

Purdanashin—As to whether a purdanashin lady can be compelled to attend in Court, see note "Appearance in Court" under s 132

4. [S. 67.] No party shall be ordered to appear in person unless he resides—

No party to be ordered to appear in person unless resident within certain limits

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the court-house

(b) *Bank of Bengal v Currie & Co* (1869) 3 B.L.R. 396
(c) *Ramchandras v Trustees of the Port of Bombay* (1930) 32 Bom. L.R. 1333, 128 I.C. 613,

(30) A.B. 567

(d) *Sundar Nath v Mallu* (1917) 39 All. 476, 39 I.C. 634

5. [S. 68.] The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

Summons for final disposal—As a general rule summonses for final disposal of suits should be issued only in simple cases (c)

6. [S. 69] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

7. [S. 70.] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case

8. [S. 71.] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

SERVICE OF SUMMONS

9. [S. 72] (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent within that jurisdiction who is to accept the service of the summons, the summons, unless the Court otherwise directs, be delivered to the proper officer to be served by him or his subordinates.

(c) *Tuljaram v. Sutaram* (1914) 38 Bom 377, 380, 21 IL 40

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10. [S 73.] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court

Mode of service
Object of service—The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing (*f*) See notes to r 17 below, Service of summons

11. [S 74] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant

Service on several defendants

Partners—As to service on partners see O 30 r 3

12. [S 75] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient

Service to be on defendant in person when practicable or on his agent

13. [S 76] (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service

Service on agent by whom defendant carries on business

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

Manager or agent personally carrying on business—The manager or agent contemplated by this rule is one who has an initiative and independent discretion albeit subject possibly to general orders for his guidance. A mere servant employed to carry out orders or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts is not such an agent (*g*)

14. [S. 77.] Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

15. [S. 78.] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation—A servant is not a member of the family within the meaning of this rule.

Service on adult male member—Where no attempt is made to find the defendant, and the summons is served on his son, the summons cannot be said to be duly served. The inquiry as to the whereabouts of the defendant must not be perfunctory (h).

16. [S. 79.] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Refusal to sign acknowledgment—A mere refusal to sign an acknowledgment of service is not an offence under s c 173 or sec 180 of the Indian Penal Code (i).

17. [S. 86.] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return

(h) *Bharam Chand v. Kanak* (1911) 26 C. W. N. 359 65 I. C. 991 (1) A. C. 638. (i) *Queen Empress v. Arundel* (1893) 20 Cal. 352.

7 the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed

The old section.—This section corresponds with *sec* 80 of the Code of 1882 except in the following particulars —

- 1 The words "after using all due and reasonable diligence" are new They give effect to the decisions cited in the notes below under the head "After using all due and reasonable diligence"
- 2 The words "or carries on business or personally works for gain" have been added to remove a doubt which arose under the old section as to whether it was good service to affix a copy of the summons on the outer door of the defendant's *place of business* (j)
- 3 The words "and the name and address, etc., at the end of the rule are also new They merely give effect to the existing practice

Service of summons.—The Code prescribes three modes of service of summons upon a defendant They are as follows —

- 1 In the first case, the summons is served by delivering a copy thereof to the defendant personally, or to an agent or other person on his behalf, and by obtaining the signature of the person to whom the copy is delivered to an acknowledgment of service endorsed on the original summons See rr 10—16 and r 18
- 2 In the second case, that is, cases mentioned in r 17, service is effected *without an order of the Court* by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and it is for the Court to declare after examination of the serving officer that the summons has been duly served When this mode of service is adopted, the provisions of r 19 have to be complied with and the Court concerned has to decide whether the summons has or has not been duly served See rr 17 and 19
- 3 In the third case, that is, cases mentioned in r 20, service is effected *after obtaining an order of the Court* by affixing a copy of the summons in some conspicuous place in the Court house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit Service so effected is as effectual as if it had been made on the defendant personally This is called *substituted service* See r 20 and the marginal note thereto (k)

Refuses to sign the acknowledgment.—Where a defendant refuses to sign the acknowledgment, the provisions of the present rule must be complied with, namely, the serving officer shall affix a copy of the summons on the outer door of the defendant's house, otherwise the summons cannot be said to have been duly served (l)

(j) *Chandrasappa v Mainaba* (1870) 7 B H C, A C 138

(k) *Maruti v Fulhu* (1891) 16 Bom 117 (notice

of appeal), *Dewan Chand v Parbati* (1918) Punj Rec no 90 p 327 481 C 28

Thus if the defendant refuses to sign the acknowledgment it is not sufficient to leave a copy of the summons on a table in his house: the copy must be affixed on the outer door of the house (l). In a recent Patna case the Court expressed the opinion that where a copy of the summons is delivered to the defendant under r 10 above and the defendant *thinks it* but refuses to sign an acknowledgment the provisions of this rule do not apply and that it is not necessary to affix a copy of the summons on the door of the defendant's house: the reason given being that in such a case the serving officer would have no other copy of the summons to be affixed on the outer door: and that the summons must be deemed to be duly served though no copy is so affixed (m). But it has been held by the same High Court that if the copy of the summons is *not returned* by the defendant the provisions of this rule must be strictly complied with (n).

After using all due and reasonable diligence.—The present rule enjoins that in cases where the defendant cannot be found the mode of service prescribed by this rule should not be resorted to until the serving officer has used *all due and reasonable diligence* to find the defendant and the defendant could not be found. To justify such service it must be shown that *proper efforts were made to find the defendant*, e.g., that the serving officer went to the place or places and at the times where and when it was reasonable to expect to find him (o). Thus if a serving officer goes to a defendant's house but does not find him there and the defendant's adult son who is in the house refuses to accept service on behalf of the father these facts by themselves do not justify the officer in resorting to the mode of service prescribed by this rule. He must before effecting such service inquire of the son as to where the defendant is and otherwise exercise due and reasonable diligence in finding the defendant (p). When a defendant is *temporarily* absent from home and is not represented in his house by an agent or male member of his family the summons should be again taken to the defendant's house to be served upon him at the time when enquiries make it clear that he is likely to be found at home (q). A *temporary* absence of the defendant does not justify the serving officer in affixing a copy of the summons on the door of the defendant's house (r) especially if the serving officer knows where the absent defendant is (s). See notes above under the head The old section.

Cannot find the defendant.—These words are wide enough to cover the case of a serving officer *not being able to obtain access* to a *pardana-shin* lady or to deliver or to tender a copy of the summons to her (t). See notes to r 10 below and notes also to O 9 r 13. Grounds on which *ex parte* decree may be set aside.

Proof of service.—If the plaintiff appears at the hearing of the suit but the defendant does not appear at the hearing the question whether the summons was duly served arises directly for the determination of the Court for the Court cannot proceed *ex parte* unless it is proved that the summons was duly served [O 9 r 6 (1)]. Where a decree is passed *ex parte* against a defendant and the defendant satisfies the Court which passed the decree that the summons was not duly served upon him the Court may set aside the decree [O 9 r 13].

(l) *Gramia v. Bombay Steamship Co.* (1909) 31 Bom. L.R. 444 1181 C.J. (9) A.B. 37

(m) *Nagshur v. Pusur* (1943) 3 Pat. 336 3 I.C. 899 (4) A.I. 446

(n) *Mahad v. Basu* (1900) 4 Pat. 135 91 I.C. 184 (5) A.I. 441

(o) *Rajendra v. Jan Meah* (1893) 96 Cal. 101
Cohen v. Narsing Dass (1893) 19 Cal. 01
Sankarlinga v. P. Inaahbapat (1898) 1 Mad. 324
Kassim v. Joh. Rmall (1916) 43 Cal. 447 34 I.C. 39
Baidradas v. Subbarandas (1905) 50 Cal. 19 85 I.C.

503 (2) A.C. 6
D. N. Va. h. v. Upendra (1943) 40 Cal. L.J. 154 8 I.C. 703
 (4) A.C. 1094

(p) *Sakaram v. Ialmar* (1906) 30 Bom. 63

(q) *Ishamell v. I. maba* (1897) 21 L.R. 23

(r) *Subaman v. Subramania* (1892) 91 Mad. 419
Abraham v. Donald (1906) 9 Mad. 34

(s) *Sak v. Gaur* (1907) 24 All. 30

(t) *Ksh. rodo v. N. h. Chandra* (1915) 19 C.W.N. 131 30 I.C. 64

18. [S 81] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons

Endorsement of time and manner of service

Form of return—See Appendix B to Schedule I Form No 11 The said Form has been altered in certain respects by the Chief Court of the Punjab see Appendix VII below

- 19 [S 82, 1st para] Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court touching his proceedings and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit

Examination of serving officer

Declare that the summons has been duly served—The declaration that the summons has been duly served is an imperative requisition and the Madras High Court has held that in the absence of such a declaration an ex parte order in execution proceedings cannot operate as constructive *res judicata* (i) i.e., that Explanation IV, section 11 will not apply See p 89 above

Or order such service as it thinks fit—These words empower the Court, even when there has been a technical compliance with the provisions of r 17, to order service in another mode if the Court thinks fit to do so in the interests of justice Thus where the person to be served is a *purdanashin* lady and the serving officer not being able to obtain access to her fixes a copy of the summons on the outer door of her dwelling house as provided by r 17, yet although the mode of service is not improper the Court may under this rule direct the service of summons by means of notice by registered post so that the cover may in due course reach the lady herself (v)

20. [S 82, 2nd para, Ss 83, 84] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house, and also

Substituted service

(u) *Aragappa v Ramanathan* (1933) 64 Mad L. J. 679 (33) A. M. 486 *Ramaswami v Chinnappa* (1933) 64 Mad L. J. 637

(v) 13th I C 780 (33) A. M. 406 *Kal role v Nahn Chandra* (1915) 19 C W N 1st 31 30 I C 64

upon some conspicuous part of the house [if any] in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Substituted service.—See notes to r 17 above, "Service of summons."

"Where the Court is satisfied"—The advisability of effecting service by substituted service is a matter primarily for the trial Court. The Appellate Court has no power to consider whether the order for substituted service was made on sufficient grounds or not. It has only to see whether the order was made according to law and whether the trial Court was satisfied that the conditions mentioned in this rule were fulfilled (c).

"For any other reason."—Where by the custom in India a defendant (being a Hindu woman of rank) could not be personally served with summons, the Judicial Committee allowed service to be substituted on her *Dewan* [chief servant] (r).

Shall be as effectual—These words do not necessarily mean that the summons has been duly served, but only that such service is as effectual as personal service for the purpose of going on with the proceedings in Court, and in spite of such service it is open to the defendant to shew that he had no knowledge of the claim (y). But substituted service may be due service particularly if the defendant has been evading service (z).

21. [S. 85, 1st para.] A summons may be sent by the Court by which it is issued, whether with- in or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service by registered post.—This rule is to be read with s-c. 27 of the General Clauses Act 10 of 1897 by which it is provided that when any document is required by an Act passed after 11th March 1897 to be served by post, and the expression used is "send" [which is the expression used in the present rule], then, 'unless a different intention appears, [and no such intention appears in the present rule] the service shall be deemed to be effected by properly addressing, pre paying and posting by registered post, a letter containing the document, and, unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.'

(c) *Darnaswami v. Balasubramaniam* (1927) 53 Mad L J 477 192 I C 243 (27) A M 507
(r) *Clark v. Mullick* (1839) 2 M I A 263 269
(y) *Gyanammal v. Abdul Hussain* (1932) 55 Mad

223 134 I C 1202 (31) A M 813 *Itam Jiharose v. Ganga Singh* (1932) 54 All 154, (31) A A 727
(z) *Mubandir v. Lakshmanan* (1932) 55 Mad 240, 135 I C 344, (31) A M 812

Reading the present rule with the said sec 27, the High Court of Bombay held in a case in which it appeared that the postal packet enclosing the summons was properly addressed to the defendant, and was registered duly stamped and posted, but the packet was returned endorsed "refused," that the Court was entitled to draw the inference indicated in the said sec 27 and to hold that there was sufficient service (a) In the earlier cases which arose under the corresponding section of the Code of 1882, where a postal packet was returned endorsed "refused," it was held that the service was not sufficient and that further evidence was necessary before the Court could act upon such endorsement (b) As to these cases, however, it is to be noted that they were all decided without any reference to sec 27 of the General Clauses Act as all except one were decided before that Act came into force, and the one decided after that Act came into force was not governed by the provisions of sec 27, as that section did not apply to the Code of 1882 which was an enactment passed before 11th March 1897, the date on which the General Clauses Act came into force

The High Court of Bombay has recently held that the Court must allow the defendant a retrial if, after a decree has been passed against him on evidence that the summons was served by registered post and returned refused he appears and denies receipt of the packet Macleod C J, said Service by registered post is at any time a poor substitute for personal service which is directed by the Court It is allowed to litigants as a matter of convenience (c)

22. [S 86] Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served

Service within Presidency towns and Rangoon of summons issued by Courts outside

Additions made to the rule by the High Court of Bombay—See App IV

23. [S 85, 2nd para] The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto

Duty of Court to which summons is sent

Form of Return—See Schedule I Appendix B Form No 10 and note the alterations made in the said Form by the High Court of Bombay in exercise of the powers conferred by sec 122 above

Sufficiency of service—Where a summons has been transmitted by one Court to another for service by the latter, and the return made by the Court serving the summons states that the service has been duly effected the presumption will be that the service was sufficient unless the return itself shows the insufficiency (d) Similarly when the return made by the Court serving the summons states that the summons has not

(a) *Baluram v Pannabai* (1911) 35 D.M. 213 11 I C 351 See also *Poopechan v Haji Hissari* (1914) 16 Bom L R 204 24 I C 437
(b) *Jogenfro Clunder v Dwarka Nath* (1888) 15 Cal 681 *Jagannath v Sassoon* (1893) 18 Bom 606, *Alga Gulam Hossain v Sassoon*

(c)

(d)

been duly served, and the summons is returned with that declaration to the Court from which it was issued, the presumption is that the service was not sufficient, and the Court from which the summons was issued should act upon that presumption unless there is good and strong evidence which comes or is brought to its notice showing that the summons was duly served (e). According to the Calcutta High Court, however, the Court issuing the summons must not proceed upon any presumption either way, but must determine for itself whether the service was sufficient or not, the reason given being that the present rule does not require the Court to which the summons is sent for service to make any return touching the *sufficiency* of service (f). This view has been dissented from by the High Court of Allahabad on grounds of expediency, and further, on the ground that it ignores the last sentence of rule 19 above, which applies not only to the Court issuing the summons, but also to the Court to which it is sent for service (g).

- 24. [Ss. 87, 88.]** Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison

As to the duty of the officer to whom the summons is sent for service, see r. 20 below

- 25. [S. 89.]** Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no agent

Service by post—In the case of a defendant living abroad substituted service is inappropriate. When a copy of a notice was ordered to be affixed to the Court house in the 24 Pargannas by way of giving information to a party in South Africa, Rankin, C.J., said that substituted service should not be used in a way which is unbusinesslike and ridiculous (h).

See notes to r. 21 above

Service in foreign territory through Political Agent or Court

- 26. [S. 90.]** Where—

- (a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(e) *Dwarkanath Prasad v. Brij Mohan Lal* (1911) 33

All 619 11 I C 33

(f) *Romanath v. Guggoda* (1892) 22 Cal 849

(g) *Dwarkanath Prasad v. Brij Mohan Lal* (1911) 33

All 619 11 I C 39

(h) *Sulaiman v. Jatin Iranath* (1930) 57 Cal 598, (29) A C 553

- (b) the Governor-General in Council has, by notification in the *Gazette of India*, declared in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be a valid service,

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant, and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other Officer of the Court that the summons has been served on the defendant in manner hereinbefore directed such endorsement shall be deemed to be evidence of service

The words italicized in cl (b) of this rule are new. They were inserted in this rule by the Repealing and Amending Act XVII of 1914

27. [S 422] Where the defendant is a public officer (not belonging to His Majesty's military, naval or air forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority, the Court

Service on civil public officer or on servant of railway company or local authority

may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant

Amendments—The words 'or air' were added in the rule after the word 'naval' by the Repealing and Amending Act 1927

Officer belonging to the Indian Marine Service—An officer or mechanic in the employ of the Indian Marine Service is subject to exactly the same rules as every other person under the Code that is to say service upon him is to be effected in the manner prescribed by rr 15 to 17 above (1)

28. [S 468] Where the defendant is a soldier or airman, the Court shall send the summons for service to his commanding officer together

Service on soldiers

with a copy to be retained by the defendant

Amendments—The words 'or airman' were inserted in the rule after the word 'soldier' by the Repealing and Amending Act, 1927

29. [Cf. Ss 87, 88, 468.] (1) Where a summons is delivered or sent to any person for service under rule 21, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

30. [Ss 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration

(2) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons and, subject to the provisions of sub rule (3), shall be treated in all respects as a summons

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit, and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent

ORDER VI.

Pleadings generally

1. [New Cf. Jud. Act 1873, S 100] O. 6
Pleading "Pleading" shall mean plaint or written statement

Introduction of English rules of pleadings—The object of this Order is to introduce into British India the leading rules of pleadings followed in England. The whole of this Order, excepting rr 14 and 15 is new. The rules comprised in this Order, except rr 14 and 15 have been taken most of them from Order 19 and the rest from Order 28 of the English Rules made under the Judicature Acts. In one respect,

however, the rigour of the English Rules has been relaxed by providing that the Court may, notwithstanding the absence of any specific denial, require any fact to be proved by the party who alleges it (see O 8, r 5)

Function of pleadings — The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, *the whole meaning of the system is to narrow the parties to definite issues*, and thereby to diminish expense and delay especially as regards the amount of testimony required on either side at the hearing (j). To attain this end the plaintiff should state in his plaint all the facts which constitute his cause of action. It is not sufficient to allege what may be a ground of action if something else be added which is not stated in the plaint. 'Upon all sound principles of pleading it is necessary to allege what must, and not what may, be a cause of action (k). The defendant should also state in his written statement the material facts on which he relies for his defence. When the result of the pleading on both sides is that a material fact is affirmed on the one side and denied on the other, the question thus raised between the parties is called an issue of fact. When one party answers his opponent's pleading by stating an objection in point of law, the legal question thus raised between the parties is called an issue of law. See O 14 r 1

A plaintiff's pleading is his plaint (O 7). A defendant's pleading is his written statement (O 8). In some cases a plaintiff who has filed his plaint may, with the leave of the Court, file a *written statement*, or the Court may require him to file a *written statement*. In such cases the written statement forms part of the plaintiff's pleadings. Again there are cases in which a defendant who has filed his written statement may, with the leave of the Court, file an *additional written statement* or the Court may require him to do so. In such cases the *additional written statement* forms part of the defendant's pleadings. The plaintiff's written statement and the defendant's additional written statement are called *subsequent pleadings*. See O 8, r 9

2. [New R. S. C. O 19, r 4] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or

Pleading to state material facts and not evidence

defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures

General rules of pleading — O 6 deals with Pleadings in general. O 7 deals with Plaints and O 8 with Written Statements. The following is a summary of the rules comprised in this order —

- 1 State your *whole* case in your pleading in other words set forth in your pleading *all* material facts on which you rely for your claim or defence (r 2)
- 2 State facts and *not law* (r 2). If any matter of law is set out in your opponent's pleading do not plead to it (l)
- 3 State the material facts on which you rely, and *not the evidence* by which they are to be proved (rr 2 10 11, 12)

(j) *Per Jessel M R in Thorp v Holborn* (1876) 3 Ch D 637 639

(k) *West London & Central Golf Mining Co v Rex*

[1903] 2 K B 391 399

(l) *Per Lordson v Major of Oxford* (1793) 2 H B 18.

- 4 State *material facts* only, omit immaterial and unnecessary facts. Do not anticipate your opponent's pleading and plead to any matter which is not alleged against you (r. 2)
- 5 State the facts of your case *concisely*, but with precision (r. 2)
- 6 It is not necessary to allege the performance of any condition precedent, an averment of performance is now implied in every pleading (r. 6)
- 7 It is not necessary to set out the whole or any part of a document, unless the precise words thereof are necessary. It is sufficient to state the effect of the document as briefly as possible (r. 9)
- 8 It is not necessary to allege any matter of fact which the law presumes in your favour, or as to which the burden of proof lies upon your opponent (r. 13)

Fundamental rule—Rule 2 of this Order is the fundamental rule of pleadings. When analysed, it will be found to require four things—

- I Every pleading must state *facts* and not law
- II It must state *material facts*, and material facts only
- III It must state only the facts on which the party pleading relies for his claim or defence, and *not the evidence* by which they are to be proved
- IV It must state such facts *in a concise form*

The main object, or one of the main objects, of this rule is that the one party may know what are the facts on which the other party relies in order that he may be prepared to meet the case (m)

I Every pleading must state facts and not law—A pleading must not set forth a public statute, for the Court is bound to take judicial notice of it (n). Nor should parties plead conclusions of law or of mixed law and fact—it is for the Court to declare the law arising upon the facts before it. The parties should only state the *facts* on which they rely for their claim or defence. If Hindu sons are sued for a debt incurred by their deceased father and late manager of the joint family it is not necessary to formulate in the plaint the Hindu law as to the pious obligation of Hindu sons to pay a father's debt that is not of an immoral character (nl).

It is bad pleading to allege merely that a *right* or a *duty* exists, the *facts* must be set out which give rise to the right or create the duty. Thus in a suit for damages for negligence it is not enough for the plaintiff to state that 'the defendant has been guilty of negligence,' without showing in what respect he was negligent and how he became bound to use care to prevent injury to others. Negligence means a breach of duty to take due care and caution. The plaint, therefore, ought to state facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged (o). Similarly, it is not sufficient for the plaintiff to aver that the defendant did the act complained of wrongfully, unlawfully and improperly or 'without any justification therefore or right so to do. He must state the facts upon which he proposes to rely as showing that the act was done wrongfully or unlawfully. 'Those epithets, under the present system of pleading, are useless and redundant. They add nothing whatever to the plaintiff's case. They are merely now epithets of abuse. They were formerly in declarations essential because under that form of pleading *legal rights* were stated for facts, but *facts* alone are stated now (p). Upon like principles, it is not sufficient for the plaintiff to say, 'Under and by virtue of a certain deed I am entitled, etc. He must state the facts which go to show his title (q). In like manner,

him, would constitute it a valid *donatio mortis causa* : it is not sufficient to say that the deceased "two days before his death made a good and valid *donatio mortis causa* to the plaintiff" of the property (r) Where a plaintiff claims by inheritance, it is not sufficient to say, "I am the heir at law." He must state the particulars showing the links of relationship on which he relies as constituting him such heir (s) In a pre-emption suit it is not enough to plead a right of pre-emption, but the pleading must show the basis of the right (s1)

The same principles apply to a defendant's pleading A defendant may not in his written statement say merely, "I am not liable" He must allege facts which show that he is not liable Thus a defendant, who claims privilege in a suit for defamation, must not plead merely that "he published the words on a privileged occasion" He must state the facts which give rise to the privilege (t)

II. Every pleading must state material facts and material facts only.—To begin with, a party should set out in his pleading *all* material facts on which he relies for his claim or defence "What particulars are to be stated must depend on the facts of each case But... it is absolutely essential that the pleading, not to be embarrassing to the defendant, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial" (u) If a party omits to plead a material fact, he will not be allowed to give evidence of that fact at the trial, unless the Court gives him leave to amend his pleadings under r 17 below "If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings" (v) But only facts that are material should be stated, for "the practice of Courts is to consider and deal with the legal results of the pleaded facts although the particular legal result is not stated in the pleading (w)

Matters affecting damages—The present rule provides that every pleading should contain, and contain only, *material facts on which the party pleading relies for his claim or defence*, as the case may be That is to say, a plaint should contain only those material facts on which the plaintiff relies for his claim and a written statement should contain only those material facts on which the defendant relies for his defence Does this mean that the plaint should be confined to those facts only which constitute the plaintiff's *cause of action*, and that the written statement should be confined to those facts only which constitute the defendant's defence? It has been held as regards a *plaintiff's claim*, that the words "material facts on which the party pleading relies for his claim," are not confined to those facts which are essential to the plaintiff's cause of action but include any fact which the plaintiff is entitled to prove at the hearing Thus facts which merely tend to increase the amount of damages are not essential to the cause of action, but they certainly are facts which the plaintiff is entitled to prove at the hearing as matters in aggravation of damages Such facts are therefore "material" facts within the meaning of this rule and a plaintiff has to state them in his plaint (x) As observed by Brett, L J, in *Philipp's v. Philipp's* (y), the words of the rule are not "the facts which will be necessary to support the cause of action": they are, "the material facts on which the party relies for his claim" In *Millington v. Loring* (z), which was a suit for damages for breach of a contract to marry, the plaintiff, after alleging the promise to marry in the first paragraph and the breach thereof in the second, went on to allege in the third paragraph that "the

know her, where *v* the defendant infected her with a venereal disease.' Analysing the above pleadings, it may be stated that the first and second paragraphs stated facts that were *essential to the cause of action*, viz., facts relating to the *making* of the contract and facts relating to the *breach* of the contract, being facts which constitute the cause of action in a suit for damages for the breach of a contract. But the facts stated in the third paragraph were not *essential to the cause of action*. Nevertheless they were *material facts* within the meaning of the rule, for the plaintiff *was* entitled to prove them as *matters in aggravation of damages*, and it was held that they were properly set forth in the pleadings. Turning now to the *defence* in a suit for damages, the rule laid down in *Wood v Durham* (a) is, that a defendant is not in general entitled to plead in his defence *matters in mitigation of damages*. The ground of the decision in that case is that such matters do not constitute any *defence* to an action, and a defendant can under the rule allege only those material facts on which he relies for his *defence*. As to *Millington v. Loring*, it was said that it was a case where 'there was a good cause of action of a double character stated. In that case there were damages claimed by reason of an alleged breach of promise of marriage, but there was far more, because *part of the cause of action* no doubt was that by reason of that the plaintiff had been ill through the seduction by the defendant, who had ruined her character, and has infected her with a bad disease.' One may be permitted to doubt whether illness through seduction and infection with disease formed *part of the cause of action*. Moreover, the decision in *Millington v Loring* has been followed in a case later than *Wood v Durham*, where it could not be said that there was a cause of action of a double character (b). However this may be, it is to be remarked that the decision in *Wood v Durham* turned not only on the construction of the corresponding English rule, but on O 21, r 4, which provides in express terms that 'no denial or defence shall be necessary as to damages claimed or their amount but they shall be deemed to be put in issue in all cases unless expressly admitted. O 21, r 4 of the English rules has not been reproduced in the Code. Therefore just as the plaintiff may plead any matter in aggravation of damages as to which he could give evidence at the trial so the defendant may plead any matter in mitigation of damages as to which he could give evidence at the trial. See notes to O 8, r 3, Except damages.

Facts not yet material to a case—The pleadings should only contain such facts as are material at the *present* stage of the suit. It is not proper to anticipate the answer of the adversary. To do so is 'like leaping before one comes to the stile' (c). 'It is no part of the statement of claim ['*plaint*' in our pleadings] to anticipate the defence, and to state what the plaintiff would have to say in answer to it. That would be a return to the old inconvenient system of pleading in Chancery which ought certainly not to be encouraged, when the plaintiff used to allege in his bill imaginary defences of the defendant and make charges in reply to them' (d). Thus it is unnecessary in a suit upon a bond to allege that the defendant was of full age when he executed the bond. For if he were a minor when he executed the bond, it is for him to prove it: it need not be denied by anticipation (e). Similarly a defendant should not plead to any matter which is not alleged against him. Thus if a defendant is sued for slander, the only way to meet the plaintiff's claim is to plead (1) that the words in question were not spoken and published, or (2) that they were spoken and published and are true, or (3) that they were spoken and published and are privileged. If, instead of so doing, he pleads that he did not say the words alleged in the *plaint*, but that he said something else and that the something else which he said was true and spoken on a privileged occasion, the defence will be struck out under r 16 below as one embarrassing the fair trial of the suit (f).

(a) (1888) 21 QBD 501. *Wood v Cox* (1888)

4 Times Rep. 550.

(b) *Whitney v Morgan* (1890) 24 QBD 530.

(c) *Sir Ralph Cory's case* (1673) 1 Vent. 217.

(d) *Hall v Eve* (1876) 4 Ch D 341 345 per

James LJ.

(e) *Walsingham's case* (1816) 2 Flowd. 561.

Sir Ralph Cory's case (1673) 1 Vent. 217.

(f) *Rassam v Budge* (1893) 1 QB 571.

III Every pleading must state facts, and not the evidence by which they are to be proved—Every pleading must contain a statement of the *material facts on which the party pleading relies but not the evidence* by which those facts are to be proved. "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation" (g) No doubt, evidence also consists of facts, but there is a convenient nomenclature to distinguish the two. The material facts on which the party pleading relies for his claim or defence are called *facta probanda*. The evidence or the facts by means of which they are to be proved are called *facta probantia*. Every pleading should contain only *facta probanda*, and not *facta probantia*. The distinction is taken in the very rule itself, between the facts on which the party relies and the evidence to prove those facts. Erle, C.J., expressed it in this way. He said there were facts that might be called the *allegata probanda*, the facts which ought to be proved, and they were different from the evidence which was adduced to prove those facts. And it was upon that expression of opinion of Erle, C.J., that rule 4 [of the English rules, corresponding to the present rule] was drawn. The facts which ought to be stated are the material facts on which the party pleading relies (A). Thus where a suit is brought against an insurance Company on a policy on the life of A, and one of the conditions of the policy is that it should be void if the insured committed suicide, the Company should only plead, if the defence is that A committed suicide, that A died by his own hand. It is wrong to state in the written statement that A had been melancholy for weeks, that he bought a pistol and shot himself with it. These facts are merely evidence (*facta probantia*) facts by means of which the *factum probandum*, namely, suicide, is to be proved (i). Similarly, it is wrong to set out in the pleading admissions made by the opponent, for admissions are only evidence (j). Thus where a plaintiff alleged that certain windows of his were ancient, and the defendant stated in his defence that the plaintiff had in a former action admitted that they were not ancient, the allegation was struck out (k). Upon the same principle, "where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out, but where the pedigree is the means of proving the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out" (l).

Rules 10, 11 and 12 of this Order are special applications of the general principle laid down in this rule.

IV Every pleading must state material facts in a concise form—To attain this end, the forms in Appendix A when applicable, and where they are not applicable, forms of the like character, as nearly as may be, should be used for all pleadings (see r 3 below). At the same time the rules given above under the head 'General rules of pleading,' should be borne in mind. But the pleader should not sacrifice precision to conciseness. For, as observed by Kay, J., 'although pleadings must now be concise, they must also be precise' (m). In fact, rule 4 expressly required that in all cases in which particulars may be necessary beyond such as are exemplified in the forms [in Appendix A] particulars (with dates and items if necessary) shall be stated in the pleadings. As to further information on this subject of "certainty" in pleadings, see notes to rr 4 5 below.

- (g) *Williams v Wilcock* (1838) 8 A & E 314 331
per Lord Denman C.J.
(h) *Phillips v Phillips* (1878) 4 Q B D 127,
134 per Brett L.J.
(i) See *Borrodale v Hunter* (1846) 5 Man and
Gr 639.
(j) *Dary v Garrett* (1873) 7 CD 478 485
Williamson v L and A B Pailuay Co
(1879) 12 CD 787, 793, *Speedling v*

- Fitzpatrick* (1889) 39 CD 410 414,
Bristol Melcil Life Association v
Britannia Fire Association (1888) 59 LT
883.
(l) *Lamb v Beaumont* (1884) 49 LT 772.
(f) *Phillips v Phillips* (1878) 4 Q B D 127,
134 per Brett L.J.
(m) *Townsend v Barton* (1882) 30 WR [Eng.]
287.

Alternative and inconsistent allegations.—The rule now under consideration does not prohibit inconsistent pleadings. A person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them, and it appears to me to be far to stretch a construction of this Order to say that he must make plain his position on which part of the case, when perhaps he is very much in the dark. (n) The rules as to joinder of defendants (O 1 r 3) and causes of action (O 2 r 3) as also the rules as to the reliefs that may be claimed by a plaintiff (O 3 r 5) clearly show that either party may allege in his pleadings two or more inconsistent sets of material facts and claim relief thereunder in the alternative. (o) A plaintiff may rely upon several different rights although they may be inconsistent. (p) But then, as to each of those he ought to set out the facts upon which he will have to rely as facts to maintain that right. (q) So too a defendant may by his written statement raise as many distinct and separate and therefore inconsistent defences as he may think proper. (r) But this is subject to the proviso contained in rule 1C below which provides that the Court may strike out any matter in a plaintiff's written statement which may embarrass the fair trial of the suit. (s) and if there is no reasonable excuse for the inconsistent reliefs the Court may put the plaintiff to the election to choose one or other relief. (t) A pleading however is not embarrassing within the meaning of rule 1C *merely because* it sets up inconsistent sets of facts. (u) Hence it cannot be struck out solely on that ground.

To go to the length of saying that no inconsistent pleading can be pleaded appears to me not warranted by the rules and contrary to the established practice of the Courts. (v) It must however be noted that if alternative cases are alleged the facts ought not to be mixed up leaving the [other party] to pick out the facts applicable to each case, but the facts ought to be distinctly stated so as to show on what facts each alternative of the relief sought is founded. (w) [See O 3 r 8.] If the facts are so mixed up that they may *embarrass* the fair trial of the suit the Court may strike out matters which may embarrass the trial. What the rules prohibit are not inconsistent pleadings which set up in one statement embarrassing allegations and inconsistent allegations in defence. See notes to O 7 r 7. After alternative relief

A plea that a policy of fire insurance was not in existence at the time of the fire and that there was no contract of insurance at all coupled with an alternative plea that if there was a contract then by reason of certain conditions precedent to the attaching of the liability the insurance company will not be liable is not contrary to the law of India. (x) A man may plead in the alternative that he is the owner of a piece of land and that if he is not the owner he is entitled to an easement over it. (y)

3 [New R S C O 19, r 5] The forms in Appendix A when applicable and where they are not applicable forms of the like character,

as nearly as may be shall be used for all pleadings

- | | |
|--|--|
| (n) <i>I Morgan Owen v Morgan</i> (188 35 Ch D 4 499 per Lord Justice) | (u) (188) 35 Ch D 40 s per |
| (o) See <i>Jag v Eaon</i> (1877 7 Ch D 1 | (v) (1887) 35 Ch D 49 50 per Lord Justice |
| (p) <i>Ilpp v Ilpp</i> (1878 4 QBD 1 7 | (w) <i>Du v v Ca</i> 18 8 7 h I 4 3 480 p |
| (q) <i>Il Sea</i> 0 0 7 8 | T g r L J B A g B p n |
| (r) <i>I In v G nirood</i> 1878 3 Ex D 51 | 4 n 9 9 4 N 145 148 54 IC |
| 5 <i>Re Morgan Owen v Morgan</i> (1884 | U ea 0 0 8 r 7 |
| 3 C 1 49 4 6 | (x) <i>Hame l d Co En a F e In uran e</i> |
| (y) <i>Il</i> | 0 10 4 Rang 144 83 IC 593 (4) |
| <i>Ira za v Ram Jo an</i> (1931) 53 All 16 | A R 317 |
| 1 8 IC 35 (30 A 4 8 | (y) <i>Tamanbha Krista harya</i> (1933) 35 Bom |
| | L 1 144 144 IC 998 (33) A B 100 |

4. [New. R. S. C., O. 19, r. 6.] In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

Particulars to be given
where necessary

Object of particulars—"Although pleadings must now be concise, they must also be precise" (z) For this purpose all necessary particulars must be embodied in the pleadings. Where a plaint contains sufficient averments and indicates with reasonable precision what the claim sued on is, the suit should not fail by reason of the omission or incorrect description of any particular (a) If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the next rule. The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and so save unnecessary expense (b) *Particulars supplement pleadings* which would otherwise be too vague and general, and ensure a fair trial by giving notice of the case intended to be set up (c) "What particulars are to be stated must depend on the facts of each case" (d) As a general rule it may be stated that 'as much certainty and particularity must be insisted on, as is reasonable, having regard to the circumstances and to the nature of the acts themselves. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry' (e) At the same time the distinction between *particulars* and *evidence* must be steadily kept in view. "The Courts have uniformly endeavoured to prevent the plaintiff, or the defendant, as the case may be from prying into the brief of his opponent for finding out *what is to be the evidence which is to be produced at the trial*. On the other hand, the Courts have uniformly said that the plaintiff or the defendant, is entitled to be told *any and every particular* which will enable him to properly prepare his case for the trial, so that he may not be taken by surprise' (f) That is to say, whilst particulars may be ordered to prevent surprise, and to inform the opposite party of the case he has to meet, particulars are not ordered of the mode in which it may be proposed to prove the case set up in the pleading (g) To use the phraseology of r 2 above, particulars will be ordered of the *material facts* on which the party pleading relies for his claim or defence, but not of the *evidence* by which those facts are to be proved. Thus a defendant is not entitled to know the names of the plaintiff's witnesses for that is to require particulars of the *evidence* by which the plaintiff's case is to be proved. But where the names of witnesses form part of the *material facts* constituting a party's case, he is bound to state them in his pleading and if he does not, an order may be made requiring him to disclose the names (h) 'If the particulars are those that he ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call (i) This may be explained by an illustration. A deals in drugs bearing the registered trade mark 'Herbalin'. B uses the word "Herbaline" on drugs manufactured by him. A sues B for infringement of his trade mark, alleging in the plaint that the use of his

(a) *Townsend v Parton* (1882) 30 W R (Fag) 297 per Kay J

(a) " "

(b) " "

(c) " "

(c) " "

(d) *Phil pps v Philippa* (1878) 4 Q B D 127, 139

(e) *Ratcliffe v Evans* [1892] 2 Q B 521 532

(f) " "

(g) " "

(h) *Zuercher v Labouchere* [1893] 2 Q B 183, 187, 188

trade mark by B is calculated to induce, and had in fact induced "diverse persons" to purchase B's goods as and for A's goods. B applies for particulars of the names and addresses of the 'diverse persons'. B is entitled to the particulars, for the names in this case form part of the material facts which constitute A's case. The whole question in such a case is, has the defendant induced *diverse persons* to buy his goods as and for those of the plaintiff (j)

Fraud and coercion—Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges. It is not enough to use such general words as "fraud," "deceit," or "machinations." General allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice (k). Where a plaintiff seeks relief on the ground of fraud, but no particulars of the fraud are given in the plaint, the Court may allow the plaint to be amended or it may reject the plaint (l) [see O 6, r 17, and O 7, r 11]. A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it (m). Nor is it proper for the appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings (n). The same rules apply when coercion is charged in the plaint (o).

If the particulars of fraud stated in the plaint are not sufficiently specific, the defendant may apply for further particulars under the next rule. Thus where it is alleged by the plaintiffs that the defendants have made false entries in the plaintiffs' books for the purpose of defrauding them, the plaintiffs may be directed to furnish particulars specifying the entries charged to be false, and the nature of their objection to each item (p). See notes to rule 5 below, "Discovery before particulars," ill 1, and notes to O 6, r 17, "Amendment by adding plea of fraud."

"Misrepresentation"—Where it is alleged in the plaint that the defendant represented to the plaintiff etc. it should be stated whether the representation was verbal or in writing (j). It is not enough in an action to restrain infringement of a trade mark to allege that *diverse persons* were induced by the acts of the defendant to purchase his goods as and for those of the plaintiff. The plaintiff should state in the plaint particulars of the names and addresses of those 'diverse persons' (r).

Breach of trust—Where breach of trust is charged, the pleading must specify the acts constituting the alleged breach of trust. It is not enough to say that the defendant had "in various ways misapplied rent and profits of leaseholds, which he had received on behalf of the plaintiff, and had committed breaches of trust" (s).

"Other cases in which particulars may be necessary"—

Misconduct—Where the dismissal of a servant or an agent is justified on the ground of misconduct, the party so justifying must specify the acts of misconduct (t).

Negligence—Where negligence or contributory negligence is charged, full details must be given of the acts on which the party pleading relies as constituting negligence (u).

(j) *Humphries v The Taylor Drug Co.* (1888)

(k)

(l) *Gunga Narain v Thakram* (1889) 15 Cal 533 15 I A 119. *Bilaji v Gangathar* (1904) 32 Bom 55. *Jyoti Irolaxh v Jhonnuli* (1903) 36 Cal 134 1 I C 784. See also *Krushnaji v Hamnaji* (1894) 18 Bom 144.

(m) *Abdul Hossain v Turner* (1887) 11 Bom

620 14 I A 111

(n) *Mahomed Mira v Saccasi Vajaya* (1900) 23 Mad 227 237

(o) *Purushdam v Pandurang* (1914) 39 Bom 149 23 I C 981

(p) *Newport Slipway &c Co v Paynter* (1896) 34 Ch D 84

(q) *Seligmann v Young* (1884) W N 93

(r) *Humphries v Taylor Drug Co* (1888) 39 Ch D 623

(s) *Anstce In re* (1885) 54 L J Ch 1104 (1885) 33 W R 557 (Eng)

(t) *Saunders v Jones* (1877) 7 C D 435

(u) *Gaultrey v Egerton* (1867) L R 2 Ch P 371, *Martin v Taggart* [1906] 2 I R 120

4

4. [New. R. S. C., O. 19, r. 6.] In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

Particulars to be given
where necessary

Object of particulars—"Although pleadings must now be concise, they must also be precise" (z) For this purpose all necessary particulars must be embodied in the pleadings. Where a plaint contains sufficient averments and indicates with reasonable precision what the claim sued on is, the suit should not fail by reason of the omission or incorrect description of any particular (a) If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the next rule. The object of particulars is to prevent surprise at the trial by informing the opposite party what case he has to meet, to define and narrow the issues to be tried and so save unnecessary expense (b) *Particulars supplement pleadings*, which would otherwise be too vague and general, and ensure a fair trial by giving notice of the case intended to be set up (c) "What particulars are to be stated must depend on the facts of each case (d) As a general rule it may be stated that "as much certainty and particularity must be insisted on as is reasonable, having regard to the circumstances and to the nature of the acts themselves. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry" (e) At the same time the distinction between *particulars* and *evidence* must be steadily kept in view. "The Courts have uniformly endeavoured to prevent the plaintiff, or the defendant, as the case may be from prying into the brief of his opponent for finding out what is to be the evidence which is to be produced at the trial. On the other hand, the Courts have uniformly said that the plaintiff or the defendant, is entitled to be told *any and every particular* which will enable him to properly prepare his case for the trial, so that he may not be taken by surprise" (f) That is to say, whilst particulars may be ordered to prevent surprise, and to inform the opposite party of the case he has to meet, particulars are not ordered of the mode in which it may be proposed to prove the case set up in the pleading (g) To use the phraseology of r 2 above, particulars will be ordered of the *material facts* on which the party pleading relies for his claim or defence, but not of the *evidence* by which those facts are to be proved. Thus a defendant is not entitled to know the names of the plaintiff's witnesses, for that is to require particulars of the *evidence* by which the plaintiff's case is to be proved. But where the names of witnesses form part of the *material facts* constituting a party's case, he is bound to state them in his pleading and if he does not, an order may be made requiring him to disclose the names (h) "If the particulars are those that he ought to give, he cannot refuse to do so merely on the ground that his answer will disclose the names of the witnesses he proposes to call (i) This may be explained by an illustration. A deals in drugs bearing the registered trade mark "Herbalm." B uses the word "*Herboline*" on drugs manufactured by him. A sues B for infringement of his trade mark, alleging in the plaint that the use of his

(z) *Townsend v. Parton* (1887) 30 W. R. (Eng.)

(a)

(b)

(c)

(d) *Philpps v. Philpps* (1878) 4 Q. B. D. 127, 130.

(e) *Ratcliffe v. Evans* [1892] 2 Q. B. 521, 532.

(f)

(g)

(h)

(i) *Zuerenbergh v. Labouchere* [1893] 2 Q. B. 183, 187, 188.

4 *Agreement*—Where an agreement is alleged, the pleading should state the date of the agreement, the names of the parties to it, and whether it was in writing or verbal (c) If it is an implied agreement, it should appear from what facts or circumstances it is to be implied (see r 12 below)

Defamation—In an action for slander, the plaintiff must give particulars of the names of the persons to whom the alleged slander was made (u)

In an act on for libel, where the charge made against the plaintiff in the alleged libel is general in its nature, a defendant who pleads a justification must state in his pleading the facts on which he relies in support of his justification (x) But where in an action of libel the defendant relies on the defence of fair comment, and pleads it in the form now commonly known as the 'rolled up plea'—i.e., "In so far as the said words consist of allegations of fact the said words are in their nature and ordinary meaning true in substance and in fact, and in so far as the said words consist of expression of opinion they are fair comment made in good faith and without malice for the benefit of the public upon the said facts which are a matter of public interest," the Court will not order the defendant to specify which of the words complained of he relies on as being statements of facts, and which as being expression of opinion Nor will the Court order him to give particulars of the facts on which he relies as being the basis of his comments if the plea (as above) limits those facts to the said facts for the plaintiff is thereby given all the information on the subject that he can require (y) A sends a book of which he is the author to B for review B, in reviewing the book prints and publishes, among other statements, the following "I is, by his own confession a most barefaced liar" A sues B for damages for libel B justifies, pleading the truth of the alleged libel B must specify in his pleading the passage in A's work on which he relies in support of the defence of justification (z)

Accounts—Where a plaintiff claims merely to have a general account taken he need not give particulars as to the items But it is otherwise if the plaintiff claims a definite amount instead of an account In the latter case the plaintiff must give particulars as to the items of which it is composed (a)

Where a lump sum is claimed—Where a plaintiff claims a lump sum, the defendant is entitled to particulars of the items composing such sum (b) So also where a plaintiff gives credit for a lump sum, and sues for the balance (c)

Particulars of defence—The general principles upon which the Courts act in requiring particulars to be given of allegations or matters stated in plaints are applicable equally to defences, and the rules relating to the giving of particulars are in general applicable to all pleadings, though from the nature of the case the occasion for particulars arises somewhat less frequently in regard to defences than in regard to claims Thus where a defence consists of traverses or denials of allegations in the claim so that the defendant is not taking upon himself the onus of proving any substantive facts, but

action for par
be proved in
obligation to
unt (d) For

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

(r) " 1900 1911 1912 1913

Blackie v Oxmiston (1844) 28 C D 119,

Knap v Golberg (1887) 36 C D 503,

507

(b) *Ish pps v Phillips* (1878) 4 Q B D 127,

133

(c) *Codlen v Corsten* (1891) 5 C P D 17

(d) *Roberts v Owen* (1890) 6 Times L R 172,

James v Rialor County Council (1890)

6 Times L R 240

instance, if a defendant sets up a defence of payments made, he has to give particulars of the dates and amounts of such payments. So if he justifies a libel, he must state the facts fully in his pleadings or give particulars (e). Similarly where he alleges that he is released from, or exonerated and discharged from, the performance of his contract, he must in his written statement give sufficient information to his opponent as to how and when he was so released or discharged [Bullen and Leake, *Precedents of Pleadings*, 8th ed., 552, 553]. But where the onus of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation. Thus where the plaintiff alleged that the committee of the Stock Exchange in declining to re-elect him as a member of the exchange did not act *bona fide*, fairly, reasonably, or judicially in coming to the conclusion they did and the committee in their defence alleged that they acted *bona fide* and honestly, it was held that the onus of proving that the committee had not acted *bona fide* being on the plaintiff, he was not entitled to particulars of the facts or grounds upon which the committee based their decision (f).

Failure to give particulars after order.—If the order directing a party to give particulars is not obeyed then, if the plaintiff is in default, he should have his action stayed and if the defendant is in default, his defence should be struck out (g).

5. [New. R. S. C., O. 19, r. 7.] A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

Further and better statement of particulars

Application for particulars—The object of particulars is to prevent surprise at the trial and to limit the inquiry at the trial to the matters set out in the particulars. So I think particulars ought to be encouraged. They tend to narrow the issues (h). If a party does not state in his pleading all the particulars required by r 4, the other party may apply under this rule for further and better particulars. If the English practice is to be followed here, the application need not be supported by any affidavit except, perhaps, in a special case (i).

When application should be made—As a general rule a defendant who claims particulars should apply for them with reasonable promptitude (j) and before putting in his defence, but he does not by putting in his defence waive his right to particulars (k). Indeed, in a proper case, the Court may order an application for particulars to stand over till a written statement has been put in to enable the Court to know what the points raised by the defence are, as where the defendant is the plaintiff's agent, and the particulars in question are all in the knowledge of the defendant, but not in the knowledge of the plaintiff (l).

Discovery before particulars—The question often arises, where a defendant has applied for particulars, whether the plaintiff should deliver particulars before obtaining discovery and inspection of the defendant's books or whether discovery should

(e) *Zierenberg v. Labouchere* [1897] 2 Q B 183

(f) *Weinberger v. Inglis* [1918] 1 Ch 133

(g)

(h)

(i)

(j)

(k)

(l)

unless he made an affidavit that he had not seduced the girl—approved in *Sachs v. Spielman* (1887) 37 C D 295, 304. But see *Kelly v. Briggs* 85 LT Journal, 78 and the criticism in *Angait v. Engle* (1884) 61 LT 780.

(j) *Gouraud v. Fitzgerald* (1858) 37 WR (Eng)

(k) *Sachs v. Spielman* (1887) 37 C D 295, 302

(l) *Sachs v. Spielman* (1887) 37 C D 295, 302

be given before particulars are delivered "There is no hard and fast rule as to the class of cases in which particulars should precede discovery, or discovery be ordered before particulars, but the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances" (m) The result of the authorities appears to be that where the party pleading does not know the facts necessary to enable him to give the particulars, but his opponent knows them, the party applying for particulars may be ordered to give discovery before the party pleading is required to deliver particulars, and the application for particulars may be postponed till after discovery. 'It is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars' (n)

1 *Suit by principal against agent for accounts charging agent with fraud*—A employs B to purchase goods, as his agent, at the lowest possible price. A sues B for an account alleging in the plaint that B had purchased goods at prices higher than the current prices and had secretly received commission from the vendors. The charges against B are stated in general terms, no particulars being given. A is unable to state the particulars of the fraud charged until he sees B's books. A is entitled to inspection of B's books before he can be called upon to deliver particulars of the fraud (o)

2 *Suit by a wife's executor against husband*—A, who is the executor of J, sues B, J's husband, to recover from him all the furniture and other chattels purchased by J with her separate income and included in an inventory of all the goods in B's house made sometime before J's death. B applies for particulars of the furniture. He is not entitled to the particulars until he declares by an affidavit which of the articles comprised in the inventory belonged to his wife. "Where the plaintiffs are executors who do not know, and the defendant a person who does know, it is right that discovery should come first" (p)

3 *Suit by a colliery company against a colliery merchant*—A colliery company sues R, a coal merchant, for damages for fraudulently passing off coal not gotten from the company's mines as coal gotten from the company's mines. The plaintiffs in their plaint give one specific instance of fraud, and allege that "on divers other occasions" the defendant had taken orders from "divers other persons" for coal to be supplied from the company's mines, and fraudulently sold coal not purchased from the plaintiff as coal gotten from the company's mines. R applies for particulars of the names and dates. The company then applies for inspection of R's books. The company is entitled to discovery before delivering particulars. Chitty J, said: "Having regard to the circumstance that many of these alleged frauds are within the defendant's means of knowledge and are not within the knowledge of the plaintiffs, I think discovery ought to precede particulars" (q)

The practice followed in the above cases was sought to be applied in a libel case where A sued B for calling him a "charity swindler" and "imposter," and B pleaded justification, and, when called upon to give particulars of the charge, said that he could not unless he was allowed inspection of A's books of account. The Court held that B was not entitled to discovery before he had delivered particulars. Kay, L.J., said: "To apply this practice to the case of a libel would be to sanction the publication of a libel when the libeller knew no facts justifying the libellous statement, because he believed he could by the process of discovery elicit such facts" (r)

(m) *Waynes Merthyr Co v Radford & Co* [1806] 1 Ch 23 35

(n) *Miller v Harper* (1888) 35 C D 110 112

(o) *Ramkrishnaiah v Sanyanand* (1932) 55 Mad 106 137 1 C 636 (32) A M 284, *Uthappa v Ahrens* (1884) 28 Ch D 717 *Leitch v Abbott* (1886) 31 Ch D 374 See also

(p)

(q)

(r)

Further particulars granted—For cases in which further and better particulars have been ordered, see notes to r. 4 above, "Other cases in which particulars may be necessary."

Objections to particulars:—

- 1 *A* applies for particulars from *B* under this rule. It is a valid objection to the application that the particulars applied for by *A* relate to the *manner* in which *B*'s case is to be proved, and not to *material facts* constituting *B*'s case. See notes to r. 4 above, "Object of particulars."
- 2 Particulars will only be ordered of *material facts* constituting a party's case, but not of any *immaterial* allegation (s).
- 3 Particulars will only be ordered of *material facts alleged* by a party in his pleading, but not of those *denied* by him. See notes to r. 4 above, "Particulars of defence."
- 4 *A* applies for particulars from *B* under this rule. It is no objection to the application that *A* must know the true facts of the case better than *B* (t).
- 5 Where a party from whom particulars are sought is unable to give the particulars without laborious inquiry, the practice is to make an order for "the best particulars the party can give" (u). This is usually the case where the party fills a representative character (r).

"Upon such terms as to costs or otherwise."—Thus an order may be made directing that unless particulars are delivered within a certain time, the suit shall be dismissed (w).

Penalty for non compliance—If the defendant fails to comply with an order for further and better particulars he is liable to have his defence struck out under rule 16 although the penalty is not explicitly added to the order (x).

Amending or delivering further particulars—Where a party who has delivered particulars under an order afterwards desires to amend them or to deliver further particulars the proper course for him is to obtain an order giving him leave to do so (y). And leave, will, in general, be granted, where the amendment will cause no injury to the opposite party except such as can be sufficiently compensated for by costs (z).

if made at the *trial* of the suit (c). See s. 153 and r. 17 of this Order.

6. [New. R. S. C., O. 19, r. 14.] Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment

- (s) *Conway v. Thomas* (1889) 13 Q. B. 400
 (t) *Harford v. Monk* (1847) 36 W. R. 125
 (u) *Harford v. Monk* (1878) 39 L. T. 411
 (v) *Clayton v. Thomas* (1889) 13 Q. B. 400
 (w) *Harford v. Monk* (1847) 36 W. R. 125
 (x) *Harford v. Monk* (1847) 36 W. R. 125
 (y) *Harford v. Monk* (1847) 36 W. R. 125
 (z) *Harford v. Monk* (1847) 36 W. R. 125

- (y) *Lancashire & Yorkshire Insurance Co. v. Gilbert* (1895) 2 Q. B. 148 153; *Emdens v. Burns* (1894) 10 Times L. R. 400
 (z) *Clayton v. Thomas* (1889) 13 Q. B. 400
 (a) *Cockbridge v. Metropolitan Coal Association* (1891) 65 I. T. 432
 (b) *Sanders v. Hamilton* (1907) 23 Times L. R. 389
 (c) *Moss v. Malings* (1886) 33 C. D. 603 (patent action)

6 of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Neither party need allege the performance of any condition precedent—*A* agrees to build a house for *B* at certain rates specified in the contract. It is a condition of the agreement that payment to *A* should only be made upon a certificate signed by *B*'s architect as to the amount due. *A* demands payment upon completion of the building but *B* refuses to pay. *A* sues *B* claiming Rs 5 000. Here the obtaining of the architect's certificate is a condition precedent to *A*'s right of action. Under the present rule it is not necessary for *A* expressly to aver in his plaint that he has obtained the architect's certificate. Such averment, the rule says, shall be implied in his pleading. The rule further provides that if *B* intends to contest the fulfilment of the condition precedent, he must distinctly specify the condition precedent in his written statement. He must plead that the architect has not certified the amount claimed in the suit. If *B* does not plead the non-performance of the condition, it will be presumed that the condition has been duly performed. If *B* pleads non-performance, the burden of proving due performance will be on *A*.

A condition precedent, it must be observed *does not strictly speaking form part of the cause of action*. Thus in the case put above *A*'s cause of action consists of the making of the contract and of the breach thereof by *B*. The condition of obtaining the architect's certificate is but an additional formality introduced by the express agreement of the parties, *suspending A's right to sue until the condition has been performed*.

A superior landlord's suit for cesses in Bengal is not maintainable without a notice under s 54 of the Bengal Cess Act, and if there is no allegation of service in the plaint this rule does not relieve the plaintiff of the necessity of proving service of notice (*d*).

The Lahore High Court has held that in a suit for damages for breach of contract, the plaintiff is dispensed, by this rule, from pleading his readiness and willingness to perform his part of the contract (*e*).

History of the Rule—This rule is a reproduction of O 19, r 14, of the English Rules. Before the year 1852, it was a recognized rule of English pleadings that the plaintiff should allege *expressly* the performance of each necessary condition precedent to the rights claimed. Then came the Common Law Procedure Act 1852 which modified the earlier practice by enabling the plaintiff to aver performance of conditions precedent *generally*. For this purpose, the form in use was 'all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said promise performed by the defendant, and to maintain his action for the breach thereof hereinafter alleged'. The present rule does away with the necessity of even a general averment of performance of a condition precedent. A general averment of the performance of all conditions precedent is implied in every pleading and therefore it need not be alleged (*f*). It is for the defendant to object if he intends to dispute the performance of any condition precedent.

"Distinctly"—This rule requires that where a party intends to contest the performance of any condition precedent, he must *distinctly* specify the condition precedent in his pleading. An allegation in general terms that there was "an express condition" is not enough. The pleading must state the terms of the condition, the names of the parties to it, and whether it was in writing or verbal (*g*).

(d) *Bikram v Taffazzal* (1933) 60 Cal 733,
146 I C 671, (33) A C 612
(e) *Firm Kanwar Dhan v Firm Ganspat Rai*
(1926) 7 Lah 442 94 I C 304 (26) A L.
318

(f) *Gates v H A & R J Jacobs* (1920) 1 Ch
567

(g) *Abba v Matheson & Co*, 104 L. T. Journal,
—68

7. [New. R. S. C., O. 19, r. 16.] No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure

Departure in pleading.—This rule provides against what is called “a departure in pleading.” It is a reproduction of O 19, r. 16, of the English Rules. Its importance in this country is not likely to be so great as in England where the practice is for each party in turn to state his own case, and answer that of his opponent before the hearing. Not that the Code does not recognize *subsequent pleadings* (see O 8, r 9), but such pleadings are seldom resorted to in this country even in the Presidency towns. The general principles on which the system of pleading (in England) is founded are as follows—

- 1 The plaintiff by his *statement of claim* alleges the material facts on which he relies in support of his case.
- 2 The defendant, in answer thereto, delivers a *defence*, in which he may take all or any of the following courses—
first, he may deny or refuse to admit the facts stated by the plaintiff,
secondly he may confess or admit them, and avoid their effect by alleging fresh facts which afford an answer thereto,
thirdly he may admit the facts stated by the plaintiff, and may raise a question of law as to their legal effect
 If the defendant adopts the first or third of these courses, a question of fact or of law is at once raised between the parties
- 3 If the defendant adopts the second of the three courses, the plaintiff may *reply*—
first, by denying the fresh facts alleged by the defendant, or
secondly, by admitting them, and alleging other facts which avoid their effect,
 or
thirdly, by raising a question of law as to their effect
- 4 If the plaintiff pleads a reply of the second kind, that is, if he replies by way of confession and avoidance the defendant has the same courses open to him in pleading a *rejoinder* (h). A rejoinder is now seldom pleaded
- 5 It is very seldom that further proceedings are taken, but there may be *sur rejoinders*, *rebutters*, and *surrebutters*

Under the Code, a plaintiff commences his suit by presenting a *plaint*. The defendant then puts in his *written statement* in answer to the plaintiff's claim. There is nothing corresponding to a *Reply* or *Rejoinder* in our system of pleadings. But the plaintiff may, with the leave of the Court, tender a *written statement*, and the defendant may, with like leave, tender an *additional written statement* (O 8, r 9). The Code of 1882 also contained a similar provision (i), but pleadings in this country seldom go beyond the defendant's written statement.

The word “pleading” at the commencement of this rule refers to *subsequent pleading*. Thus in England a plaintiff may not raise in his *Reply* a ground of claim different from that raised in his *Statement of Claim*, nor can he in his *Reply* set up facts inconsistent with those set up in his *Statement of Claim*. A reply is not the proper place in which

(h) Bullen and Leake, *Precedents on Pleadings* 8th ed., pp. 1, 2. | (i) See Code of 1882, s. 112

to raise new claims. A plaintiff who wishes to add new claims can do so only by *amending* the Statement of Claim. Similar remarks apply to a defendant's Rejoinder. As a plaintiff's Reply must be consistent with his Statement of Claim, so a defendant's Rejoinder must be consistent with his Defence. Thus if a plaintiff alleges merely a negligent breach of trust in his Statement of Claim, the Reply must not assert that the breach of trust was *fraudulent* (j). Similarly, if the Defence alleges that the arbitrators *did not make any award*, the Rejoinder must not assert that the award *was not tendered by the proper time*, 'for it is one thing not to make an award, and another thing not to tender it when made' (k). Upon the same principle, a plaintiff who claims *rent* on the basis of a lease cannot claim the same sum in his Reply as *damages* for unlawfully 'holding over', for by his Statement of Claim he treats the defendant as his tenant, and he cannot turn round in his Reply and say 'If the defendant is not liable as a tenant, he is liable as a trespasser' (l).

8. [New. R. S. C., O 19, r. 20] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract—All matters which go to show that the contract sued on is void or unlawful must be *specifically pleaded*. If such matters are not expressly pleaded, no evidence thereof can, as a rule, be given at the trial. Thus if A sues B on a contract, and B in his written statement *merely denies* the contract, such denial will be taken to mean only that there was *in fact* no such contract as alleged: it will not be construed as a denial of the *legality* of the contract. The result is that if A proves the contract sued upon, B will not be allowed to contend at the hearing that the contract was a *wagering contract*, and therefore void. B ought to have specifically pleaded in his written statement that the contract was a *wagering contract* (m). But where at the hearing of a suit the plaintiff's case discloses that the transaction which is the basis of his claim is *illegal*, the Court cannot properly ignore the illegality, *even if the illegality be not pleaded or relied on by the defendant* (n). 'No Court ought to enforce an *illegal contract* or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is *illegal*, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. *If the evidence adduced by the plaintiff proves the illegality* the Court ought not to assist him' (o). Note that an agreement by way of *wager* is void but not *illegal* [see Indian Contract Act, 1872, ss 23 and 30]. See O 8, r 2.

9. [New. R. S. C., O 19, r. 21.] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without

Effect of document to be stated

(j) *Kingston v Corker* (1807) 20 L. R. Ir 364

(k) *Roberts v Mariett* (1871) 2 Wms Saund 188

(l) *Duckworth v Al Cleland* (1878) 2 L. R. Ir 507

(m) *Colborne v Stockdale* (1795) 1 Str 493,
Grizewood v Blane (1851) 11 C. B. 526.

(n)

(o)

setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Effect of document to be stated.—This rule directs what should be the proper method of pleading where a material fact (r. 2) is evidenced by a document (p). The intention expressed by the first part of the rule seems clearly to be that, where a document is material, it shall not be necessary to set it out at length, but only to state the legal effect of it, the object apparently being to prevent long pleadings (q). Thus it is sufficient if a plaintiff in a suit for the recovery of immovable property under a will states in his plaint the *effect* of the will under which he claims. He is not bound to set out the precise words of the will, although a question has arisen as to the true construction of those words (r). At the same time, it is not enough for a plaintiff to say that, under and by virtue of a certain deed, he is entitled to the property claimed by him. He must state the *effect* of the document on which he relies (s).

Precise words.—In an action of libel or slander it is always necessary to set out the exact words alleged to be libellous (t).

10. [New R. S. C., O. 19, r. 22.] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Malice, knowledge, &c

Condition of mind—Rules 10, 11 and 12 are no more than practical applications of the general principle laid down in r. 2 above. Malice, fraudulent intention, knowledge, etc., constitute in some cases the *material facts* of a party's case, they must therefore be alleged in the party's pleading. But the circumstances from which they are to be inferred need not be stated in the pleading.

Malice.—Malice is a necessary part of the cause of action in suits for slander of title and for malicious prosecution. It must therefore be alleged by the plaintiff in his plaint. Similarly, where a defendant in an action of libel claims privilege, alleging that the words complained of were used on a privileged occasion, the plaintiff may allege and prove malice, that is, improper motive.

Fraudulent intention—See notes to r. 4 above, 'Fraud and coercion.'

Knowledge—In a suit by a servant against his master for injury caused by the dangerous condition of a building where he is employed, the plaint must not only affirm the master's knowledge of the danger, but must also negative the servant's knowledge of it (u). To support an action for damages for the bite of a dog, the plaintiff must allege and prove that the dog had to the defendant's knowledge bitten or attempted to bite some person before it bit the plaintiff (v).

11. [New R. S. C., O. 19, r. 23.] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise

Notice

(p) *Darbyshire v Leigh* [1896] 1 Q. B. 554, 557.
 (q) *Darbyshire v Leigh* [1896] 1 Q. B. 554, p. 558.
 (r) [1896] 1 Q. B. 554, *supra*.
 (s) *Jalappa v Philippa* (1878) 4 Q. B. D. 127.
 (t) *Harris v Warr* (1879) 4 C. P. D. 125.

(u) *Griffiths v London and St Katharine Dock & Co* (1844) 13 Q. B. D. 259.
 (v) *Thomas v Morgan* (1835) 4 Dowd. 223, *Osborne v Choquet* [1896] 2 Q. B. 109, *Barker v Snell* (1908) 2 K. B. 820.

13 terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice as part of cause of action—Notice, where it forms part of the cause of action, must be pleaded as a fact, *e.g.*, notice of suit proposed to be brought against the Secretary of State for India [see s. 80], or against a Railway Company (*iv*), or against a Municipality, notice of dishonour of a bill of exchange, notice to a tenant to quit, etc. It is not necessary to set out the notice *verbatim* in the plaint.

12. [*New. R. S. C.*, O. 19, r. 24.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Implied contract, or relation
 Implied contract—A contract may be expressed in one document or it may have to be implied from a series of documents or conversations or from a number of other circumstances. Rule 9 applies in the former case; the present rule, in the latter case (circumstances in the conduct of two parties may establish a binding contract between them, although the agreement, reduced into writing as a draft, has not been formally executed by either (*x*)). As regards contracts to be implied from a series of letters, it is to be noted that where a Court has to find a contract in a correspondence and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration (*y*).

13. [*New. R. S. C.*, O. 19, r. 25.] Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

Presumptions of law.—A plaintiff need not, in his plaint, allege the consideration for which a bill of exchange was given to him, when he sues *only on the bill*, for it will be presumed in his favour that the bill was made for consideration (*z*). It will be for the defendant to plead that there was no consideration for the bill. But if the plaintiff sues *on the consideration* as a substantive ground of claim, he must allege the consideration specifically.

(*w*) Indian Railways Act 1890 ss. 77, 140
 (*x*) *Brogden v. Metropolitan Railway Co.* (1877)
 2 App. Cas. 666
 (*y*) *Hussey v. Horne Payne* (1879) 4 App. Cas.

311
 (*z*) See Negotiable Instruments Act 26 of 1881,
 s. 118

14. [Ss. 51, 115] Every pleading shall be signed by the party and his pleader (if any) Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Pleading to be signed

Omission to sign plaint.—The signing of plaints is merely a matter of procedure (a) If a plaint is not signed by the plaintiff or by a person duly authorised by him in that behalf and the defect is discovered at any time before judgment the Court

has not been signed The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court (b) see s 99

A company plaintiff may authorize a person to sign—The words 'other good cause' apply to the case of a company and a company may authorize a person to sign a plaint on its behalf (c)

15. [Ss 51 52, 115] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case

Verification of pleadings

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed

Verification of plaint—The verification of a plaint is not evidence on which a suit can be decreed even if the defendant does not appear (1)

Omission to verify pleading—A pleading which is not verified in the manner required by this rule may of the limitation period the meaning of s 99 of the was rejected for defectiv correct on (r1) See notes to r 14 above

- | | |
|---|--|
| <p>(a) " " " " " "</p> <p>(b) " " " " " "</p> <p>(c) " " " " " "</p> <p>(f) <i>Ross & Co v Scriven</i> (1916) 43 Cal 1001 1010-1012 34 I C 235</p> <p>(e) <i>Shub Doo v Ram Prasad</i> (1924) 46 All 637 640 87 I C 938 (25) A A 79 Jajit</p> | <p><i>Ram v Katarar</i> (1896) 18 All 398, <i>Fateh Chand v Mansab Rai</i> (1898) 20 All 442</p> <p><i>Ramgopal v Dharendra</i> (1907) 54 Cal 380 101 I C 53 (27) A C 36 Hals</p> <p><i>Mahomed v Ishak Ali</i> (1932) 54 All 57 134 I C 96 (31) A A 507 I B Eph</p> <p><i>rayam v Turner Morrison & Co</i> (1930) 3- 14 m I R 1178 123 I C 609 (30) A B 511</p> <p><i>Edventional Book Depot v Rabindranath</i> (1933) 55 All 664 (33) A A 474</p> <p>(el) <i>Pura Lal v Bhagwan Day</i> (1933) 55 All 216 145 I C 436 (33) A A 295</p> |
|---|--|

6

16. [*New. R. S. C., O. 19, r. 27.*] The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit

Striking out pleadings

Amending your opponent's pleading—This rule deals with amendments which a party desires to be made in *his opponent's pleading*. The next rule deals with amendments which a party desires to make in *his own pleading*.

Striking out and amending pleadings—"It seems to me," said Bower, L.J., in *Knowles v. Roberts* (f) "that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right." It is a recognized principle that 'a defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it, and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery' (g).

"Unnecessary."—This rule has been reproduced verbatim from O. 19, r. 27, of the English Rules. According to the English practice, the mere fact that a pleading contains matters which are unnecessary is no ground for striking out those matters (h). It only affects the costs of the pleading (i). An allegation in a pleading will not be struck out merely because it is unnecessary, unless it is scandalous or tends to prejudice, embarrass or delay the fair trial of the action. Thus where in a suit against a Local Board the plaint alleged that a member of the Board had used his influence with the Board for

be struck out under this rule (l). In an action to enforce a compromise of a former action, it is *unnecessary and embarrassing* to set out in the plaint the original disputes between the parties, such allegations will therefore be struck out (l). Where a statement of claim contained immaterial facts and set out at great length documents which could not be material except as evidence by way of admission so that the defendant could not know what case he had to meet, it was held that the whole statement of claim should be struck out as being unnecessarily prolix and embarrassing (m). In an action for slander it is *unnecessary and embarrassing* for the defendant to state in his defence that he did not say the words alleged in the plaint, but that he said something else, and that the something else which he said was true, such statements will therefore be struck out (n).

"Scandalous"—Every Court has an inherent power, quite independently of this rule, to strike out scandalous matter in any record or proceedings. 'The Court has a duty to discharge towards the public and the suitors, in taking care that its records are

(f)
(g)
(h)
(i)
(j)

35
(l)
(m)
(n)

kept free from irrelevant and scandalous matter" (n). "Scandal is calculated to do great and permanent injury to all persons, whom it affects, by making the records of the Court the means of perpetuating libellous and malignant slanders; and the Court, in aid of the public morals, is bound to interfere to suppress such indecencies, which may stain the reputation and wound the feelings of the parties and their relatives and friends" (p). Thus where an application for bail to the High Court contained defamatory allegations against the trying Magistrate which were all irrelevant, the High Court of Bombay refused to allow the application to be filed, and ordered it to be returned (q). Similarly where a memorandum of appeal alleged partiality against the Judge whose decree was in question, the High Court of Madras ordered the objectionable passages to be expunged (r). It must, however, be noted that "*nothing can be scandalous which is relevant*" (s). Thus matters in aggravation of damages are relevant, they will not, therefore, be struck out, though scandalous (t). Similarly, allegations of dishonesty or fraud or conspiracy will not be struck out as scandalous, if they are relevant to the facts in issue. They will be struck out only if they are irrelevant (u). An application to strike out scandalous matter may be made by any person, whether or not he is a party to the suit or personally affected by the scandalous matter (r).

"Tend to prejudice, embarrass or delay the fair trial of the suit."—In considering the question whether a pleading tends "to prejudice, embarrass or delay the fair trial of the suit," a liberal interpretation should be given to the words "trial of the suit". Hence not only a pleading which tends to prejudice or embarrass a party at the actual trial of a suit but a pleading which tends to prejudice or embarrass a party at any stage of the proceedings in the suit, would be within this rule (w).

A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (x). But a pleading is not embarrassing merely because it is prolix (y). Nor is a pleading embarrassing merely because it contains allegations that are inconsistent or stated in the alternative (z). But if there is no reasonable excuse for the inconsistent reliefs the Court may put the plaintiff to his election to choose one or other relief (a). See notes to r 2 above, Alternative and inconsistent allegations". See also notes above, Unnecessary.

The power of the Court under this rule should be exercised with great care and caution. Where a defendant sets up a contemporaneous oral agreement, the Court should not strike out his pleading on the ground that evidence of such agreement is inadmissible under s 92 of the Indian Evidence Act, 1872, and that the pleading is therefore embarrassing. Whether an oral agreement contemporaneous with a written document is admissible in evidence depends to some extent on how the case is presented at the trial (b).

(n) *Christie v Christie* (1873) L. R. 8 Ch 499, 507 per Selborne, L. C.

(p) Story & Equity Pleadings, 10th Ed., sec 270.

(q) *Chce Durant, In re* (1891) 15 Bom 488.

(r) *Zamindar of Tuni v Bennayya* (1890) 22 Mad 155.

(s) *Fisher v Owen* (1878) 8 C D 645, 653, per Cotton, L. J.

(t) *vt " " " "*

(u)

out) *Murray v Epsom Local Board* [1897] 1 Ch 35 (allegations of bad faith struck out).

(r) *Cracknell v Janson* (1879) 11 C D 1, 13, *Bright v Warner* (1878) W N 211, where the application was made by a co-defendant.

(w) *Berdan v Greenwood* (1878) 3 Ex D 251, 256.

(x) *British Lant Association v Foster* (1888) 4 Times Rep 574, *Stokes v Grant* (1878) 4 C P D 25.

(y) *Heap v Harris* (1877) 2 Q B D 630, 633.

(z) *Child v Stenning* (1877) 5 C D 695. *In re Morgan Owen v Morgan* (1887) 35 C D 492.

(a) *Durack v Pam Jatan* (1931) 53 All 16, 128 I C 755 (30) A A 877.

(b) *Anderson v Walter* (1925) 29 C W N 670, 88 I C 435, (25) A C 860.

Practice—The Court may, under this rule, order the whole pleading to be struck out as was done in the undermentioned cases (*f*) where the statement of claim consisted partly of unintelligible matter, partly of irrelevant matter, and the rest of scandalous matter, or it may order the objectionable matter only to be struck out, which appears to be the usual practice (*g*). Where the defect can be remedied by amendment, the Court may give leave to amend (*h*). Where a pleading is not so specific as it ought to be, the Court may direct the party to amend his pleading or give further particulars (*i*).

Amendment of pleadings

1 S 152 [amendment of clerical and arithmetical mistakes in judgments, decrees
and orders]
2 S 153 [amendment of proceedings in a suit by the Court whether moved
thereto by the parties or not, for the purpose of determining the real
question or issue between the parties]
3 O 1, r 10, sub r (2) [striking out or adding parties]
4 O 6, r 16 [amending your opponent's pleading compulsory amendment]
5 O 6 r 17 [amending your own pleading voluntary amendment]

LEAVE TO AMEND WHEN GIVEN

(h) *Knoles v Roberts* (1888) 38 C D 263, 269
(i) *In re Morgan O'reu v Morgan* (1887) 35 C D
492, 500

costs or other terms to be imposed by the order (j) "I have had much to do in Chambers," said Bramwell, L. J., "with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise" (l). It does not matter that the original omission arose from negligence or carelessness. "However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. *There is no injustice if the other side can be compensated by costs*" (l). "I have found in my experience," said Bowen, L. J., "that there is one panacea which heals every sore in litigation, and that is costs" (m). It is immaterial whether the error sought to be amended was accidental or not. There is no rule limiting amendment to accidental errors. The rule says, "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy." Thus in a suit on a promissory note the plaintiff may amend his plaint and sue on the original consideration (n). There is no kind of error or mistake which, if not fraudulent or intended to overreach the Court ought not to correct if it can be done without injustice to the other party (o). Thus a plaintiff in a suit for debt may be allowed to amend the plaint by setting out an acknowledgment passed to him by the defendant even after the defendant has filed his written statement raising the plea of limitation (p). A delay in making an application for an amendment may be ground for doubting the genuineness of the acknowledgment, but is not a good ground for refusing the application (pl). Even an admission made by mistake may be allowed to be withdrawn, and the pleading amended accordingly (q). Misdescription of immovable property in a plaint may be corrected even in appeal (r). The party applying, however, must not be acting *mala fide* the application to amend must be *bona fide* and made in good faith (s). In a case where the application was made in good faith and supported by unimpeachable documents an amendment was allowed although the plaintiff had attempted to support his original case by a forged document (t). Where in a suit on a breach of contract the plaintiff sues for the difference between the contract price and the price realized on re-sale, but it transpires at the hearing that the property in the goods had not passed to the defendant, the plaintiff may be allowed to amend the plaint and to claim damages for the breach being the difference between the contract price and the market price on the date of the breach. The Calcutta High Court has held that the plaintiff is not entitled to damages unless the plaint is amended (u). The High Court of Bombay has held that the plaintiff is entitled to damages without amendment of the plaint (v). If a plaintiff who by his plaint has claimed pursuant to sec 19 of the Specific Relief Act, 1877 specific performance of a contract and compensation in addition or in substitution, subsequently gives notice

(j) *Tidderley v Harper* (1878) 10 C D 393
Stewart v North Metropolitan Tram

(k) "

(l) *Clarapete & Co v Commercial Union Association* (1883) 32 W R (Eng) 263 *Bel*
don v Neal (1887) 19 Q B D 394 396

(m) *Cropper v Smith* (1884) 6 C D 700 711

(n) *Sarafulla v Mahasikhhai* (1933) 57 Bom
 802, 147 I C 476 (33) A B 476 overruling

Burjori v Hormuzi (1932) 34 Bom L R
 643 135 I C 783 (31) A B 394

Manchershah v Gorind (1930) 32 Bom
 L R 1035 128 I C 43 (31) A B 424

Maung Shwe Myat v Maung Lo Sin

(1975) 3 Rang 183 89 I C 435 (55)
 A R 282 F B

(o) (1884) 28 C D 700 710 711 *supra*

(p) *Gunnaji v Malanji* (1910) 34 Bom 200 3
 I C 159

(pl) *Kushan Lal v Pam Chandra* (1933) 55 All
 206 (33) A A 374

(q) See *Hollis v Burton* [1899] 3 Ch 226 236

(r) *Bhagirthiv Chandra* (1927) 20 All L J 159
 66 I C 208 (22) A A 81

(s) *Tidderley v Harper* (1878) 10 C D 383 397

(t) *Hari Bhajan v Ganpathi Das* (1932) 36
 C W N 112 143 I C 377 (33) A C
 271

(u) *Anguliat and Co v Sassoon & Co* (1912)
 39 Cal 568 131 C 700

(v) *Narasingji Manufacturing Co v Dudan*
sahib (1924) 26 Bom L R 523, 80 I C
 439 (24) A B 530

17 abandoning his claim for compensation, he cannot recover damages for breach of the contract without amending his plaint, since relief under sec 29 of that Act can be decreed only where the plaintiff is ready and willing to perform the contract, and it is therefore still subsisting (y)

The Court should not deliver a judgment inconsistent with the pleadings and issues without insisting on an amendment of the pleadings and if necessary raising fresh issues (z)

LEAVE TO AMEND WHEN REFUSED

It follows from what has been stated above that leave to amend should be refused—

- (1) Where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is—
 - (i) merely technical, or
 - (ii) useless and of no substance
- (2) Where the plaintiff's suit would be wholly displaced by the proposed amendment
- (3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time
- (4) Where the amendment would introduce a totally different, new and inconsistent case and the application is made at a late stage of the proceedings
- (5) Where the application for amendment is not made in good faith

1 Leave to amend will be refused where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties—This happens where the amendment is merely (1) technical or (2) of no substance

Where the amendment is merely technical—If after the evidence for the plaintiff has been taken, the defendant applies for an amendment merely for the purpose of enabling him to raise a purely technical objection to the plaintiff's right to sue, the application should be refused (y) *B* and *C* wrongfully remove *A*'s furniture. *A* sues *B* for damages and recovers judgment against him [*B* and *C* being joint wrong doers the judgment against *B* according to English law, precludes *A* from suing *C* for the same wrong] *A* afterwards sues *C* for damages for the same wrong. *C* does not plead the judgment against *B* in his defence but after the evidence for *A* has been taken applies for leave to amend his written statement by pleading that the judgment against *B* is a bar to the suit against him. The application must be refused (z) for the amendment is not necessary to bring out the real questions between the parties but purposes merely to enable *C* to avail himself of a technical rule of law (a)

Where the amendment is useless and of no substance—As the object of the present rule is to enable the real questions in dispute to be raised on the pleadings leave to amend should be refused to the plaintiff where the proposed amendment would not help him in substantiating his claim (b) and to the defendant where the proposed amendment would not help him in supporting his defence (c). Thus where *A* sues *B*, and finding that the suit against *B* would fail applied to join *C* as a defendant the application was refused on the ground that even if the plaint were amended by adding *C* as a party, the nature of the case precluded *A* from claiming relief even against *C*. In refusing leave to amend

(ye) *Mama v Sarsoon* (1973) 55 I A 360 5°
 Bom 597 111 I C 413 (28) A Pl 208
 (z) *Nagardas v Jelmahomed* (1930) 32 Bom
 L R 454 126 I C 312 (30) A H 249
 (y) *Collette v Goode* (18 8) 7 C D 84 847
 (z) *Fulera v Cohen* (1889) 43 C D 187 in app
 from 41 C D 563

(a) (1889) 43 C D 187 190 *supra*
 (b) *Morrel Brothers and Co Ltd v Westmore*
land (1903) 1 K B 64 77 (1904) A C 11
Sinclair v James (1894) 3 Ch 554 557
Lucrresse v Lord Norreys (1848) 39 C D
 213 235
 (c) *Vachado v Fontes* (1897) 2 Q B 431

Vaughan Williams, L.J., said "One good reason for our not doing so is that looking at the case that he [plaintiff] tells us he would wish to present, that case, if presented by amendment, would in my judgment, also fail, so that there is nothing to be gained by amendment" (d). Similarly, where A sues B for libel, and B pleaded justification, and B afterwards applied to amend his defence by adding a paragraph which virtually contained a plea in mitigation of damages, but was no answer to the action, the application was refused (e). See notes to r 2 above, "Matters affecting damages."

2. Leave to amend will be refused if the plaintiff's suit would be wholly displaced by the proposed amendment.—In *Steward v The North Metropolitan Tramways Co* (f), the plaintiff sued a tramway company for damages caused by their negligence in allowing their tramway to be in a defective condition. By their defence the company denied negligence. It was no part of the defence that the company were not the proper parties to be sued. More than six months after the delivery of the defence the company applied for leave to amend the defence by adding an allegation that by a contract between the company and the local authority of the district, the liability to maintain the roadway had been transferred to the local authority and that the company had ceased to be responsible for the roadway. At the date of the application the plaintiff's remedy against the local authority had become barred by limitation. If the agreement had been pleaded earlier, the plaintiff could have maintained an action against the board. Under these circumstances the application was refused. It is clear from the above facts that if the amendment were allowed, the plaintiff might fail against the company, as they were not the proper defendants, and if he brought an action against the local authority, it would be too late. That would be an injury to the plaintiff such as could not be compensated for by any costs that the Court might order the company to pay to the plaintiff. The test as to whether the amendment should be allowed, said Pollock, B., is, whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.

3. Except in very special cases—Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant a legal right which has accrued to him by lapse of time (g).—The leading English case on the subject is *Weldon v Neal* (h). The facts of that case may be stated in the form of an illustration. A sues B for damages for slander. A afterwards applies for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment. These, although they were not barred by the effect of allowing it, would be barred by the limitation and therefore unjustly to prejudice him. We must act, said Lord Esher, M.R., on the settled rule of practice which is that amendments are not admissible

- (d) *Jones v Hughes* [1905] 1 Ch 180 187
Ginesha Singh v Mundi Forest Co
 (1899) 21 All 346 348
 (e) *Wood v Earl of Durham* (1888) 21 Q B D 501
 (f) (1886) 16 Q B D 178
 (g) *Charan Das v Amir Khan* (1900) 47 I A 235
 49 Cal 110 371 C 606
 (h) (1880) 19 Q B D 394 followed in *Janardhan v Shih Jershad* (1916) 43 Cal 60 351 C 179
Baliaran v Cava (1915) 36 All 30 24 I C 235
Kali Das v Draupadi (1917) 22 C W N 104 43 I C 893
Irbati v Harish Chandra (1919) 24 C W N 749 751 58 I C 665
Guanendra v Jarrish Nath (1911) 26 C W N 73 65 I C 39 (2) A C 255
Viranka

v Atul (1924) 28 C W N 1009 1004

4 Leave to amend will be refused where the amendment would introduce a totally different, new and inconsistent case—In *Ma Shue Mya v Moung Mo Hnaung (m)*, their Lordships of the Privy Council said “All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit.” This proposition follows directly from r 17. The object of r 17 is to allow an amendment for the purpose of determining the real questions in dispute between the parties. That being the purpose for which an amendment is allowed, no amendment should be allowed which would introduce a totally new and different case (n). Thus where a suit is brought against the members of a joint Hindu family for specific performance of an agreement for the sale of family property alleged to have been made by the karta, or for damages, namely, the earnest money with interest, and the karta dies pending the suit and the suit title is amended by adding as his heirs his sons and grandsons who are already parties, it is not permissible by amendment to change the suit into one for money had and received or one to recover a debt (o). The result of the English cases is thus summed up in Bullen and Leake’s *Precedents of Pleadings* (p).

Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent.”

The above proposition may be split into two parts —

- A Leave to amend a *plaint* should not be granted, if the amendment would convert the suit into another of a different and inconsistent character
- B Leave to amend a *written statement* should not be granted if the amendment would convert the defence into another of a different and inconsistent character

We shall deal with these propositions in order

A *Leave to amend a plaint should not be granted if the amendment would convert the suit into another of a different and inconsistent character*—A institutes a suit against B. B files his written statement. At the hearing of the suit, A finds that his case as laid in the plaint must fail, and that he can only succeed on a different case. He then applies for leave to amend the plaint. Should the leave be granted? It has been held under the corresponding English rule that no amendment should be allowed if it would introduce an entirely different case from that which the defendant came to meet (q) or, to put it in another form if it would “change one action into another of a substantially different character (r).” Section 53 of the Code of 1882 which dealt with amendment of plaints, expressly provided that ‘a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character.’ That section has been omitted in this Code, and the present rule (which is a reproduction of O 28, r 1, of the English Rules) now takes its place. But the decisions under the old section on the point now under consideration are still good law, and should be considered

(m) (1921) 48 I A 214 216-217, 48 Cal 832, 835, 63 I C 914 (2) A PC 249
 (n) *Laird v Briggs* (1880) 16 C D 440 446.
Verby v Sharpe (1876) 8 C D 3.
Lendra v Janaki Nath (1918) 45 Cal 305 317 318 47 I C 129.
Padma v Girish Chandra (1919) 46 Cal 168 171 172 45 I C 241.
Mohesh Chandra v Radha Kishore (1904) 12 C W N 28 36-37.
Muang Ba Thein v Ma Tham Myint (1908) 3 Ranz 483 92 I C 253 (26) A R 49.
Madhava v Partap (1908) 10 Lah L J 534, (23) A L 933.

Sudaram v Chimandas (1908) 52 Bom 610 (23) A B 516
 (o) *Ramesaran Mander v Mahabir Sahu* (1927) 54 I A 55 6 Pat 323 100 I C 56 (27) A PC 18
 (p) 6th Ed, p 16
 (q) *Ellis v Manchester Carriage Co* (1876) 2 C P D 13 16.
Hippgrave v Case (1885) 28 C D 356 361.
Verby v Sharpe (1878) 8 C D 39 49.
Clark v Bray (1885) 31 C D 68
 (r) *Raleigh v Goschen* [1898] 1 Ch 73, 81

4 Leave to amend will be refused where the amendment would introduce a totally different, new and inconsistent case.—In *Ma Shwe Mya v Moung Mo Hnaung* (m), their Lordships of the Privy Council said "All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit. This proposition follows directly from r 17. The object of r 17 is to allow an amendment for the purpose of determining the real questions in dispute between the parties. That being the purpose for which an amendment is allowed, no amendment should be allowed which would introduce a totally new and different case (n). Thus where a suit is brought against the members of a joint Hindu family for specific performance of an agreement for the sale of family property alleged to have been made by the karta or for damages, namely the earnest money with interest, and the karta dies pending the suit and the suit title is amended by adding as his heirs his sons and grandsons who are already parties it is not permissible by amendment to change the suit into one for money had and received or one to recover a debt (o). The result of the English cases is thus summed up in Bullen and Leake's Precedents of Pleadings (p).

Leave to amend may be refused where at the trial or hearing the party seeks to alter the whole nature of his case by an unexpected amendment which may require further evidence to be adduced by his opponent.

The above proposition may be split into two parts —

- A Leave to amend a *plaint* should not be granted, if the amendment would convert the suit into another of a different and inconsistent character.
- B Leave to amend a *written statement* should not be granted, if the amendment would convert the defence into another of a different and inconsistent character.

We shall deal with these propositions in order.

A *Leave to amend a plaint should not be granted if the amendment would convert the suit into another of a different and inconsistent character*—A institutes a suit against B. B files his written statement. At the hearing of the suit, A finds that his case as laid in the plaint must fail, and that he can only succeed on a different case. He then applies for leave to amend the plaint. Should the leave be granted? It has been held under the corresponding English rule that no amendment should be allowed if it would introduce an entirely different case from that which the defendant came to meet (q) or, to put it in another form, if it would change one action into another of a substantially different character (r). Section 53 of the Code of 1882 which dealt with amendment of plaints, expressly provided that a plaint shall not be amended so as to convert a suit of one character into a suit of another and inconsistent character. That section has been omitted in this Code, and the present rule (which is a reproduction of O 28, r 1, of the English Rules) now takes its place. But the decisions under the old section on the point now under consideration are still good law.

- (m) (1921) 48 I A 214 216-217 48 Cal 832 835
63 I C 914 (22) A PC 249
- (n) *Laird v Briggs* (1840) 16 C D 440 445
Newby v Sharpe (1876) 8 C D 3
Ependra v Janaki Nath (1918) 45 (a)
30a 317 318 47 I C 129 *Ladma v*
Gurish Chandra (1919) 46 Cal 168 171
172 45 I C 241 *Mohesh Chandra v*
Radhia Kishore (1909) 12 C W 28
36-37 *Moung Ba Thein v Ma Than*
Mynat (1926) 3 Rang 483 9 I C 253
(26) A R 49 *Wadhawa v Parlap* (1928)
10 Lah L J 574 (28) A L 933

- Sitarum v*
640 (28) A
- (o) *Ramsaran Mah*
54 I A 55 6
A PC 18
- (p) 6th Ed p 16
- (q) *Ellis v Manchester*
C P D 13 16 B
28 C D 306 361 A
8 C D 39 49 Clark
C D 68
- (r) *Raleigh v Goschen* [1893] 1

17

It must be observed at the outset that a plaintiff must in general be limited to the case which he puts forward in his plaint. There are, however, cases in which by some mistake or misapprehension the plaintiff has failed to state his case correctly and properly in the plaint. In such cases the Court may allow the plaint to be amended (s), for if the amendment is refused the plaintiff may have to bring another suit, and the object of the rule allowing amendment of plaints is to avoid multiplicity of suits (f). But the Court cannot allow an amendment if the suit is premature (u) and ought not to allow an amendment, if it would convert the suit into another of a different and inconsistent character. "We cannot countenance the notion," said Straight, J., "that a plaintiff, coming into Court with one case, and hopelessly failing to prove it, should be permitted to succeed upon another, and that directly in antagonism with his primary allegation" (t). The law prohibits every amendment that would change the fundamental character of the suit (w). It is not, however, to be supposed that if the fundamental character of the suit is not altered, a plaintiff is entitled as of right to amend the plaint. As stated by the High Court of Bombay, "the power to get a plaint amended is subject to the discretion of the judge, and is not claimable as a right of the suit or in all circumstances" (x).

Rules—The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. This is the rule laid down by their Lordships of the Judicial Committee in the case of *Eshen Chunder Singh v Shama Churn Bhutto* (y), and this rule has been followed in numerous decisions of our Courts (z).

From the general rule stated above, we deduce the following three rules each of which is borne out by the cases cited under it—

Rule I—Where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he may not be allowed to amend his plaint so as to base it on a different legal relation.

Note—Even if the legal relation between the plaintiff and the defendant is unchanged, the plaint will not be allowed to be amended, if it completely alters the cause of action [ill (7)].

Rule II—Where a plaintiff bases his claim on a specific title he may not to amend the plaint so as to base it on a different title. But this is subject and when the title by which the plaintiff claims remains unaltered, the plaint may be allowed to be amended, if it completely alters the cause of action.

Rule III—When one kind of fraud is charged another kind of fraud cannot, in the absence of proof, be substituted for it.

Illustrations of Rule I

1. *A*, alleging that *B* hired cargo boats from him, and that a balance of Rs 3 000 is due to him on that account, sues *B* for the amount. It is proved at the hearing that *B* did not himself hire the boats but that he was merely *A*'s agent to let the boats on hire. *A* then applies to amend his plaint by claiming an account from *B* on the footing

- (s) *Lakshmbai v Hari* (1872) 9 B H C 1
Bhyro v Lekhranee (1871) 16 W R 123,
Hunoomanpersaud v Mussumat Aoon
verree (1856) 6 M I A 393 410
 (t) *Sarat Chand v Mohun Libi* (1894) 25 Cal
 371
 (u) *Jugal Kishore v Chars* (1927) 49 All 599
 1011 C 507 (2) A A 451
 (v) *Hamilton v The Land Mortgage Bank of India*
 (1883) 5 All 456 459

- (w) *Kas Nath v Sadaniv* (1893) 20 Cal 805
Jaithal ngam v Kundarwanis (1931) 60
 Mad L J 713 132 J C 311 (31) A M 1
 (x) *Tapiram v Sada* (1897) 21 Bom 570
 (y) (1860) 11 M I A 7 *Mylapore v Irekay*
 (1887) 14 Cal 801 14 I A 168
 (z) *Mukhoda v Ram Churn* (1882) 8 Cal 871
 875 *Hamilton v Land Mortgage Bank*
 (1883) 5 All 456

that *B* was *A*'s agent. The amendment should not be allowed because in the one case the legal relation between *A* and *B* is that of *letter and hirer* and in the other, that of *Principal and Agent*. *Shibkrisho v Abdool* (1880) 5 Cal 602 O. 6

2 *A* sues *B* for the rent of a house alleged to have been let by *A* to *B*. *B* denies the lease and contends that he is the owner of the house. I will not be allowed to amend the plaint by converting the suit into one for a declaration of ownership. *Bas Shri Majumdar v Maganlal* (1890) 19 Bom 303

3 *A* sues *B* for damages for wrongful occupation of his land and for injury done to his land. After the issues are framed *A* applies to amend the plaint by claiming from *B* rent for the land on the basis of a subsisting tenancy. The amendment should not be allowed because it will convert a claim based on *trespass* into a claim on the basis of a subsisting lease. *Narayan v Hari* (1889) 13 Bom 664, *Jhari Singh v Pirthi Nath* (1917) 2 Pat LJ 69 35 IC 191 (a). See ill. (5) below

4 A suit for possession on the footing of a subsisting lease cannot be converted at a late stage of the proceedings into a suit for ejectment. *Newby v Sharp* (1878) 8 CD 39 49 *Laird v Briggs* (1880) 16 CD 440

5 A suit for rent will not be allowed to be converted at the hearing into a suit for use and occupation. — *A* sues *B* to recover Rs. 1,000 alleged to be rent due under a lease executed by *B*. The Court finds that *B* was in occupation of the premises during the period for which the rent is claimed but that the alleged lease was not executed by *B*. At this stage *A* applies to amend his plaint by alleging that though the lease was not executed by *B* he is entitled to recover the amount for use and occupation of the premises. The amendment will not be allowed. (b)

6 A suit for possession will not be allowed to be converted into a suit for redemption. In the former case the plaintiff sues as owner of the land in the latter as mortgagor. *Laxmishankar v Hanjabhai* (1920) 44 Bom 510 57 IC 426

7 *A* who is *P*'s agent to manage certain property belonging to *I* appoints *S* to act as a sub-agent for *I* and gives him Rs. 1,000 belonging to *P* for the payment of Government revenue and other purposes. *S* fails to account for the money. *P* sues *A* to recover the amount paid by *A* to *S* claiming the same on the ground that *S* was appointed sub-agent without *P*'s authority. It is found at the hearing that *S* was appointed sub-agent with *P*'s authority. *P* will not be allowed to amend the plaint so as to base his claim on the ground that *A* had not exercised ordinary prudence in selecting *S* as a sub-agent for *P*. *Hamilton v Land Mortgage Bank* (1883) 5 All 456. [This is an illustration of the proposition that rule 11 is subject to Rule 1. If the amendment were allowed the legal relation between the plaintiff and the defendant which is that of principal and agent would no doubt remain unchanged but the cause of action would be wholly changed.]

Illustrations of Rule 11

1 *A* alleging that *B* was the adopted son of *C* and that he (*A*) is the heir of *B* sues *D* to recover certain property forming part of the estate of *B*. The Court finds that the adoption of *B* was not valid. *A* then contends for the first time in appeal to the Privy Council that even if the adoption was not valid he is entitled to recover the property as the heir of *C*. This is a totally new case and *A* cannot be permitted in appeal to set up an entirely new case. *Gopee Lal v Chundraoolee* (1872) 19 W P 12 1A Sup Vol 131

(a) See also *Garrishankar v Atmaram* (1894) 18 Bom 611 *Panchandra v Faruque* (1886) 10 Bom 451
Lukher Kanto v Sumerrudd (1841) 13 W R 45 *Lakshmi Bai v Hari* (1871) 9 BHC 1 *Surendra Naam v Lha Lal*

(1895) 5 Cal 5 *Pakhra v Upendra* (1901) 5 Cal 23 *Jeeralhadra v Tyga Na Narayana* (1901) 5 Mad LJ 399 99 IC 9 (*) *AM 180* Dis tinguish *Balmukund v Dalu* (1903) 25 All 499

17

2 *A* obtains a decree against *λ*, and after the death of the latter, attaches certain immovable property in execution of the decree. *B* and *C*, sons of *λ*, sue *A* for a declaration that the property is joint family property, and it is not liable to be attached and sold in execution of the decree against the father, on the ground that the debts contracted by their father were for immoral purposes. It is proved that the debts were not incurred for immoral purposes. Thereupon *B* and *C* apply to amend the plaint by alleging that they had separated from their father before the date of the decree, and that they were not therefore liable to pay the amount of the decree. The amendment cannot be allowed, because the plaintiffs' claim as originally laid was on the footing that there was no partition between them and their father. *Narayanrai v Jatherrahu* (1888) 12 Bom 431

3 *A*, a Hindu, claiming as the heir of his uncle, sues the executors of his uncle's widow for possession of property left by the widow, alleging that the same belonged to the estate of his uncle, and that the widow had no power to dispose of it by will. The Court holds that the widow had power to will away the property. *A* will not be allowed to amend the plaint by adding that even if the widow had the power to dispose of the property by her will he was entitled to the residue as his uncle's heir as the same was left to charitable objects of an unspecified and general character, and could not therefore be legally applied to charity. *Damodar v Purmanandas* (1883) 7 Bom 155. [This is an illustration of Rule 11 being subject to Rule 1. If the amendment were allowed, the title by which the plaintiff claims, namely, as his uncle's heir, would no doubt remain unchanged but the cause of action would be completely altered.]

4 A suit founded on a *Kittima* adoption cannot be allowed to be converted into one based on an *appathitta* adoption. *Maung Ba Than v Ma Than Myins* (1925) 3 Rang 483, 92 I C 253 (25) A R 49

Illustration of Rule III

A, the official assignee of the estate of a deceased insolvent, sues *B* to recover Rs. 1,50,000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from *A*'s predecessor in office. It is proved that *A*'s predecessor was aware of the payment. *A* applies to amend the plaint by alleging that though his predecessor consented to the payment such consent was illegal as being a fraud, though of a different kind, upon the Court. The amendment cannot be allowed because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character. *Abdul Hossain v Turner* (1887) 11 Bom 620, 14 I A 111. See notes to O 6, r 4, "Fraud and coercion, p 531 above

B Leave to amend a written statement should not be granted, if the amendment would convert the defence into another of a different and inconsistent character.—As in the case of a plaint so in the case of a written statement, the Court will not allow an amendment that would involve 'a complete change of front in the defence' (c)

A agrees to grant a lease of a brickfield to *B*. No lease is executed but *B* enters into possession under the agreement. *B* then sues *A* for specific performance of the agreement, alleging that *A*, though frequently asked to do so had neglected and refused to grant the lease. *A* denies that he was asked to grant the lease and expresses his readiness to execute the lease. *A* also counter claims for Rs. 1,500 by way of rent. After the suit is set down for trial, *A* applies for leave to amend his defence and counter claim, and to join therewith a claim for possession of the land. The application must be refused. To allow *A* to amend would be to allow him to present a totally distinct, new and inconsistent case". *Clark v Wray* (1886) 11 C D 68

5. Leave to amend will be refused where the application for amendment is not made in good faith.—Leave to amend will not be given if the party applying is acting *mala fide* (d), as where there is no substantial ground for the case proposed to be set up by the amendment (e). Want of *bona fides* may be inferred from a great delay in making the application (f).

Amendment of plaint by adding new reliefs.—The amendment of a plaint by adding a new prayer may or may not convert the suit into another of a different and inconsistent character. If the amendment converts the suit into another of a different and inconsistent character, it will not be allowed. If the amendment does not convert the suit into another of a different and inconsistent character, it may or may not be allowed at the discretion of the Court. In the exercise of this discretion, the Court will

a simple money decree against the mortgagor. Again if plaintiff sues for redemption of a mortgage believing that an earlier mortgage had merged in it, and defendant denies the latter but admits the earlier mortgage, the plaintiff may be allowed to amend his plaint and sue in the alternative for redemption of the earlier mortgage (i). In such a case, the character of the suit is not fundamentally altered, nor could the defendant be possibly taken by surprise (j). Similarly, a purchaser suing for *specific performance* may be allowed to amend his plaint by asking in the alternative for a *refund* of the earnest money (k). Where a plaintiff has framed his suit *bona fide*, believing that consequential relief is not open to him and that he is entitled to a declaration, the plaint may be allowed to be amended even in appeal by adding a prayer for possession (l). But leave will be refused if the frame of the plaint was a device to avoid payment of Court Fee (m). See also note above, "Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant, etc."

Amendment by adding a plea of fraud.—It is "the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of Where the plaintiff sued on a mortgage, and the defendant in his written statement alleged that he was a minor at the date of the mortgage, leave was given to the plaintiff to amend the plaint by raising an alternative case that the loan was obtained by the defendant by the fraudulent representation that he had attained majority at the time (p). See Notes to O 6, r 4, "Fraud and coercion."

Suit for specific performance and compensation in addition or in substitution.—The Court, even at the trial, has power to allow the necessary amendment, but that power must be exercised most carefully and jealously, and with due regard to the position of both the plaintiff and the defendant. An amendment should not be allowed when the suit has been pending as one for specific performance for a long period, during

(d) *Tildesley v Harper* (1878) 10 C D 393
396-397

(e) *Lawrence v Norreys* (1888) 39 C D 213, 235

(f) *Arusha v Pachaiyappa* (1924) 47 Mad LJ 540 82 IC 492 (24) A M 833

(g) *Narayana v Shankunni* (1892) 15 Mad 255
Ramanadan v Tulikutti (1898) 21 Mad 244

(h) *Kashinath v Sadashiv* (1893) 20 Cal 805
Sukhdeo v Lachman (1902) 24 All 456

(i) *Brij Kishore v Beni Pershad* (1929) 5 Luck. 424, 121 IC 273 (29) A O 493

(j) *Sukhdeo v Lachman* (1902) 24 All 456
P. M. Chettyar v Ma Shwe Pon (1927)
5 Rang 115 101 IC 628 (27) A E 154

(k)

(l)

(m)

(n)

(o)

(p)

2 *A* obtains a decree against *X* and after the death of the latter attaches certain immovable property in execution of the decree. *B* and *C* sons of *X*, sue *A* for a declaration that the property is joint family property, and it is not liable to be attached and sold in execution of the decree against the father on the ground that the debts contracted by their father were for immoral purposes. It is proved that the debts were not incurred for immoral purposes. Thereupon *B* and *C* apply to amend the plaint by alleging that they had separated from their father before the date of the decree and that they were not therefore liable to pay the amount of the decree. The amendment cannot be allowed because the plaintiffs' claim as originally laid was on the footing that there was no partition between them and their father. *Varayanrao v Jathariahu* (1888) 12 Bom 431

3 *A* a Hindu claiming as the heir of his uncle sues the executors of his uncle's widow for possession of property left by the widow, alleging that the same belonged to the estate of his uncle and that the widow had no power to dispose of it by will. The Court holds that the widow had power to will away the property. *A* will not be allowed to amend the plaint by adding that even if the widow had the power to dispose of the property by her will he was entitled to the residue as his uncle's heir as the same was left to charitable objects of an unspecified and general character and could not therefore be legally applied to charity. *Damodar v Purmanandas* (1883) 7 Bom 155 [This is an illustration of Rule II being subject to Rule I. If the amendment were allowed the title by which the plaintiff claims namely as his uncle's heir would no doubt remain unchanged but the cause of action would be completely altered.]

4 A suit founded on a *Kuttima* adoption cannot be allowed to be converted into one based on an *appathutta* adoption. *Maung Ba Than v Ma Than Myin* (1925) 3 Rang 483 92 IC 253 (25) AR 49

Illustration of Rule III

A the official assignee of the estate of a deceased insolvent sues *B* to recover Rs 150,000 alleged in the plaint to be unlawfully withheld from the estate in consequence of a payment fraudulently concealed from *A*'s predecessor in office. It is proved that *A*'s predecessor was aware of the payment. *A* applies to amend the plaint by alleging that though his predecessor consented to the payment such consent was illegal as being a fraud though of a different kind upon the Court. The amendment cannot be allowed because to allege fraud of one kind and to substitute fraud of another kind is to convert the suit into one of an inconsistent character. *Abdul Husein v Turner* (1887) 11 Bom 620 14 IA 111. See notes to O 6 r 4. Fraud and coercion p 531 above

B Leave to amend a written statement should not be granted if the amendment would convert the defence into another of a different and inconsistent character.—As in the case of a plaint so in the case of a written statement the Court will not allow an amendment that would involve a complete change of front in the defence. (c)

A agrees to grant a lease of a brickfield to *B*. No lease is executed but *B* enters into possession under the agreement. *B* then sues *A* for specific performance of the agreement alleging that *A* though frequently asked to do so had neglected and refused to grant the lease. *A* denies that he was asked to grant the lease and expresses his readiness to execute the lease. *A* also counter claims for Rs 1500 by way of rent. After the suit is set down for trial *A* applies for leave to amend his defence and counter claim and to join therewith a claim for possession of the land. The application must be refused. To allow *A* to amend would be to allow him to present a totally distinct, new and inconsistent case. *Clark v Wra* (1886) 11 C D 68

5. Leave to amend will be refused where the application for amendment is not made in good faith—Leave to amend will not be given if the party applying is acting *mala fide* (d), or where there is no substantial ground for the case proposed to be set up by the amendment (e) Want of *bona fides* may be inferred from a great delay in making the application (f)

Amendment of plaint by adding new reliefs—The amendment of a plaint by adding a new prayer may or may not convert the suit into another of a different and inconsistent character. If the amendment converts the suit into another of a different and inconsistent character, it will not be allowed. If the amendment does not convert the suit into another of a different and inconsistent character, it may or may not be allowed at the discretion of the Court. In the exercise of this discretion, the Court will not allow an amendment, if the application for amendment is made at such a late stage of the proceedings that, if allowed, it would necessitate practically trying the case *de novo* (g), otherwise the amendment may be allowed (h). Thus a mortgagee suing for *sale* of the mortgaged property may be allowed to amend the plaint by asking merely for a *simple money decree* against the mortgagor. Again if plaintiff sues for redemption of a mortgage believing that an earlier mortgage had merged in it, and defendant denies the latter but admits the earlier mortgage, the plaintiff may be allowed to amend his plaint and sue in the alternative for redemption of the earlier mortgage (i). In such a case, the character of the suit is not fundamentally altered, nor could the defendant be possibly taken by surprise (j). Similarly, a purchaser suing for *specific performance* may be allowed to amend his plaint by asking in the alternative for a *refund* of the earnest money (k). Where a plaintiff has framed his suit *bona fide*, believing that consequential relief is not open to him and that he is entitled to a declaration, the plaint may be allowed to be amended even in appeal by adding a prayer for possession (l). But leave will be refused if the frame of the plaint was a device to avoid payment of Court Fee (m). See also note above, "Leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant, etc"

Amendment by adding a plea of fraud—It is 'the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance' (n). Where facts supporting the charge of fraud were *disclosed in the cross examination of the defendant*, leave was given to amend by adding a plea of fraud (o). Similarly, where the plaintiff sued on a mortgage, and the defendant in his written statement alleged that he was a minor at the date of the mortgage leave was given to the plaintiff to amend the plaint by raising an alternative case that the loan was obtained by the defendant by the fraudulent representation that he had attained majority at the time (p). See Notes to O 6, r 4, Fraud and coercion

Suit for specific performance and compensation in addition or in substitution—The Court, even at the trial, has power to allow the necessary amendment, but that power must be exercised most carefully and jealously, and with due regard to the position of both the plaintiff and the defendant. An amendment should not be allowed when the suit has been pending as one for specific performance for a long period, during

(d) *Tildesley v Harper* (1878) 10 C D 393

(e) "336-337"

(f) " "

(g) " "

(h) " "

(i) " "

(j) " "

(k) " "

(l) " "

(m) " "

(n) " "

(o) " "

(p) " "

(j) *Sukhdeo v Lachman* (1902) 24 All 456,

P M Chetigar v Ma Shue Pon (1927)

5 Rang 115 101 IC 828 (27) A B 154

(k) *Ibrahimhai v Fletcher* (1897) 21 Bom 827

(l) *Sheopujan v Maharaja* (1923) 2 Pat 919 76

1 C 347 (24) A P 310

(m) *Hakim Rai v Firm Ishar* (1927) 8 Lah 531,

102 IC 46 (27) A L 499

(n) *Bentley v Black* (1893) 9 Times Rep 590

(o) *Riding v Hawkins* (1889) 14 P D 56

(p) *Sarat Chand v Mohan Bubi* (1898) 2 C W 201

(A) *Kashinath v Sadashiv* (1893) 20 Cal 805,
Sukhdeo v Lachman (1902) 24 All 456
(i) *Brij Kishore v Beni Ierhad* (1929) 5 Luck.
474 121 IC 273 (29) A O 493

O. 6,
rr. 17-18

which the defendant has been prevented by sec 27 (b) of the Specific Relief Act, 1877, from dealing with the property. An amendment which leaves standing an averment that the plaintiff is ready and willing to perform the contract, and the claim to specific performance, does not make the plaint appropriate to a suit for damages for its breach (g)

" AT ANY STAGE OF THE PROCEEDINGS "

Leave to amend may be granted at any stage of the proceedings. It may be granted on appeal [s 107, sub s (2)] (r), or even on second appeal (s 108) (s). In the under mentioned case (t), the plaintiff was allowed to amend his plaint in appeal before the Privy Council. In a later case where the suit was brought upon a mortgage of the property of a joint Hindu family, and the suit was dismissed on appeal to the High Court on the ground that necessity was not proved, the Privy Council refused to entertain a new contention raised before them for the first time, that the plaintiff was at least entitled to a decree against the mortgagor manager upon his personal admission, on the ground that it involved a radical amendment of the plaint (u). The appellate Court may allow an amendment whether leave to amend was asked for in the Court below or not. It may also allow an amendment even if the Court below offered leave to amend but the offer was declined (v).

Mere delay is not a ground for refusing an amendment. As a general rule, however, late the amendment is sought to be made it should be allowed except in the five cases mentioned above (w). In order to avoid multiplicity of proceedings the tendency is to allow amendment at any stage if it can be done without injustice to the other side, a new case of fraud paying all the costs is little difficulty, in

ordinary cases, in a party obtaining leave to amend on payment of the costs of and occasioned by the amendment and the application (y). Leave to amend may also be given at the hearing on proper terms as to the costs and the postponement of the hearing if necessary, except, again in the five cases mentioned above. Thus leave to amend has been granted at the trial where there was a defect in the parties and it became necessary to amend the proceedings in the suit (z). It would also be granted where both parties knew what the case was and there was no surprise (a).

Revision—See notes to s 115, " Interlocutory orders "

Appeal—No appeal lies under cl 15 of the Letters Patent from an order amending the title of a plaint by omitting the word ' Summary ' before the word ' Suit ', and transferring the case to the Short Causes List (b).

18. [New. R. S C., O. 28, r. 7.] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if

Failure to amend after
order

- | | |
|-----|--|
| (r) | <i>Int'l</i> (1930) 57 Cal 398 127 IC 772, (30) A C 534 |
| (s) | (y) <i>Steward v. North Metropolitan Tramways Co</i> (1886) 16 Q B D 556 |
| (t) | (z) <i>Lydall v. Martinson</i> (1877) 5 C D 780, <i>Doulex v. Dowdell</i> (1878) 9 C D 294, <i>Borden v. Borden</i> (1878) 10 C D 86 |
| (u) | (a) <i>Green v. Seton</i> (1878) 13 C D 599 591 See also <i>Noble v. Lysias & Co v. Jones & Co</i> (1880) 17 C D 721 (cause of action allowed to be added after evidence of defendant) |
| (v) | (b) <i>Mandal v. Mandal</i> (1925) 27 Bom LR 90 86 IC 100 (2) A II 155 |
| (w) | 4 IC 106 <i>Clarnpde v. Commercial Union Association</i> (1841) 32 W R 262 (1841) |
| (z) | <i>Chartered Bank of India v. Imperial Bank of</i> |

no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court

ORDER VII

Plaint.

Particulars to be contained in plaint

1. [S 50, para 1] The plaint shall contain the following particulars —

- (a) the name of the Court in which the suit is brought,
- (b) the name, description and place of residence of the plaintiff,
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained,
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind a statement to that effect,
- (e) the facts constituting the cause of action and when it arose,
- (f) the facts showing that the Court has jurisdiction,
- (g) the relief which the plaintiff claims,
- (h) where the plaintiff has allowed a set off or relinquished a portion of his claim, the amount so allowed or relinquished, and
- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits

Facts constituting the cause of action —The plaintiff must give such particulars as will enable the defendant and the Court to ascertain from the plaint whether in fact and in law the cause of action did arise as alleged or not. The plaintiff's mere statement that it did arise or that he has a good cause of action is useless for this purpose (c). As to the meaning of cause of action see notes to sec 20. Cause of action. See also notes to O 6 r 2

"Facts showing that the Court has jurisdiction."—If the plaintiff relies on the defendant's residence or place of business as giving jurisdiction the facts showing this must be stated in the body of the plaint (*d*) The statement of these facts in the title to the suit is not sufficient, as the title to the suit is not covered by the verification clause (*e*) See ss 16, 19 and 20, and cl. 12 of the Charter set forth in Appendix II.

"Relief which the plaintiff claims."—See r 7 below and notes thereto

"Relinquished a portion of his claim."—See O 2, r. 2, sub r. (2).

Statement of value—See notes to sec. 15, "Where the subject matter of a suit does not admit of being satisfactorily valued"

2. [S. 50, paras. 2, 3.] Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

In money suits

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

Suit for mesne profits or accounts—See notes to sec 6, "Pecuniary jurisdiction in passing decrees"

3. [*New.*] Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

Where the subject matter of the suit is immovable property

4. [S. 50, para. 4.] Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative

"Where the plaintiff sues in a representative character."—Where a person dies leaving a will, the *executor* named in the will may obtain *probate* of the will Where a person dies intestate, his *heirs* may apply for *letters of administration* The person to whom letters of administration are granted is called *administrator*. The executor or administrator, as the case may be, of a deceased person, is his *legal representative* for all purposes, and all the property of the deceased vests in him as such A suit by a person as executor or administrator of a deceased person is a suit by him in a *representative* character There are some cases in which the law requires *probate* or *letters of administration*, as the case may be, to entitle a person suing in a representative character to a decree in respect of the estate of the deceased In a large number of cases,

4. *INDIAN CHRISTIANS*—Up to the year 1901, Indian Christians were governed by the provisions of the Indian Succession Act, 1865. Hence it was necessary, where the deceased left a will, that the executor should obtain probate before he could establish any right as such to the property of the deceased (Indian Succession Act, 1865, s. 187) and if the deceased died intestate, it was necessary to obtain letters of administration before any right could be established to any part of the property of the deceased in a Court of law (Indian Succession Act, 1865, s. 190). In 1901, an Act was passed called the Native Christian Administration of Estates Act (VII of 1901), declaring that the provisions of section 190 of the Succession Act, 1865, shall not apply to any part

are reproduced in s. 212 and 213. Under sec. 213 a probate is necessary where the deceased has left a will. Under sec. 212 no letters of administration are necessary where the deceased has died intestate. But if a suit is brought to recover a debt due to the estate of a deceased Indian Christian, no decree can be passed against the debtor except on production of a probate or letters of administration or a succession certificate; see Indian Succession Act, 1925, s. 214.

"Has taken the steps."—In those cases where a probate is necessary, and those are cases specified in s. 213 of the Indian Succession Act 39 of 1925, it has been held by the Privy Council that the grant of probate is not a condition precedent to the institution

(f) See in this connection *Prampi v. Adarji* (1893) 18 Bom. 337, and *Ratanbai v.*

Narasimdas (1927) 51 Bom. 721, 104 I. C. 791, (27) A. B. 474.

of the suit, and that the executor or legatee may institute the suit without obtaining a probate, but that he will not be entitled to a decree until he obtains a probate (g).

If the deceased has left no will, and the case is one governed by sec. 212 of the Indian Succession Act, 1925, so that letters of administration are necessary to establish a right to the property of the deceased in a Court of law, the question arises whether it is necessary that letters of administration to the estate of the deceased should be obtained before the institution of the suit, or whether it is sufficient if they are obtained before the decree is passed. The High Court of Bombay has held that if letters of administration are not obtained before the institution of the suit, and the plaintiff does not show that the plaintiff has obtained letters of administration, the plaintiff should be rejected on pre-entation, but if the plaintiff is not rejected, and the hearing has been allowed to proceed, there is nothing to prevent the Court from passing a decree for the plaintiff if letters of administration are obtained before the decree (h). The English law on the subject may thus be stated in the language of the Judicial Committee in *Meyappa v Supramaniam* (i). "An administrator derives title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled (see *Common Law Digest Administration*, B 9 and 10, *Thompson v Reynolds* (j), *Woodley v Clark* (k))."

Title of suit.—See Appendix A. (2) Description of Parties in Particular Cases, the last two forms. See also r 9 (2) below.

5. [S. 50, para 5] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

6. [S. 50, para 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show the ground upon which exemption from such law is claimed.

Ground of exemption from limitation law

Grounds of exemption from limitation law.—These grounds are set forth in section 12 to 20 of the Limitation Act, 1908. If no ground of exemption is shown in the plaintiff and the suit appears from the statement in the plaintiff to be barred by limitation the plaintiff shall be rejected (see r 11, cl (d) below). But a plaintiff should not be rejected merely because the exemption is not claimed specifically. All that the rule requires is that the plaintiff shall show the ground of exemption (l). If a plaintiff does not show any ground of exemption, the Court of first instance should allow the plaintiff to be amended save under very exceptional circumstances (m). But a plaintiff should

(g) *Chandra Kulkarni v. Prasad Kumar* (1911) 34 Cal. 322 3-1 A. 91 C. 122 [a case]

(h) *Sethna v. Hemipray* (1914) 35 B. M. 81 241 C. 114 14m Gen. of Enrol. v. La. (1905) 12 C. M. 73.

(i) (1916) 43 I. A. 113, 119 2-1 C. 221.

(j) 3 C. & P. 123.

(k) 5 B. & C. 141.

(l)

(m)

not be allowed to rely upon a ground of exemption from the law of limitation for the first time in appeal (n) See notes to O 41, r 2, below

The High Court of Bombay has held that when a plaintiff does satisfy the requirements of this rule by stating what is in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground, should he be later advised that the latter is the true ground (o) According to the Calcutta (p) and Lahore (q) rulings, a plaintiff who has stated one ground of exemption may be allowed to take another and inconsistent ground The Madras High Court agrees, but in order to do so the plaintiff must obtain the leave of the Court to amend his plaint (r)

7. [*New* R. S. C., O. 20, r. 6.] Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

Relief to be specifically stated

Relief—Every plaint must state specifically the relief which the plaintiff claims whether it be damages, or specific performance, or an injunction, or a declaration, or an account, or the appointment of a receiver, or possession of land, or relief of any other kind A plaintiff who omits, except with the leave of the Court, to sue for all the reliefs to which he may be entitled in respect of the same cause of action will not afterwards be allowed to sue for any relief so omitted [O 2 r 2, sub r (3)] But it is not necessary to ask for general or other relief

Where a relief is claimed upon a specific ground the Court may grant it upon a ground different from that on which it is claimed in the plaint, if the ground is disclosed by the allegation in the plaint and the evidence in the case (s) Thus in a case in which a plaintiff claimed an easement by *prescription*, and it was found that he was not entitled to the easement by prescription, their Lordships of the Privy Council dealing with the case as a special appeal, decreed the claim on the *presumption of title arising from a grant* (t)

Where a plaint asks for more than what the plaintiff is entitled to, the Court may give him only as much relief as he is entitled to, but the suit must not be dismissed (u) Where a plaint asks for less than what the plaintiff is entitled to, the Court cannot give him relief in excess of the plaint, unless the plaint is amended before judgment Thus if a suit is brought upon a balance of accounts or for mesne profits, and the plaintiff, instead of claiming whatever may be found due on the taking of accounts and stating an approximate amount [O 7, r 2], states a specific sum as the amount claimed,

- | | |
|---|---|
| (n) <i>C. 11 v. C. 12</i> (1913) 64 Cal 1 J 317 | (r) <i>J. 11 v. S. 11</i> (1913) 64 Cal 1 J 317 |
| (o) <i>C. 11 v. C. 12</i> (1913) 64 Cal 1 J 317 | (s) <i>J. 11 v. S. 11</i> (1913) 64 Cal 1 J 317 |
| (p) <i>H. 11 v. H. 12</i> (1913) 64 Cal 1 J 317 | (t) <i>J. 11 v. S. 11</i> (1913) 64 Cal 1 J 317 |
| (q) <i>L. 11 v. L. 12</i> (1913) 64 Cal 1 J 317 | (u) <i>J. 11 v. S. 11</i> (1913) 64 Cal 1 J 317 |
| (r) <i>M. 11 v. M. 12</i> (1913) 64 Cal 1 J 317 | |
| (s) <i>N. 11 v. N. 12</i> (1913) 64 Cal 1 J 317 | |
| (t) <i>O. 11 v. O. 12</i> (1913) 64 Cal 1 J 317 | |
| (u) <i>P. 11 v. P. 12</i> (1913) 64 Cal 1 J 317 | |

the Court cannot, without an amendment of the plaint [O. 6, r. 17], pass a decree for more than what is claimed (t)

General or other relief.—Under the system of pleadings hitherto followed in India, it was usual to add in the plaint a prayer for general relief called *general prayer* which ran thus “The plaintiff claims *such further or other relief* as the nature of the case may require” Under the present rule it is no longer necessary specifically to ask for such relief. Such relief may now always be given to the same extent as if it had been asked for, provided it is not inconsistent with that specifically claimed, and with the case raised by the pleading (x). In order, however, to entitle a plaintiff to a relief under the claim for general relief, it is necessary that the ground for such relief should be disclosed by the allegations in the plaint (x). “A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings” (y). Thus where a plaintiff sues for a declaration of title to certain property under a deed of sale he cannot be allowed to succeed on the basis of title by *adverse possession* (z).

With regard to the nature of the general or other relief which a plaintiff may have, the rule is that if the plaint contains allegations, offering issues on facts that are material, the plaintiff is entitled to the relief which those facts will sustain, but he cannot desert the specific relief claimed, and under the claim for general relief ask for specific relief of another description, unless the facts and circumstances alleged on the pleadings will consistently with the rules of the Court, maintain that relief (a).

Where a suit is brought by a reversioner against a Hindu widow (1) for an injunction restraining her from waste, (2) for appointment of a receiver, and (3) for ‘further relief,’ the plaintiff, if he fails in the substantial heads of his claim, is not entitled, under cover of a request for ‘further relief,’ to obtain a declaration that he is the next reversionary heir (b).

In a suit by a mortgagee for sale of the mortgaged property, the mortgagee may relinquish his claim for sale, and ask for a simple money decree, though such relief is not specifically claimed. This he may do under the claim for general relief. The Court has the power to grant that relief, provided the mortgage contains a personal covenant to pay the mortgage debt (c). The Court may also under this rule award interest on a balance of account from the date of the institution of the suit, although interest is not specifically asked for in the plaint (d). But the Court has no power under a claim for general relief, to grant to a *pro forma* plaintiff the relief claimed by the active plaintiff, if it turns out that the *pro forma* plaintiff, and not the active plaintiff, is entitled to the relief claimed. This may be explained by an illustration. B sells his interest in certain property in the possession of C to A. A and B then sue C to recover possession of the property. B makes no claim, and he is joined merely as a formal party to the suit. The Court finds the sale to A void as champertous (Contract Act, s. 23). On these facts no decree can be passed in favour of A for possession. Nor should any decree be passed in favour of B awarding possession of the property to him under the claim for

(r) &c.

(x) “The plaintiff claims such further or other relief as the nature of the case may require”

(y) “A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings”

(z) “Where a plaintiff sues for a declaration of title to certain property under a deed of sale he cannot be allowed to succeed on the basis of title by adverse possession”

(a) *Horn v. Malt* (1806) 13 Ves. 110, per Lord Lillan; *Cockrell v. Dickens* (1840) 2

M. I. A. 253 389 See also *Rokmal v. Gulab Singh* (1925) 27 Bom. L. R. 277 87
I. C. 481 (2) A. B. 218, *Jam Chaudh v. Shanker* (1922) 20 All. L. J. 13, 65 I. C.

242 (22) A. A. 5
(b) *Jundli v. Narayanram* (1916) 43 I. A.

(c) “The mortgage contains a personal covenant to pay the mortgage debt”

(d) “The Court may also under this rule award interest on a balance of account from the date of the institution of the suit, although interest is not specifically asked for in the plaint”

(e) “The Court has no power under a claim for general relief, to grant to a pro forma plaintiff the relief claimed by the active plaintiff, if it turns out that the pro forma plaintiff, and not the active plaintiff, is entitled to the relief claimed”

(f) “This may be explained by an illustration. B sells his interest in certain property in the possession of C to A. A and B then sue C to recover possession of the property. B makes no claim, and he is joined merely as a formal party to the suit. The Court finds the sale to A void as champertous (Contract Act, s. 23). On these facts no decree can be passed in favour of A for possession. Nor should any decree be passed in favour of B awarding possession of the property to him under the claim for

general relief, though the Court finds that *C* is in wrongful possession of the property, and that the person really entitled to the property is *B*. *B* must bring a separate suit against *C* to recover possession (*e*).

Alternative relief—A plaintiff may rely “upon several different rights alternatively, although they may be inconsistent” (*f*), provided that his pleading is not thereby rendered embarrassing. A pleading is not embarrassing within the meaning of O 6, r 16, because it contains inconsistent sets of facts (*g*). Thus a plaintiff may in the same suit claim to have a partnership agreement with the defendant cancelled on the ground that he was induced to enter into it by the fraud of the defendant, or in the alternative, for a dissolution of partnership and accounts (*h*). Similarly a plaintiff may claim over the same plot of land a right of *ownership*, or in the alternative, a right of *easement* (*i*). A plaintiff may in a suit for pre-emption base his claim in the alternative on contract, or on custom, or on Mahomedan law (*j*). He may also in such a suit set up an alternative claim as *owner* (*k*).

In *Mahomed Bakh v Hosseini Bibi* (*l*), the Judicial Committee observed that where a plaintiff sues alleging that a deed purporting to be executed by herself is a forgery, the Court ought not to admit the *inconsistent* issue whether it was executed under undue influence. These observations were explained away in an Allahabad case where it was held that a plaintiff may sue for the cancellation of a bond on the ground that it was a forgery, or, in the alternative, that it was void for want of consideration (*m*). But quære whether the allegations of forgery and want of consideration are, not *inconsistent and embarrassing*. The High Court of Calcutta has held that a plaintiff may sue to set aside a deed of gift on the ground that she executed it under a fraudulent representation that it was a power of attorney, or, in the alternative on the ground that it was obtained by undue influence (*n*).

A plaintiff in a suit for specific performance may claim in the alternative that if the contract cannot be enforced it should be rescinded and delivered up for cancellation (*o*). A purchaser in a suit for specific performance may claim in the alternative a return of the earnest money, and he may at the hearing give up his prayer for specific performance, and ask for a return of the earnest money, and the Court may direct the defendant to return the earnest money (*p*). In England in a case under the old practice it was held that a suit to set aside a transaction for fraud, or, in the alternative for specific performance of a compromise, could not be sustained (*q*). It seems probable that the same conclusion would still be arrived at on the ground that the claims were *inconsistent and embarrassing* (*r*).

For a fuller discussion of this subject see notes to O 6 r 2. Alternative and inconsistent allegations.

Relief not founded on pleadings.—See notes under the same head to O 14, r 1.

Events happening after institution of suit.—Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change

(e) *Debi Dayal v. Bhan Lertap* (1904) 31 Cal 433

(f) *Iyappa v. Iyappa* (188) 4 Q B D 127

(g) 131 per Brett L J

(h) *Pe. Morgan Owen v. Morgan* (1897) 35 C

(i) D 492

(j) " " " " " "

(k) " " " " " "

(l) " " " " " "

(m) " " " " " "

(n) " " " " " "

(o) (1888) 15 1 A 81 86 15 Cal 634 See also

Iyappa v. Rama Lakshamma (1890) 13

Mad 549

(m) " " "

(n) " " "

(o) " " "

Ves 420

(p) *Karson las v. Chhotalal* (1924) 48 Bom 259

71 C 25 (24) A B 119

(q) *Cowley v. Loole H & M* 50

(r) *Fry on Specific Performance*, 6th ed.,

para 1058 p 494

of circumstances become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (s) Leave to amend may be granted under O 6 r 17 for this purpose (t)

8 [New R S C, O 20, r 7] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly

Relief founded on separate grounds

See notes to O 6 r 2 Alternative and inconsistent allegations'

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit in which case he shall present such statements

Procedure on admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

Sub rule (2) representative capacity—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or is sued, although no doubt that is a convenient place to make such a statement. It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (u) See O 7, r 4 and Appendix A, (v) Description of Parties in Particular Cases' the last two forms.

(d) *Varman v Ambica* (1917) 44 Cal 4th 53
341 C 803

(e) *Illuru v Kannaama* (1906) 43 Mad L J
49 901 L 842 (20) J M 6

(u) *Kuor noni v Wan* 114 (1915) 10 C W N
113 281 C 618 *Ratha v K. I. Jappa*
111 (1919) 46 Cal 6 891 501 C 52

10. [S. 57.] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint

Return of plaint.—Where a suit filed in a Revenue Court is not triable by that Court, the Court should not dismiss the suit, but return the plaint to be presented to the proper Court (c). A suit against two defendants, cognizable by a Civil Court as against the first, and by a Revenue Court as against the second, was filed in a Civil Court. The Patna High Court directed the plaint to be returned for presentation to the Revenue Court, and that a copy of it should be retained on the record for trial of the suit as against the second defendant (c).

"At any stage of the suit."—These words are new. They have been added to give effect to the undermentioned decision (x) in which it was held that a plaint may be returned to be presented to the proper Court at any stage of the suit even after the trial has begun and concluded. But a plaint should not be returned unless the Court finds that it has no jurisdiction (y).

Court fee.—If the Court has no jurisdiction it should return the plaint even though the claim is undervalued (z), and when it is presented to the proper Court, the latter Court is bound to give credit for the fee levied by the former Court (a).

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 40, r 3 cl (1)].

Appeal.—An appeal lies from an order returning a plaint to be presented to the proper Court, whether the order is made by the Court of first instance [O 43, r 1, cl (a)] or by the Court of first appeal in the exercise of powers conferred upon it by s 107 (b). But no second appeal lies from the order of the first appellate Court (c) [see s 104 (2)].

A files his plaint in a District Munsif's Court. The Munsif returns the plaint for presentation to the proper Court, holding that the suit is beyond his pecuniary jurisdiction. On the plaint being presented to a Subordinate Judge's Court, it is again returned by that Court on the ground that the Munsif's Court had jurisdiction. Is A

- | | | |
|-----|---|--|
| (r) | 48 I C 485 | (1924) 46 Mad L J 345 77 I C 781 |
| (w) | <i>Bisheshwar v. Bisheshwar</i> (1926) 48 All 164 | (24) A M 616, <i>Ganesh v. Tatya</i> (1927) |
| (x) | 90 I C 353 (4) A A 54 | 51 Bom 236 101 I C 343 (27) A B 257 |
| | | (a) <i>Parasurama v. Nair</i> (1912) 35 Mad 567 10 |
| | | I C 201 (t B), <i>Ganesh v. Tatya</i> (1927) |
| | | 51 Bom 236 101 I C 343 (27) A B 257 |
| | | (b) <i>Haidullah v. Hanhaya Lal</i> (1903) 23 All |
| | | 174 <i>Delip Singh v. Kundan Singh</i> (1914) |
| (y) | <i>Bisheshwar v. Bisheshwar</i> (1926) 48 All 164 | 36 All 58 22 I C 614 <i>Nand Kishore v.</i> |
| | 90 I C 353 (4) A A 54 | <i>Abdur Rahman</i> (1920) 42 All 74 52 I C |
| (z) | <i>Bethasani v. Nagammal</i> (1931) 59 Mad | 801 <i>Goor Buz v. Brij Lal</i> (1899) 26 Cal |
| | L J 899 129 I C 625, (31) A M 62 | 275, <i>Chinnasami v. Karuppa</i> (1894) 21 |
| | <i>Tamanna v. Amireddi</i> (1931) 61 Mad | Mad 234 |
| | L J 43 129 I C 826 (31) A M 67 | (c) <i>Sultanah v. Balwant</i> (1925) 27 Bom L R |
| | dis-senting from <i>Kundaram v. Subba</i> | 635 83 I C 753, (25) A B 431 |

of circumstances, become inappropriate, or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (s). Leave to amend may be granted under O. 6, r. 17, for this purpose (t).

8 [N. v. R. S. C., O. 20, r. 7.] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Relief founded on separate grounds

See notes to O. 6, r. 2, "Alternative and inconsistent allegations"

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

Procedure on admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is used.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

Sub-rule (2): representative capacity—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or is sued, although no doubt that is a convenient place to make such a statement. It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (u). See O. 7, r. 4, and Appendix A, "(2) Description of Parties in Particular Cases," the last two forms.

(s) *Aurumma v Ambica* (1917) 44 Cal. 47, 65, 24 I. C. 889.

(t) *Tathira v Kannamma* (1926) 49 Mad. L. J. 479, 90 I. C. 893, 126 A. W. 6.

(u) *Kannamma v Wasif Ali* (1915) 19 F. W. N. 1193, 28 I. C. 816. *Biddu v Kalladappa and* (1919) 46 Cal. 877, 883, 50 I. C. 525.

Return of plant

Procedure on returning
plaint

(1974) 46 Mad L J 345 77 I C 701
(24) A M 646 Ganesh v Talga (1927)
51 Bom 236 101 I C 343 (27) A B 257
(a) Pureswara v Nair (1912) 35 Mad 567 10
I C 201 (1) B 1 Ganesh v Talga (1927)
51 Bom 236 101 I C 343 (27) A B 257
(b) Hashidullah v Kanhaya Lal (1903) 25 All
174 Datt Singh v Kundan Singh (1914)
36 All 58 22 I C 614 Nand Ahore v
Abdur Rahman (1920) 42 All 74 52 I C
801 Goor Bur v Bry Lal (1899) 26 Cal
25 Chinnasami v Karuppa (1898) 21
Mad 234
(c) Vakkant v Faleant (1925) 27 Bom L R
635 88 I C 73 (25) A B 431

of circumstances become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made (s) Leave to amend may be granted under O 6, r 17, for this purpose (t)

8 [New R S C, O 20, r. 7.] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Relief founded on separate grounds

See notes to O 6, r 2. Alternative and inconsistent allegations "

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements

Procedure on a admitting plaint

Concise statements

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is used

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct

Sub rule (2) representative capacity.—It is not necessary to state in the title of the suit the representative capacity in which the plaintiff or the defendant sues or is sued although no doubt that is a convenient place to make such a statement. It is enough if the pleading shows that the plaintiff or the defendant sues or is sued in a representative capacity (u) See O 7, r 4 and Appendix A (2) Description of Parties in Particular Cases, the last two forms

(s) *Aurman v Anbca* (191) 44 Cal 47 55
34 I C 889

(t) *Fallor v Jannamma* (1906) 49 Mad L J
49 90 I C 881 (26) A M 6

(u) *Kuarmon v Wauif Al* (1915) 19 C W N
1193 98 I C 818 *Bdhu v Jula Japri*
and (1910) 46 Cal 877 883 50 I C 593

10. [S 57] (1) The plaintiff shall be bound to return the suit to the Court in which the suit was instituted.

Return of plaint

(2) On returning a plaint the Judge shall be bound to return the name of the party presenting it and a brief statement of the reasons for returning it.

Procedure on return of plaint

Return of plaint.—Where a suit filed in a Revenue Court is not to be tried by that Court, the Judge is bound to return the plaint to be presented to the proper Court. A suit against two defendants, originally brought in a Civil Court, was returned by a Revenue Court as against the second, was filed in a Civil Court. The District Judge ordered the plaint to be returned for presentation to the Revenue Court, and a copy of it should be retained on the record for trial of the suit as against the first defendant (a).

—**At any stage of the suit.**—These words are new. They have been added to refer to the unexplained decision (x) in which it was held that a plaint may be returned to be presented to the proper Court at any stage of the suit even after the trial has begun and completed. It is a plaint which may be returned unless the Court finds it to be inadmissible (y).

Court before which a plaint may be presented.—The words "the proper Court" are used to refer to the Court to which the plaint may be presented. In the proper Court, the latter Court may order it to be presented to the proper Court (a).

Chartered High Courts.—The words "Chartered High Courts" are used to refer to the High Courts of the Chartered High Courts (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) (gd) (ge) (gf) (gg) (gh) (gi) (gj) (gk) (gl) (gm) (gn) (go) (gp) (gq) (gr) (gs) (gt) (gu) (gv) (gw) (gx) (gy) (gz) (ha) (hb) (hc) (hd) (he) (hf) (hg) (hh) (hi) (hj) (hk) (hl) (hm) (hn) (ho) (hp) (hq) (hr) (hs) (ht) (hu) (hv) (hw) (hx) (hy) (hz) (ia) (ib) (ic) (id) (ie) (if) (ig) (ih) (ii) (ij) (ik) (il) (im) (in) (io) (ip) (iq) (ir) (is) (it) (iu) (iv) (iw) (ix) (iy) (iz) (ja) (jb) (jc) (jd) (je) (jf) (jg) (jh) (ji) (jj) (jk) (jl) (jm) (jn) (jo) (jp) (jq) (jr) (js) (jt) (ju) (jv) (jw) (jx) (jy) (jz) (ka) (kb) (kc) (kd) (ke) (kf) (kg) (kh) (ki) (kj) (kk) (kl) (km) (kn) (ko) (kp) (kq) (kr) (ks) (kt) (ku) (kv) (kw) (kx) (ky) (kz) (la) (lb) (lc) (ld) (le) (lf) (lg) (lh) (li) (lj) (lk) (ll) (lm) (ln) (lo) (lp) (lq) (lr) (ls) (lt) (lu) (lv) (lw) (lx) (ly) (lz) (ma) (mb) (mc) (md) (me) (mf) (mg) (mh) (mi) (mj) (mk) (ml) (mm) (mn) (mo) (mp) (mq) (mr) (ms) (mt) (mu) (mv) (mw) (mx) (my) (mz) (na) (nb) (nc) (nd) (ne) (nf) (ng) (nh) (ni) (nj) (nk) (nl) (nm) (nn) (no) (np) (nq) (nr) (ns) (nt) (nu) (nv) (nw) (nx) (ny) (nz) (oa) (ob) (oc) (od) (oe) (of) (og) (oh) (oi) (oj) (ok) (ol) (om) (on) (oo) (op) (oq) (or) (os) (ot) (ou) (ov) (ow) (ox) (oy) (oz) (pa) (pb) (pc) (pd) (pe) (pf) (pg) (ph) (pi) (pj) (pk) (pl) (pm) (pn) (po) (pp) (pq) (pr) (ps) (pt) (pu) (pv) (pw) (px) (py) (pz) (qa) (qb) (qc) (qd) (qe) (qf) (qg) (qh) (qi) (qj) (qk) (ql) (qm) (qn) (qo) (qp) (qq) (qr) (qs) (qt) (qu) (qv) (qw) (qx) (qy) (qz) (ra) (rb) (rc) (rd) (re) (rf) (rg) (rh) (ri) (rj) (rk) (rl) (rm) (rn) (ro) (rp) (rq) (rr) (rs) (rt) (ru) (rv) (rw) (rx) (ry) (rz) (sa) (sb) (sc) (sd) (se) (sf) (sg) (sh) (si) (sj) (sk) (sl) (sm) (sn) (so) (sp) (sq) (sr) (ss) (st) (su) (sv) (sw) (sx) (sy) (sz) (ta) (tb) (tc) (td) (te) (tf) (tg) (th) (ti) (tj) (tk) (tl) (tm) (tn) (to) (tp) (tq) (tr) (ts) (tt) (tu) (tv) (tw) (tx) (ty) (tz) (ua) (ub) (uc) (ud) (ue) (uf) (ug) (uh) (ui) (uj) (uk) (ul) (um) (un) (uo) (up) (uq) (ur) (us) (ut) (uu) (uv) (uw) (ux) (uy) (uz) (va) (vb) (vc) (vd) (ve) (vf) (vg) (vh) (vi) (vj) (vk) (vl) (vm) (vn) (vo) (vp) (vq) (vr) (vs) (vt) (vu) (vv) (vw) (vx) (vy) (vz) (wa) (wb) (wc) (wd) (we) (wf) (wg) (wh) (wi) (wj) (wk) (wl) (wm) (wn) (wo) (wp) (wq) (wr) (ws) (wt) (wu) (wv) (ww) (wx) (wy) (wz) (xa) (xb) (xc) (xd) (xe) (xf) (xg) (xh) (xi) (xj) (xk) (xl) (xm) (xn) (xo) (xp) (xq) (xr) (xs) (xt) (xu) (xv) (xw) (xx) (xy) (xz) (ya) (yb) (yc) (yd) (ye) (yf) (yg) (yh) (yi) (yj) (yk) (yl) (ym) (yn) (yo) (yp) (yq) (yr) (ys) (yt) (yu) (yv) (yw) (yx) (yy) (yz) (za) (zb) (zc) (zd) (ze) (zf) (zg) (zh) (zi) (zj) (zk) (zl) (zm) (zn) (zo) (zp) (zq) (zr) (zs) (zt) (zu) (zv) (zw) (zx) (zy) (zz) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) (fg) (fh) (fi) (fj) (fk) (fl) (fm) (fn) (fo) (fp) (fq) (fr) (fs) (ft) (fu) (fv) (fw) (fx) (fy) (fz) (ga) (gb) (gc) (gd) (ge) (gf) (gg) (gh) (gi) (gj) (gk) (gl) (gm) (gn) (go) (gp) (gq) (gr) (gs) (gt) (gu) (gv) (gw) (gx) (gy) (gz) (ha) (hb) (hc) (hd) (he) (hf) (hg) (hh) (hi) (hj) (hk) (hl) (hm) (hn) (ho) (hp) (hq) (hr) (hs) (ht) (hu) (hv) (hw) (hx) (hy) (hz) (ia) (ib) (ic) (id) (ie) (if) (ig) (ih) (ii) (ij) (ik) (il) (im) (in) (io) (ip) (iq) (ir) (is) (it) (iu) (iv) (iw) (ix) (iy) (iz) (ja) (jb) (jc) (jd) (je) (jf) (jg) (jh) (ji) (jj) (jk) (jl) (jm) (jn) (jo) (jp) (jq) (jr) (js) (jt) (ju) (jv) (jw) (jx) (jy) (jz) (ka) (kb) (kc) (kd) (ke) (kf) (kg) (kh) (ki) (kj) (kk) (kl) (km) (kn) (ko) (kp) (kq) (kr) (ks) (kt) (ku) (kv) (kw) (kx) (ky) (kz) (la) (lb) (lc) (ld) (le) (lf) (lg) (lh) (li) (lj) (lk) (ll) (lm) (ln) (lo) (lp) (lq) (lr) (ls) (lt) (lu) (lv) (lw) (lx) (ly) (lz) (ma) (mb) (mc) (md) (me) (mf) (mg) (mh) (mi) (mj) (mk) (ml) (mm) (mn) (mo) (mp) (mq) (mr) (ms) (mt) (mu) (mv) (mw) (mx) (my) (mz) (na) (nb) (nc) (nd) (ne) (nf) (ng) (nh) (ni) (nj) (nk) (nl) (nm) (nn) (no) (np) (nq) (nr) (ns) (nt) (nu) (nv) (nw) (nx) (ny) (nz) (oa) (ob) (oc) (od) (oe) (of) (og) (oh) (oi) (oj) (ok) (ol) (om) (on) (oo) (op) (oq) (or) (os) (ot) (ou) (ov) (ow) (ox) (oy) (oz) (pa) (pb) (pc) (pd) (pe) (pf) (pg) (ph) (pi) (pj) (pk) (pl) (pm) (pn) (po) (pp) (pq) (pr) (ps) (pt) (pu) (pv) (pw) (px) (py) (pz) (qa) (qb) (qc) (qd) (qe) (qf) (qg) (qh) (qi) (qj) (qk) (ql) (qm) (qn) (qo) (qp) (qq) (qr) (qs) (qt) (qu) (qv) (qw) (qx) (qy) (qz) (ra) (rb) (rc) (rd) (re) (rf) (rg) (rh) (ri) (rj) (rk) (rl) (rm) (rn) (ro) (rp) (rq) (rr) (rs) (rt) (ru) (rv) (rw) (rx) (ry) (rz) (sa) (sb) (sc) (sd) (se) (sf) (sg) (sh) (si) (sj) (sk) (sl) (sm) (sn) (so) (sp) (sq) (sr) (ss) (st) (su) (sv) (sw) (sx) (sy) (sz) (ta) (tb) (tc) (td) (te) (tf) (tg) (th) (ti) (tj) (tk) (tl) (tm) (tn) (to) (tp) (tq) (tr) (ts) (tt) (tu) (tv) (tw) (tx) (ty) (tz) (ua) (ub) (uc) (ud) (ue) (uf) (ug) (uh) (ui) (uj) (uk) (ul) (um) (un) (uo) (up) (uq) (ur) (us) (ut) (uu) (uv) (uw) (ux) (uy) (uz) (va) (vb) (vc) (vd) (ve) (vf) (vg) (vh) (vi) (vj) (vk) (vl) (vm) (vn) (vo) (vp) (vq) (vr) (vs) (vt) (vu) (vv) (vw) (vx) (vy) (vz) (wa) (wb) (wc) (wd) (we) (wf) (wg) (wh) (wi) (wj) (wk) (wl) (wm) (wn) (wo) (wp) (wq) (wr) (ws) (wt) (wu) (wv) (ww) (wx) (wy) (wz) (xa) (xb) (xc) (xd) (xe) (xf) (xg) (xh) (xi) (xj) (xk) (xl) (xm) (xn) (xo) (xp) (xq) (xr) (xs) (xt) (xu) (xv) (xw) (xx) (xy) (xz) (ya) (yb) (yc) (yd) (ye) (yf) (yg) (yh) (yi) (yj) (yk) (yl) (ym) (yn) (yo) (yp) (yq) (yr) (ys) (yt) (yu) (yv) (yw) (yx) (yy) (yz) (za) (zb) (zc) (zd) (ze) (zf) (zg) (zh) (zi) (zj) (zk) (zl) (zm) (zn) (zo) (zp) (zq) (zr) (zs) (zt) (zu) (zv) (zw) (zx) (zy) (zz)

to file the plaint in the Subordinate Judge's Court, he forfeited his right of appeal (d) Yes, according to the Madras High Court (e)

The merits of an order refusing leave under s. 20, cl. (b), cannot be attacked in an appeal from an order returning a plaint to be presented to the proper Court (f)

Return of plaint by Small Cause Court—Revision—The Allahabad High Court has held that an order of a Small Cause Court returning a plaint under this rule may be subject to revision by the High Court under s. 25 of the Provincial Small Cause Court Act (g)

Rejection of plaint

11. [S. 54.] The plaint shall be rejected in the following cases :—

- (a) where it does not disclose a cause of action :
- (b) where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so ;
- (d) where the suit appears from the statement in the plaint to be barred by any law.

Scope of the rule—The rule is mere procedure. It is not meant to enlarge any taxing section but only to ensure the proper application of the Court fees Act. It does not touch upon the plaintiff's right to pay Court fee on the footing of his own valuation in cases coming within s. 7 (iv) of the Court Fees Act (h)

Change of law—Clause (a) is new. See notes below, " Clause (a) "

Chartered High Courts.—Clauses (b) and (c) of this rule do not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction. See O 49, r. 3 (i)

Duty of Court to examine plaint—It is the duty of the Court under O 7 to examine a plaint before issuing summonses and to ascertain whether any cause of action has been pleaded and whether any relief has been claimed against the defendants and to determine whether the plaint should be rejected or returned for amendment (j)

" Shall be rejected."—This rule may be applied at any stage of a suit. Therefore, a plaint may be rejected under this rule even after it has been numbered and registered as a suit (j). The power to reject a plaint or to return it for amendment should

- (d) *Benu Madhub v. Jotendra* (1907) 5 Cal. L. J. 580, doubted in *Bailkunta Nath v. Nawab Salimulla* (1907) 6 Cal. L. J. 547, 556
- (e) *Narayanas v. Cheria* (1918) 41 Mad. 721, 45 I. C. 89
- (f) *Allen Brothers v. Arurus Mal* (1925) 7 Lah. L. J. 66, 88 I. C. 546, (25) A. L. 333
- (g) *Bibi Kasturi v. Balmukund* (1932) 54 All. 1048, 143 I. C. 404 (33) A. A. 190

- (h)
- (i)
- (j)

not be exercised except in a clear case. If there is any serious question to be decided, the proper course is to let the suit proceed to written statement and discovery, and then determine the matter on preliminary issues (l).

The provision contained in this rule that the plaint shall be rejected in the four cases mentioned in the rule is mandatory. In a case, therefore, where the relief claimed was properly valued, but the plaint was written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper, failed to do so, it was held that the plaintiff should not be allowed to amend the plaint by omitting the prayer in respect of which the extra court fee was directed to be paid and that the plaint should be rejected (l).

Rejection of plaint in part.—This rule does not justify the rejection of any particular portion of a plaint (m).

Clause (a) Where plaint does not disclose a cause of action.—Under the Code of 1882, s. 53, it was not obligatory upon the Court to reject a plaint if it did not disclose a cause of action. Under the present rule the Court is bound to reject a plaint if it does not disclose a cause of action. As to the meaning of "cause of action," see notes to s. 20, "Cause of Action," on p. 116 above.

Clause (b): Where the relief claimed is undervalued.—If the correct valuation would render the Court incompetent to entertain the suit, clause (b) does not apply. In such a case the plaint must be returned under rule 10 to be presented to the proper Court and the deficient Court fee will be paid in the Court having jurisdiction to hear the suit (n).

Clause (c): Where a plaint is written upon paper insufficiently stamped, — The following points are to be noted in connection with this clause:—

1 Where a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. This follows from the terms of cl. (c) itself (o). Reasonable time must be allowed after the Court has decided that the Court fee paid is insufficient (p), and within the time allowed if the plaintiff cannot pay he may apply to continue the suit as a pauper (q).

2 If the plaintiff fails to supply the requisite stamp paper within the period fixed by the Court, the plaint may be rejected under this rule, even after it has been numbered and registered as a suit. The reason is that the power to reject a plaint under this rule is not exhausted when the plaint has been admitted and registered (r). See notes above "Shall be rejected."

3 A plaint is presented on the last day allowed by the law of limitation. It is written upon paper insufficiently stamped. The plaintiff is ordered to supply the requisite stamp paper within a week. The order is complied with on the fourth day after the date of presentation of the plaint. This would necessarily be after the expiration of the period of limitation prescribed for the institution of the suit. Can the plaint be admitted under

(l) *Secretary of State v. Golabrai* (1932) 59 Cal 150, 135 I C 873 (32) A C 146.

(l) *Midnapur Zamindari Co. v. Secretary of State* (1917) 44 Cal 352 40 J C 96.

(m) *Raghubans Puri v. Jyoti Sutarupa* (1907) 23 All 325. *Appa Rao v. Secretary of State* (1931) 57 Mad 416, 129 I C 450, (31) A M 175.

(n)

(o)

(p)

(q)

(r) *Brahmamoorthy Dast v. Anil Lal* (1900) 27 Cal 276, *Ismanudh Singh v. Anand Lal* (1911) 24 Cal 20.

11 these circumstances. Under this Code it can be [see s. 149]. Under the Code of 1852 there was a conflict of decisions on the point. The High Courts of Calcutta (e), Madras (f) and Bombay (g) holding that the Court had power to admit the plaint while the Allahabad High Court held that the Court had no such power (r). The view taken by the Calcutta, Madras and Bombay High Courts was that the Court had power under s. 54 of that Code at any time and without any regard to limitation, to fix a time within which the requisite stamp paper should be supplied, and if the stamp was made good within the period fixed by the Court the suit was to be deemed to be instituted when the plaint was first presented and not when the requisite stamp paper was supplied. On the other hand, the view taken by the Allahabad High Court was that though the Court had the power to give time to a plaintiff within which to supply the requisite stamp paper it must be a time within limitation and that s. 54 did not give any power to the Court to extend the period of limitation. This conflict has now been set at rest by the provisions of s. 149 of this Code. That section gives effect to the Calcutta, Madras and Bombay decisions. The Allahabad decisions are no longer law (w). S. 149 empowers the Court at any stage to allow a plaintiff to make up the deficiency of Court fees and provides in effect that when the deficiency has been made up the plaint is as valid as if it had been properly stamped when presented. It follows from the provisions of s. 149 that where a plaint written upon paper insufficiently stamped is presented to the Court on the last day allowed by the law of limitation and the Judge to whom the plaint is presented directs extra court fee to be paid but fixes no time for payment and the plaintiff pays the extra court fee though it be after the expiration of the period of limitation and the Court accepts it the plaint should be treated as if the full fee had been paid in the first instance and the suit cannot be held to be barred by limitation (z). In a recent Patna case the plaintiff was given a week's time in which to make up the deficiency before the expiry of the week the Court closed for the vacation. The amount in deficit was tendered two days after the re-opening of the Court and accepted and the plaint was registered. The period of limitation for the claim had expired prior to the date of the acceptance of the deficit. It was held that the acceptance of the fee, although tendered late and the subsequent registration of the plaint amounted to an exercise by the Court of its discretion to allow the deficiency to be paid on the day when it was tendered and, therefore, the suit was not barred by limitation (y).

The procedure prescribed by the present rule is not applicable to a case in which an appellate Court acts under s. 12 of the Court Fees Act 1870 (v).

Memorandum of appeal insufficiently stamped.—Under s. 7 (3) of the Court Fees Act the plaintiff may put his own valuation in a suit for a declaratory decree and consequential relief. In a case where a plaintiff valued the declaration and the injunction

single entire sum re
Rs. 2000 as the suit
Court further directed
that on such payment being made the appeal would be treated and further action
taken under s. 12 of the Court Fees Act with reference to the improper valuation of the
plaint (d).

- | | |
|--|--|
| (a) <i>State v. ...</i> (1923) 43 All. | (z) <i>State v. ...</i> (1923) 43 All. |
| (b) <i>State v. ...</i> (1923) 43 All. | (y) <i>State v. ...</i> (1923) 43 All. |
| (c) <i>State v. ...</i> (1923) 43 All. | (x) <i>State v. ...</i> (1923) 43 All. |
| (d) <i>State v. ...</i> (1923) 43 All. | (w) <i>State v. ...</i> (1923) 43 All. |
| (e) <i>State v. ...</i> (1923) 43 All. | (v) <i>State v. ...</i> (1923) 43 All. |
| (f) <i>State v. ...</i> (1923) 43 All. | (u) <i>State v. ...</i> (1923) 43 All. |
| (g) <i>State v. ...</i> (1923) 43 All. | (t) <i>State v. ...</i> (1923) 43 All. |
| (h) <i>State v. ...</i> (1923) 43 All. | (s) <i>State v. ...</i> (1923) 43 All. |
| (i) <i>State v. ...</i> (1923) 43 All. | (r) <i>State v. ...</i> (1923) 43 All. |
| (j) <i>State v. ...</i> (1923) 43 All. | (q) <i>State v. ...</i> (1923) 43 All. |
| (k) <i>State v. ...</i> (1923) 43 All. | (p) <i>State v. ...</i> (1923) 43 All. |
| (l) <i>State v. ...</i> (1923) 43 All. | (o) <i>State v. ...</i> (1923) 43 All. |
| (m) <i>State v. ...</i> (1923) 43 All. | (n) <i>State v. ...</i> (1923) 43 All. |
| (o) <i>State v. ...</i> (1923) 43 All. | (p) <i>State v. ...</i> (1923) 43 All. |
| (p) <i>State v. ...</i> (1923) 43 All. | (q) <i>State v. ...</i> (1923) 43 All. |
| (q) <i>State v. ...</i> (1923) 43 All. | (r) <i>State v. ...</i> (1923) 43 All. |
| (r) <i>State v. ...</i> (1923) 43 All. | (s) <i>State v. ...</i> (1923) 43 All. |
| (s) <i>State v. ...</i> (1923) 43 All. | (t) <i>State v. ...</i> (1923) 43 All. |
| (t) <i>State v. ...</i> (1923) 43 All. | (u) <i>State v. ...</i> (1923) 43 All. |
| (u) <i>State v. ...</i> (1923) 43 All. | (v) <i>State v. ...</i> (1923) 43 All. |
| (v) <i>State v. ...</i> (1923) 43 All. | (w) <i>State v. ...</i> (1923) 43 All. |
| (w) <i>State v. ...</i> (1923) 43 All. | (x) <i>State v. ...</i> (1923) 43 All. |
| (x) <i>State v. ...</i> (1923) 43 All. | (y) <i>State v. ...</i> (1923) 43 All. |
| (y) <i>State v. ...</i> (1923) 43 All. | (z) <i>State v. ...</i> (1923) 43 All. |

Clause (d) :—Suit barred by any law.—Where a suit appears from statements in the plaint to be barred by the law of limitation but the plaintiff is not rejected when presented, the Court may in a proper case allow the plaint to be amended at the hearing (1). Where a suit is brought against the Secretary of State without giving the notice required by sec. 80 the plaint shall be rejected under this clause (c).

Enlargement of time—The Court may *enlarge* the time fixed under cl. (1) and (c). See sec. 148.

Appeal—An order rejecting a plaint is a decree [s. 2 (2)], and appealable as such (d). An order rejecting a plaint was said in an Allahabad case to be an appealable order (e). This must be *per incuriam* for it is not one of the orders enumerated in O. 43.

Where a plaint is rejected under cl. (b) the order rejecting the plaint is not appealable when the order is based on a question of valuation *pure and simple*. But if the order necessarily involves a decision of the category or class under which a suit falls, even though it incidentally decides a question of valuation the order is appealable (f). These decisions turn on (n) sec. 12 of the Court Fees Act, 1870.

Revision—The Chief Court of the Punjab has held that an order directing a plaintiff to pay additional Court fee is not open to revision as the plaintiff will have his remedy by way of appeal from the consequential order rejecting the plaint (g). The same view has been taken in the undernoted cases (h). On the other hand it has been held that the demand of an improper Court fee is a refusal to exercise jurisdiction to try the case and is therefore open to revision (i), and that the payment of the unjustifiable Court fee may be an irreparable injury to the plaintiff (j). An order as to Court fee which is favourable to the plaintiff is not open to revision (k). See in this connection note 'Court fee' under sec. 115.

Review—An order rejecting a plaint under cl. (c) of this section is open to review (l). So also in a proper case an order rejecting a plaint under cl. (b) of the section (m).

12. [S 55] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

Procedure on rejecting plaint

Procedure on rejecting memorandum of appeal—The same procedure is to be followed when a memorandum of appeal is rejected (n).

13. [S 56] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Where rejection of plaint does not preclude presentation of fresh plaint

(1) *Chinnay v. Mahanji* (1910) 34 Bom. 250 3

(2) *1 C 159*

(3)

(4)

(5)

(6) *1 C 159*

(7) *1 C 159*

(8) *1 C 159*

(9) *1 C 159*

(10) *1 C 159*

(11)

(12)

(13)

(14)

(15)

(16)

(17)

(18)

(19)

Documents relied on in plaint

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint

List of other documents

Documents in sub rule (2)—The Bombay and Madras High Courts have held that the documents in the list under sub rule (2) are the documents referred to in the pleadings of which the defendant is entitled to inspection under rule 15 (o). The Calcutta High Court holds that rule 15 does not apply to such documents (p). A horoscope does not require to be entered in the list of documents mentioned in sub r (2). The reason is that it is not a document to be relied upon as a probative document in itself but it is a record made by the maker of the horoscope to which he is entitled to refer for the purpose of refreshing his memory in the witness box (q).

Failure to produce documents—The penalty for not producing the documents referred to in this rule is that prescribed in r 18 below, and not the reject on of the plaint (r).

Loss of document after production—Where a promissory note sued upon was produced and delivered to the Court as required by this rule but subsequently disappeared from the file the Judicial Committee held that the plaintiff was entitled to give secondary evidence under sec 65 (2) of the Evidence Act, 1872, without showing how it disappeared (s).

15. [S. 60] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is

Statement in case of documents not in his possession or power

16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint

Suits on lost negotiable instruments

(a) *Ram Dayal v. Varkhury* (1894) 18 Bom 363
Ramanathan v. Annamalai (193) 55 Mad
 4 A 1351 C 745 (31) A 30 823
 (p) *Chandmull v. Dhanraj* (1919) 24 C W N
 30- 56 IC 457

(q) -
 (r)
 (s)

17. [S. 62.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint together with a copy of the entry on which he relies

(2) The Court or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification, and, after examining and comparing the copy with the original, shall if it is found correct certify it to be so, and return the book to the plaintiff and cause the copy to be filed

Bankers' Books Evidence Act 18 of 1891—The Bankers' Books Evidence Act provides a special mode of proof of entries in bankers' books by dispensing with the production of the books. Sec 4 of the Act provides that a *certified copy* of any entry in a bankers' book is to be received as *prima facie* evidence of the existence of such entry and that it should be admitted as evidence of the matter contained therein to the same extent as the *original* entry

18. [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court be received in evidence on his behalf at the hearing of the suit

(2) Nothing in this rule applies to documents produced for cross examination of the defendant's witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory

In what cases leave may be granted under this rule—The object of rr 14 and 18 is to provide against false documents being set up after the institution of a suit. In these cases therefore where there is no doubt of the existence of a document at the date of the suit the Court should as a general rule admit the document in evidence though it was not produced with the plaint or entered in the list of documents annexed to the plaint as required by r 14 (1). But the Court may even in such a case refuse to receive it in evidence if it is produced at a very late stage of the proceedings, e.g. ten years after the date of the suit and a day before the judgment was delivered as was done in the undermentioned case (u)

(t) *Devadas v. Tarjada Begam* (1854) 8 Bom 37

(u) *Ganoochar v. Kruhnaji* (1900) 44 Bom 605, 57 J C 593

ORDER VIII.

Written Statement and Set-off.

1. [S. 110.] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

Written statement

Written statement—The written statement must contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his defence, but not the evidence by which those facts are to be proved (O 6, r 2) A defendant may, by his written statement, raise as many distinct and separate, and therefore inconsistent, defences as he may think proper, provided the pleading is not embarrassing (*v*) A written statement is not embarrassing within the meaning of O 6 r 16 merely because it sets up inconsistent defences (*w*) But where the defendant relies upon several distinct grounds of defence they must be stated separately and distinctly (r 7 below) See notes to O 6, r 2, "Alternate and inconsistent allegations"

2. [New. R. S. C., O. 19, r. 15.] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

New fact must be specifically pleaded

Fraud—See notes to O 6, r 4, "Fraud and coercion"

Facts showing illegality—When a plaintiff sues upon a bond and the defence is that there was no consideration, the Court should not entertain the plea that the consideration was unlawful, *e g*, stifling a criminal prosecution if it is raised for the first time in the argument of counsel at the close of the hearing The illegality of the consideration must be specifically pleaded (*x*) See notes to O 6, r 8

Limitation—In India, a suit instituted after the expiry of the period of limitation shall be dismissed, although limitation has not been set up as a defence, Limitation Act, 1908, s 3 In England limitation must be specifically set up as a defence

Claim against joint contractors for breach—Where in a suit against joint contractors separate defences are put in, a successful defence pleaded and proved by one only enures for the benefit of all (*y*)

3. [New. R. S. C., O. 19, r. 17.] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically

Denial to be specific

(r) *Berdan v Greenwood* (1878) 3 Ex D 201

(x) *Nur Ishaq v Miras Khan* (1925) 7 Lah LJ 86 85 IC 683 (5) A L 345

(w) *Re Morgan Bowen v Morgan* (1887) 30 C D 492

(y) *Pirie v Richardson* (1907) 1 K B 448

with each allegation of fact of which he deems it necessary to state the truth, except damages.

"Deal specifically with each allegation of fact" - The defendant must deal with each fact which is alleged against him separately, and say that he admits it, denies it, or does not admit it. It is not merely denial with his mouth open, but a non-admission, for [the defendant] is to deal specifically with every allegation of fact which he does not admit the truth. (2) Every allegation of fact is to be taken to be admitted if it is not denied specifically or by necessary implication. (3) It is stated to be not admitted (r. 5)

A defendant ought not to deny, by his written statement, facts which it is neither to his interest nor in his power to dispute or plead to any matter which is not alleged against him (b). See the (c) of the not yet material to a case."

"Except damages"—It is not necessary for a defendant to deny the damages, to deny specifically the damages, it is quite sufficient if he pleads in general that he is not liable for the damages (c). See notes to O. 6, r. 2, "Matters affecting damages."

4. [New R S C, O 19, r. 21.] Where a defendant does not

Evasive denial

an allegation of fact in the pleadings, he must not do so evasively, but at the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with details of circumstances, it shall not be sufficient to deny it along with those circumstances.

Evasive denial—Where the plaintiff sets up an agreement, and the defendant denies that the terms of the agreement between himself and the plaintiff were different.

specific denial at all (d). Similarly, where the plaintiff alleges that the defendant offered to the plaintiff's agent a bribe of Rs 500 on 17th July, 1908 at his office, it is an evasive traverse for the defendant to plead the defendant did not offer to the plaintiff's agent a bribe of Rs 500 on 17th July, 1908 at his office if the defendant might have offered any other sum on another day and in another place. Here the point of substance is that a bribe was offered. The details as to the time and place are only circumstances. The defendant should plead that he never offered a bribe of Rs 500 or any other sum (e). Where a denial is evasive, it is to be treated as a denial under O 6 r 17, unless the Court is satisfied that the defendant was entitled to make a full and frank disclosure of the facts (f).

(1) $\frac{1}{2}$ 1 2 3 4 5 6 7 8 9 10 11 12

(a) " " "

(b) _____

(c) *Loss of Copy* Scenarios (1916) 49 (n) 111.

(f) *Thorey v. Hollister* 184 (1896) 31 10 1896 644

| | | | | |
|-----|-------------------------|-----|----|----|
| (e) | Talbot v. Harter (1874) | 114 | 10 | 61 |
| (f) | Talbot v. Harter (1874) | 114 | 10 | 61 |

(f) *Talbot v. Harper* (1874) 10 Q.B. 601

facts which have been expressly admitted by the defendant or which must be taken to have been admitted by him within the meaning of this rule (see Evidence Act, 1872, s. 58). The admission itself being a proof, no other proof is necessary. In the case, however, of facts which may be taken to be admitted by the defendant within the meaning of this rule, the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission. That is to say, the Court may require the plaintiff to adduce such proof of the fact as it would have been necessary for him to adduce if no such admission had been made. This power which has been conferred upon the Court by the proviso to the rule is not new. The matter, it will be seen, is one of evidence, and a similar power is contained in the Indian Evidence Act I of 1872. The proviso to the rule, in fact, is a reproduction of the proviso to section 58 of the Evidence Act. That section runs as follows:—

“No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings. *Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.*”

The proviso to section 58 as well as the proviso to the present rule indicates the intention of the Legislature that pleadings in India ought not to be construed with the same strictness as in England. Upon this principle, the defendant has been allowed under special circumstances to traverse at the hearing allegations in the plaint which he had omitted to traverse in his written statement (f). The rule of pleadings in England is very stringent. According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse that fact at the hearing. The fact will be taken to be admitted by him, and the Court has no power to require the plaintiff to prove it in any case. Strike out the proviso to the present rule, and you have the rule of English law. In fact the first paragraph of this rule is a reproduction of O 19 r 13 of the English Rules made under the Judicature Acts. The proviso has been added to modify the rigour of that rule.

But though pleadings in India are not to be construed as strictly as in England neither party will be allowed to set up at the hearing an entirely new and inconsistent case. The plaintiff must be held to the state of facts alleged in his plaint or consistent therewith (m). Similarly, the defendant must be held to the state of facts alleged in his written statement or consistent therewith (n).

Omission to file written statement.—This rule applies only where a pleading has been put in by the defendant. Omission to file a written statement does not amount to an admission of the facts stated in the plaint (o).

6. [S III] (1) Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's

Particulars of set off to be given in written statement

- | | | | |
|-----|---|-----|---|
| (f) | . | (n) | <i>Choea v. Isa</i> (1876) 1 Bom 209 <i>Muncher Shah v. New Dharmadary Co</i> (1880) 4 Bom 5-6 |
| (m) | . | (o) | <i>Poss & Co v. Scriven</i> (1916) 43 Cal 1001 1009 1010 34 I C 235 <i>Narindar Singh v. King</i> (1904) 10 Lah L J 332, (1905) A L J 762 |

6 suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations

(a) *A* bequeaths Rs 2,000 to *B* and appoints *C* his executor and residuary legatee *B* dies and *D* takes out administration to *B*'s effects *C* pays Rs 1,000 as surety for *D*, then *D* sues *C* for the legacy *C* cannot set off the debt of Rs 1,000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1,000

(b) *A* dies intestate and in debt to *B* *C* takes out administration to *A*'s effects and *B* buys part of the effects from *C* In a suit for the purchase money by *C* against *B*, the latter cannot set off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*

(c) *A* sues *B* on a bill of exchange *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set off The amount not being ascertained cannot be set off

(d) *A* sues *B* on a bill of exchange for Rs 500 *B* holds a judgment against *A* for Rs 1,000 The two claims being both definite pecuniary demands may be set off

(e) *A* sues *B* for compensation on account of trespass *B* holds a promissory note for Rs 1,000 from *A* and claims to set off that amount against any sum that *A* may recover in the suit *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands

(f) *A* and *B* sue *C* for Rs 1,000 *C* cannot set off a debt due to him by *A* alone

(g) *A* sues *B* and *C* for Rs 1,000 *B* cannot set off a debt due to him alone by *A*

(h) *A* owes the partnership firm of *B* and *C* Rs 1,000 *B* dies, leaving *C* surviving *A* sues *C* for a debt of Rs 1,500 due in his separate character *C* may set off the debt of Rs 1,000

Changes in the rule—Sub rule (3) is new See r 9 below

Conditions of applicability of the rule—A defendant may claim a set off under this rule if the following conditions are satisfied, but not otherwise —

I The suit must be one for the recovery of money

II. As regards the amount claimed to be set off—

- (a) it must be an ascertained sum of money [see ill. (c) (1) and (e) and (v)]
- (b) such sum must be legally recoverable;
- (c) it must be recoverable by the defendant or by all the defendants if there is more than one [see ill. (c)]
- (d) it must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one [see ill. (f)]
- (e) it must not exceed the pecuniary limits of the jurisdiction of the court in which the suit is brought, and
- (f) both parties must fill in the *defence and counter-claim* as they fill in the *plaintiff's suit* [see ill. (a) (1) and (b)]

The suit must be one for the recovery of money. In *Shankar v. Shankar* (p) their Lordships of the Privy Council observed that it would not be a suit for an account was a suit for recovery. In a well-known case, *Attalabhai v. Attalabhai*, it was held that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery and that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery and that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery.

The amount claimed to be set off must be an ascertained sum of money, and not unliquidated damages. It does not mean a sum limited by the plaintiff. In *Shankar v. Shankar* (p) it was held that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery and that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery. In *Shankar v. Shankar* (p) it was held that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery and that a suit for a dissolution of partnership and for payment of the balance due to the plaintiff by the defendant was a suit for recovery.

A clerk sues B for employment for a year. B sues A for a year's salary. A left his employment without notice. B claims to set off. The amount to be set off is the salary for the year. A. (3) on the next page.

Equitable set off—There are cases in which the set off is not a legal set off even in respect of an unascertained sum which is a legal set off. In such cases where the cross-claims arise out of the same transaction or are connected by their nature and circumstances that they can be looked upon as part of one transaction. In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross-suit and that he may be allowed to set off though the amount may be unascertained. Such a set off is called an *equitable set off* as it is allowed by Courts of Equity as distinguished from a *legal set off* which is allowed by Courts of Common Law in respect only of an ascertained sum. It will thus be seen that the present rule is restricted to a legal set-off for it requires that the amount

(p) (1865) 13 Cal 104 131 A 49
 (q) *Farmington v. Chand Mal* (1884) 10 All 597
 (r) *Edward v. Jomn* (1893) 14 C W N 10
 51 C 67, *Har Prasad v. Jom Nari*
 (194) 10 All L J 844 801 C 340
 (4) A 80
 (t) *Blair v. Parneswar* (1903) 30 Cal 1000

See also *Chand Lal v. K. N. S. Har Lal*
 (194) 40 All 394 83 J C 401 (4) A A
 341 a case under the Agra Tenancy Act
 of 1901
 (u) *J. C. Galsani v. Pothal* (1931) 57 Cal
 855 191 (4) (31) A C 3
 (v) *Har Prasad v. Jom Nari*
 (191) 33 All 3 341 C 3

II. As regards the amount claimed to be set off—

- (a) it must be an *ascertained* sum of money [see ill. (c), (d), and (e) above];
- (b) such sum must be *legally* recoverable;
- (c) it must be recoverable by the defendant or by all the defendants if more than one [see ill. (c)];
- (d) it must be recoverable by the defendant from the plaintiff or all the plaintiffs if more than one [see ill. (d)];
- (e) it must not exceed the *pecuniary limits* of the jurisdiction of the Court in which the suit is brought, and
- (f) both parties must fill, in the defendant's claim to set off, the *same character* as they fill in the plaintiff's suit [see ill. (a), (b), and (h)].

The suit must be one for the recovery of money.—In *Nan Karay v. Ka Htau* (p), their Lordships of the Privy Council observed that it was doubtful whether a suit for an *account* was a suit for *money*. In a subsequent Allahabad case, it was held that a suit for a dissolution of partnership and for partnership accounts with a prayer that such *balance* as may found due to the plaintiff upon taking the partnership accounts may be paid to him was a suit for *money*, and that a plea of set off might therefore be raised by the defendant in such suit (q).

The amount claimed to be set off must be an ascertained sum of money, and not unliquidated damages.—The expression "ascertained sum" does not mean a sum admitted by the plaintiff. It is used in contradistinction to unliquidated damages (r). In ill. (d) and (e) the claim is for an ascertained sum, not so in ill. (c) where the amount claimed to be set off is for unliquidated damages. In the case mentioned in ill. (c) the defendant may bring a cross suit against the plaintiff. In ill. (d) the amount claimed to be set off by B is the amount of a decree, and this may be set off against A's claim. It is not necessary that B should have taken any steps to enforce the decree (s). But if B's decree had been a decree for sale on a mortgage there could have been no set off, for such a decree is not for an ascertained sum but for an account to be taken of what is due on the mortgage for principal and interest and costs (t).

A, a clerk, sues B, his employer, for arrears of wages due to him. B alleges that A left his employment without notice and that A is therefore liable to pay damages which he claims to set off. The amount not being ascertained cannot be set off (u). See ill. (3) on the next page.

Equitable set off.—There are cases in which the defendant may be allowed a set off even in respect of an unascertained sum which sounds in damages. These are cases where the cross demands arise out of the *same transaction*, or are so connected in their nature and circumstances that they can be looked upon as part of one transaction. In such cases Courts of Equity in England have held that it would be inequitable to drive the defendant to a separate cross suit, and that he may be allowed to plead a set off though the amount may be *unascertained*. Such a set off is called an *equitable set-off*, as it is allowed by Courts of *Equity*, as distinguished from a *legal set off* which is allowed by Courts of *Common Law* in respect only of an *ascertained* sum. It will thus be seen that the present rule is restricted to a *legal set off*, for it requires that the amount

(p) (1886) 13 Cal 124 131 A 48

(q) *Pamjoran v. Chand Mal* (1888) 10 All 597

(r) *Edward v. Parnin* (1909) 14 C W N 170
5 I C 67 *Har Prasad v. Ram Narup*
(1924) 22 All L J 844, 82 I C 310
(24) A A. 872

(s) *Blair v. Pamethwar* (1903) 30 Cal 1066

See also *O. Hind Ram v. Kanti Behari Lal*
(1924) 46 All 438, 81 I C 403 (24) A A
341, a case under the Agents' Act
2 of 1901

(t) *J. C. Gidder v. Hathikinn* (1911) 57 I al
855 1, 51 C 4, 0 (11) A O 21

(u) *Vidya Mills Co. Ltd v. Brij Mohan Lal*
(1917) 33 All 332 34 I C 205

to be set off shall be an *ascertained* sum. The question therefore arises whether an *equitable* set off can be pleaded in Indian Courts, in other words, if the defendant's claim is for an *unascertained* sum, but has arisen from the *same transaction* as the plaintiff's claim the defendant can set off such demand against the plaintiff's claim. It has been held that he can do so not under the provisions of the present rule which is limited to a *legal* set off, but in the exercise of the general right of a defendant to plead a set off whether it is legal or equitable. The provisions of the Code regulate *procedure* only and they have not the effect of taking away any *right* of set off which a defendant may have independently of its provisions. O 20 r 19 (3), recognizes an equitable set off. The leading case on the subject is *Clark v Ruthnacaloo* (t). In a suit for an account the defendant can claim an equitable set off on payment of Court fee (u). But the right of set-off does not exist when the cross demand relates to a *different transaction* (x).

Illustrations

1 A sues B to recover Rs 6000 due under a contract. B admits A's claim, but claims to set off several sums of money alleged to be damages sustained by him by reason of A's breach of some of the terms of the *same* contract. B is entitled to claim the set off, for the claim arises from the *same transaction*. *Kastanasamy v Municipal Commissioner for Malras* (1868) 4 Mad II C 120, *Pragi Lal v Maxwell* (1885) 7 All 284.

2 A agrees to sell and B agrees to purchase, 200 bales of wool. B takes delivery of 170 bales and is ready and willing to take delivery of the remaining 30 bales, but A fails to deliver them. A sues B for the price of the 170 bales. B claims to set off the damages sustained by him by reason of A's failure to deliver the remaining bales. B is entitled to claim the set off as the claim arises out of the *same transaction*. *Kishorchand v Madhoyji* (1880) 4 Bom 407, *Nia v Durga* (1893) 15 All 9, *Nand Ram v Ram Prasad* (1905) 27 All 145.

3 A sues B his master, for Rs 800 being arrears of salary. B claims to set off Rs 625 being the loss sustained by him by reason of neglect and misconduct on the part of A as his servant. B is entitled to claim the set-off as his claim arises out of the *same relation* from which A's claim arose namely, that of master and servant. *Chisholm v Gopal Chander* (1889) 16 Cal 711. But see *Victoria Mills Co Ltd v Brij Mohan Lal* (1917) 39 All 362 38 I C 203.

4 A (mortgagee) sues B (mortgagor) to recover the principal and interest due on a usufructuary mortgage. B claims to set off the loss alleged to have been occasioned by A's failure as mortgagee in possession to make repairs to the mortgaged property. B is entitled to claim the set off. *Shua v Jaru* (1892) 15 Mad 290.

5 A washerman sues his employer for his wages. The employer may set off the value of articles short returned to him against the wages. *Maiden v Bhundu* (1910) Punj Rec no 77 p 226 7 I C 1006.

6 A sues a limited company to recover the amount of dividends payable to him as a shareholder. The company is not entitled to set off damages claimed by the company against A for breach of a contract to sell and deliver cotton to the company. *Vithal das v The Hyderabad Spinning and Weaving Co, Ltd* (1923) 47 Bom 182, 67 I C 326, (23) A B 24.

(v) (1865) 2 Mad II C 996 *Kishorehand v Mathoory* (1880) 4 Bom 407 *Bhagbat v Bamdeb* (1885) 11 Cal 557 For other cases see the Illustrations.
(w) *Surendra v Ash tosh* (1931) 35 C W 17 132 I C 190 (31) A C 308 *Surendra*

Nath v At l Chandra (1907) 34 Cal 89.
(x) *Ramdeo v Pokhara n* (1894) 21 Cal 419 *Daloo v Benqal Spinning Co* (189) 21 Bom 126 *Dhundiraj v Ganesh* (1894) 18 Bom 7-1

The amount claimed to be set off must be "legally recoverable—". The amount claimed by way of set-off under this rule must be "legally recoverable". It follows from this that if the defendant's claim is barred by the law of limitation at the date of the suit, it cannot be pleaded by way of set-off under this rule. (a) But this rule relates only to a legal set-off. The question arises whether a claim by way of equitable set-off can be allowed if it is barred by limitation at the date of the suit. It has been laid down that in cases where the plaintiff's claim and the defendant's claim relate both to the same estate or there is a fiduciary relationship between the parties, the defendant's claim to set-off, though barred by limitation at the date of the suit, may be entertained as an equitable set-off. It has thus been held that in a suit by an heir against his co-heirs for his one-sixth share of the estate of the deceased, the latter are entitled to set off one-sixth of the Government revenue payable by them in respect of the estate, though a separate suit by them to recover from the plaintiff the proportionate part of the revenue payable by him would be barred by limitation (b). Similarly in mortgage suits sums are allowed to be set off in taking accounts of the mortgage, even though barred by limitation (c). Upon the same principle it has been held that a trustee in possession of the trust estate is entitled to set up his right to be indemnified out of the trust estate when called upon for an account although his right to set off the amount claimed by him by way of indemnity is barred by limitation (d). In a recent case (e) the High Court of Madras held that in a suit by a lessor for rent it is not open to the lessee to claim by way of equitable set-off an unpaid claim for damages which was barred at the date of the suit. See *Seetha Bai Ayyar v. S. S. A. Anon.* An exception to this rule (namely, that a time barred claim cannot be pleaded by way of equitable set-off) has been recognized in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and cestui que trust and there is a co-extensibility even barred claims may be taken into account in adjusting the final accounts. This exception has been extended in some of the decided cases in India to mortgages presumably on the ground that there is accountability between the parties. See *Prasanna Bai v. Venkatesh Rao* (f), *Chidambaram Pillai v. Krishnaswami Pillai* (g) and *Isaiah Singh v. Perumanil Singh* (h). It is not necessary to say now whether these cases have been rightly decided. I see no reason for extending the exception to suits between a lessor and a lessee.

In a Madras case (J) an agent used his principal's money that he had found in his pocket taking for his own use. The defendant pleaded in his written statement that money would be found in his pocket taking accounts and in the case of a decree for such sum as might be found to him. The defendant's claim was that he was entitled to the sum as it was found in the late of the written statement. It was held that if the sum was found to be all well as an equitable set off to the plaintiff's claim, then the defendant was not entitled to a decree for the sum found to him as his sum was found in the late of the written statement. It was a decree for the sum found to him as it was found to enable the defendant to equal the plaintiff's claim. It was held to be taken by the High Court of Bombay (J) in an Allahabad case (G) that the principle of the opinion that the set off is to be made at the time of the trial and not merely to the extent of the sum found to the plaintiff.

[illegible]

() $\text{Ma} 1 \text{ L } J \quad 85 \quad 94 \quad 4 \text{ I } \quad 2 \text{ I}$
 () $\text{Igra an} \quad \text{Sr math} (191) \quad 1 \text{ I} \quad \text{Ma} 1 \text{ U } 11$
 (d) (1913) $5 \text{ M } \text{L } J \quad 561 \quad 1 \text{ I } \quad 2 \text{ I}$
 (e) (1915) $8 \text{ M } \text{L } J \quad 5 \quad 8 \quad 1 \quad 4 \quad 1$
 (f) (1915) $19 \text{ C } \text{W} \quad 1183 \quad 1 \text{ I } \quad 716$
 (g) $\text{Jannan} \quad \text{Zan} \quad \text{la of } 7 \quad (1110) 42$
 $\text{Mad } 83 \quad 53 \text{ I } \text{C} \quad 34$
 (h) $\text{Nayan} \quad \text{Sa mahamed} (10) \quad 24 \text{ I}$
 $\text{L R } 994 \quad 7 \text{ I } \quad 943 \text{ C } 3 \text{ A } \quad 13 \text{ I}$
 () $\text{Pog} \quad \text{Zay } \text{Marw il} (1865) 7 \text{ All } 184$
 $\text{et } \text{Iarmann} \quad \text{Zajal } \text{Aaral} (12) \text{ I}$
 $3 \text{ All } 5 \quad 5 \quad 6 \text{ I } \text{C } 16$

6 plaintiff's claim, even if it was barred at the date of the written statement. See notes to O 20, r 19, 'Decree in case of set off'.

Costs awarded to a tenant in a suit brought against him by the benamidar of the landlord cannot be set off by the tenant in a subsequent suit for rent brought against him by the landlord. The costs having been awarded against the benamidar, they are not legally recoverable from the landlord (j)

A separate debt cannot be set off against a joint and several debt.—Thus in ill (g) B cannot set off the debt due to him alone by A, for it is a separate debt, while the suit is to recover a joint and several debt. It has similarly been held that in a suit by a company against its directors, no individual director is entitled to set off the amount due to him alone from the company (l)

The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought.—The valuation of a set off for the purpose of jurisdiction must be taken as relating to the whole amount pleaded as a set off, and without reference to any portion of the plaintiff's claim admitted by the defendant. A sues B in a Presidency Small Cause Court for Rs 1,000. B claims to set off a sum of Rs 2,700 and claims judgment for Rs 1,700 after giving A credit for Rs 1,000, admitted by B to be due to A. The Small Cause Court has no jurisdiction to try the claim as to set off, the value of the amount claimed as set off being above Rs 2,000 (i)

A plea of payment is distinct from a plea of set off. A sues B to recover Rs 1,500 in a Court of which the pecuniary jurisdiction is limited to Rs 2,000. B alleges that he has paid Rs 1,000 to A on account, and admits his liability for the balance of Rs 500, but he claims a set off of Rs 1,700 being the amount due on a promissory note passed to him by A, and asks for a decree for Rs 1,200. The amount claimed to be set off is not Rs 1,000 plus Rs 1,700 = Rs 2,700, but Rs 1,700 only, and it is therefore within the jurisdiction of the Court (m)

Not only the amount, but also the nature of the set off, must be within the cognizance of the Court in which the suit is brought. Hence a Court cannot entertain a claim to a set off unless such claim, if made the subject of a suit, would fall within its jurisdiction (n). But it has been held that as a set off is a ground of defence a Court may entertain a set off on a cause of action arising outside the local limits of its territorial jurisdiction (o)

Same character.—Ills (a) and (b) are cases in which the parties do not fill the same character (p)

A suit is brought by a Hindu son as the heir and representative of his father to recover from B a debt due by B to the father. B claims to set off a debt due to him by A's father. B may do so, for both the parties fill the same character as they fill in the plaintiff's suit (q). Similarly in a suit by A against B for an account for goods supplied by A to B B may claim a set off of the amount due to him from A in respect of wages as A's gumasta (r)

Court fee.—A written statement containing a claim of set off must be regarded as a plaint in regard to such set off, and must be stamped accordingly (s)

| | |
|---|---|
| (j) <i>Tiluk Chandra v Jasoda Kumar</i> (1906) 11 C W N 215 | (o) |
| (k) | (p) |
| (l) | (q) |
| (m) <i>Hoe Mor v Seedat</i> (1914) 2 Rang 349 84 1 C 906 (25) A R 22 | (r) <i>Ragharendra v Yalpurad</i> (1917) 41 Bom 163 39 I C 17 |
| (n) <i>Beni Madho v Gaya</i> (1893) 15 All 404 | (s) (1892) 15 Mad 29 <i>supra</i> |

Set-off in winding up proceedings—Though a director has no right to set off a debt due to him from the company against a claim made against him by the liquidator under s. 214 of the Indian Companies Act, 1882 [Ind. Co. Act, 1912, s. 215] which provides a summary remedy (i), he is entitled to set off the amount due to him if a regular suit is brought against him by the company in respect of that claim (u). In a suit by a liquidator against a debtor of the company, the debtor is entitled to set off the amount of a fixed deposit made by him with the company provided the deposit had matured at the date of the suit, though it had not matured at the date of the order for winding up the company (v), but he cannot set off a deposit in the name of a firm of which he is a partner (w).

Set off in insolvency.—See Presidency Towns Insolvency Act, 1909, s. 47 (r), and Provincial Insolvency Act, 1907, s. 30, now Act 5 of 1920, s. 45.

Solicitor's lien for costs—Before the year 1832 the Courts in England had a discretionary power as regards set off and a discretion as to the terms upon which they would allow it (y). This discretion was taken away under the General Rules of 1832 and the General Rules of 1853. Rule 93 of the General Rules of 1832 was in these words: "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided nevertheless that interlocutory costs in the same suit, awarded to the adverse party may be deducted." This rule was reproduced in identical terms in 1853. That state of things continued until the Judicature Act, 1873, came into force. O. 65, r. 14, made under that Act, was directly contrary to the previous rule. The previous rule allowed no set off; O. 65, r. 14, says that a set off may be allowed. The result is that in England the Courts under O. 65, r. 14, exercise now in matters of set off the discretion which was taken away by the General Rules of 1832 (z).

See 111 of the Code of 1877 provided that the Court may pronounce a final judgment in the same suit both on the original and on the cross claim but it shall not affect the lien upon the amount decreed of any pleader in respect of the costs payable to him under the decree. This provision was reproduced in sec. 111 of the Code of 1882, and it is reproduced in the present rule also. It is clear from the language of this rule that the Courts of this country have no discretion in the matter of a solicitor's lien in cases falling within this rule.

A solicitor has at common law a lien for his costs over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions (a) The lien attaches to property of every description, such as, for instance, money payable to the client under a judgment including costs ordered to be paid to the client, or the proceeds of an execution in the hands of a Sheriff, money paid into Court, whether as security for costs or by way of defence, or otherwise, and money received by way of compromise (b) The lien does not extend to general costs for all business done by a solicitor for his client, but only to costs of the suit in which the property has been acquired or preserved by his exertions (c) Where there are assets of a partnership in the hands

- (f) " "
- (u) Lakshminankar (1906) 30 B m 173
194
- (r) " " " "
- (w) " " " "
- (z) " "
- (y) Prudiphatt v Leith (No 2) (1916) 2 Ch 168
178
- (z) Reid v Copper (1915) 2 K B 147 pp 149,
150
- (a) Ex parte Morrison (1860) L R 4 Q B 153,
156 Balon v Holland (1879) 4 My & C
R 334 Rhodes v Sudgen (1886) 34 Ch
D 155
- (b) Tyahji Dayabhai d Co v Jetha Derji d Co
(1927) 51 Bom 855 105 I C 353, ("7")
A B 542 Mahbury vol 26, s 1343,
p 821
- (c) Saradanand v Parashram (1928) 52 Bom 336,
108 I C 705 (24) A B 108 Varayana
swami v Chelapalai (1910) 33 Mad 255,
41 C 394

6 plaintiff's claim, even if it was barred at the date of the written statement. See notes to O 20, r 19, "Decree in case of set off"

Costs awarded to a tenant in a suit brought against him by the benamidar of the landlord cannot be set off by the tenant in a subsequent suit for rent brought against him by the landlord. The costs having been awarded against the benamidar, they are not legally recoverable from the landlord (j)

A separate debt cannot be set off against a joint and several debt—Thus in ill (g), B cannot set off the debt due to him alone by A, for it is a separate debt, while the suit is to recover a joint and several debt. It has similarly been held that in a suit by a company against its directors, no individual director is entitled to set off the amount due to him alone from the company (l)

The amount claimed to be set off must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought—The valuation of a set off for the purpose of jurisdiction must be taken as relating to the whole amount pleaded as a set off, and without reference to any portion of the plaintiff's claim admitted by the defendant. A sues B in a Presidency Small Cause Court for Rs 1,000. B claims to set off a sum of Rs 2,700, and claims judgment for Rs 1,700, after giving A credit for Rs 1,000, admitted by B to be due to A. The Small Cause Court has no jurisdiction to try the claim as to set off, the value of the amount claimed as set off being above Rs 2,000 (i)

A plea of payment is distinct from a plea of set off. A sues B to recover Rs 1,500 in a Court of which the pecuniary jurisdiction is limited to Rs 2,000. B alleges that he has paid Rs 1,000 to A on account, and admits his liability for the balance of Rs 500, but he claims a set off of Rs 1,700 being the amount due on a promissory note passed to him by A, and asks for a decree for Rs 1,200. The amount claimed to be set off is not Rs 1,000 plus Rs 1,700 = Rs 2,700, but Rs 1,700 only, and it is therefore within the jurisdiction of the Court (m)

Not only the amount, but also the nature of the set off, must be within the cognizance of the Court in which the suit is brought. Hence a Court cannot entertain a claim to a set off unless such claim, if made the subject of a suit, would fall within its jurisdiction (n). But it has been held that as a set off is a ground of defence a Court may entertain a set off on a cause of action arising outside the local limits of its territorial jurisdiction (o)

Same character.—Ills (a) and (b) are cases in which the parties do not fill the same character (p)

A suit is brought by a Hindu son as the heir and representative of his father to recover from B a debt due by B to the father. B claims to set off a debt due to him by A's father. B may do so, for both the parties fill the same character as they fill in the plaintiff's suit (q). Similarly in a suit by A against B for an account for goods supplied by A to B, B may claim a set off of the amount due to him from A in respect of wages as A's gumasta (r)

Court fee.—A written statement containing a claim of set off must be regarded as a plaint in regard to such set off, and must be stamped accordingly (s)

- | | | | | | | | | | |
|---|---------------|---------------|--|--|---|---|--|---|-----------------------------------|
| (j) <i>Tiluk Chandra v Jasoda Kumar</i> (1906) 11 C W N 215 | (k) | (l) | (m) <i>Hos Jhos v Seedat</i> (1924) 2 Rang 349 84 1 C 956 (25) A R 22 | (n) <i>Beni Madho v Gaya</i> (1893) 15 All 404 | (o) <i>Lassoo d. Sons v Krishna</i> (1932) 34 Bom L R 1401, 141 I C 387 (32) A R 61 | (p) See also <i>Abul Hasan v Zohra</i> (1833) 5 All 299, <i>Lakshuman v Madhav</i> (1891) 15 Bom 186, <i>Madharao v Rana</i> (1915) 39 Bom 131 27 I C 350 | (q) <i>Chennappa v Raykunatha</i> (1892) 15 Mad 29 | (r) <i>Ragharendra v Yalgurad</i> (1017) 41 Bom 163 39 I C 17 | (s) (1892) 15 Mad 29 <i>supra</i> |
|---|---------------|---------------|--|--|---|---|--|---|-----------------------------------|

Set off in winding up proceedings—Though a director has no right to set off a debt due to him from the company against a claim made against him by the liquidator under s 214 of the Indian Companies Act, 1882 [Ind Cos Act 1913 s 230] which provides a *summary* remedy (t) he is entitled to set off the amount due to him if a regular suit is brought against him by the company in respect of that claim (u). In a suit by a liquidator against a deb or of the company, the deb or is entitled to set off the amount of a fixed deposit made by him with the company provided the deposit had matured at the date of the suit though it had not matured at the date of the order for winding up the company (v), but he cannot set off a deposit in the name of a firm of which he is a partner (w).

Set off in insolvency—See Presidency Towns Insolvency Act, 1903, s 47 (x) and Provincial Insolvency Act, 1907, s 30 now Act 5 of 1920, s 45.

Solicitor's lien for costs—Before the year 1832 the Courts in England had a discretionary power as regards set off and a discretion as to the terms upon which they would allow it (y). This discretion was taken away under the General Rules of 1832 and the General Rules of 1853. Rule 93 of the General Rules of 1832 was in these words: 'No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set off is sought, provided nevertheless that interlocutory costs in the same suit awarded to the adverse party may be deducted.' This rule was reproduced in identical terms in 1853. That state of things continued until the Judicature Act 1873 came into force. O 65, r 14 made under that Act was directly contrary to the previous rule. The previous rule allowed no set off, O 65 r 14, says that a set off may be allowed. The result is that in England the Courts under O 65 r 14 exercise now in matters of set off the discretion which was taken away by the General Rules of 1832 (z).

Sec 111 of the Code of 1877 provided that the Court may pronounce a final judgment in the same suit both on the original and on the cross claim but it *shall not affect the lien* upon the amount decreed of any pleader in respect of the costs payable to him under the decree. This provision was reproduced in sec 111 of the Code of 1892 and it is reproduced in the present rule also. It is clear from the language of this rule that the Courts of this country have no discretion in the matter of a solicitor's lien in cases falling within this rule.

A solicitor has at common law a lien for his costs over property recovered or preserved or the proceeds of any judgments obtained for the client by his exertions (a). The lien attaches to property of every description such as for instance money payable to the client under a judgment including costs ordered to be paid to the client or the proceeds of an execution in the hands of a Sheriff money paid into Court whether as security for costs or by way of defence, or otherwise and money received by way of compromise (b). The lien does not extend to general costs for all business done by a solicitor for his client but only to costs of the suit in which the property has been acquired or preserved by his exertions (c). Where there are assets of a partnership in the hands

- | | |
|--|---|
| <p>(t) <i>Ex parte Pelly</i> (1889) 21 Ch D 49 50ⁿ 507 <i>Flitcroft & case</i> (1881) 21 Ch D 59 533 <i>Carrage Supply Association in re</i> (1884) 27 Ch D 3</p> <p>(u) <i>Ahmedabad Advance Spg and Wg Co v</i> <i>Lakshminankar</i> (1906) 30 Bom 173 194</p> <p>(v) <i>Mehr Chand v Amritsar Bank</i> (1915) Punj Rec no 63 p 25 55 I C 975</p> <p>(w) <i>Alvanah Bank v Mohan Lal</i> (19—) 8 Lah 100 101 I C 76 (2) A L 484</p> <p>(x) See <i>Muller v National Bank of India</i> (189) 19 Cal 146</p> <p>(y) <i>Pudlephatt v Leith</i> (No 2) (1916) 2 Ch 168 178</p> | <p>(z) <i>Feid v Cupper</i> (1915) 1 K B 147 pp 149 150</p> <p>(a) <i>Ex parte Morrison</i> (1860) L R 4 Q B 153 156 <i>Bacon v Bolland</i> (1839) 4 My & C R 354 <i>Thodes v Sudgen</i> (1886) 34 Ch D 155</p> <p>(b) <i>Tyabji Davabhai & Co v Jetha Detsi & Co</i> (19—) 51 Bom 855 105 I C 343 (27) A B 542 Halbury vol 26 s 1313 p 81</p> <p>(c) <i>Sadanand v Parashram</i> (1928) 52 Bom 336 108 I C 705 (78) A B 108 <i>Narayana</i> <i>swami v Chelapalai</i> (1910) 33 Mad 255 41 C 393</p> |
|--|---|

of a receiver appointed in a partnership suit the solicitors engaged in that suit are entitled to a lien on those assets in priority to the creditors of the partnership. But a solicitor's lien does not prevail against the claim of a mortgagee who advances money to the client to enable him to pay off prior encumbrances on the property in suit (d).

It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law prevailing in English Courts before the passing of 23 and 24 Vict. ch. 127 by which that lien was very much extended (e). At common law a solicitor had no lien on *realty*. Lien on *realty* was first conferred by the above statute. The High Court of Calcutta has held that in India an attorney is entitled to a lien on immovable property recovered for his client in the suit (f). The High Court of Bombay has held otherwise (g) and this view seems to be correct.

A solicitor's lien for his costs extends to all the moneys of his client which are lying in Court. It makes no difference that the moneys are brought into Court by attachment at the instance of a decree holder. The lien, however, does not exist when moneys are once distributed to the creditors of the client. So long as the moneys are in Court the Court has power to direct payment to the solicitor of his costs out of the moneys (h). A obtains a decree against B. C who has obtained a decree against A attaches the amount of the decree obtained by A against B in B's hands. A's attorney is entitled to a lien for his costs on the sum so attached but the only order that can be made in such a case is an order to the defendant *not to pay* the sum attached to any one without notice to the attorney (i). A solicitor's lien does not entitle him to a set off against a general balance of an account due by him (j).

Parties to an action may compromise without the intervention of the solicitor but there must be no intention to deprive the solicitor of his charges and the Courts will exercise its equitable interference to enable a solicitor to proceed in the action for his costs though no notice of his lien has been given in cases where it is made out that there is an intention to cheat the solicitor, but unless there has been notice or collusion the

unfair to any of the parties or compel the Courts to go into complicated questions of fact, especially when charges of fraud or collusion are made or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction. In such a case the Court will refer the solicitor to a *regular suit* (k).

opposite party of such costs. Thus a case where the original client was dead and it appeared that his legal representatives were not men of substance and that they were unable to pay was held by the High Court of Calcutta to be a proper one for the Court in the exercise of its discretion to make a direct order for payment of costs to the solicitor by the opposite party (l).

| | | | |
|-----|-----|---------|--|
| (d) | | Cal 144 | |
| (e) | (f) | 1 | |
| (f) | | 1 | |
| (g) | | 1 | |
| (h) | (i) | 1 | |

- 6 of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to a lien on those assets in priority to the creditors of the partnership. But a solicitor's lien does not prevail against the claim of a mortgagee who advances money to the client to enable him to pay off prior encumbrances on the property in suit (*d*)

It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law prevailing in English Courts before the passing of 23 and 24 Vict. ch. 127 by which that lien was very much extended (*e*). At common law a solicitor had no lien on *realty*. Lien on *realty* was first conferred by the above statute. The High Court of Calcutta has held that in India an attorney is entitled to a lien on immovable property recovered for his client in the suit (*f*). The High Court of Bombay has held otherwise (*g*), and this view seems to be correct.

A solicitor's lien for his costs extends to all the moneys of his client *which are lying in Court*. It makes no difference that the moneys are brought into Court by attachment at the instance of a decree holder. The lien, however, does not exist when moneys are once distributed to the creditors of the client. So long as the moneys are in Court, the Court has power to direct payment to the solicitor of his costs out of the moneys (*h*). A obtains a decree against B. C who has obtained a decree against A attaches the amount of the decree obtained by A against B in B's hands. A's attorney is entitled to a lien for his costs on the sum so attached, but the only order that can be made in such a case is an order to the defendant *not to pay* the sum attached to any one without notice to the attorney (*i*). A solicitor's lien does not entitle him to a set off against a general balance of an account due by him (*l*).

Parties to an action may *compromise* without the intervention of the solicitor, but there must be no intention to deprive the solicitor of his charges, and the Courts will exercise its equitable interference to enable a solicitor to proceed in the action for his costs, though no notice of his lien has been given, in cases where it is made out that there is an intention to cheat the solicitor, but unless there has been notice or collusion, the solicitor, if the client has compromised, can look only to his client for his costs (*j*).

Although the High Courts possess a summary jurisdiction to enforce a solicitor's lien upon the fruits of his exertion, it will not do so when the circumstances would make it unfair to any of the parties or compel the Courts to go into complicated questions of fact, especially when charges of fraud or collusion are made or where a solicitor has deliberately taken additional fresh security for the purpose of securing his costs and has not relied on his lien under the summary jurisdiction. In such a case the Court will refer the solicitor to a *regular suit* (*k*).

On an application by a solicitor made in a suit in which costs have been awarded to his client against the opposite party, the Court has jurisdiction to enforce, in a proper case, the solicitor's lien by making a *direct order* for payment to the solicitor by the opposite party of such costs. Thus a case where the original client was dead and it appeared that his legal representatives were not men of substance and that they were unable to pay, was held by the High Court of Calcutta to be a proper one for the Court in the exercise of its discretion to make a direct order for payment of costs to the solicitor by the opposite party (*l*).

(d) *Sadanand v. Parashram* (1908) 52 Bom. 336
108 I. C. 705 (23) A. R. 108

(e) *Dezobab v. Jefferson* (1886) 10 Bom. 213

(f) *Lumar Krishna v. Hari Narain* (1916) 43
Cal. 676 33 I. C. 708

(g) *Sadanand v. Parashram* (1908) 52 Bom.

(h)

(i)

(j) *Damodar Das v. Morgan & Co.* (1933) 60

(k)

(l)

(j) , Cal 144

(k)

(l)

(m)

(n)

(o)

(p)

(q)

(r)

By a decree passed in a suit for redemption of a mortgage brought by *A* against *B*, *A* is directed to pay the mortgage debt to *B*, but *B* is directed to pay to *A* the costs of the suit. The High Court of Calcutta held that the suit being one for redemption, *B*'s attorney is not entitled to a lien for his costs on the whole of the mortgage money, but to the mortgage money less the costs payable by *B* to *A*, which costs *A* is entitled to set-off against the mortgage money (*m*). See O 20, r 19, and O 21, r 19.

It has been held by the High Court of Calcutta that where *A* obtains a decree against *B* for Rs 1,451, and *B* subsequently obtains a decree against *A* for Rs 1,000 *A* is entitled to have satisfaction of *B*'s decree entered, notwithstanding the lien of *B*'s attorney for his costs. Reliance was placed in the judgment on the fact that *B*'s attorney had not stated that there was no chance of recovering his costs from his client [*B*] and that the decree which *B* had against *A* was the only property out of which his claim could be satisfied (*n*). This case was approved by the Bombay High Court in a case where it was held that an attorney's lien should not prevail over the rights of the parties themselves and that in India it was a matter of discretion whether an attorney's lien should or should not intercept a set off between the parties (*o*). But in a case where a petitioning creditor was indebted to the insolvent for costs it was held that the attorney's lien for such costs prevails over the petitioning creditor's right to set off such costs against the debt due to him by the insolvent (*p*). Again it has been held that a solicitor's lien for costs prevails over the claim of an attaching creditor (*q*).

Appeal.—Unless the whole suit is disposed of, an appeal does not lie from an order disposing of a defendant's claim to set off made under this rule, even though the question as to that claim may have been tried as a preliminary issue. Such an order is not a preliminary decree. See O 20, r 19, which shows that there should be only one decree drawn up in a suit in which a set off is claimed (*r*).

Res judicata.—A defendant is under no obligation to claim a set off. His omission therefore, to do so does not preclude him from bringing a separate suit in respect thereof (*s*).

Counterclaim.—Though the Code does not provide for counterclaims, there is nothing to prevent a Court from treating the counterclaim as a plaint in a cross suit, and hearing the two suits together, provided the requisite court fee on the counterclaim has been paid (*t*).

7. [New. R. S. C., O. 20, r. 7.] Where the defendant relies upon several distinct grounds of defence or set off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

Defence of set-off founded on separate grounds

See notes to rule 1 above. Compare O 7, r 8.

8. [New.] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement

New ground of defence

| | | | |
|-----|---|-----|---|
| (m) | <i>Brijnath v Jaggernath</i> (1879) 4 Cal 742 | (r) | <i>Shro Parashad v Indore Malwa United Mills Ltd</i> (1917) Pun Rec no 62 p 220, 39 I C 508 |
| (n) | " " " " " " " " " " " " | (s) | <i>Amritsar National Banking Co., Ltd v Faral Hahy</i> (1919) Punj Rec no 74 p 1851, 52 I C 850 |
| (o) | " " " " " " " " " " " " | (t) | <i>Sava Bya v Mawng Kyaw Shun</i> (1924) 2 Rang 276, 82 I C 721, (24) A R 346 |
| (p) | " " " " " " " " " " " " | | |
| (q) | " " " " " " " " " " " " | | |

claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

See r 9 below

9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be

Subsequent pleadings

presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Additional written statement—The additional written statement should not set up a totally new case or state facts at direct variance with the original written statement so as completely to change the issue in the case (u) See O 6, r 7, and notes.

10. [S 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in

Procedure when party fails to present written statement called for by Court

relation to the suit as it thinks fit.

Decree against defendant where no written statement filed—This rule enables the Court to pronounce judgment against the defendant on failure to file a written statement such as is required by r 9. Failure to file a written statement in other cases does not come within this rule (v), and the Court cannot in those cases pass a decree against the defendant unless the plaintiff proves his case (w). In a Bombay case the defendant was served with a summons which required him to file his written statement within four weeks from the date of service. The date fixed for the hearing was 27th November 1907. The defendant failed to file his written statement within four weeks. It was held that the plaintiff was not entitled to apply for and obtain an ex parte decree before the returnable date of the summons, namely, 27th November 1907 (x).

Appeal—An appeal lies from an order under this rule pronouncing judgment against a party [O 43, r 1, cl (b)]

ORDER IX.

Appearance of Parties and Consequence of Non-appearance

1 [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the

hearing is adjourned to a future day fixed by the Court.

(u) *Douglas v Collector of Benares* (1851) 5 M 1 A 271, 290

(v) *Moopan v Karupanan* (1928) 6 Rang 466, 112 I O 438 (28) A R 261

(w) *Ross & Co v Scaria* (1918) 43 Cal 1001 1009 1010, 34 I C 235, *Narindar Singh*

v *King* (1928) 10 Lab L J 339 (28) A L 769

(x) *Dhiraajlal v Hormusji* (1908) 32 Bom 534
See also *Jayantlal v Nagath* (1913) 15 Bom L R 126, 19 I C 97

2. [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, Court may make an order that the suit be dismissed :

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Defendant.—The expression "defendant" in this rule does not include the guardian ad litem of a minor defendant (v).

Appeal—The order or dismissal under this rule is a form of dismissal for default. It is not a decree [s. 2 (2)], and no appeal lies from it. The plaintiff's remedy is under r. 4 of this Order (z).

Revision—The Court has no power under this rule to dismiss the suit in a case where the plaintiff has paid the requisite Court fee, for the service of the summons, but the office does not issue the summons in time. If the Court dismisses the suit in such a case, the High Court has power to set aside the order in revision (a)

3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Where neither party appears suit to be dismissed

Where neither party appears — *A* sues *B* and *C*. *A* and *C* do not appear when the suit is called on for hearing, but *B* appears. The Court makes an order dismissing the suit. As between *A* and *B* the order is one under r. 8, so as to attract the applicability of r. 9. But as between *A* and *C*, the order is one under the present rule so that r. 4 applies, and not r. 9 (b).

If the plaintiff appears on the date fixed for the hearing, but the defendant does not appear, and the suit is dismissed owing to failure on the part of the plaintiff to adduce evidence in support of his claim, the dismissal is on the merits and not under this rule (c)

This rule does not apply after a preliminary decree has been passed and a suit cannot be dismissed for default of appearance on an application for a final mortgage decree (d)

"May make an order that the suit be dismissed."—These words have been substituted for the words "the suit shall be dismissed" [Code of 1882, s 98] to make it clear that the dismissal under this rule is not a decree, but an order. See s 2 (2).

(g) *Gobind Ram v. Muhammad* (1912) Panj
Rec no 35 p 115 111 C 317

(2) Federal Agency or Field Office (1991) 92 111

(d) _____

[illegible]

(c) *Hingra Singh v. Jauri Singh* (1918) 40 All.
590 46 I C 390

(4) 590 46 I C 590

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

O. 8,
rr. 8-10

claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

See r 9 below

9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

Subsequent pleadings

Additional written statement.—The additional written statement should not set up a totally new case or state facts at direct variance with the original written statement so as completely to change the issue in the case (u) See O 6, r 7, and notes.

10. [S 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court

Decree against defendant where no written statement filed—This rule enables the Court to pronounce judgment against the defendant on failure to file a written statement such as is required by r 9 Failure to file a written statement in other cases does not come within this rule (v), and the Court cannot in those cases pass a decree against the defendant unless the plaintiff proves his case (w) In a Bombay case the defendant was served with a summons which required him to file his written statement within four weeks from the date of service The date fixed for the hearing was 27th November 1907 The defendant failed to file his written statement within four weeks It was held that the plaintiff was not entitled to apply for and obtain an ex parte decree before the returnable date of the summons, namely, 27th November 1907 (x)

Appeal—An appeal lies from an order under this rule pronouncing judgment against a party [O 43, r 1, cl (b)]

ORDER IX.

Appearance of Parties and Consequence of Non-appearance.

O. 9, r. 1

1 [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the

Parties to appear on day fixed in summons for defendant to appear and answer

hearing is adjourned to a future day fixed by the Court.

(u) *Douglas v Collector of Benares* (1851) 5 M I A 271 290

(v)

(w)

v King (1928) 10 Lah L J 339 (28) A L 769

(x) *Dhvirajlal v Hormusji* (1908) 32 Bom 534 See also *Jayantlal v Aagnath* (1913) 15 Bom L R 126, 19 I C 97

2. [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Defendant—The expression "defendant" in this rule does not include the guardian ad litem of a minor defendant (y).

Appeal—The order or dismissal under this rule is a form of dismissal for default. It is not a decree [s. 2 (2)], and no appeal lies from it. The plaintiff's remedy is under r. 4 of this Order (z).

Revision—The Court has no power under this rule to dismiss the suit in a case where the plaintiff has paid the requisite Court fee, for the service of the summons, but the office does not issue the summons in time. If the Court dismisses the suit in such a case, the High Court has power to set aside the order in revision (a).

3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed

Where neither party appears dismissed

Where neither party appears—A sues B and C. A and C do not appear when the suit is called on for hearing, but B appears. The Court makes an order dismissing the suit. As between A and B the order is one under r. 8, so as to attract the applicability of r. 9. But as between A and C, the order is one under the present rule so that r. 4 applies, and not r. 9 (b).

If the plaintiff appears, the order is one under r. 8.

rule (c)

This rule does not apply after a preliminary decree has been passed and a suit cannot be dismissed for default of appearance on an application for a final mortgage decree (d).

"May make an order that the suit be dismissed"—These words have been substituted for the words "the suit shall be dismissed" [Code of 1882, s. 98] to make it clear that the dismissal under this rule is not a decree, but an order. See s. 2 (2).

(y) *Colind Lam v. Muhammad* (1912) P. 101

(z)

(a)

(b)

(c) "

(d)

O. 9,
rr. 4, 5

4. [S. 99.]

Plaintiff may bring fresh
suit or Court may restore
suit to file

Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Sufficient excuse for plaintiff's non-appearance.—A *bona fide* mistake which is not unreasonable is a sufficient excuse within the meaning of this rule (c). If the order of dismissal is set aside, the defendant is entitled to notice of the date fixed for the hearing of the suit (cl).

Interlocutory orders.—When the suit is restored, all interlocutory orders are also restored in the absence of something expressly appearing to the contrary (c2).

Whether this rule applies to proceedings in execution—See notes to r. 9 below under the same head.

5. [S. 99A.]

Dismissal of suit where
plaintiff after summons
returned unserved fails
for three months to apply
for fresh summons

(1) Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

- (a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or
- (b) such defendant is avoiding service of process, or
- (c) there is any other sufficient cause for extending the time,

in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

(c) *Hardatras v. Victoria Finance and Bullion Association* [1899] A.C. 425

(cl) *Moolji & Co. v. Surven* (1916) 43 Cal. 1001
1009 1010, 34 I.C. 235, *Sarindar Singh*

684 145 I.C. 804 (33) A.C. 522

See also *Y. Muthiah* (1933) 65 Mad. L.J.
Dom. L.R. 126, 19 I.C. 97.

Amendment of sub rule (1) —Sub rule (1) was substituted for the original sub rule by Act 24 of 1920 the material changes being the substitution of three months for one year, shall make an order for may make an order and the addition of cl (c)

return made by the *serving officer* or from the date of return made by the *officer whose duty it is to certify to the Court returns made by the serving officer*. It was held that the period was to be calculated from the date of return made by the latter officer and not that made by the serving officer (f). The words italicized above were added to give effect to that decision. The procedure is this after the writ of summons is issued it is delivered to an officer of the Court for service on the defendant. The officer then delivers the summons to the serving officer whose duty it is to serve summonses. After effecting service the serving officer has to endorse on the original summons a return stating the manner in which the summons was served. If for any reason the summons cannot be served upon the defendant the serving officer has to make a return to that effect. This return is *countersigned* by the officer to whom the summons was delivered by the Court and the summons is then returned by him to the Court. It is from the date of the *co intersignature* that the period of three months is to be calculated and not from the date of the return made by the serving officer.

' Make an order that the suit be dismissed —These words were substituted in the Code of 1908 for the words may dismiss the suit which occurred in s 99 A of the Code of 1882 in order to make it clear that a dismissal under this rule is not a decree but an order. See s 2 (2)

Appeals —This rule does not apply to appeals (g)

6. [S. 100] (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then—

Procedure when only plaintiff appears

When summons duly served

(a) If it is proved that the summons was duly served, the Court may proceed *ex parte*,

When summons not duly served

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant,

When summons served but not in due time

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

(f) *Farisalam v Abdul* (1899) 13 Bom 500

(g) *Babanna v Parvati* (1906) 50 Bom 815 100

O 9,
rr. 6, 7

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

Ex parte decree—If the defendant does not appear, and it is proved that the summons was duly served upon him, the Court may proceed *ex parte*. If the plaintiff makes out a *prima facie* case, the Court may pass a decree for the plaintiff. If the plaintiff fails to make out a *prima facie* case, the Court may dismiss the plaintiff's suit. Every Judge in dealing with an *ex parte* case should take good care to see that the plaintiff's case is at least *prima facie* proved. The mere absence of the defendant does not of itself justify the presumption that the plaintiff's case is true (A). The Court has no jurisdiction to pass an *ex parte* decree without any evidence being given by or on behalf of the plaintiff (s) and the provisions of O 8, r 10, only apply when the Court has under O 8, r 9, required the defendant to file a written statement (j). The Court has no power to pass an *ex parte* decree before the returnable date mentioned in the summons (i).

Ex parte decree for amount in excess of sum actually due—If the plaintiff obtains an *ex parte* decree for a sum in excess of that which is due to him, the defendant is entitled *ex debito justitiae* to have such decree set aside (l) except where the error was due to an accidental slip within the meaning of s 152 in which case the Court may on the plaintiff's application allow the decree to be amended by reducing it to the proper amount (m).

Subsequent appearance of defendant pending suit—When a defendant files a written statement but does not appear on the day fixed for the hearing and it is in consequence declared *ex parte*, he should not be precluded from appearing at a later stage of the suit while it is still pending, he should be allowed to come in at the stage which the suit has reached (n).

"Appears."—As to the meaning of the word 'appears,' see note to r 9 below, 'Appearance'

Remedies open to a defendant in the case of an *ex parte* decree—See note to r 13 below, 'Remedies in case of *ex parte* decree'

7. [S. 101.] Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in

answer to the suit as if he had appeared on the day fixed for his appearance

This rule was applied in the undermentioned case (o)

| | | |
|--|-----|---|
| (A) A | (k) | " |
| | (l) | " |
| | (m) | " |
| | (n) | " |
| (i) 647 1004 & Co v Scriven (1910) 43 Cal 1001 34 | (o) | " |
| (j) 235 11 C 235 | | |
| (k) 466 11 C 438 (28) A R 201 | | |

A.M. 1274

establish his case by reason of *non attendance of his witnesses* (b) or for *want of evidence* (c), the dismissal is not one under r 8, and he cannot therefore avail himself of the remedy provided by this rule

There is a conflict of decisions whether if a plaintiff does not apply under this rule within the 30 days allowed by law, he is entitled to apply for a review under O 47, r 1, after the expiration of that period. The Patna High Court has held (d), following an earlier decision of the Calcutta High Court (e), that he is not, on the other hand, the Calcutta High Court has held in a later case that he is (f). The ground of the Patna decision is that to allow a review in such a case would be an evasion of the rule of limitation. See note below "Limitation"

"Appearance."—A plaintiff or a defendant will be deemed to have "appeared" on the day fixed for the hearing of the suit, if he appears—

- (1) in person, or
- (2) by a pleader either himself duly instructed and able to answer all material questions relating to the suit or accompanied by some person able to answer such questions [O 5, r 1, sub r (2)]

First, as regards Appearance of a party in person—The mere presence of a party in Court at the hearing is sufficient to constitute "appearance" within the meaning of this Order. It does not matter for what purpose he appears or what action he takes on the appearance. A plaintiff appearing and applying for an adjournment on the ground that his witnesses are not present will be deemed to have appeared. If the application is refused, and the suit is dismissed owing to his inability to establish his case in the absence of witnesses, the dismissal is not one under r 8 for the plaintiff *did appear*, and he cannot therefore avail himself of the provisions of this rule (g). Similarly a defendant appearing and applying for an adjournment on the ground that he had no time to prepare his case, will be deemed to have appeared. If the application is refused, and a decree is passed against him owing to his *unpreparedness to defend the suit* the decree is not *ex parte* under r 6, for he *did appear* and he cannot therefore avail himself of the provisions of r 13 below (h).

Next, as regards Appearance of a party by a pleader—Different considerations arise when a party is represented by a pleader. Appearance by a pleader within the meaning of this Order does not, like appearance by a party in person mean mere presence in Court, it means appearance by a pleader duly instructed and able to answer all material questions relating to the suit or by a pleader accompanied by some person able to answer all such questions" [O 5, r 1]. Hence a party cannot be said to "appear" by a pleader, if the pleader appears at the hearing and states that though he has filed his vakalatnama, he has not received any instructions from his client with regard to the case, and that he is therefore unable to go on with the suit (i). Similarly a party cannot be said to "appear" by a pleader if the pleader has no instructions other than to apply for an adjournment, and, on the adjournment being refused, withdraws

(b) *Mahomed v Ali Baksh* (1873) 5 All JFC 74 (g)

(c) *Kartick v Sridhar* (1886) 12 Cal 563 (h)

(d) *Doodip Singh v Copal Singh* (1916) 1 Pat L.J. 547 38 I C 53 (i)

(e) *Kaula v Nabadrip* (1898) 2 C.W.N. 318

(f) *Lala Chet Narain v Pampal* (1912) 16 C.W.N. 643 15 I C 554 following *Raj Narain v Ananga* (1899) 20 Cal 595

O. 9, r. 9 from the suit, stating that he has no further instructions to go on with the suit (j) In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit*. But what if the party himself is *also* present in person in Court at the time? According to the Madras (k) and Patna (l) and Calcutta (m) High Courts, it makes no difference that the party himself is present in Court for mere physical appearance does not constitute "appearance." According to the Bombay High Court, he must be deemed to have "appeared," the reason given being that if the pleader is not duly instructed to answer material questions, the Court may, under O 10 r 1, ask questions relating to the suit to the party himself and may examine his witnesses (n).

A pleader appears at the hearing on behalf of a plaintiff and applies for an adjournment on the ground that he had no time to prepare himself with the case or on the ground that the papers being left with his senior he could not proceed with the case. The application is refused and the pleader being unable to go on with the case, the suit is dismissed. Can it be said under these circumstances that the plaintiff *appeared by a pleader*? It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader, and that the order of dismissal could not therefore be said to be one made under r 8 so as to entitle the plaintiff to apply under this rule (o).

"Suit.—An application under sec 158 of the Bengal Tenancy Act, 1885 is not a 'suit' within the meaning of r 8 or this rule (p).

Fresh suit in respect of the same cause of action—If the plaintiff fails to appear, and the suit is in consequence dismissed under r 8 the dismissal does not operate as *res judicata* (q). In such a case, however the plaintiff is precluded by this rule from bringing a fresh suit in respect of the same cause of action. Thus if A sues B for damages for breach of a contract, and the suit is dismissed for default of A's appearance, A cannot bring a fresh suit to recover damages for breach of the same contract. A's only remedy in such a case is to apply for a review, or to apply under this rule for an order to set aside the dismissal. But if the cause of action in the subsequent suit is *different* from that in the first suit, the subsequent suit will not be barred under this rule. Thus the dismissal for default of a suit by a reversioner against a Hindu widow for an injunction to *restrain her from making a gift* of immovable property inherited by her from her husband is no bar to a subsequent suit by the same plaintiff against the widow for a declaration that a gift of the property made by the widow after the first suit is inoperative (r). Similarly if A sues B for the *rent* of certain lands and the suit is dismissed for default of A's appearance under r 8 the dismissal does not operate as a bar to a suit by A against B for enhanced rent (s) or for

| | |
|-----|---|
| (j) | Kumar (1907) 1 Pat 188 69 I C 837 (2) A F 485 |
| (m) | Sikandar v Akshai (1932) 59 Cal 756 138 I C 87 (32) A C 418 Sardarmol |
| (n) | |
| (o) | |
| (k) | 400 41 414 (p) Janki Jay v Raja Katanand (1903) 2 Pat 192 74 I C 464 (23) A F 381 |
| (l) | (q) Radha Parshad v Lal Sahab (1890) 17 I A 150 13 All 53 |
| (r) | Chand Lall v Iartab Singh (1888) 15 I A 156 16 Cal 98 |
| (s) | Gopal Lal v Taj Muhammad (1927) 7 Pat 28 103 I C 615 (27) A F 375 |

possession of the lands (t) For other cases in which it was held that the cause of action in the subsequent suit was not the same as in the first suit, see cases cited in foot note (u)

If the right of redemption has not been extinguished the rule will not apply to a suit for redemption (v) The Privy Council case of *Shankar Balsh v Daya Shanker* (w) seems to have been decided on the English rule that the dismissal of an action for redemption operates as a foreclosure

This rule does not apply to a suit for partition The reason is that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists any of the joint tenants may sue for partition of the joint property (x)

The dismissal under r 8 of a suit filed by the Voluntary Liquidator against a shareholder for the recovery of money alleged to be due to the company is a bar to a subsequent application by the Official Liquidator to have the name of the defendant placed on the list of contributories in respect of the same claim (y)

The rule does not apply when an application for probate is dismissed for default (z) nor when an adjudication order is annulled under sec 43 (1) of the Provincial Insolvency Act, 1920 for default of appearance of the insolvent on the day fixed for hearing his application for discharge (a)

Fresh suit by plaintiff's assignee—Does the dismissal of a suit under rule 8 preclude an assignee of the plaintiff from suing on the same cause of action? This question was discussed in a Patna case and answered in the affirmative, but the judgment proceeded on the ground that the assignee had taken advantage of the procedure under rule 9 and had substituted himself on the record of plaintiff's appeal from an order rejecting plaintiff's application under rule 9 to set aside the dismissal (b)

Minor plaintiff—A fresh suit notwithstanding the provisions of this rule may be instituted in respect of the same cause of action where the first suit was brought by a next friend on behalf of a minor and was dismissed under r 8 for default of the next friend's appearance owing to gross want of care and diligence on his part (c) See notes to r 13 below. Ex parte decree against minor defendant

Sufficient cause—What is sufficient cause is in each case a question of fact—

(1) A plaintiff left the Court house, believing that a part heard case which preceded his case would occupy some time, he returned in about half an hour, and found that his suit had been called on and dismissed owing to his absence He then applied to set aside the order of dismissal *Hell*, refusing the application, that the above circumstances did not amount to sufficient cause for non appearance *Manilal v Gulam Husain* (1889) 13 Bom 12

(2) Where it was the duty of an attorney's clerk to examine every evening the board for the next day, and to inform his master what cases in which he was engaged as attorney were on the board for hearing and the clerk, neglecting his duty, did not

(t)

licensee)

- (u) *Fata Copal v Taj Mahomed* (19 8) 7 Pat 103 1 C 615 (2) 41 375 *Mlaung He Tu v Ma Thet Su* (19-) 5 Rang 85 108 1 C 809 (24) A R 3 [suit by Buddha for his share of inheritance] *Latapchand v Mast Mahi* (1933) 14 Lah 485 144 1 C 651 (33) A L 53
(v) *Shridhar v Ann* (19-) 5- Bom 111 114 1 C 22 (24) A R 67
(w) (1888) 13 (al 4) 151 A 66
(x) *Bukshar Das v Jam Prasad* (1906) 24

- All 677 *Madon Mohan v Balkanta Nath* (1906) 10 C W N 839 *Madhara v Sesha Iedda* (19 6) 49 Mad 939 97 1 C 6- (6) A M 1018
(v) *Jup Lam v Fatai Din* (19 0) 1 Lah 237 57 1 C 2,3
(z) *Surjya v Jaynarayan* (19 1) 53 Cal 578, 94 1 C 375 (26) A C 105
(a) *Pennapalachariar v Chinnival* (1926) 49 Mad 933 97 1 C 706 (6) A M 942
(b) *Gopi Ram v Thakur Jagannath* (1929) 9 Pat 447 (29) A 1 685
(c) *Lalla Nao v Jammundam* (1895) 22 Cal 8 *Cavendish v Ladrakshi* (1895) 19 Bom 571 57 *Hanmantappa v Jirubas* (1900) 24 Bom 517 55.

O. 9, r. 9 from the suit, stating that he has no further instructions to go on with the suit (j) In neither case can it be said that the party appeared by a pleader *duly instructed and able to answer all material questions relating to the suit*. But what if the party himself is also present in person in Court at the time? According to the Madras (l) and Patna (h) and Calcutta (i) High Courts it makes no difference that the party himself is present in Court for mere physical appearance does not constitute appearance. According to the Bombay High Court he must be deemed to have appeared the reason given being that if the pleader is not duly instructed to answer material questions the Court may under O. 10 r. 1, ask questions relating to the suit to the party himself and may examine his witnesses (n).

A pleader appears at the hearing on behalf of a plaintiff and applies for an adjournment on the ground that he had no time to prepare himself with the case, or on the ground that the papers being left with his senior he could not proceed with the case. The application is refused and the pleader being unable to go on with the case the suit is dismissed. Can it be said under these circumstances that the plaintiff *appeared by a pleader*? It has been held in the undermentioned cases that the plaintiff must be held to have appeared by a pleader, and that the order of dismissal could not therefore be said to be one made under r. 8 so as to entitle the plaintiff to apply under this rule (o).

* Suit.—An application under sec. 158 of the Bengal Tenancy Act 1885 is not a suit within the meaning of r. 8 or this rule (p).

Fresh suit in respect of the same cause of action.—If the plaintiff fails to appear and the suit is in consequence dismissed under r. 8 the dismissal does not operate as *res judicata* (q). In such a case however the plaintiff is precluded by this rule from bringing a fresh suit in respect of the same cause of action. Thus if A sues B for damages for breach of a contract and the suit is dismissed breach, or to action

in the subsequent suit is *different* from that in the first suit the subsequent suit will not be barred under this rule. Thus the dismissal for default of a suit by a reversioner against a Hindu widow for an injunction to *restrain her from making a gift* of immovable property inherited by her from her husband is no bar to a subsequent suit by the same plaintiff against the widow for a declaration that a *gift of the property made by the widow after the first suit is inoperative* (r). Similarly if A sues B for the rent of certain lands and the suit is dismissed for default of A's appearance under r. 8, the dismissal does not operate as a bar to a suit by A against B for enhanced rent (s) or for

(j)

- Kumar (1902) 1 Pat 188 69 I C 837
(2) A I 485
(m) *Silander v. Khushal* (1902) 59 Cal 756
138 I C 87 (3) A C 418 *Sardarmal v. Jaharmal* (1913) 59 Cal 906 138 I C 342 (3) A C 425
(n) *Emam v. Haji Jan Mahomed* (1909) 33 Bom 475 31 C 99
(o) *Ramchandra v. Madhar* (1897) 16 Bom 23
Chiranjiv v. Kundan (1898) 20 All 294
Patishare v. Tellur (1903) 26 Mad 267
See these cases discussed in *Satish Chandra v. Ahava Irasad* (1907) 34 Cal 403 411 414
(p)
(q)

(k) *Godha v. ...*

(l)

- (r) *Chand Kaur v. Parlab Singh* (1888) 15 I A 156 16 Cal 98
(s) *Gopal Lal v. Taj Mukan mad* (1927) 7 Pat 28 103 I C 615 (27) A P 375

possession of the lands (f) For other cases in which it was held that the cause of action in the subsequent suit was not the same as in the first suit see cases cited in foot note (u)

If the right of redemption has not been extinguished the rule will not apply to a suit for redemption (v) The Privy Council case of *Shankar Baksh v Daya Shanker* (w) seems to have been decided on the English rule that the dismissal of an action for redemption operates as a foreclosure

This rule does not apply to a suit for partition The reason is that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists any of the joint tenants may sue for partition of the joint property (x)

The dismissal under r 8 of a suit filed by the Voluntary Liquidator against a shareholder for the recovery of money alleged to be due to the company is a bar to a subsequent application by the Official Liquidator to have the name of the defendant placed on the list of contributories in respect of the same claim (y)

The rule does not apply when an application for probate is dismissed for default (z) nor when an adjudication order is annulled under sec 43 (1) of the Provincial Insolvency Act, 1920 for default of appearance of the insolvent on the day fixed for hearing his application for discharge (a)

Fresh suit by plaintiff's assignee—Does the dismissal of a suit under rule 8 preclude an assignee of the plaintiff from suing on the same cause of action? This question was discussed in a Patna case and answered in the affirmative, but the judgment proceeded on the ground that the assignee had taken advantage of the procedure under rule 9 and had substituted himself on the record of plaintiff's appeal from an order rejecting plaintiff's application under rule 9 to set aside the dismissal (b)

Minor plaintiff—A fresh suit notwithstanding the provisions of this rule may be instituted in respect of the same cause of action where the first suit was brought by a next friend on behalf of a minor and was dismissed under r 8 for default of the next friend's appearance owing to gross want of care and diligence on his part (c) See notes to r 13 below. Ex parte decree against minor defendant

Sufficient cause—What is sufficient cause is in each case a question of fact —

aside the order of dismissal Held refusing the application, that the above circumstances did not amount to sufficient cause for non appearance *Manilal v Gulam Husain* (1889) 13 Bom 12

(2) Where it was the duty of an attorney's clerk to examine every evening the board for the next day, and to inform his master what cases in which he was engaged as attorney were on the board for hearing, and the clerk, neglecting his duty, did not

- (f) *Gobind v Afzul* (1883) 9 Cal 476 *Balkrishnan v Jaghubar* (1931) 45 All 81 74 I C 991 (3) A A 409 [1st suit to eject defendant as tenant and suit to eject him as licensee]
(g) *Paya Copal v Taj Mahomed* (1908) 7 Pat 113 I C 615 (2) A I 375 *Maung Hs 2w v Ma The* (1927) 5 Rang 104 I C 809 (24) A R 73 [suit by Buddit for his share of inheritance]
Tatapchand v Musi Mahani (1933) 14 Lal 445 144 I C 651 (33) A I 365
(e) *Shradhar v Camu* (1924) 5 Bom 111 108 J C 22 (22) A B 67
(w) (1888) 15 (21) 42 15 I A 66
(x) *Bukshar Das v Jam Prasad* (1906) 24

- All 67 *Madon Mohon v Baikantia Nath* (1906) 10 C W N 839 *Madhira v Nisha Peddi* (1926) 49 Mad 937 97 I C 622 (26) A M 1018
(z) *Jup Lam v Fazel Din* (1901) 1 Lah 237, 57 I C 23
(a) *Surjya v Jaynarayan* (1906) 53 Cal 578, 94 I C 375 (26) A I 1057
(b) *Venugopalachariar v Chinnulal* (1906) 49 Mad 935 97 I C 706 (26) A M 942
(c) *Gopi Jam v Thakur Jagannath* (1929) 9 Pat 447 (29) A P 685
(c) *Lalla Shree v Lammundam* (1895) 22 Cal 8, *Curandaz v Ladharaku* (1895) 19 Bom 571 577 *Hannantapa v Jirubai* (1900) 24 Bom 547 552.

9, r. 9 inform the master, and no one appearing for the plaintiff, the suit was dismissed, it was held that the absence was caused by a bona fide mistake, and the suit was restored on payment by the attorney of the costs of the hearing. *The Oriental Corporation v. The Mercantile Corporation, Ltd.* (1866) 2 B H C. 267.

(3) In two cases the High Court of Bombay said that the rule of practice to be observed in the subordinate Courts in the Bombay Presidency is that when a party arrives late before the Judge, and finds that his suit has been dismissed before his arrival, he is entitled to have his suit restored, though there may be no "sufficient cause" for his late arrival, on payment of such costs as may have been incurred by reason of his default by the defendant. *Chhotalal v. Ambalal* (1925) 27 Bom L R. 685, 83 I C. 225, (23) A B 423, *Sorabji v. Ramji* (1924) 26 Bom L R. 321, 80 I C. 237, (24) A B 392. In a later case it was held that there was no such hard and fast rule, and that the Court had a discretion in each case to deal with the matter. *Currimbhoy v. Moos* (1929) 31 Bom L R. 468, 117 I C. 593, (29) A B 250.

(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part. *Arunachala v. Subbaramiah* (1923) 46 Mad. 60, 63, 68 I C. 971, (23) A M. 63 [delay caused by inevitable accident]. As to negligence of pleader see the undermentioned case (d).

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (e), Bombay (f), and Rangoon (g) that this rule does not take away the inherent power of a Court to restore a suit dismissed for default, if there be a just and reasonable cause for restoring it, even if no "sufficient cause" is shown within the meaning of this rule for the plaintiff's non appearance. Thus where a case was called on at 12 o'clock, and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts, and the plaintiff himself was waiting in his pleader's room and the suit was dismissed for default of appearance, it was held that though there was no "sufficient cause" for non appearance within the meaning of this rule, the case was one in which the Court should in the exercise of its inherent powers restore the suit to the file (h). Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court, but went to bring his principal

the meaning of this section, the Court had inherent power to restore the suit having regard to the special facts of the case (i).

Appeal.—An appeal lies under O. 43, r. 1 (c), from an order rejecting an application (in a case open to appeal) made under this rule, but no appeal lies from an order granting the application (j). As regards an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the High Court, it has been held by the High Court of Calcutta that it is appealable not only under O. 43, r. 1 (c), but also as a "judgment" or "order" of the Court (k). Patent (l), but that an order given under O. 43, r. 1 (c), or as a "judgment"

(d) *Abdul Aziz v. The Punjab National Bank, Ltd.* (1929) 10 Lah. 570, 114 I C. 76, (29) A L. 26

(e)

(f)

(g)

(h)

(i)

(j)

(k)

(l)

an application to restore a suit dismissed under this rule is open to revision, but in a case where the order was on terms that the plaintiff shall pay the defendant's costs and the defendant adopted the order by accepting payment or costs it was held that he was precluded from attacking it (*m*)

Where an application is made by a plaintiff under this rule, but the application is dismissed for default, no appeal lies from the order of dismissal (*n*)

Revision—If there is no sufficient cause for setting aside the dismissal, the Court cannot do so as a matter of grace because it involves a heavy claim and if it does so, the High Court will set aside the order in revision, even though the suit has been tried and decreed (*o*) A suit cannot be dismissed after a preliminary decree has been passed, but if such an order is made and the application to restore the suit is rejected the order of rejection is subject to revision (*p*)

Whether this rule applies to proceedings in execution—As has already been stated in the notes on sec 141, the provisions of O 9 do not apply to proceedings in execution. Therefore, if an application for execution is dismissed for default, it cannot be restored under this rule (*q*) It is competent, however, to the applicant to present a fresh application for execution (*r*) The High Court of Lahore has held that if an application for execution is dismissed for default, the Court may restore it in the exercise of its inherent power under sec 151 of the Code (*s*) The Allahabad High Court has also held that an execution application dismissed for default may be restored under the inherent power (*s1*) A different view has been taken by the High Courts of Patna and Madras (*t*)

An application to set aside a sale on the ground of irregularity under O 21, r 90, is also a proceeding in execution and the provisions of this Order do not apply to it. A judgment debtor, whose property is sold in execution of a decree, applies under O 21, r 90, to set aside the sale on the ground of material irregularity in conducting the sale. Notice of the hearing of the application is given to B, the decree holder and to C, the auction purchaser. Three cases might occur. First, where none of the parties appears at the hearing of the application and the application is dismissed for non-appearance. Secondly, where B and C appear at the hearing but A does not, and the application is dismissed for A's non-appearance. Thirdly, where A alone appears at the hearing, and an ex parte order is made granting A's application and setting aside the sale. Since O 9 does not apply, the dismissal of the application in the first case cannot be treated as a dismissal under O 9, r 3, and the provisions of O 9, r 4, do not apply (*u*) Similarly the dismissal in the second case cannot be treated as a dismissal under O 9, r 8 and the provisions of O 9, r 9, do not apply (*v*) For the same reason the ex parte order made in the last case cannot be treated as one under O 9, r 6 and the provisions of O 9, r 13, do not apply

(m) *Perikalanayudu v. Chinnna* (1930) 54 Mad L.J. 137 131 C 337 (30) A.M. 268

(n) *Jagdish v. Harbans* (1917) 2 Pat L.J. 720 43 IC 54 *Hara Kumar v. Murari* (1927) 36 Cal L.J. 184 69 IC 1005 (27) A.C. 572

(o)

(p)

(q)

(r)

(s) *Bhadu v. Ram Lal* (1921) 2 Lah 66 60 IC 720

(s1)

(t)

(u)

(v)

9, r. 9 inform the master, and no one appearing for the plaintiff, the suit was dismissed, it was held that the absence was caused by a bona fide mistake, and the suit was restored on payment by the attorney of the costs of the hearing *The Oriental Corporation v The Mercantile Corporation, Ltd* (1866) 2 B H C 267

(3) In two cases the High Court of Bombay said that the rule of practice to be observed in the subordinate Courts in the Bombay Presidency is that when a party arrives late before the Judge, and finds that his suit has been dismissed before his arrival, he is entitled to have his suit restored, though there may be no sufficient cause for his late arrival, on payment of such costs as may have been incurred by reason of his default by the defendant *Chhotalal v Ambalal* (1923) 27 Bom L R 685 89 IC 223 (23) A B 423, *Sorabji v Ramjilal* (1924) 26 Bom L R 321, 80 IC 237 (24) A B 392 In a later case it was held that there was no such hard and fast rule, and that the Court had a discretion in each case to deal with the matter *Currimbhoy v Moos* (1929) 31 Bom L R 468, 117 IC 593, (29) A B 250

(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part *Arunachala v Subbaramiah* (1923) 46 Mad 60, 63, 68 IC 971, (23) A M L 63 [delay caused by inevitable accident] As to negligence of pleader see the undermentioned case (d)

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (e), Bombay (f), and Rangoon (g) that this rule does not take away the inherent power of a Court to restore a suit dismissed for default if there be a just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of this rule for the plaintiff's non appearance. Thus where a case was called on at 12 o'clock, and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts, and the plaintiff himself of appearance, it was held that the Court in the exercise of its inherent powers restore the suit to the file (h). Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court but went to bring his principal

the meaning of this section, the Court had inherent power to restore the suit having regard to the special facts of the case (i)

Appeal—An appeal lies under O 43, r 1 (c) from an order rejecting an application (in a case open to appeal) made under this rule, but no appeal lies from an order granting the application (j). As regards an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the High Court, it has been held by the High Court of Calcutta that it is appealable not only under O 43, r 1 (c), but also under O 43, r 1 (c), or a

(d) *Abdul Aziz v The Punjab National Bank Ltd* (1929) 10 Lah 570 114 IC 76 (29) A L 96

(e)

(f)

(g)

(h)

(i)
(j)

(k)

(l)

an application to restore a suit dismissed under the provisions of O 9 r 3, where the order was on terms that the plaintiff's party must appear, the defendant adopted the order by accepting judgment and was thereby precluded from attacking it (m)

Where an application is made by a plaintiff or by the defendant to have a suit dismissed for default, no appeal lies from the order of dismissal (n)

Revision—If there is no sufficient cause for setting aside the order, the court cannot do so as a matter of grace because it involves a heavy and final decree. The High Court will set aside the order in revision, even though the order has been decreed (o). A suit cannot be dismissed after a preliminary decree has been given, but if such an order is made and the application to restore the suit is rejected, the order of rejection is subject to revision (p).

Whether this rule applies to proceedings in execution—As has already been stated in the notes on sec 141, the provisions of O 9 do not apply to proceedings in execution. Therefore, if an application for execution is dismissed for default, it cannot be restored under this rule (q). It is competent, however, to the applicant to present a

Notice of the hearing of the application is given to B, the decree holder and to C, the auction purchaser. Three cases might occur. First where none of the parties appears at the hearing of the application and the application is dismissed for non

treated as a dismissal under O 9 r 3 and the provisions of O 9 r 4 do not apply (u). Similarly the provisions of O 9 r 3 and the provisions of O 9 r 4 do not apply (v) and the provisions of O 9 r 3 and the provisions of O 9 r 4 do not apply (w).

- (m) *Venkatarayudu v. Chinna* (1930) 54 Mad L.J. 137 131 C 337 (30) A.M. 268
- (n) *Jagdish v. Harbans* (1917) 2 Pat L.J. 43 43 IC 54 *Hara Kumar v. Murari* (1921) 30 Cal L.J. 184 69 IC 1005 (22) A.C. 572
- (o) *Manikam v. Mahudam* (1925) 43 Mad L.J. 15 85 IC 49 (25) A.M. 109
- (p) *Isakimani v. Arulayee* (1930) 53 Mad 395 124 IC 605 (30) A.M. 154
- (q) *Hajrat v. Valivinsawa* (1894) 18 Bom 499

- (r) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700
- (s) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700
- (t) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700
- (u) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700
- (v) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700
- (w) *Bhoj v. Jam Lal* (1921) 2 Lab 66 60 IC 700

O. 9, r. 9 inform the master, and no one appearing for the plaintiff, the suit was dismissed, it was held that the absence was caused by a bona fide mistake, and the suit was restored on payment by the attorney of the costs of the hearing *The Oriental Corporation v The Mercantile Corporation, Ltd* (1860) 2 B H C 267

(3) In two cases the High Court of Bombay said that the rule of practice to be observed in the subordinate Courts in the Bombay Presidency is that when a party arrives late before the Judge, and finds that his suit has been dismissed before his arrival, he is entitled to have his suit restored, though there may be no "sufficient cause" for his late arrival, on payment of such costs as may have been incurred by reason of his default by the defendant *Chhotalal v Ambalal* (1925) 27 Bom LP 685 89 IC 225 (23) A B 423, *Sorabji v Ramjilal* (1924) 26 Bom LR 321, 80 IC 237, (24) A B 392 In a later case it was held that there was no such hard and fast rule, and that the Court had a discretion in each case to deal with the matter *Currimbhoy v Moos* (1929) 31 Bom LR 468, 117 IC 593, (29) A B 250

(4) A litigant should not be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part *Arunachala v Subbaramiah* (1923) 46 Mad 60, 63, 68 IC 971, (23) A M 63 [delay caused by inevitable accident] As to negligence of pleader see the undermentioned case (d)

Inherent power to restore suit dismissed for default—It has been held by the High Courts of Allahabad (e), Bombay (f), and Rangoon (g) that this rule does not take away the inherent power of a Court to restore a suit dismissed for default, if there be a just and reasonable cause for restoring it, even if no "sufficient cause" is shown within the meaning of this rule for the plaintiff's non appearance. Thus where a case was called on at 12 o'clock, and the plaintiff's pleader being under the impression that the case would be taken up at 2 o'clock was engaged in other cases in other Courts, and the plaintiff himself of appearance, it

ance within the exercise of its inherent powers restore the suit to the file (h) Similarly where a plaintiff believing that his case which was fourteenth on the list would not be reached immediately did not attend the Court but went to bring his principal

the meaning of this section, the Court had inherent power to restore the suit having regard to the special facts of the case (i)

Appeal—An appeal lies under O 43, r 1 (c) from an order rejecting an application (in a case open to appeal) made under this rule, but no appeal lies from an order granting the application (j) As regards an order rejecting an application to set aside the dismissal of a suit made by a single Judge sitting on the original side of the High Court, it has been held by the High Court of Calcutta that it is appealable not only under O 43, r 1 (c) but also as a "judgment" within the meaning of cl 15 of the Letters Patent (l), but that an order granting the application is not appealable either under O 43, r 1 (c) or as a "judgment" under cl 15 of the Letters Patent (l) An order granting

(d) *Abdul Aziz v The Punjab National Bank Ltd* (1909) 10 Lah 500 114 IC 76 (29) A L 96

(e)

(f)

(g)

(h)

(i)

(j)

(k)

(l)

12. [S 107] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear

Consequence of non attendance without sufficient cause shown of party ordered to appear in person

Where party directed to appear in person—This rule applies to all cases where a party has been ordered to appear in person and fails to do so. This is clear from the fact that the words 'under the provisions of section 66 or section 436' [now O 5 r 3 and O 29, r 3 respectively] which occurred in the corresponding s 107 of the Code of 1882 have been omitted from the present rule (f). The Court has power to strike out the defence of a defendant who disobeys an order for personal appearance under O 3 r 1 but this is a highly penal procedure which cannot be adopted if the defendant disobeys a witness summons (f1).

Setting aside Decrees ex parte

13. [S 108] In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

setting aside decree ex parte against defendant

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also

Old section—This rule corresponds with s 108 of the Code of 1882. The words 'as against him' have been added after the words 'shall make an order setting aside the decree'. The proviso to the rule is also new. See as to the effect of these changes, notes, Proviso to the Rule.

Remedies in case of ex parte decree—A defendant against whom an ex parte decree has been passed under r 6 for default of appearance at the hearing, has the following courses open to him (g) —

(1) he may appeal from the ex parte decree under s 96,

(2) he may apply for a review of judgment under O 47, r 1 (A),

(3) he may apply under this rule for an order to set aside the ex parte decree, provided the application is made, in cases to which the Limitation Act, 1908, applies,

(f) *Taragattammal v Valliamman* (1918) 41 Mad 266 258 411 C 19

(f1) *Apparao v Soornammal* (1933) 65 Mad L J 34 146 I C 556 (33) A.M. 8*1

(g) *Jethalal v Varsajal* (1902) 46 Bom 184 187 63 I C 478 (2*) A B 267

(A) *Bibi Muttu v Ilahi Begam* 1834) 6 All 65

1. 9, r. 13 within 30 days from the date of the decree, or where the summons was not duly served when he has knowledge of the decree (i), and in cases to which the Limitation Act, 1877, applies within 30 days from the date of executing any process for enforcing the judgment (j). As to "knowledge of the decree," it has been held that it must be knowledge of a particular decree passed against the defendant in a particular Court in favour of a particular person and for a particular sum, and not merely the knowledge that a decree has been passed by some Court against him (k).

Where the right to make the application is barred under the Act of 1877, and the law arose before the Limitation Act of 1908 came into force, the provisions of that Act could not revive the right (l). But where the right is not barred, the law of limitation to be applied to applications under the present rule made after January 1, 1909, is art 164 of the Limitation Act of 1908, and not art 164 of the Limitation Act of 1877, though the ex parte decree was passed when the Limitation Act of 1877 was in force (m).

The first two remedies, that is the remedies by way of appeal and review, are open to any person against whom a decree is passed, whether the decree is ex parte or not. But the third remedy, the one provided by this rule can only be resorted to if the decree is passed ex parte, that is to say, passed against the defendant for default of appearance under r 6. If the decree is passed on grounds other than his non appearance the remedy is not by this rule but by way of appeal (n). An ex parte decree passed on an award under Sch II para 20 may be set aside under this rule (o).

Whether remedies concurrent—A defendant against whom an ex parte decree is passed is at liberty as stated above, to apply to set aside the decree under this rule, or to appeal from the decree, or to apply for a review of the judgment. He is entitled to apply under this rule to set aside the decree and at the same time to appeal from the decree. Further, he is entitled to appeal from the decree without a previous application to set aside the decree under this rule (p). Similarly he is entitled to apply for a review without previously applying under this rule (q). If he applies under this rule and his application is rejected, he is entitled under O 43, r 1 (d), to appeal from the order rejecting the application. But he is not bound to appeal from the order, he may appeal under s 96 from the ex parte decree itself.

If a defendant against whom an ex parte decree is passed does not apply under this rule to set aside the decree, but appeals from the decree two questions arise, namely,—

- (1) Whether the reason for the defendant's failure to apply to set aside the decree remains whether the lower Court had sufficient evidence to support the decree, or whether the only question which it could consider is whether the evidence on the record is sufficient to support the ex parte decree, in other words, whether the decree can be sustained on the merits, and
- (2) whether if the appellate Court comes to the conclusion that the suit ought not to have been heard ex parte, it has the power to remand the case for rehearing to the lower Court.

Upon these points there is a conflict of decisions. In a case under the Code of 1882 the Calcutta High Court held that the only question which the appellate Court could consider was whether the decree was wrong in law or based on insufficient evidence.

- | | |
|--|---|
| (i) Limitation Act 1908 Sch I art 164 | (n) <i>Mahim Chandra v Anaba Chandra</i> (1931) 31 C W N 758 130 IC 441 (31) |
| (j) Limitation Act 1877 Sch II art 164 | AC 58 |
| (k) <i>Bap Rao v Sadhu</i> (1923) 47 Bom 485 73 IC 130 (-31) A B 193 | (o) <i>Sul Arayan v Amalappa and Am</i> (19 8) 65 Mad LJ 260 112 IC 691, (28) A W 969 |
| (l) <i>Nepal Chandra v Anroda</i> (1912) 39 Cal 506 15 IC 51 | (p) <i>Ashruffnagar Lahircaus</i> (1880) 8 Cal 272 |
| (m) <i>Hoppe Vais Ltd v Pithabais</i> (1910) 12 Bom 730 7 IC 982 <i>Jia Bibi v Allah</i> (1915) 37 All 597 30 IC 573 | (q) <i>Kari praan v Ayyathorai</i> (1886) 9 Mad 445 |
| | (r) See <i>Raj Varma v Ananga</i> (1899) 26 Cal 504 |

and that it could not deal with the question whether the lower Court was right in proceeding *ex parte* (r) But in a recent case (s) under the present Code, the Calcutta High Court has treated this decision as obiter, and holds that the Court of Appeal can deal with the reason for the defendant's non-appearance and if not satisfied with the *ex parte* order can remand the suit for trial on the merits In a Bombay case also decided under the Code of 1882, it was held that the appellate Court could consider the reason for the defendant's non-appearance, but it had no power to remand the case to the lower Court for a re-hearing, the reason given being that an order of remand could only be made under s. 562 [now O 41, r 23] when a suit was disposed of on a preliminary point and that the disposal of a suit *ex parte* was not a disposal on a preliminary point (t) In *Sadhu v Kuppen* (u), which also was a case under the Code of 1882, a Full Bench of the Madras High Court held that the appellate Court could consider the reason for the defendant's non-appearance and that if it came to the conclusion that the lower Court ought not to have proceeded *ex parte*, it had the power to remand the case to that Court for a re-hearing The Madras ruling was followed by the High Court of Bombay in *Jethilal v Varajlal* (v), and also by the Patna High Court (w) The High Court of Rangoon has followed the first Calcutta ruling (x)

If an application to set aside an *ex parte* decree is rejected, and the defendant does not appeal from the order under O 43, r 1 (d), he cannot, according to an Allahabad ruling, re-agitate the matter in appeal from the *ex parte* decree, the reason given being that the appellate Court has no power to consider the reason for the defendant's non-appearance, but it can only hear the appeal on the merits (y)

As to review, see notes to r 9, "Remedies in case of dismissal under rule 8"

Where written statement filed—A defendant against whom a decree is passed *ex parte* for default of appearance is entitled to apply under this rule to set aside the decree though he may have filed his written statement (z)

Prevented from appearing—As to the meaning of appearing, see notes to O 9 r 9, Appearance

Hearing of application pending appeal—The High Courts of Calcutta (a), Madras (b), and Allahabad (c) have held that where a defendant against whom an *ex parte* decree is passed applies under this rule to set it aside, and at the same time prefers an appeal from it, the proper Court to hear the application is the Court which passed the decree, and not the appellate Court A obtains an *ex parte* decree against B B applies under this rule to have the decree set aside At the same time he prefers an appeal from the decree Which Court has jurisdiction to hear the application—is it the Court which passed the decree or is it the appellate Court? According to the above decisions, the only Court which has jurisdiction to hear the application is the Court which passed the decree The reason given is that the matter to be considered in a proceeding under this rule is entirely distinct from the matter to be considered in an appeal from the *ex parte* decree, the one being concerned with the due service of summons and the

(r) *Jonardan v Jamdhone* (1896) 23 Cal 734 743

(s) *Jnanendra v Irofullananda* (1923) 32 C W N 101 106 I C 542 (28) A C 81

(t) *Jarrotshankar v Bat Neral* (1892) 17 Bom 733

(u) (1907) 30 Mad 54 59

(v) (1922) 46 Bom 184 63 I C 478 (22) A B 267

(w) *Jam Lal v Kali Prasad* (1929) 9 Pat 403, 1,01 C 304 (29) A 1 609

(x) *Faj Chandra v A D O C Fay* (1924) 2 Rang 108 79 I C 506 (24) A B 13

(y) *Hummis v A L. Ud-din* (1917) 39 All 143,

(z) 36 I C 277
(a)

(b) *Talanappa v Subramania* (1921) 44 Mad 731 62 I C 755 (21) A M 564

(c) *Gajraj v Swami Nath* (1917) 39 All 13, *Mirza Abdulla v Kamran* (1923) 21 All L J 901 79 I C 321, (24) A A 173

O. 9, r. 13 other with the determination of the merits of the controversy between the parties. Similarly if *A* sues *B* and *C*, and *C* alone appears, and an ex parte decree is passed against *B*, and a decree on the merits is passed against *C*, *B* a application to set aside the ex parte decree can only be heard by the Court which passed the decree, although an appeal by *C* may be pending in the appellate Court. It makes no difference that the application is made by one defendant and the appeal is preferred by another defendant (d).

Hearing of application after disposal of appeal.—But if the appeal is disposed of, other considerations arise. The High Courts of Calcutta (e), Allahabad (f) and the Chief Court of Oudh (g) have held that where an appeal is preferred from an ex parte decree, and the decree is confirmed or otherwise disposed of in appeal under O. 41, r. 32, the Court which passed the ex parte decree has no longer any power to entertain an application to set it aside even if the application was made before the appeal was filed. This is because the decree of the lower Court is merged in that of the appellate Court. But if the appeal is dismissed for default, there is no merger and the original Court can entertain the application (h). On the other hand, it has been held by the High Court of Madras that the Court which passed an ex parte decree has jurisdiction to entertain an application to set it aside even after an appeal therefrom has been dismissed (i). See notes to s. 36, "Merger of decree."

Where a defendant against whom an ex parte decree is passed is not joined as a party to the appeal preferred by other parties to the suit, and the appellate Court does not adjudicate upon his case, the ex parte decree against him does not merge in the decree of the Court of appeal so as to preclude him from applying under this rule to the Court which passed the ex parte decree to set aside the decree. *A* sues *B*, *C* and *D*, and obtains an ex parte decree against *B* and a decree on the merits against *C* and *D*. *C* and *D* appeal from the decree. *B* is not joined as a party to the appeal. The appellate Court confirms the decree of the Court of first instance passed against *C* and *D*. This does not preclude *B* from applying to the Court of first instance to set aside the ex parte decree against him (j).

Ex parte decree obtained by fraud.—A regular suit does not lie to set aside an ex parte decree merely on the ground of non service of summons (l). But where an ex parte decree is alleged to have been obtained by a plaintiff by fraud, the defendant is entitled to institute a regular suit to set aside the decree on the ground of fraud (l). The suit is maintainable even though the defendant was unsuccessful in his application made under this rule to set aside the ex parte decree and though he did not appeal from the order rejecting his application (m). But if the very fraud that is set up by the defendant in his suit was set up in his application, and the Court after going into the question of fraud rejected the application, the suit would be barred as *res judicata* unless the fraud alleged was of such a nature that it could not properly come within the

(d) *Id.*(e) *D.*(f) *Mathura v. Ram Charan* (1915) 37 All. 208, 29 I. C. 261.

(g)

(h)

(i)

(j) *Decided from Bankura v. Subraya* (1907) 30 Mad. 535.

(k)

(l)

(m)

scope of enquiry under this rule. *A* applies under this rule to set aside an *ex parte* decree on the ground of fraud in respect of the service of summons upon him. The Court, after going into the question of fraud, rejects the application. *A* then institutes a regular suit to set aside the *ex parte* decree, basing his suit on the very fraud that was alleged by him in the application. The suit is barred as *res judicata* (n). In a recent Calcutta case *A* sued *B* in a Munsif's Court on a hand note and obtained an *ex parte* decree for Rs 59. *B* applied to set aside the decree, but the application was refused. *B* then sued *A* in the Munsif's Court to set aside the decree on the grounds, (1) that the summons was not duly served, and (2) that the decree was obtained by perjured evidence. It was held that the issue as to service of summons was not *res judicata*, the reason given being that the suit included matters which could not have been raised on the application to set aside the decree (o). This decision, it is submitted, is not good law.

Application by legal representative of deceased defendant.—Under the Code of 1882, it was not settled whether his *legal representative* could apply for an order to set aside the *ex parte* decree against a deceased defendant. The High Court of Calcutta held that he could (p). The High Courts of Madras (q), and Allahabad (r), held that he could not. But the Allahabad Court conceded that if the application was made by the defendant, and he died during the pendency of the application, the proceedings could be continued by his legal representative (s). Under this Code (s 146) such an application may be made by the legal representative of the deceased defendant (t).

Grounds on which *ex parte* decree may be set aside.—These are stated in the second paragraph of the rule, the one being that the summons was not duly served upon the defendant (u), and the other that though the summons was duly served, the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing (v). A summons cannot be said to be duly served if it is a misleading document having no relevance to the real proceedings which are contemplated and having no reference to the order ultimately passed (u). When a summons was served upon a *jurdanashin* lady, to whom the serving officer was not able to obtain access, by affixing a copy of the summons on the outer door of her dwelling house under O 5, r 17, and it appeared that the lady had no knowledge of the suit against her, the Court set aside the *ex parte* decree passed against her on the ground that she was prevented by "sufficient cause" from appearing at the hearing of the suit (x). Substituted service is as effectual as personal service for the purpose of going on with the proceedings of the Court. It is not necessarily due service and it is open to the defendant to shew that he had no knowledge of the claim (y).

"Sufficient cause."—Where an *ex parte* decree has been passed against a defendant who has failed to appear at the hearing, he is not entitled to have the decree set aside as a matter of course even if he applies on the same day for the purpose. It is a matter for the discretion of the Court (z). The fact that a defendant was contemplating an appeal from a preliminary decree in a suit for partition is no ground for his failure to attend proceedings in connection with the division of property and for setting aside the

(n) *Pitambar Chandra v. Sankar Chandra* (1901) 23 All 99.

(o) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(p) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(q) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(r) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(s) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(t) *See* *Prabhu Chandra v. Sankar Chandra* (1901) 23 All 99.

(u) *Fakhr ud Din v. Chakraborty* (1901) 23 All 99. *Rhura Mal v. Har Kishan* (1902) 24 All 343.

(v) *Somavada v. Subbamma* (1903) 26 Mad 599.

(w) *Balrajend v. Shree Kumar* (1924) 22 All L. J 791. 82 I C 184 (24) A A 81.

(x) *Khatode v. Nabin Chandra* (1915) 19 C.W.N. 1231. 30 I C 64.

(y) *Gyanammal v. Abdul Husain* (1932) 55 Mad 223. 134 I C 1202 (31) A M 813. *Sam Rhavoor v. Ganga Singh* (1932) 54 All 154 (31) A 727.

(z) *Chrimble v. Moore* (1929) 31 Bom L.R. 468. 117 I C 593 (29) A B 250.

(f) *See* *Venkateswamy v. Krishnamurthy* (1915) 38 Mad 442. 21 I C 568.

O. 9, r. 13 final decree for partition (a) The Bombay High Court has held that if the defendants are present in person, the mere fact that their counsel are engaged in other Courts in the same building is not sufficient cause within the meaning of this section (b) In a Rangoon case under the Land Acquisition Act, 1894, the Collector failed to appear as he was on the point of doing so.

Judges

while the

Appearance

'Upon such terms as to payment into Court.'—In restoring a case under this rule, the Court may make it a condition that costs (d) or the decretal amount or some portion thereof be paid into Court (e) If a decree is set aside on failure to comply with a condition imposed by a Court, an appeal will lie under O 43, r 1 (d), and the appellate Court will consider whether the condition was a reasonable one (f)

High Court of Calcutta, Original Side—The High Court of Calcutta has held that it is not a condition of the rule that the defendant must appear in person (g) High Court of Calcutta has held that it may set aside an ex parte decree even in a case in which there has been an element of negligence (g) The same High Court has also held that an application to set aside an ex parte decree, not being one under this rule, is not governed by art 164 of the Limitation Act (h)

Has the Court inherent power to set aside an ex parte decree—A Full Bench of the Madras High Court has held that the Court has no power apart from the provisions of this rule to set aside an ex parte decree (i) The Calcutta and Patna High Courts take the same view (j) In one of the Calcutta cases (j1) Rankin, C J, said "I entirely dissent from the view that, if no case is made out under that rule (O 9, r 13) it is open to the learned Judge to enlarge the rule by talking about sec 151 On the other hand an inherent jurisdiction is recognized by the Bombay High Court (k) In Allahabad the cases are conflicting In one case a Bench of that Court approved of the Madras Full Bench ruling (l) In another case a single Judge said that the inherent jurisdiction undoubtedly existed (m)

Ex parte decree against minor defendant—It is no ground for setting aside an ex parte decree passed against a minor defendant that the Nazir who was appointed guardian ad litem of the minor did not appear and defend the suit if the failure to defend was owing to the fact that the Nazir did not receive instructions from any person to defend the suit It would be otherwise if fraud, collusion or gross negligence on the

(a)

(b)

(c)

(d)

(e) *Shyam Lal v Ram Narain Lal* (1920) 5 Pat L J 470 571 C 300

(f) *Narayan v Lakunt* (1917) 51 Bom 27 99 I C 384 (27) A B 1 overruling *Fakirgouda v Vishnudas* (1916) 50 Bom 3 6 96 I C 371 (28) A B 303

(g) *Banerjee v Subwardaj* (1928) 55 Cal 473 106 I C 91 (28) A C 772

(h) *Haji Ramjan v Hafiz* (1927) 33 C W N 411 (28) A C 864

(i) *Narayani v Narajana* (1910) 43 Mad 94 53 I C 847 approving *Benkataram v Narajana* (1913) 44 Mad L J 235 18 I C 360 and overruling *Soma,ja v Subbamm* (1903) 18 Mad 599

(j) *K B D H v Shamsiddin* (1930) 34 C W N 419 128 I C 94 (30) A C 488 *Harihar v Bijay Krishna* (1930) 34 C W N 222 126 I C 779 (30) A C 387 *Ajodhya v West Phul Kuer* (1922) 1 Pat 277 65 I C 341 (22) A 1 479

(j1) 34 C W N 419 421 *supra*

(k) *Sorabji v Ramjilal* (1924) 26 Bom L R 321 80 I C 237 (24) A B 393 *Abdulla bhai v Issibhai* (1913) 31 Bom L R 1423 141 I C 407 (25) A B 634

(l) *Ram Sarup v Gaja Prasad* (1916) 49 All 175, 90 I C 180 (25) A A 610

(m) *Kallan v Nanhle* (30) A A 701

part of the guardian ad litem were proved (a), and in the case of (c) through another guardian to set aside the decree (c) but not (d).

Proviso to the rule—Cases under this proviso fall into two classes.

- I Where the decree is *ex parte* against all the defendants, and the application to set aside the decree is made only by some of them.
- II Where against some of the defendants the decree is passed against others who have appeared and defended the suit on their merits, and the application to set aside the decree is made by some of the defendants against whom the decree was passed.

In cases under both classes the question is whether, if the decree is set aside against the applicant, the Court can set aside the decree as against the other defendants also, so as to reopen the whole suit, and if so, in what cases? The present rule expressly provides for two cases. The first para of r. 13 says that where a defendant against whom an *ex parte* application is made for an order to set it aside, and satisfies the Court that he was not duly served upon him, etc., the Court shall make an order as against him [that is the applicant] (p). The proviso to r. 13 says that the decree is of such a nature that it cannot be set aside as against such defendant, or may be set aside as against all or any of the other defendants. This is for cases where it may be necessary in the ends of justice to set aside the decree only against the applicant but also against the other defendants (q). The general rule be so,

- (1) where the decree is one and indivisible (r)
- (2) where the suit would result in inconsistent decrees if the decree were set aside as against the other defendants also (s)
- (3) where the relief to which the applicant is entitled in the suit cannot be given otherwise, than by setting aside the decree as against the other defendants also (t)
- (4) where the decree proceeds on a ground common to all the defendants (u).

These four cases may be considered under the two classes referred to above.

Class I—Where the decree is passed *ex parte* against all the defendants but the application to set aside the decree is made by some of them only.

Illustrations

(a) B, C, and D, who constitute a joint Hindu family execute a mortgage of the joint property in favour of A. A sues B, C, and D to enforce the mortgage. D is served with the summons but not B and C. None of the defendants appears at the hearing and an *ex parte* decree is passed against all the defendants for a sale of the mortgaged property. B and C apply for an order to set aside the decree on the ground that the summons was not served upon them. Here the decree being one and indivisible, the Court

- | | |
|---|---|
| (n) <i>Shankar Prasad v. Jayasure Lallee</i> (14-1) 15 W R 371 per Norman, C.J. and Loch J. <i>Mahomed Hamidulla v. Tohurrennissa Bibi</i> (1895) 25 Cal 153 159 <i>Flora Mal v. Har Kishan Das</i> (1902) 24 All 3-3 400 | (1898) 25 Cal 155 160 <i>Monomahal v. Nara Narayan Iy</i> (1892) 4 C W 458 |
| (o) <i>Bhura Mal v. Har Kishan Das</i> (1899) 24 All 343 348 400 <i>Suryaprasada v. Hareemulla</i> (1930) 59 Mad L J 914 124 I C 249 (31) A 31 6 | (r) <i>Bhura Mal v. Har Kishan Das</i> (1902) 24 All 3-3 400 401 <i>Mahomed Hamidulla v. Tohurrennissa Bibi</i> (1895) 25 Cal 153 159 |
| (q) <i>Dunkher Khan v. Jayasure Lallee</i> (14-1) 61 W R 371 per Norman, C.J. and Loch J. See also <i>Gopala Chetty v. Subbar</i> (1903) 26 Mad 604 | (s) <i>Dunkher Khan v. Jayasure Lallee</i> (14-1) 61 W R 371 per Norman, C.J. and Loch J. See also <i>Gopala Chetty v. Subbar</i> (1903) 26 Mad 604 |
| (t) <i>Mahomed Hamidulla v. Tohurrennissa Bibi</i> | |

O. 9, r. 13 final decree for partition (a) The Bombay High Court has held that if the defendants are present in person the mere fact that their counsel are engaged in other Courts in the same building is not sufficient cause within the meaning of this section (b) In a Iangoon case under the Land Acquisition Act, 1894, the Collector failed to appear as he was on tour at that time and there was considerable pressure of work. One of the Judges of a Division Bench held that this was a sufficient cause for his non appearance while the other Judge held that it was not (c) For other cases see note to O 9 r 9 Appearance

Upon such terms as to payment into Court —In restoring a case under this rule the Court may make it a condition that costs (d) or the decretal amount or some portion thereof be paid into Court (e) If a decree is set aside on failure to comply with a condition imposed by a Court an appeal will lie under O 43 r 1 (d) and the appellate Court will consider whether the condition was a reasonable one (f)

High Court of Calcutta Original Side —The High Court of Calcutta has held that this rule does not apply in terms on the Original Side of the High Court. The principle however of this rule is applied on that side and Rankin C.J. said that the High Court on its Original Side has a discretion which it may exercise independently of the rule and that it may set aside an ex parte decree even in a case in which there has been an element of negligence (g) The same High Court has also held that an application to set aside an ex parte decree not being one under this rule is not governed by art 164 of the Limitation Act (h)

Has the Court inherent power to set aside an ex parte decree —A Full Bench of the Madras High Court has held that the Court has no power apart from the provisions of this rule to set aside an ex parte decree (i) The Calcutta and Patna High Courts take the same view (j) In one of the Calcutta cases (j1) Rankin C.J. said I entirely dissent from the view that if no case is made out under that rule (O 9 r 13) it is open to the learned Judge to enlarge the rule by talking about sec 151. On the other hand an inherent jurisdiction is recognized by the Bombay High Court (k) In Allahabad the cases are conflicting. In one case a Bench of that Court approved of the Madras Full Bench ruling (l) In another case a single Judge said that the inherent jurisdiction undoubtedly existed (m)

Ex parte decree against minor defendant —It is no ground for setting aside an ex parte decree passed against a minor defendant that the Nazir who was appointed guardian ad litem of the minor did not appear and defend the suit if the failure to defend was owing to the fact that the Nazir did not receive instructions from any person to defend the suit. It would be otherwise if fraud, collusion or gross negligence on the

(a) *Chhanga v. Jirhi* (1908) 26 All. L. J. 87
107 I. C. 541 (8) A.A. 19 see also
Airadh v. Fakhman (1909) 51 All. 631
119 I. C. 246 (29) A.A. 79

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) *Veelaven v. Varagann* (1901) 43 Mad. 91
53 I. C. 847 appro. 18 I. C. 124
Varagann (1913) 4 Mad. I. J. 93, 18
I. C. 380 and overruling *Somayya v. Subbanna* (1903) 26 Mad. 592

(j) *K. B. D. v. Shamsuddin* (1910) 34 C. W. N. 419 128 I. C. 94 (30) A. C. 489
Harhar v. Bhoj Krishna (1930) 34 C. W. N. 222 126 I. C. 779 (30) A. C. 337
Ajodhya v. Mst. P. Kuer (1922) 1 Pat. 277 65 I. C. 341 (2) A. I. 479

(j1) 34 C. W. N. 419 421 *supra*

(k) *Dorabji v. Ramjilal* (1904) 26 Bom. L. R. 31 60 I. C. 237 (24) A. B. 39
Abdulla bhai v. Iss bhai (1913) 34 Bom. L. R. 145 141 I. C. 40 (3) A. B. 631

(l) *Pam. Sar p. v. Gaja Prasad* (1906) 48 All. 175 90 I. C. 180 (25) A. A. 610

(m) *Kailan v. Anthe* (30) A. A. 701

part of the guardian ad litem were proved (n), and in such a case the minor may apply through another guardian to set aside the decree (o). See notes to r. 9, "Minor plaintiff."

Proviso to the rule—Cases under this proviso fall into two classes

- I Where the decree is *ex parte* against *all* the defendants, but the application to set aside the decree is made only by *some of them*
- II Where against some of the defendants the decree is passed *ex parte*, but against others who have appeared and defended the suit, it is passed on the merits, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed *ex parte*

In cases under both classes the question is whether, if the decree is set aside as against the applicant, the Court can set aside the decree as against the other defendants also, so as to reopen the whole suit, and if so, in what cases? No provision was made in the old section as to these cases. The present rule expressly provides for these cases. The first para. of r. 13 says that where a defendant against whom a decree is passed ex parte applies for an order to set it aside, and satisfies the Court that the summons was not duly served upon him, etc., the Court shall make an order setting aside the decree as against him [that is the applicant] (p). The proviso to r. 13 says that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants. The object is to provide for cases where it may be necessary in the ends of justice to set aside the decree not only against the applicant but also against the other defendants (q). This would as a general rule be so.

- (1) where the decree is one and indivisible (*r*)
- (2) where the suit would result in inconsistent decrees if the decree were not set aside as against the other defendants also (*s*)
- (3) where the relief to which the applicant is entitled in the suit could not effectively be given otherwise than by setting aside the decree as against the other defendants also (*t*),
- (4) where the decree proceeds on a ground common to all the defendants (*u*)

These four cases may be considered under the two classes referred to above

Class I—Where the decree is passed *ex parte* against all the defendants, but the application to set aside the decree is made by some of them only

Illustrations

(a) *B, C, and D, who constitute a joint Hindu family execute a mortgage of their joint property in favour of A. A sues B, C, and D to enforce the mortgage. D is served with the summons, but not B and C. None of the defendants appears at the hearing and an ex parte decree is passed against all the defendants for a sale of the mortgaged property. B and C apply for an order to set aside the decree on the ground that the summons was not served upon them. Here the decree being one and indivisible, the Court*

- | | |
|---|--|
| (n) <i>Vishnu v. Dattu</i> (1907) 9 Bom L R 1099 | (1894) 25 Cal 155 160 <i>Monomohani v. Vora</i> |
| (o) <i>Motchand v. Balram Das</i> (1933) 55 All 138 143 I C 3-6 (33) A 116 | <i>Narayan Poy</i> (1-99) 4 C W N 456 458 |
| (p) See as to the insertion of the words as against him the <i>Idem v. Idem</i> | (r) <i>Bhura Mal v. Har Kishan Das</i> (1901) 24 All 343 348 400 <i>Suryaprasanna v. Sreera</i> |
| (q) <i>Idem v. Idem</i> | <i>mula</i> (1930) 59 Mad L J 918 129 I C 249 (31) A M 6 |
| (r) <i>Mahomed Hamdulla v. Tuharennissan Bibi</i> | (t) <i>Bhura Mal v. Har Kishan Das</i> (1901) 24 All 343 400 401 <i>Mahomed Hamdulla v. Tuharennissan Bibi</i> (1878) 25 Cal 155 159 |
| | (u) <i>Dandher Khan v. Lajpattur Lancer</i> (1871) 51 W R 371 per Norman (J.), and Loch J See also <i>Gopala Chettia v. Sudder</i> (1903) 26 Mad 104 |

O. 9, r. 13 may set aside the decree not only as against *B* and *C*, but also as against *D*, though he was served with the summons and there was no sufficient cause for his non appearance *Ajodhya Pershad v Sheo Pershad* (1900) 5 C W N 58, *Ashfaq Husain v Gauri Sahai* (1911) 33 All 264, 38 I A 37, 9 I C 975, *Bala Balsh v Amiruddin* (1930) 34 C W N 679, 128 I C 182, (30) A C 700

(b) *A* sues *B* and his minor sons *C* and *D*, members of a joint Hindu family, to recover Rs 1,000 alleged to have been advanced to *B* as manager of the family. None of the defendants appears at the hearing, and an ex parte decree is passed against all the three. All the three defendants apply to have the decree set aside. As to *C* and *D* it is proved that no summons was served upon them. As to *B* it is proved that the summons was duly served upon him. Here the decree being *one and indivisible* (1), the Court may set aside the decree not only as against *C* and *D*, but also as against *B*, though the summons was served upon him and there was no sufficient cause for his non-appearance. Moreover, this is a case where the relief to which the minors *C* and *D* are entitled could not effectively be granted unless the decree was set aside as against *B* also. For if the decree were allowed to stand as against *B*, *B*'s share in the joint family property could be attached and sold though the sons might succeed in showing at the trial of the suit that the debt never was incurred or that it had been discharged, or that from its nature the joint family property was not liable. The sale of the father's share in the joint family property would be a manifest injury to the sons, and this could only be avoided by setting aside the decree against the father also, and re opening the whole suit. *Bhura Mal v Har Kishan Das* (1902) 24 All 383 at pp 440 and 401

(c) *X*, alleging that *A* and *B* are in joint possession of certain immovable property, sues *A* and *B*, and asks for a declaration that he is in joint possession with them. *A* is served with the summons, but *B* is not. Neither defendant appears at the hearing, and a decree ex parte is passed against both the defendants. *B* applies to have the decree set aside, and it is set aside as against him, but not as against *A*. At the hearing *B* establishes that *X* has no title whatever to the property. There would in such a case be *two absolutely inconsistent decrees*, namely, the ex parte decree held by *X* against *A* declaring *X* to be jointly in possession with *A* and *B*, and the decree against *X* passed at "herefore a case
st *A* also see

(d) *X* sues *A* and *B* on a promissory note executed by *A*. *B* is *A*'s nephew, and he is joined as a defendant on the ground that *A* and *B* are members of a joint Hindu family, and that the note was for a debt binding on the family. Neither defendant appears at the hearing, and an ex parte decree is passed against both the defendants. The decree against *A* proceeds on the ground that the note was passed by him and against *B* on the ground that the debt was incurred for a family purpose. *B* applies for an order to set aside the decree, alleging that the summons was not served upon him and that the debt in respect of which the note was passed by *A* was not incurred for a family purpose. It is not disputed that the amount was actually advanced to *A*. Such being the case, the decree may be set aside as against *B*, but it must not be set aside as against *A*. Justice does not require it, for the contention of *B* that the debt was one not binding on him is a defence peculiar to him alone, and not one common to him and *A*. *Gopala Chetti v Subbier* (1903) 26 Mad 604

(e) *A* sues *B*, *C* and *D* personally and as managers of a devasam to recover Rs 275, being revenue paid by him on behalf of the defendants. None of the defendants appears at the hearing, and an ex parte decree is passed against them personally and against the

(1) See *Mahomed Hamidulla v Tohurennissa Biba* (1898) 25 Cal 155 160 where it was

said of a similar decree that it was *one and indivisible*

devasam property. If *B* alone applies under this rule, and shows sufficient cause for his non appearance at the hearing, the decree may be set aside so far as it ordered payment by *B* personally and from the devasam property, but it cannot be set aside so far as it directs *C* and *D* to pay the amount personally. *Talia Koni v Murutha Iera* (1905) 31 Mad 454

Class II—Where against some of the defendants the decree is passed *ex parte*, but against others who have appeared and defended the suit it is passed on the merits, and the application to set aside the decree is made by one or more of the defendants against whom the decree was passed *ex parte*—In this case the question arises, whether, if the decree is of such a nature that it cannot be set aside as against the applicant only, but must be set aside also as against the defendants against whom the decree was passed on the merits, the Court has the power to set aside the decree as against such defendants also. It is submitted that it has. The words 'the decree' in the proviso mean the decree passed in the suit, not only against the defendants who did not appear but also against the defendants who did appear. The words 'other defendants' in the proviso mean defendants other than the applicant against whom the decree is passed, whether as against them it was passed *ex parte* or after a hearing (*w*)

Illustrations

(a) *X* sues *A* and *B*, alleging that *A* and *B* are in joint possession of certain immovable property, and asking for a declaration that he is in joint possession with them. *A* appears and defends the suit. *B* does not appear. The Court finds that *A* and *B* are in joint possession, and that *X* is entitled to joint possession with them, and a decree is passed against *A* and *B* declaring that *X* is entitled to joint possession with them. Here the decree, so far as regards *A*, is passed after a hearing and, as regards *B*, it is *ex parte*. But there is only one decree, and the words 'the decree' in the proviso can only refer to that decree. Therefore, if *B* applies for an order to set aside the decree and the decree

jointly in possession along with *A* and *B*, whilst *B* would be in possession of a decree in his favour declaring that *X* is not entitled to joint possession with him and *A*. See *Bhura Mal v Har Krishan Das* (1902) 24 All 383 at p 400

(b) *A* and *B*, both Mahomedans, pass a promissory note to *X*. *B* dies leaving three heirs, *H1*, *H2*, and *H3*. *X* sues *A* (surviving maker of the note) and *H1*, *H2* and *H3* as heirs of *B*. *A* and *H1* appear at the hearing and defend the suit. *H2* and *H3* do not appear. A decree is passed against all the defendants: the liability of *H1*, *H2* and *H3* under the decree being limited to the extent of the property of *B* inherited by them as *B*'s heirs. Here the decree, so far as regards *A* and *H1*, is passed after hearing, and, as regards *H2* and *H3*, it is *ex parte*. *H2* and *H3* apply to have the decree set aside alleging that the summons was not served upon them. The Court is satisfied that the summons was not served. Upon these facts the High Court of Calcutta held under the old section that the decree should be set aside not only as against *H2* and *H3* but also as against *A* and *H1*, the ground of the decision being that the decree was one and indivisible. *Mahomed Hamidullaz v Tohurennissa Bibi* (1895) 25 Cal 155

(c) *A* sues *B* and *B*'s mother *C*, Native Christians, upon a promissory note jointly passed by them. *B* appears at the hearing and defends the suit. *C* does not appear. A decree is passed against both defendants for the amount of the note. Here the decree so far as regards *B* is passed after a hearing and as regards *C* is *ex parte*. *C* applies for

(a) See the judgment of Burdett J. in *Mahomed Hamidulla v Tohurennissa Bibi* (1895) 25 Cal 155, 159, 160 and cf *Aikman*

J. in *Bhura Mal v Har Krishan Das* (1902) 24 All 383, 400

9, r. 13 an order to set aside the decree, alleging that the summons was not served upon her. The Court finds that the summons was not served upon C. Upon these facts the High Court of Bombay held under the old section that if the decree were set aside as against C, it should not be set aside as against B also, B having appeared and defended the suit. *Manaku v Sitaram* (1894) 18 Bom 142. If the Bombay decision means that the setting aside of a decree ex parte against a defendant does not necessarily revive the suit as against a defendant who has appeared and defended the suit, the decision is still good law. But if it means that where a decree is passed ex parte against A and after a hearing against B the Court can set aside the decree only against A, and cannot set it aside in any case against B, the decision is no longer law—see the proviso to the rule.

(d) A sues B and C for a declaration of title to certain lands, and D and E (tenants of B and C) for possession of the lands. B and C appear and defend the suit. D and E do not appear. The Court passes a decree against all the four defendants, as against B and C declaring that the lands belong to A, and as against D and E, directing them to deliver possession of the lands to A. Here the decree against D and E is ex parte for they did not appear at the hearing. D and E apply for an order to set aside the decree, alleging that the summons was not served upon them. The Court is satisfied that the summons was not served. Should the decree be set aside as a whole that is against all the defendants B, C, D and E, or should it be set aside against D and E only? The decree should not be set aside as a whole, for the decree is not one and indivisible. The relief granted to A as against B and C is a declaration of A's title to the lands. The relief granted to A as against D and E is that they should deliver up possession of the lands to A. In fact, the decree, though nominally one, really consists of two decrees each against one set of defendants: the relief granted against each set being separately specified. Hence the decree may be set aside as against D and E, but not against B and C for the relief granted against B and C is distinct from that granted against D and E, who alone applied for an order to set aside the decree. *Monomohini v Nara* (1899) 4 C W N 456.

(e) A sues B, C and D the holders of a holding for rent and an ex parte decree is passed against them. B alone applies to set aside the decree. The decree may be set aside as against B but it should not be set aside as against C and D, the reason being that a decree for rent can be passed against some holders of a holding without impleading the other holders. *Aeshav Chandra v J. Jyulnassa* (1928) 32 C W N 507 (28) A C 397.

Whether this rule applies to execution proceedings.—This rule does not apply to proceedings in execution of a decree.—See notes to s. 141 above. The rule does not apply even though the order passed in execution falls under s. 47 and is therefore under s. 2 deemed to be a decree (x). An ex parte order directing the attachment of the judgment debtor's property cannot be set aside under this rule (y), nor an ex parte order under O 21 r. 101, restoring a claimant to possession (z), nor an ex parte order under O 21, r. 33, delivering possession to a decree-holder purchaser (a).

An application for a personal decree under O 34 r. 6 is not an application in execution and so an ex parte personal decree against a mortgagor may be set aside under this rule (b). But the principle of the rule has been extended to an application to set aside a decree for future mesne profits which the Court has directed to be ascertained in execution (c).

(x) *Ar. nathalam v Veerappa* (1932) 55 Mad 17 134 IC 806 (31) A.M. 656 F.B. disapproving dicta in *Alagon duram v J. Jyulnassa* (1929) 52 Mad 899 120 J.C. 567 (9) A.M. 757.

(y) 55 Mad 17 *supra*.

(z) *Harecharan v Manmatha* (1914) 41 Cal 1

19 IC 693

(a) *Kastakal v Palani* (1906) 50 Mad L.J. 67 97 IC 1008 (8) A.M. 980.

(b) *Babu Lal v Raghunandan* (1930) 50 All 839 134 IC 79 (30) A.A. 841.

(c) *S. Jagprakash v. Seeramsil* (1930) 50 Mad L.J. 918 139 IC 249 (31) A.M. 6.

Dismissal for default of application to set aside ex parte decree —See note O. to r 9 above, "Dismissal for default of application to restore suit"

Application to set aside ex parte decree after it has been executed.—The fact that an ex parte decree has been satisfied does not preclude the defendant from applying to the Court for an order to set it aside under this rule. A obtains an ex parte decree against B, and attaches B's goods in execution of the decree. B pays the amount of the decree under protest, and applies for an order to set aside the decree on the ground that the summons was not served upon him. The Court may make an order setting aside the decree, notwithstanding that the decree has been satisfied (d)

Effect of setting aside ex parte decree —If an ex parte decree is set aside under this rule the suit is restored. The suit is also restored if the ex parte decree is set aside by suit on the ground that the summons was not served. But if the ex parte decree is set aside in a suit not only on the ground of suppression of summons by fraud but also on the ground that the original claim was fraudulent the suit itself cannot be restored or retried, for the issue, whether the plaintiff in the original suit had a right to obtain a decree against the defendant, is barred by *res judicata* (e)

Ex parte decree against firm —A decree against a firm cannot be said to be ex parte against a partner in the firm because he has not appeared at the hearing. An ex parte decree against a firm can be set aside on the ground that the summons was not duly served on the firm. If the summons was duly served upon the firm the decree cannot be set aside because one of the partners was not served. Under O 30, r 3, it is not necessary to serve every partner. A sues X Y & Co., a firm. The firm consists of two partners X and Y. The summons is served on X alone as a partner, Y is not served with the summons. Neither X nor Y appears at the hearing and an ex parte decree is passed against the firm. The summons having been duly served on the firm, the decree against the firm cannot be set aside because Y was not served and he did not appear at the hearing (f)

Appeal —If in a case open to appeal an application under this rule is dismissed an

lawfully imposed on the defendants were not complied with (j)

Revision —It has been held by the High Court of Allahabad that an order setting aside an ex parte decree is not subject to revision under s 115 the reason given being that the validity of the order may be attacked under s 105 in an appeal from the final decree (i). The High Court of Madras has held that an order setting aside an ex parte decree may be set aside in revision if it is not based on any ground recognised by law (l)

Insolvency of defendant and deposit in Court.—Where an ex parte decree is set aside on condition that defendant should deposit a sum equivalent to the plaintiff's claim

(d) *Prudential Insurance Co. v. Newington* (1898) 15 Q.B. 413

(e)

(f)

(g)

(h) *Sharma Dass v. Harbans* (1899) 15 Cal 406
Isal v. Hashmat (1916) 1 R. 40

p 115 31 J.C. 914

(i)

(j)

(k)

(l) *Sharma Kallu v. Nadir Bakhsh* (1901) 19 All. L.J. 907 64 I.C. 527 (27) A.A. 441

(m) *Subramaniam v. Peradajulu* (1927) 53 Mad. L.J. 110 103 I.C. 145 (27) A.M. 22

O. 9, rr. 13, 14 or any other sum, and the amount is so deposited, and a decree is eventually passed for the plaintiff, the plaintiff and not the Official Assignee or receiver is entitled on the insolvency of the defendant to the money paid into Court (m)

Limitation.—A full Bench of the Madras High Court has held that a rule framed by that Court applying s 5 of the Limitation Act, 1908, to applications under r 13, was *intra vires* (n) The period of 30 days has been enlarged under that section in the case of a mistake of a pleader or his clerk (o) See notes above, 'Remedies in case of ex parte decree'

Where no application to set aside an ex parte decree is made within the period of limitation, the Court has no inherent power under s 151 to set it aside after the expiry of the period (p)

Vakalatnama—No fresh vakalatnama is necessary for the purpose of an application to set aside an ex parte decree (q) See O 3 r 1

14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party

No decree to be set aside without notice to opposite party

"Opposite party."—Where in a suit for partition by A against B and C an ex parte decree is passed against B, the opposite party on whom notice should be served under this rule is A the plaintiff and not C the co defendant (r)

ORDER X

Examination of Parties by the Court

O. 10, rr. 1, 2 **1. [S. 117]** At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made The Court shall record such admissions and denials

Ascertainment whether allegations in pleadings are admitted or denied

2. [S. 118] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions

Oral examination of party or companion of party

(m) *Parshotam Das v. Dard* (1915) 13 All

(n)

(o)

(p)

(q)

(r)

relating to the suit by whom such party or parties are accompanied, may be examined orally by the Court, if it thinks fit, put in the course of the examination questions suggested by either party.

Object of examination under this rule—The object of this rule is not to take evidence or ascertain what is to be the evidence in a suit to determine the matters in dispute between the parties (a). At the trial of a suit and before any evidence had been taken a Subordinate Judge of the District Court called a witness box and examined him and allowed him to be cross-examined by the parties on the whole case. Their Lordships of the Privy Council expressed disapproval of this unusual procedure and said with reference to this rule: "It is a procedure which is used by the Judge only when he finds it necessary to clarify material points raised on any material questions relating to the suit and ought not to be so far as to supersede the ordinary procedure of trial as prescribed in O 15 (i)".

3. [S. 119.] The substance of the examination of a party, if reduced to writing by the Judge, shall form part of the record.

Substance of examination to be written

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (b) O 4 r 3 cl (2)

4. [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule (2) refuses or is unable to answer

Consequence of refusal or inability of pleader to answer

any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

*** Direct that such party shall appear in person**—Under this rule an order directing a party to appear in person can only be made if the pleader who represents him has refused or is unable to answer material questions (u). See O 4 r 12.

Appeal—An appeal lies from an order pronouncing judgment against a party under sub r (2) [O 43 r 1 cl (e)]. Where in a suit by A against B C and D the Court struck off B's defence owing to his failure to appear in person but ultimately decided

(a) *Cumbe v. Tulukram* (1888) 15 Cal 533
151 A 119

W N 95 131 IC 669 (31) A IC 176

(b) *Mannabhai v. Mool Ramdeo* (1931) 35 C

(u) *Sahu v. Hanumantrao* (1922) 23 Bom 319

O. 11, r. 1 succeed in impeaching or even destroying the defendant's title. The reason is that the defendant being in possession, he cannot be dispossessed of the land except by proof of title on the part of the claimant. Hence the plaintiff in ejectment should not be allowed to interrogate the defendant merely for the purpose of destroying or impeaching the defendant's title (h). And thus is the Exception above referred to. But the plaintiff in ejectment is entitled to interrogate the defendant as to any matter relating to the defendant's title that may support his case directly (i). The same principles apply in the case of discovery by production of documents.

The High Court of Calcutta has said that interrogatories in India should not be allowed for the first of the above purposes, that is to ascertain the nature of your opponent's case but that they may be allowed for the second, that is to support your own case (j). This is on the ground that where a party has not sufficiently disclosed his case, it is the Court that has to determine the exact nature of his case by procedure under O 8, r 7, and O 14, rr 12 and that it is not therefore permissible to the opposite party to get that information by discovery. But these rules are, it is submitted, intended not to supersede, but to supplement discovery and there is no reason why any distinction should be drawn between the English and the Indian practice (k).

What interrogatories may not be allowed—These may be divided into three classes—

1 A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case or title (l).

2 A party is not entitled to interrogate as to any confidential communications between his opponent and his legal advisers.

3 A party is not entitled to execute interrogatories which would involve disclosures injurious to public interests.

See notes to r 13 below, 'Grounds of objection to production of documents.'

Interrogatories relating to names of persons—Interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant (m). Such interrogatories are not allowable in any other case. Thus in a suit by the vendor against the purchaser for specific performance of a contract for sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal. The only object of such an interrogatory is to give the plaintiff the opportunity of releasing the defendant and of securing for the plaintiff some other person liable under the contract in substitution for, and not jointly with, the defendant (n).

As to interrogatories as to names of witnesses, see note above. Discovery by interrogatories, and notes to O 6, r 4, 'Object of particulars.' As to interrogatories as to names of informants in defamation cases, see the undermentioned cases (o).

- | | |
|--|--|
| <p>(h) —</p> <p>(i) <i>Miller v Rixton</i> [1903] 21 R 120</p> <p>(j) <i>Ali Kader v Gobind Dass</i> (1890) 17 Cal. 810</p> <p>(k) <i>Dajinath v Raghunath</i> (1913) 41 Cal. 6 at p 9 241 C 765</p> | <p>(l) <i>Benbow v Lane</i> (1850) 16 C D 93 95 <i>Flemmer v May</i> (1750) 1 Ves 46 Brax on Discovery, pp 444 463, <i>Wigram on Discovery</i> p 261</p> <p>(m) <i>Thol v Leask</i> (1835) 10 Ex 201 <i>Hancocks v Leblache</i> (1878) 3 C P D 19 202</p> <p>(n) <i>Sebright v Hanbury</i> [1916] 2 Ch 213</p> <p>(o) <i>Chapman v Leach</i> (1920) 1 K B 336 [lander] <i>Lyle Samuel v Odham Ltd</i> [1901] 1 K B 135 [action for libel in a newspaper]</p> |
|--|--|

Refusal by company to register transfer.—Where an article of a company's articles of association empowers the directors without assigning any reason to decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted to the company, and the company refuses to register a transfer, the company is not entitled in an action for a declaration that the refusal was wrongful to refuse to state which of the grounds mentioned in the articles the directors had acted under, although it might refuse to say what reasons influenced them in exercising their discretion on that ground (p)

Foreign law.—An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law (q)

Time for delivery of interrogatories.—A plaintiff may, under this rule, deliver interrogatories to a defendant even before the filing of the written statement. But there is this difference, if the English practice is to be followed here, that in what are called *common law actions*, interrogatories, if delivered before filing the written statement, will as a rule be struck out under r 7 as unnecessary and vexatious unless sufficient reasons are given by the plaintiff to explain why the interrogatories are necessary at that stage of the suit (r), while in suits of the nature of *chancery actions* (s), they may, as a rule, be allowed though no written statement has been filed (t)

A defendant, as a rule, is not allowed to deliver interrogatories to the plaintiff before he has filed his written statement (u)

Leave of Court.—The application for leave to administer interrogatories is, as a rule, made *ex parte*. In determining whether leave should be granted, the Court should consider whether it is a fit and proper case for administering interrogatories. Leave should be refused if the interrogatories are scandalous or are an abuse of the process of the Court. But it is not the duty of the Court, when granting leave, to consider what particular questions the party interrogated should be compelled to answer. The proper time for considering that question is after the party interrogated has made his affidavit in answer [r 8] (v). See r 2 below.

"Opposite party."—These words do not include solely the relation of plaintiff and defendant. Hence one defendant may administer interrogatories to another defendant, provided there is *some right to be adjusted in the action between them* (w).

Where opposite party is a minor or lunatic.—Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or guardian *ad litem*, as the case may be. See r 23 below.

Points of distinction between interrogatories and cross examination —

(1) Not every question which could be asked to a witness in the box may be put as an interrogatory. Thus, questions which are put only to test the credibility of a person will not be allowed, although of course they may be asked in cross examination (x).

(2) Interrogatories can be administered only to a *party* to a suit, and not to a witness (y).

| | | |
|-----|---|---|
| (p) | <i>C. 1—1844 F. 1—1844 L. 1—1844</i> | <i>Hawley v. Leach</i> (1846) W. N. (1846) 41 |
| (q) | | (r) <i>Sham Ashore v. Shosh Ashore</i> (1840) 5 Cal. 70— <i>Prem Sukh v. Indro Nath</i> (1841) 14 Cal. 420 |
| (r) | | (s) <i>Mullov v. Kirby</i> (1840) 15 C. D. 167— <i>Shaw v. Smith</i> (1846) 16 Q. B. D. 193— <i>Dechall v. Leach</i> <i>Crisp & Co</i> (1913) 2 Ch. 275 |
| (t) | That is acted on as stated by the Judicature Act 1873 s. 34 & the Chancery Division | (x) <i>Altkuarn v. Labouchere</i> (1874) 3 Q. B. D. 654— <i>Kennedy v. Rhodes</i> (1874) 1 Ch. 331— <i>332—Thaynham v. Lurjays</i> (1913) 33 L. M. 34—1 F. C. 152 |
| (u) | <i>Harford v. Munk</i> (1844) 9 C. D. 618— <i>Union Fink of London v. Manly</i> (1849) 15 C. D. 232—241 | (y) <i>Attorney-General v. Gaskill</i> (1842) 20 C. D. 519—520 |
| (v) | <i>Dunne v. Longbourne</i> (1846) 2 C. D. 1—4—5 | |

O. 11, r. 1 succeed in impeaching or even destroying the defendant's title. The reason is that the defendant being in possession, he cannot be dispossessed of the land except by proof of title on the part of the claimant. Hence the plaintiff in ejectment should not be allowed to interrogate the defendant merely for the purpose of destroying or impeaching the defendant's title (k). And this is the *Exception* above referred to. But the plaintiff in ejectment cannot do so. The matter relating to the same principles apply in

The High Court of Calcutta has said that interrogatories in India should not be allowed for the first of the above purposes, that is, to ascertain the nature of your opponent's case but that they may be allowed for the second, that is, to support your own case (j). This is on the ground that where a party has not sufficiently disclosed his case, it is the Court that has to determine the exact nature of his case by procedure under O 8, r 7, and O 14, rr 1 2, and that it is not therefore permissible to the *opposite party* to get that information by *discovery*. But these rules are, it is submitted, intended not to supersede, but to supplement discovery and there is no reason why any distinction should be drawn between the English and the Indian practice (l).

What interrogatories may not be allowed—These may be divided into three classes—

1 A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case or title (l)

2 A party is not entitled to interrogate as to any confidential communications between his opponent and his legal advisers

3 A party is not entitled to execute interrogatories which would involve disclosures injurious to public interests

See notes to r 13 below, 'Grounds of objection to production of documents'

Interrogatories relating to names of persons—Interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant (m). Such interrogatories are not allowable in any other case. Thus in a suit by the vendor against the purchaser for specific performance of a contract for sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal. The only object of such an interrogatory is to give the plaintiff the opportunity of releasing the defendant and of securing for the plaintiff some other person liable under the contract in substitution for, and not jointly with, the defendant (n).

As to interrogatories as to names of witnesses see note above, 'Discovery by interrogatories', and notes to O 6 r 4, 'Object of particulars'. As to interrogatories as to names of informants in defamation cases, see the undermentioned cases (o).

- | | |
|--|--|
| (k) — | (l) <i>Benbow v Low</i> (1880) 16 C D 93 94; <i>Plummer v May</i> (1750) 1 Ves 426; <i>Bray v Discovery</i> pp 444 463; <i>Wigram on Discovery</i> p 261 |
| (m) <i>Milner v Eyrton</i> [1903] 21 R 120 | (n) <i>Thol v Leach</i> (1855) 10 Ex 704; <i>Hancock v Leblach</i> (1878) 3 C D 107 108 |
| (o) <i>Ab Kader v Gobind Dass</i> (1890) 17 Cal 840 | (p) <i>Sabir ghi v Hainbury</i> [1915] 2 Ch 743 |
| (k) <i>Bajunath v Raghunath</i> (1913) 41 Cal 6 at p 241 C 765 | (o) <i>Chapman v Leach</i> [1900] 1 K B 336 (lander); <i>Lyle v Somers v Odgers, Lt</i> [1900] 1 K B 130 (action for libel in a newspaper) |

Refusal by company to register transfer.—Where an article of a company's articles of association empowers the directors without assigning any reason to decline to register any transfer of shares not fully paid up made to any person not approved by them or made by any member jointly or alone indebted to the company, and the company refuses to register a transfer, the company is not entitled in an action for a declaration that the refusal was wrongful to refuse to state which of the grounds mentioned in the articles the directors had acted under, although it might refuse to say what reasons influenced them in exercising their discretion on that ground (p)

Foreign law—An interrogatory involving a question of foreign law is not permissible unless the party interrogated is shown to be an expert in that law (q)

Time for delivery of interrogatories—A plaintiff may under this rule, deliver interrogatories to a defendant even before the filing of the written statement. But there is this difference, if the English practice is to be followed here, that in what are called *common law actions* interrogatories, if delivered before filing the written statement, will as a rule be struck out under r 7 as unnecessary and vexatious unless sufficient reasons are given by the plaintiff to explain why the interrogatories are necessary at that stage of the suit (r), while in suits of the nature of *chancery actions* (s), they may, as a rule, be allowed though no written statement has been filed (t)

A defendant, as a rule, is not allowed to deliver interrogatories to the plaintiff before he has filed his written statement (u)

Leave of Court—The application for leave to administer interrogatories is as a rule, made *ex parte*. In determining whether leave should be granted the Court should consider whether it is a fit and proper case for administering interrogatories. Leave should be refused if the interrogatories are scandalous or are an abuse of the process of the Court. But it is not the duty of the Court, when granting leave, to consider what particular questions the party interrogated should be compelled to answer. The proper time for considering that question is after the party interrogated has made his affidavit in answer [r 8] (v). See r 2 below.

"Opposite party"—These words do not include solely the relation of plaintiff and defendant. Hence one defendant may administer interrogatories to another defendant, provided there is *some right to be adjusted in the action between them* (w).

Where opposite party is a minor or lunatic—Where a party to a suit is a minor or a lunatic, interrogatories may be administered to his next friend or guardian *ad litem*, as the case may be. See r 23 below.

Points of distinction between interrogatories and cross examination —

- (1) Not every question which could be asked to a witness in the box may be put as an interrogatory. Thus questions which are put only to test the credibility of a person will not be allowed although of course they may be asked in cross examination (x).
- (2) Interrogatories can be administered only to a party to a suit, and not to a witness (y).

| | |
|-----|--|
| (p) | <i>Hawley v Peade</i> (1866) 15 W & A (Eng) 64 |
| (q) | <i>Sham Kishore v Shorabhoorun</i> (1880) 5 Cal 407 <i>From Sulh v Intro Nath</i> (1821) 18 Cal 420 |
| (r) | <i>Mullov v Kirby</i> (1880) 15 C D 167 <i>Shaw v Smith</i> (1886) 18 Q B D 193 <i>Brehal v Lorch & Co</i> (1913) 2 Ch 35 |
| (s) | <i>Allauren v Labouchere</i> (1874) 3 Q B D 654 <i>Kennedy v Dodson</i> (1875) 1 Ch 331 <i>333 Bhagwandas v Lurjorji</i> (1913) 37 Ind 171 C 152 |
| (t) | <i>That is not assigned by the Judicature Act 1833 s 34 to the Chancery Division</i> <i>Harbord v Monk</i> (1871) 11 D 616 <i>Union Bank of London v Monty</i> (1879) 13 C D 232 241 |
| (u) | <i>Dunne v Longbourne</i> (1876) 2 C D 74 |
| (v) | <i>Attorney-General v Gaskill</i> (1880) 20 C D 519 530 |

O. 11,
rr. 1-3

Impleading party of discovery—A person cannot be made a party to a suit solely for the purpose of discovery (2)

Distinction between pleadings and interrogatories—Interrogatories are not like pleadings confined to the *material* facts on which the parties rely in support of their claim or defence. Interrogatories may be administered not only to ascertain the nature of your opponent's case but to obtain admissions from him of everything which is material on the pleadings so as to facilitate the proof of your own case and thus save yourself the expense of proving facts admitted by your opponent in answer to the interrogatories (a)

Probate proceedings—O 11 applies by virtue of s 266 of the Indian Succession Act 39 of 1925 to proceedings in probate (b)

2. [New. R. S. C., O. 31, r. 2.] On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs

Power of Court under this rule—It is to be noted that the Court has no power under this rule to settle interrogatories but to state only what interrogatories should be administered (c). Further the allowance by the Court of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them but leaves him at liberty to take any objection to answering which he might otherwise have taken (d). See rr 67 below

Running down cases—In running down cases only such interrogatories should be allowed as may be necessary for disposing fairly of the suit or for saving costs within this rule (e)

3. [R. S. C., O 31, r. 3, Cf S. 123] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper

(2) *Rahmohoy v Turner* (1893) 17 Bom 341
Burchard v Macfarlane [1901] 2 Q B 411

(a) *Attorney General v Gaskill* (1893) 10 C D 519 518

(b) *Anulabala v Rajendranath* (1916) 43 Cal

(c) 300 341 C 407
A. Lalain v Rajendranath (1916) 43 Cal 300

(d) *Peck v Ray* (1894) 3 Ch 490

(e) *Grubbs v Mores* [1900] 1 K B 650

length, the cost occasioned by the said interrogatories and the answer thereto shall be paid in any event by the party in fault.

4. [New. R. S. C., O. 31, r. 4.] Interrogatories shall be in Form No 2 in Appendix C, with such variations as circumstances may require

Form of interrogatories

5. [R. S. C., O. 31, r. 5, Cf. S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly

Corporations

Delivery of interrogatories to an officer of a corporation—A corporate body cannot answer for itself, and if it is necessary that some officer should answer for it His answer is the answer of the company and can be read against the company Therefore he is only bound to answer with reference to knowledge *acquired in the course of his employment* by the company, and as the result of inquiries made by him of the other officers and agents of the company with regard to their knowledge *acquired in the same way* He is not bound to answer as to *his own knowledge*, or to make inquiries of the other officers or agents of the company as to their knowledge *acquired accidentally or in some other capacity* (f)

6. [R. S. C., O. 32, r. 6, Cf. S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer

Objections to interrogatories by answer

Scandalous interrogatories—Certainly nothing can be scandalous which is relevant (g) Interrogatories which tend to incriminate a party are not scandalous if they are relevant (h)

Irrelevant interrogatories—The discovery by interrogatories as distinguished from cross-examination must be *directly relevant* to the matter in issue (i) Thus in an action for damages against the defendant for seducing the plaintiff's daughter the defendant cannot be asked how rich he is as it is perfectly irrelevant in such cases whether the defendant is rich or poor the true measure of damages being the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter But interrogatories as to whether the defendant has had sexual

(f) *Wellbach* Incend agent Gas L 341 ng (o v New Sunl ght Incend agent Co (1900) 2 Ch 1
(g) *Fisher v Owen* (1882) 8 C D 615 623 per 11 n L J

(h) *Allhusen v Laouchere* (1888) 3 Q B D 634 (1889) 8 C D 645 *supra*
(i) *Per Howell Murray* (1888) 33 C D 316
Kennedy v Dodson (1895) 1 Ch. 334 335 34

O. 11, r. 6 intercourse with the daughter, and whether he had stated that he believed that she had not had such intercourse with any other man, are allowable (j) Similarly interrogatories will not be allowed if the defence at which they aim would be no defence in law to the suit (k)

Where a party seeks discovery of documents, and the opposite party alleges that the documents are not relevant, the procedure to be followed is that laid down in r. 18, sub r (2) below. A party should not be compelled by means of interrogatories to give discovery of documents, the relevancy of which is denied (l)

"Not exhibited bona fide for the purpose of the suit."—Though an interrogatory may be relevant, it may be objected to on the ground that it is put with a view to serve an ulterior object beyond the scope of the suit

"Not sufficiently material at that stage"—An interrogatory may be perfectly relevant to a suit, and put bona fide for the purposes of the suit, but if it is premature, it will not be allowed (m) This may be illustrated by the following cases—

- (1) *A* sues *B* for breach of an alleged trust and for profits made by *B* by such breach. *B* denies the alleged trust. *A* is not entitled to interrogate *B* so as to require from him an account of profits of the alleged trust fund unless the trust is proved (n), but it is otherwise if the breach of trust is admitted (o)
- (2) In *Fennessy v Clark* (p), the plaintiff's interrogatories as to the amount of damages were held to be premature, as it was not yet decided whether the plaintiff was entitled to any damages at all. Cotton, L. J., said: "The Court is always unwilling before the right to relief is established to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief."

"Or any other ground"—Besides the three specific grounds mentioned in the rule, a party interrogated may object to answer an interrogatory on the ground that it is prolix, oppressive, unnecessary or scandalous (r. 7), or on the grounds specified in the notes to r. 1, "What interrogatories may not be allowed," on p. 610 above

"Fishing" interrogatories not allowed.—The questions asked must not be fishing, that is to say, they must refer to some definite and existing state of circumstances, and must not be put merely in the hope of discovering something which may help the party interrogating to make out some case (q). See *Odgers on Pleading*, 8th Ed., p. 298. For instances of "fishing interrogatories," see *Ali Kadar v Gobind Das* (r)

Contracts by way of wager.—In cases where the defence of wager is set up the Court will refuse to allow the party setting up this defence to interrogate his opponent generally as to his business transactions apart from the particular transactions in the suit, the reason being that it is manifestly unfair to compel a person to disclose his general dealings on the chance that thereby his opponent may discover something that will support his case (s)

Defamation.—Where a statement of claim in an action for slander alleges publication to one named person, and publication also to various other persons unnamed, it is not generally permissible to ask the defendant whether he uttered the words complained

- | | |
|---|---|
| (j) <i>Hodgson v Taylor</i> (1873) L. R. 9 Q. B. 79 | (p) (1899) 37 C. D. 184 (in infringement of trade mark) |
| (k) <i>Fogers & Co v Lambert & Co</i> (1890) 24 Q. B. D. 53 | (q) <i>Gourley v Plimsett</i> (1873) L. R. 8 C. P. 362; <i>Fennessy v Wright</i> (See 2) (1890) 24 Q. B. D. 445 |
| (l) <i>Attorney v Soobul</i> (1896) 23 Cal. 117 | (r) (1890) 17 Cal. 840, 842, 843 |
| (m) <i>Nesbitt v Bank of Bengal</i> (1887) 14 Cal. 703 | (s) <i>Chagurandas v Burjorji</i> (1913) 37 Bom. 317; 1 I. C. 150 |
| (n) <i>Parker v Willis</i> (1881) 18 C. D. 477 | |
| (o) <i>Waltham v Waltham</i> (1884) 28 Sol. Jo. 406 | |

of to any person or persons other than the person named, and if so, to give their names. Such an interrogatory is a fishing interrogatory, the object being to find out some cause of action against the defendant other than the specific cause of action alleged in the plaint (t)

7. [New.] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories

Setting aside and striking out interrogatories

Setting aside and striking out interrogatories—A, as trustee in the bankruptcy of C, sues B for a declaration that a piece of land purchased by B and C in 1883 was purchased by B and C in partnership. B denies the partnership. A exhibits interrogatories to B asking for particulars of purchases of land by B and C previous and subsequent to 1883 to prove that they had been co partners in various other purchases similar to that of 1883. The interrogatories are irrelevant and oppressive, and must be struck out. "To ask the defendant to take the trouble to go through his books and papers for so many years is vexatious and oppressive (u) "

The present rule does not apply where the interrogatories are merely irrelevant. An objection that an interrogatory is irrelevant must be taken in the affidavit in answer (r. 6), and is no ground for setting aside the interrogatory under this rule (v)

"There is no foundation for the opinion that a person who has a ground for refusing to answer [an interrogatory] is precluded from availing himself of that ground because he has not applied to have the interrogatory struck out (w)

8. [R. S. C., O. 31, r. 8, S. 126.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer, filing

Answers as to matters done by agent or servant of party interrogated—A party to a suit is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within his own knowledge, but are only within the knowledge of his agents or servants, if such knowledge has been acquired by them in the ordinary course of their employment. He is bound to obtain the information from such agents or servants, unless he shows that it would be unreasonable to require him to do so, as for instance if either such agents or servants have left his employment, or if it would occasion unreasonable expense or an unreasonable amount of delay or the like (x). A party a banker or solicitor is his agent within the meaning of the above rule (y). But a party is not bound to disclose matters that have come to the knowledge of his agents or servants otherwise than in the ordinary course of their employment (z)

(t) *Irisham v. Huntingfield* (1913) 2 K. B. 193
(u) *Arncliffe v. Hudson* (1885) 1 Ch. 331, 341
(v) *Dalrymple v. Louth* (1884) 2 Q. B. 501
(w) *Fisher v. Owen* (1878) 8 C. D. 645, 654
(x) *F. & S. v. Vaughan and Co. v. Fisher* (1882) 10 Q. B. D. 161. *Isidore v. Shropshire*

Union Railways and Canal Co. (1884) 24 C. D. 110, 113
(y) *Allard v. Smith* (1882) 2 Ch. 111
(z) *Wellsbach Insurance Co. v. New Sunlight Insurance Co.* (1892) 2 Ch. 1, 10-11

D. 11,
r. 9-12

9. [New. R. S. C., O. 31, r. 9.] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer

10. [New.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken

11. [R. S. C., O. 32, r. 11, S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or answer further

Application for further answer to interrogatories.—An application for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required (a)

"Answers insufficiently."—"With regard to an answer to interrogatories what the Court has to consider is thus simply, whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is insufficient or not, and if it is insufficient, then only can it require a further answer" (b) "When an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matters as part of it, the answer is insufficient, and the proper course to pursue is to ask that a further answer shall be made" (c)

Privilege.—Where in an answer to interrogatories the party interrogated declines, to give further information on the ground of privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. *The mere existence of reasonable suspicion which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified* (d) See notes to r. 13, "Conclusiveness of affidavit of documents"

Consequence of failure to answer interrogatories.—See r. 21 below.

12. [R. S. C., O. 31, r. 12, S. 129.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the

Application for discovery of documents

(a) *Anstey v. North and South Western Railway Co.* (1879) 11 C. D. 433(b) *Lyell v. Kennedy* (1884) 27 C. D. 1 21(c) *Id.* r. 28(d) *Lyell v. Kennedy* (1884) 27 C. D. 1

documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13. [R. S. C., O. 31, r. 13, S. 129, 2nd para.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

Discovery and production of documents.—Besides discovery by way of answer to interrogatories, there is another species of discovery called *discovery of documents*. The parties to a suit may have in their possession or power documents relating to the matters in question in the suit. These documents may be divided into two classes —

- (i) those which the adversary is entitled to inspect, and
- (ii) those which he is not entitled to inspect.

Documents which belong to class (ii) are described and classified below, under the head "Grounds of objection to production of documents". As to class (i) it may be said that the adversary is entitled to inspection of all documents which do not come within class (ii). Speaking generally, we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party's evidence of his case or title. But how is inspection to be obtained? If A wants to inspect documents in the possession of B which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by B. A must therefore call upon B to produce the documents. But how can A do this, unless he knows what documents are in the possession or power of B? To enable him to obtain this information, A is entitled to *discovery* from B of the documents in his possession or power (e). For this purpose, A may apply to the Court for an order requiring B to make an affidavit, called *affidavit of documents*, stating what documents are in his possession or power relating to the matters in dispute in the suit. When the Court makes the order B is bound to make his affidavit of documents; and if he fails to do so, he will be subjected to the penalties specified in r. 21 below. After B has disclosed his documents by affidavit A may require him to *produce* for his inspection such of the documents as he is in law entitled to inspect.

Contents of affidavit of documents.—A party who is ordered to make his affidavit of documents should *set forth* in the affidavit all documents which *are or have been* in his possession or power relating to all matters in question in the suit. As

(e) See *Municipal Board of Agra v Ashraf Lal* (1922) 44 All. 202, 65 I C 934, (22) A A 1

O. 11,
rr. 9-12

9. [New. R. S. C., O. 31, r. 9.] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer

10. [New.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken

11. [R. S. C., O. 32, r. 11, S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

Order to answer or answer further

Application for further answer to interrogatories.—An application for a further answer to interrogatories ought to specify the interrogatories or parts of interrogatories to which a further answer is required (a).

"Answers insufficiently."—"With regard to an answer to interrogatories what the Court has to consider is this simply, whether the answer is insufficient, not to go into the question of the truthfulness of the answer, but to see whether it is insufficient or not, and if it is insufficient, then only can it require a further answer" (b) "When an answer is couched in a form which makes it embarrassing, that is to say, which prevents the person who asks for it from using it without having thrust upon him irrelevant matters as part of it, the answer is insufficient, and the proper course to pursue is to ask that a further answer shall be made" (c)

Privilege.—Where in an answer to interrogatories the party interrogated declines, to give further information on the ground of privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. *The mere existence of reasonable suspicion* which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified (d) See notes to r. 13, "Conclusiveness of affidavit of documents"

Consequence of failure to answer interrogatories.—See r. 21 below.

12. [R. S. C., O. 31, r. 12, S. 129.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the

Application for discovery of documents

(a) *Anstey v. North and South Woodrich Subseq Co* (1879) 11 C D 433

(b) *Lyell v. Kennedy* (1844) 27 C D 1, 21

(c) *Ib.*, p. 28

(d) *Lyell v. Kennedy* (1844) 27 C D 1

documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

13. [R. S. C., O. 31, r. 13, S. 129, 2nd para.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

Discovery and production of documents.—Besides discovery by way of answer to interrogatories, there is another species of discovery called *discovery of documents*. The parties to a suit may have in their possession or power documents relating to the matters in question in the suit. These documents may be divided into two classes —

- (i) those which the adversary is entitled to inspect, and
- (ii) those which he is not entitled to inspect

Documents which belong to class (ii) are described and classified below, under the head 'Grounds of objection to production of documents'. As to class (i) it may be said that the adversary is entitled to inspection of all documents which do not come within class (ii). Speaking generally, we may say that the adversary is entitled to inspection of all documents which do not of themselves constitute *exclusively* the party's *evidence* of his case or title. But how is inspection to be obtained? If A wants to inspect documents in the possession of B which he is entitled to inspect, it is clear that he cannot inspect them unless they are produced by B. A must therefore call upon B to produce the documents. But how can A do this, unless he knows what documents are in the possession or power of B? To enable him to obtain this information, A is entitled to *discovery* from B of the documents in his possession or power (e). For this purpose, A may apply to the Court for an order requiring B to make an affidavit, called *affidavit of documents*, stating what documents are in his possession or power relating to the matters in dispute in the suit. When the Court makes the order B is bound to make his affidavit of documents, and if he fails to do so, he will be subjected to the penalties specified in r. 21 below. After B has disclosed his documents by affidavit A may require him to *produce* for his inspection such of the documents as he is in law entitled to inspect.

Contents of affidavit of documents.—A party who is ordered to make his affidavit of documents should *set forth* in the affidavit all documents which *are or have been* in his possession or power relating to all matters in question in the suit. As

(e) See *Municipal Board of Agra v. Ashraf Lal* (1922) 44 All. 202, 63 I. C. 234, (22) A. A. 1

O. 11, r. 13

to documents which *are not but have been* in his possession or power he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them. For the same reason if there are any documents in which he has a *joint* property with other persons not before the Court, he must state the names of those persons. Rule 13 provides that every affidavit of documents should also specify which of the documents therein *set forth* the declarant objects to *produce* for the inspection of the opposite party together with the grounds of such objection (see App C Form No 5). These grounds are three in number and are detailed below. The Court examines these grounds when it is called upon to make an order for *production* of the documents in a party's possession for the *inspection of the opposite party* (r 14).

Grounds of objection to production of documents—Production of documents can be resisted as of right on three grounds (1) as disclosing the party's evidence (2) as being within the doctrine of legal professional privilege and (3) as being injurious to public interests.

1 A party is not bound to produce for the inspection of his opponent documents which of themselves evidence exclusively the party's own case or title (f).—Documents constituting evidence of the party's case or title are not protected unless they are *solely or exclusively* evidence of it. Where a document is or may be evidence for the *adversary as well as the party* the party cannot withhold inspection of it from the adversary (g), although his own evidence may be thus disclosed (h). It is not enough for a man to say such and such documents are the title deeds of *his property*: it is no ground for refusing their production if they are necessary to *support* the adversary's case (i). But a document is protected from production and inspection if it *exclusively* evidences a party's own case and does not support the adversary's case (j). To entitle the party to this protection the privilege must be properly claimed and he must state in his affidavit that the documents constitute evidence of his own case or title, that they contain nothing supporting or tending to support the adversary's case or title and that they contain nothing impeaching his own case or title (k). As to discovery in actions of ejectment see notes to r 1 above. What interrogatories may be allowed.

The rules regarding inspection and discovery of documents are not meant for suits relating to boundary disputes and other disputes. Assertions of a party on oath that documents required to be produced relate only to his own title cannot be disregarded if the Court is satisfied that they are true and that the party asserting has not misconceived the nature and effect of those documents (l).

2 A party is not bound to produce any confidential communications between him and his legal adviser (m).—The object of this rule is to enable persons to obtain legal advice safely and effectually (n). The following are amongst the confidential communications between a client and his legal adviser that are protected from production and inspection: (1) statement of facts drawn up by the client for submission to his solicitor and documents prepared by him for the purpose of providing the solicitor with evidence and information

(f) B

(g) B

(h)

(i)

(j) B

(k)

(l)
(m)

(n)

for the conduct of his case (o) (2) advice given by the solicitor with reference thereto (p), (3) entries in the solicitor's diary of communications between himself and his client (q), (4) memoranda or minutes made by the client of the communications between himself and the solicitor (r), (5) communications between solicitor and counsel with reference to the client's case (s) (6) draft pleadings (t), (7) case laid before counsel for his opinion and other briefs for counsel (u), (8) solicitor's bill of costs, for it is virtually the solicitor's history of the transaction in which he was concerned (v) But the communication is not privileged unless it is of a confidential nature (w) And, further, it must have been made to the legal adviser with a view to obtain professional advice (x) It is not necessary that it should have been made either during an actual or even an expected litigation A communication with a legal adviser is protected, though it relates to a transaction which is not the subject of litigation provided it is a communication made to him for the purpose of obtaining professional advice (y) But no privilege attaches to communications between a solicitor and his client which are in themselves facts of a criminal or unlawful proceeding (z) Where one of the trustees of a will is a solicitor and acts as the solicitor for the trustees, communications passing between him and his co-trustees, which would be privileged if the solicitor were not a trustee, are privileged notwithstanding that he is a trustee (a) But confidential communications between a principal and an agent who is not a legal agent, e.g., a commercial agent, are not privileged, whether they are made after litigation has become imminent and after legal advice has been taken, or even after litigation has commenced (b) Similarly reports made by a servant to his master regarding the subject matter of the suit are not privileged (c) See Evidence Act, 1872, ss 126, 129

3 A party is not bound to produce any public official document if its production would be injurious to public interests (d) —With reference to a claim to privilege on this ground Lord Blanesburgh said "Particularly must it be remembered in this connection that the fact that production of the documents might in the particular litigation prejudice the Crown's own case or assist that of the other side, is no such 'plain overriding principle of public interest' as to justify any claim of privilege. In truth the fact that the documents if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security" (e)

This head of privilege applies as a rule when a party to the suit is a public officer
See Evidence Act, 1872, ss 123 124

In all the three heads of privilege mentioned above, the privilege must be claimed in the affidavit of documents, and the grounds of privilege must be sufficiently disclosed

- | | |
|---|--|
| (o) <i>Southark Co v Quick</i> (1878) 3 Q B D 315 <i>Birmingham and Midland Motor Omnibus Co, Ltd v London and North Western Ry Co</i> [1913] 3 K B 850 <i>Feuerherd v London General Omnibus Co</i> [1918] 2 K B 565 | (x) - 5 Bom L R 122 |
| (p) <i>Pyrre v Shreehanlar</i> (1891) 15 Bom 7 | (y) . |
| (q) <i>Ward v Marshal</i> (1888) 3 Times Rep 578 | (z) . |
| (r) <i>Woolley v A L R Co</i> (1869) L R 4 C P 602 | (a) . |
| (s) <i>Mostyn v West Mostyn Co</i> (1876) 34 L T 30 | (b) . |
| (t) <i>Lamb v Orton</i> (1853) 22 L J Ch 713 | (c) - . . . |
| (u) <i>Walsam v Stainson</i> (1863) 2 H & M 1, <i>Muncheraha v New Dhurumary Co</i> (1870) 4 Lk M 576 | (d) . . . A . . . |
| (v) <i>Turtan v Barber</i> (1874) L R 17 Eq 329, <i>Chant v Iruen</i> , 9 Lk 790 | (e) <i>Wadeet v E I Co</i> (1865) 8 Dk G M & G, p 182 <i>Jehangir v Secretary of State</i> (1904) 6 Lk L R 131 160 |
| (w) <i>Hayer Haroon v Abdul Karim</i> (1879) 3 Lk M 91 <i>Frank v Mohansing</i> (1894) 18 B M 263 <i>271, Emperor v Rodrigues</i> (1903) | (f) <i>Robinson v State of South Australa</i> (1931) App. C 704, 715 716 S. C. W. N. 1121, 1123 135 L C 625, (31) A 14 254 |

11, r. 13 If the affidavit of documents does not sufficiently raise the claim of privilege, the party may be allowed to put in a further affidavit in support of that claim (f)

Is a party bound to give discovery of documents which will tend to incriminate him or expose him to a penalty or forfeiture? No, according to the English law (g) But apparently, yes, according to the Indian law. See Evidence Act, s 132, where the term "witness" obviously includes a party to a suit

Conclusiveness of affidavit of documents. Further affidavit—If a party states in his affidavit of documents that he has no documents relating to the matters in question in the suit other than those set forth in the affidavit, his oath is conclusive, and the other party cannot cross examine upon it, nor adduce evidence to contradict it, nor administer interrogatories asking whether he has not in his possession or power documents other than those set forth in his affidavit (h) The oath of the party being conclusive, the Court will not order him to make a further affidavit of documents though the opponent may state on oath that the party has got other documents in his possession (i), the reason being that in all questions of discovery the oath of the party making the discovery is conclusive as against the oath of the party claiming the discovery (j). The only case in which the Court may require a party to make a further affidavit is where there is a reasonable probability or presumption or *even ground for suspicion*, derived from certain sources that he has other relevant documents in his possession (k) The sources into which the Court may look for this purpose are (1) the affidavit of documents itself (2) the documents therein referred to and (3) the pleadings (l) Unless the affidavit is shewn from any of these sources to be insufficient, the general rule is that no further affidavit can be ordered But this rule is qualified where the basis on which the affidavit has been made turns out to be wrong Thus if the party making the affidavit has misconceived his case so that the Court is practically certain that if he had acted on a proper view of the law he would have disclosed further documents, then the Court will refuse to recognise the affidavit as conclusive and order a further affidavit (m)

The affidavit of documents is also conclusive as to the facts constituting the ground of objection to production Thus if a party sets forth five documents in his affidavit, and objects to produce two of them on the assertion that they relate *exclusively* to his own defence, and tend not to support the adversary's title, the Court will not order production, unless the Court is satisfied that the sources specified in the preceding

paragraph that the nature of the documents as described by the party has been misconceived by the party, or that the documents are of such a character that the party cannot properly make such an assertion (o) Mere suspicion that the documents are not of the character described by the party, though it is sufficient to justify the Court in ordering the party to make a further affidavit of documents (see preceding paragraph), does not entitle the Court to order their production (p)

In a suit for the price of material supplied to the defendant in which the defence was that the materials were defective, the defendant objected to produce his engineer's report

(f) *Emblen Churn v. Bengal S. & W. Co.* (1895) 22 Cal 105

(g) *Bray on Discovery*, 311 319, Supp. Dig. art 122

(h)

(i)

(j)

(k)

Financiere v. Perini in Guano Co. (1882) 11 Q. B. 53

(l) *Jones v. Monte S. I. Co.* (1900) 5 Q. B. D. 558 *Hent Coal Contractions v. Duguid* [1910] 1 K. B. 904 and cases cited in last note

(m) *British Association of Glass Bottle Makers*

(n)

(o)

(p) *Bray on Discovery*, 312, 313

on the ground that it formed *evidence* of his own case *exclusively*, but the Court ordered production on the ground that the defendant *had set forth the nature of the report in his written statement*, and the statement showed that the report was not of the character described by the defendant (q)

Inspection by Court of documents for which privilege is claimed—Where on an application for an order for inspection privilege is claimed for any document, the Court may inspect the document for the purpose of deciding whether the claim of privilege is valid See r 19, sub r (2)

For an instance when such an order was made see the undernoted case (r)

Sufficient description of documents—As it is one of the objects of the affidavit of documents to enable the Court to make an order for production of the documents mentioned therein, the affidavit ought to contain a sufficient description of the documents. A description will be held sufficient, if it is of such a character that if an order for production is made, the Court can determine whether the documents are the same as those ordered to be produced (s). Where there are numerous documents the practice is to tie them up in bundles, to schedule the bundles, and number the document or otherwise ear mark them in such a way that the other party may ask for those which he wants to see (t)

When a party claims to withhold certain documents from production, although some description may be necessary, he need not give such a description as would enable the adversary to know *their contents* (u). Thus where privilege is claimed for letters, it is not necessary to state the dates or the names of the writers, nor such other particulars as might enable the opponent to discover indirectly the contents (v)

"Not necessary at that stage of the suit"—See notes to r. 6 above, "Not sufficiently material at that stage"

Relating to any matter in question in the suit—Every document which will *throw any light* on the case is a document relating to a *matter in dispute* in the suit (w) though it may not be *admissible in evidence* (x). A document may not be admissible in evidence and yet it may contain information which may either directly or indirectly enable the party seeking discovery either (1) to advance his own case or (2) to damage his adversary's case, or which may fairly lead him to a train of inquiry which may have either of these two consequences (y). Every such document must be included in the affidavit of documents, and the opposite party is entitled to inspection of such documents. Thus a plaintiff may be required to *produce* for inspection of the defendant correspondence containing mere matter of opinion by non legal agent as to the prospect of the plaintiff's success in the case, though the correspondence *may not be admissible in evidence* (z)

Non disclosure of documents—Presumption—"It is open to a litigant to refrain from producing any documents that he considers irrelevant, if the other litigant is dissatisfied it is for him to apply for an affidavit of documents, and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents . . . It is for

(q) *Embica Churn v Bengal S & W Co* (1895)
22 Cal 105

(r) *Robinson v State of South Australia* (1931)
30 C W N 1121 135 L C 63 (31)
A YC 254

(s) *Taylor v Batten* (18 8) 4 Q B D 85

(t) *Hull v Hart Davis* (1884) 26 Q D 40 4*2
Coole v Smith (1891) 1 Ch 509, *Price v Price* (18 9) L J Ch 215

(u) " " " "
(v) " " " "
(w) " " " "
(x) " " " "

(y) ¹⁴¹
Compagnie Financiere v Peruvian Guano Co
(1882) 11 Q B D 63

(z) *Bustros v Wade* (18 6) 1 Q B D 423

r. 13 the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way, if he fails to do so no inference in his favour can be drawn as to the contents thereof (a) But where an order for discovery is made upon a party, and it is alleged by him as to some of the documents that they may have been destroyed or may have perished it is incumbent on him to give evidence of diligent search and of failure to find them if no such evidence is given the presumption arises that the contents of the documents not accounted for are as regards the issue in dispute unfavourable to that party (b)

Several plaintiffs or several defendants—Where there are several plaintiffs or several defendants all must join in making the affidavit of documents unless some specific reasons to the contrary are shown The fact that some of the parties reside in England is no reason why they should be excused from making such affidavit (c)

Minors and lunatics—The next friend or guardian *ad litem* as the case may be of a minor or a lunatic may be required to make an affidavit of documents (r. 13)

Affidavit of documents from a co defendant—An affidavit of documents may be required by a defendant from a co defendant if there is an issue joined between them but not otherwise (d) See notes to r. 1 above Opposite party

Advocate General—No order can be made against the Advocate General whether he be plaintiff or defendant requiring him to give discovery on oath Hence no affidavit of documents can be required from the Advocate General But an affidavit of documents may be required from the relators (e) See s. 92

Official Liquidator—The Official Liquidator being an officer of the Court should not in the absence of special circumstances be required to make an affidavit as to documents in his possession though he is bound to produce to the adverse litigant the documents which the latter requires to see (f)

Marine Insurance—The affidavit of ships papers which underwriters are entitled to require from the plaintiff in an action on a policy of marine insurance on cargo is not limited to documents in the possession of the plaintiff or other persons interested in the insurance but extends to all material documents in whomsoever's possession they may be (g)

Sealing up parts of documents—Where one part of a document relates to matters in dispute in the suit and another part does not the latter may be sealed up and so concealed from inspection Similarly where protection from discovery can be claimed for one part of a document and not for another part the part which can be protected may be sealed up (h) In some cases the Judge has ordered the sealed parts to be unfastened in order that he might inspect them himself (i) See r. 19 sub r. (a)

Duty of solicitor—Where after a party has made his affidavit of documents his solicitor finds that there are other documents which have not been disclosed it is the duty of the solicitor to bring those documents to the notice of his opponent at the earliest possible opportunity (j)

Inspection of property being subject matter of suit—See O. 39 r. 7 (1) (a)

(a)

pp. 64, 69

(f) *Mutual Society in re* (1883) 11 Ch. D. 714(g) *Tenra a Modena Franco Esponola v. New Zealand Insurance Co.* (1914) 1 K. 19(h) *Tray on D. ex. r. p.* 33 *Jad. b. 4. Jan. 1* (1893) 10 C. 1 587 *He rat. l. v. Ia. S. u.* (1894) 4 Cal. 83

(b)

(i) *Lafayette v. Enalla v. La. S. Co.* (1858) 17 J. Ch. 5 C. on v. Le. s. (1853) 1 W.

(c)

(j) *[Laf.] 118. Gurun. 4. 10. v. 2. 10. am.* (1801) 10 Cal. 404

(d)

(j) *Att. c. v. the master of an* (1900) 10 C. W. N. 60 61 1 C. 905

(e)

14. [R. S. C., O. 31, r. 14, S. 130.] It shall be for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right: and the Court may deal with such documents, when produced, in such manner as shall appear just.

Production of documents—Discovery of documents must be distinguished from production of documents. "The rule as to discovery is the exact contrary of that as to production. You must set out every document in your possession whether you are bound to produce it or not" (l). If the document is privileged from production, it must be disclosed and privilege claimed for it. This rule provides for production of documents upon oath. In actual practice production is now obtained by notice under r. 15 or by order under r. 18. The Court has no discretion under this rule to refuse an order of production unless the documents are privileged (l). At the same time no order shall be made under this rule against a party unless he has directly or indirectly admitted the document to be in his possession or power (m). As to the three heads of privilege, see notes to r. 13 above, "Grounds of objection to production of documents," "Conclusiveness of affidavit of documents," and "Sealing up parts of document."

Failure to produce documents.—Non compliance with an order under this rule does not justify the striking out of the defence. R. 11 below does not apply to such a case (n).

Indian Evidence Act, ss 163 164—Under sec 163 if A calls for a document which he has given B notice to produce, and the document is produced in Court and inspected by A, B can compel A to put the document in evidence. Under s 164 a party refusing to produce a document cannot use it in evidence without the consent of the other side or the order of the Court.

Waiver of privilege. Where a document is privileged the fact that . . .

Partner—One partner of a firm represents the other partners for the purpose of production of documents (p).

Revision—The High Court will not in revision interfere where a lower Court, in the exercise of its discretion, refuses inspection of documents produced before it under this rule (q).

Right to take copies—The inspecting party is entitled to take copies of documents, produced for inspection (r). In a proper case, as where a document is alleged to be forged, the Court may allow a party to a suit to take a photograph of the document in the possession of the other party (s).

(k) *Swanton v Lushman* (1881) 45 L T 360 361

(l) *Hallace v Jefferson* (1878) 2 Bom 453, *Balamoney v Ramasami* (1907) 30 Mad 230

(m) *Kumar Bameshwar v Rani Pikhnat* (1920) 5 Pat L J 550, 58 I C 28

(n) *Kripa Ram v Jawahir Lal* (1924) 26 All. L.

J 1378

(o) *Kay v Poorunchand* (1880) 4 Bom 631

(p) *Haji Jaluria v Casim* (1886) 1 Bom 496

(q) *Balamoney v Ramasami* (1907) 30 Mad 230

(r) *Ormerod Grierson & Co v St George & Iron Works, Ltd* [1903] 1 Ch 505

(s) *Leuca v The Earl of Lonsborough* [1893] 2 Q B 191

11, r. 15

15. [R. S. C., O. 31, r. 15, S. 131.] Every party to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof, and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit

Inspection of documents referred to in pleadings or affidavits

Inspection of documents referred to in pleadings and affidavits—Rules 15 to 18 are confined to documents referred to in the pleadings or affidavits. They are intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings (f)

The machinery for the production of documents is of two kinds. In the first place rule 12 of this Order enables a party without filing any affidavit to apply for an order directing any other party to the suit to make discovery on oath of the documents in his possession or power relating to any matter in question in the suit. Under that rule a defendant is not as a rule entitled to discovery before he has filed his written statement (u)

to in the plaint unless he has filed his written statement (w). It has been held in Bombay following *Quiller v. Heally* (x) that r. 15 applies also to documents relied on by the

Calcutta holds that this rule applies to documents entered by the plaintiff in the list attached to the plaint under sub rule (2) of rule 14 (b). Where a document not at all material to the suit is casually referred to in the plaint the defendant is not entitled to inspection of it (c)

A party who is required under this rule to produce a document referred to in his pleadings for the inspection of the opposite party may claim privilege for the document

- (t) *Q. H. v. Heally* (1883) 3 C. D. 40
 (u) *Mercer v. Cotton* (1855) 1 Q. B. D. 442.
 (v) *Q. H. v. Heally* (1883) 3 C. D. 40
 (w) *Q. H. v. Heally* (1883) 3 C. D. 40
 (x) (1883) 3 C. D. 40
 (y) *I am Dyal v. Vurhurry* (1894) 18 Bom 368

- (z)
 (a)
 (b)
 (c)

004 1 8 1 3 4 11 3

If a document is referred to in the pleadings it does not follow that it has lost all privilege. The rule only says that if a party will not produce a document to which he has referred in his pleadings, he shall not afterwards be at liberty to put such document in evidence. That is the penalty. He may prefer to lose part of his claim rather than produce the document. [Thus] rule does not take away the privilege of the documents, but only prevents them from being put in evidence unless produced" (d)

Where a plaintiff by his plaint refers to letters written by himself, he is not bound to produce copies of those letters for the inspection of the defendant, there being no reference to copies in the plaint (e). As regards exhibits to an affidavit, it has been held that "any one who has a right to see an affidavit has also a right to see an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit" (f). A party is entitled under this rule to inspection of letters referred to in an affidavit of the opposite party, though the affidavit has not been filed, provided it is sworn and a copy thereof is furnished to him (g).

Inspection by party or his pleader.—No one is entitled under this rule to inspection except a party or his pleader. The term "party" includes the authorized agent of the party (h). But if such agent was formerly in the employ of the opposite party and in charge of his books, the Court ought not to permit inspection to be taken by him (i).

16. [R. S. C., O. 31, r. 16.] Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. [R. S. C., O. 31, r. 17, S. 132.] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the same, a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

"Documents"—This rule applies to all documents mentioned in r. 15, it is not confined to cases where there has been an affidavit of documents under rr. 12 and 13 (j).

Banker's books—See notes to O. 7, r. 17, "Bankers' Books Evidence Act, 1891."

(d) *Roberts v. Oppenheim* (1884) 26 C. D. 724, 734.

(e) *Quiller v. Heally* (1883) 23 C. D. 42.

(f) *La Hinchliffe* [1895] 1 Ch. 117, 120.

(g) *Le Fenner and Lord* [1897] 1 Q. B. 767.

(h) *Williams v. Prince of Wales Ass. Co.* (1857) 23 B. & W. 333.

(i) *Enghal v. Ekrumal* (1893) 25 Cal. 294.

(j) *Le Fenner and Lord* [1897] 1 Q. B. 667, 669, 670.

O 11,
rr. 17, 18

Business books—See r 19 below

Usual place of custody—*A* who owns a ginning factory at Broach agrees with *B* in Bombay to gin *B*'s cotton in his factory at Broach. *B* sues *A* in Bombay for damages for breach of the contract and requires inspection of *A*'s books in Bombay. *A* offers to give inspection at Broach where the books are kept. *B* is not entitled to inspection in Bombay, for Broach is the place where the books are kept (*k*)

18. [R. S. C., O. 31, r. 18, Ss. 133, 134] (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit. Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavits of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

Served with notice—No order for inspection can be made under this rule unless notice has been served under r 15 (*l*)

Sub rule (1)—The proviso to sub rule (1) gives the Court a certain discretion as to inspection. The fact that a great number of documents are referred to in the plaint is no ground for refusing inspection before the written statement is filed (*m*)

Sub rule (2)—This rule shows that an order for inspection can be made not only in respect of documents mentioned in the plaint, written statement and affidavits of discovery but also in respect of other documents. In the case of documents mentioned in the plaint their relevancy is admitted and no affidavit is necessary. But as to documents not so mentioned an affidavit has to be filed to satisfy the Judge that they are relevant (*n*). But an opportunity should be given to such party to make an affidavit in answer and if he in such affidavit denies possession of the document the affidavit will be conclusive on that fact (*o*). But he cannot merely rely on his previous affidavit

(1) See *Fervillas v Testa* (1881) 5 D M 467

(2) *Mohand o v Ishun Ch* (1884) 10 Cal 56

(3) *Dhap v Ram Jernha* (1887) 14 Cal 64

(m) *Panathan v Annamalai* (1937) 55 Mad

(n) 191 135 1 C 745 (31) A M 8-5

(o) *Gob rahn Das v Jal Dev* (1911) 53 All 44 135 1 C 7 (31) A A 1

(p) *See v o Moys v Soob* (1890) 3 Cal 117 197

of documents in answer to an application under this sub rule, for such an affidavit is conclusive for the purposes only of *discovery* as distinguished from inspection (p)

Appeal—No appeal lies under the Code from an order for inspection. Nor does an appeal lie under cl. 1 of the Letters Patent, for an order directing inspection to be given is not a judgment within the meaning of that clause (q)

Bankers Books Evidence Act—In ordering inspection under the Bankers Books Evidence Act 1891 the Court is guided by the general rules regulating the inspection of documents before trial (r)

19. [*New* R. S. C., O. 31, r. 19A.] (1) Where

Verified copies

inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power, and, if not then in his possession when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them

Specific documents—To justify an application under sub r. (3), the party making the application must in his affidavit *name and specify*, so that they can

(p) *Paranta Coomars v. Kum dani* (1911) 38 Cal.

481 11 C 12

(q) *Sonbai v. Ahmedbhai* (18) 9 D. M. H. C.

398 409 *Ahmed v. Ayazabai* (1909) 11

Dorr L. R. 248 11 C 167

(r) *Waterhouse v. Larker* [1924] 2 K. B. 759

O. 11,
rr. 19-21

be identified, the particular documents of which he desires discovery. It is not sufficient to make a general affidavit based on *a priori* reasoning that certain classes of documents must be in his opponent's possession or power (s)

Sub rule (2)—For an instance in which the Court inspected a document for which privilege was claimed see the under noted case (t)

20. [R. S. C., O. 31, r. 20, S. 135.] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection

Premature discovery
Issue to decide upon right to inspection—The object of the rule is to enable the Court to decide an issue in a suit as distinguished from the suit itself for the purposes of discovery (u). See notes to r. 6 above. 'Not sufficiently material at that stage'

21. [R. S. C., O. 31, r. 21, S. 136.] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly

Non compliance with order for discovery
Dismissal of suit—This rule cannot be applied unless there has been an order for discovery under r. 12 or for inspection under r. 18 (t). And even where such an order has been made, it is only when the default is wilful, and as a last resort that the Court should dismiss the suit or strike out the defence (u). If the parties concerned are *purdanashin* ladies this should be taken into account before making the order (z). The word "production" which occurred after discovery in the corresponding s. 136 of

- (s) *White v Spafford & Co* [1901] 2 K. B. 241
(t) *Robinson v State of South Australia* (1931) 35 C. W. N. 11-1 130 J. C. 65 (31) A 1 C 254
(u) *Ahmedbhai v Fullerbhai* (1849) 6 D. M. 572
(v) *Fahian Lal v Sultan Singh* (1916) 33 All. 5 30 J. C. 53 *Derkaran v Angudas* (1905) 22 B. M. L. R. 694 89 J. C. 15 (20) A B 386 *Imperial v Habibullah* (1906)

- "4 All. L. J. 589 96 J. C. 16 (26) A. A. 653
(w) *Alfahabad Bank v Ganpat Das* (1930) 11 Lah. 209 121 J. C. 41 (29) A. L. 7-0
Asseroolia v Alfool (1883) 9 Cal. 93
Slam Aishore v Shoa Bhoosun (1880) 5 Cal. 70 *Dane Her v Meyers* (1843) W. N. 58 *Haghi v Hagh* (1846) 31 C. D. 48
(z) *Behari Lal v Habba Bidi* (1886) 8 All. 26"

the Code of 1882 has been omitted in the present rule. It has hence been held by the High Courts of Allahabad (y), and Madras (z), that this rule does not apply to cases where there has been non compliance with an order for production of documents made under r. 14. According to a Lahore decision (a), this rule applies also to orders made under r. 14.

Contempt.—Besides the penalty prescribed by this rule, a party to a suit filed in a Chartered High Court, who has failed to answer or give inspection, is liable to be committed for contempt by that Court. This power has been conferred on Chartered High Courts by their Letters Patent (b). An order of *committal for contempt* is appealable according to the Bombay decisions (c), but not according to the Allahabad decisions (d). But the Bombay High Court has held that if the contempt is of a criminal nature, e.g., interfering with the trial of a civil suit the order of the Court is made in the criminal jurisdiction and is not appealable under cl. 15 of the Letters Patent (e).

Appeal.—An appeal lies from an order under this rule under O 43, r 1 (f) below (f), nevertheless an order under this rule dismissing a suit has been set aside in the exercise of the Courts' inherent jurisdiction (g). But of course if the defence is struck out and the suit is dismissed an appeal and second appeal will lie from the decree (h).

22. [New. R. S. C., O. 31, r. 24.] Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer. Provided always that in such case the Court may look at the whole of the answers and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. [New. R. S. C., O. 31, r. 29.] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Minors and lunatics.—Prior to this rule the practice of the different High Courts as to discovery from minors and persons of unsound mind was not uniform. It is useless to note the decisions under the old Code.

- | | |
|--|--|
| <p>(y) <i>Lyallpur Sugar Mills Co Ltd v Ram Chandra Gur Sahai Cotton Mills Co Ltd</i> (1922) 44 All 565, 67 I C 73 (22) A A 235</p> <p>(z) <i>Sihmalia v Pannathian</i> (1924) 46 Mal L J 300, 77 I C 766, (24) A M 682</p> <p>(a) <i>Pannath v Parabhu Dayal</i> (1921) 65 I C 661</p> <p>(b) <i>Hasanbhai v Cowasji</i> (1897) 7 Bom 1 See also <i>Sulter v Rimshawari</i> (1908) 55 Cal 1110 115 I C 185 (29) A C 117</p> | <p>(c) <i>Narainhoo v Narotam</i> (1883) 7 Bom 5</p> <p>(d) <i>Godu v Suraj Mal</i> (1905) 27 All 380</p> <p>(e) <i>Narayanrao v Solomon Moses</i> (1933) 57 Bom 286 143 I C 621, (33) A B 108</p> <p>(f) <i>Maung Khant v Ma Thei</i> (1925) 3 Rang 63, 891 I C 751 (25) A R 218</p> <p>(g) <i>Mohanjilal & Co v Folidas</i> (1932) 34 Bom L R 714, 138 I C 248, (32) A B 271</p> <p>(h) <i>Gobardhan Das v Jas Devi</i> (1931) 53 All 442, 130 I C 7, (31) A A 221</p> |
|--|--|

ORDER XII.

*Admissions*O. 12,
rr. 1-3Notice of admission of
evidence

1. [R. S. C., O. 32, r. 1.] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party

Different kinds of admissions—The object of obtaining admissions is to do away with the necessity of proving facts that are admitted [see Evidence Act, 1872, s. 55] Admissions are of three kinds, namely,—

I Admissions in pleading—

- (1) *actual* that is, those contained in the pleadings (O 7, r 5) or in answer to interrogatories (O 11, r 22)
- (2) *constructive*, that is, those which are merely the consequence of the form of pleading adopted (O 8 rr 3-4, 5)

*II Admissions by agreement**III Admissions by notice*

Admissions by notice are dealt with in this Order

The importance of admission consists in the fact that either party may, at any stage of the suit move for judgment on the admissions made by the other side (r 6)

2. [R. S. C., O. 32, r. 2, S. 128.] Either party may call upon the other party to admit any document saving all just exceptions, and in case of refusal or neglect to admit after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense

Notice to admit
documents

Admissions between co-defendants—Admissions between co-defendants to which the plaintiff is not a party, cannot be treated as evidence against the plaintiff (i)

3. [New R. S. C., O. 32, r. 3.] A notice to admit document shall be in Form No 9 in Appendix C, with such variations as circumstances may require

Form of Notice

4. [*New R. S. C., O. 32, r. 4.*] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice. Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. [*New R. S. C., O. 32, r. 5.*] A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C with such variations as circumstances may require.

6. [*New R. S. C., O. 32, r. 6.*] Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Scope of the rule—This rule is new. It is a reproduction of O 32 r 6 of the English Rules. It enables either party at any stage of the suit to move for judgment on the admissions which have been made by the other side. Either party may by availing himself of this rule get rid of so much of the suit as to which there is no controversy (j). The rule however is permissive: it does not preclude a party, who does not avail himself of it and proceeds to trial in the ordinary way, from relying at the trial on the admissions made by the opposite party (k).

* The Court may make such order or give such judgment as the Court may think just. —A judgment on admissions is not a matter of right, but is in the

(j) *Thorpe v Holdsworth* (18 6) 3 C D 63 640 | (k) *Tuldsley v Harper* (1877) 7 C D 403

O. 12, r. 6 discretion of the Court. If a case involves questions which cannot be conveniently disposed of on a motion under this rule, the Court may, in the exercise of its discretion, refuse the motion (l)

There is no hard and fast rule that where the defendant admits part of the plaintiff's claim and denies the rest of the claim, the Court should, if it gives judgment under this rule for the plaintiff as to the portion of the claim admitted by the defendant, refuse to allow the plaintiff to proceed with the suit as to the remainder of his claim. If there is a clear and unambiguous admission by the defendant as to part of the plaintiff's claim, the Court has jurisdiction to enter judgment as to that part of the plaintiff's claim, and it is in its discretion, having regard to the nature of the case and the allegations contained in the pleadings and the admissions made in Court, whether it should allow the plaintiff to proceed to prove the remainder of his claim (m). A sues B for Rs. 6,800. B admits that only Rs. 4,500 are due, and alleges as to the rest of A's claim that it was in respect of goods as to which there was a separate arrangement between the parties. The issue as to the balance of A's claim being an issue independent of the other part of the claim, the Court may pass judgment for A for Rs. 4,500, and give leave to A to prove his claim to the balance. It is clear that even if the issue as to the balance of A's claim were decided in B's favour, it would not, having regard to B's admission, reduce A's claim below Rs. 4,500 (n).

In the *United Telephone Co v Donohoe* (o), the plaintiffs sued the defendant for infringement of a patent, claiming injunction and damages. The defendant admitted ten instances of infringement, but denied he had committed any others. The plaintiffs thereupon moved for judgment upon the admissions in the pleadings. In the Court of first instance the Vice Chancellor granted an injunction against infringement by the defendant of the plaintiff's patent, but he refused an enquiry as to damages. The Court of Appeal held that the plaintiffs were entitled to an enquiry as to damages, but that it must be limited to the instances of infringement admitted, and that the judgment having been obtained upon a motion for judgment upon the pleadings, the plaintiffs were bound to take the negative as well as the affirmative allegations therein. Referring to this case, Sanderson, C.J., said in the Calcutta case cited above (p) that the question, whether the Judge who in the first instance heard the application, would have had jurisdiction to give judgment on the admissions and to allow the plaintiffs to proceed to prove the rest of their claim as to the other alleged infringements, if such an application had been made, was not before the Court.

Admissions on pleadings—Under this rule either party may move for judgment upon admissions of fact made on the pleadings or otherwise. Admissions in pleadings are either actual or constructive. Actual admissions consist of facts expressly admitted either in pleadings or in answer to interrogatories [O 11, r. 22]. The patent case cited in the preceding paragraph is an instance of actual admissions. Constructive admissions, on the other hand, are admissions which are inferred or implied from pleadings as a consequence of the form of pleading adopted [O 8, rr. 3, 4, 5]. Constructive admissions usually arise where a defendant has not specifically dealt with some allegation of fact in the plaint of which he does not admit the truth [O 8, r. 3], for as we have seen, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the written statement, will be taken to be admitted

(l) *Mellor v. Sidbottom* (1877) 5 C. D. 342. *For Wright v. York* [1890] 2 Ch. 747.
 750. *Calcutta v. E. D. Sanyal & Co., Ltd.* (1913) 4 C. W. N. 783. 82 I. C. 343 (24) A. C. 100.
 (m) *Fremont v. Udaipuram* (1918) 45 Cal. 138. 144 44 I. C. 233. *Andrews v. The*

Patriotic Assurance Co. of Ireland (1886) L. R. 18 Ir. 115.
 (n) *Fremont v. Udaipuram* (1918) 45 Cal. 138. 44 I. C. 233.
 (o) (1886) 31 C. D. 599.
 (p) *Fremont v. Udaipuram* (1918) 45 Cal. 138, 44 I. C. 233.

except as against persons under disability [O 8, r 5]. Constructive admissions also arise where a defendant denies an allegation of fact in the pleadings evasively and does not answer the point of substance [O 8, r 4].

Illustrations

1. *A* alleging that he and *B* having agreed to carry on certain business in partnership, draft articles of partnership were prepared and approved by *B* and that they both thereupon proceeded with the partnership undertaking sues *B* for a declaration that he and *B* were partners and claims that the partnership may be dissolved. *B* in his written statement admits that he agreed to enter into partnership as alleged, but adds that "terms of the arrangement between himself and the plaintiff were *not definitely agreed upon* as alleged." This is an evasive denial of the fact of partnership (O 8, r 4) and it will therefore be construed as an admission by *B* of the partnership. *A* is therefore entitled under this rule to a decree for dissolution of partnership, without adducing any evidence to prove the partnership. But though the written statement will be construed as an admission of the fact of partnership it will not be construed as an admission of the terms of the partnership. *B* may therefore claim an inquiry as to the terms of the arrangement of partnership, and if such inquiry is claimed, the Court will direct it by its decree (q).

2 A defendant, by his written statement, simply "puts the plaintiff to proof of the several allegations in the plaint" The denial not being specific (O 8, r 3) the defendant will be deemed to have admitted the facts alleged in the plaint (O 8, r 5) so as to entitle the plaintiff to a decree under this rule without adducing any evidence in support of his case (r)

In applying the present rule in India, it is to be noted that, where a plaintiff applies for a decree upon *constructive admissions* in a written statement, the Court may in its discretion refuse to pass the decree, if it thinks in the special circumstances of the case that the defendant must not be held to have admitted facts not specifically denied in his written statement (s). See the proviso to r 5 of O 8, and notes thereto.

An order on admissions on the pleadings will not be made, unless the admissions are clear and unequivocal (i). Moreover a plaintiff moving for judgment on admissions in the defendant's written statement must have a clear case and the mere admission by the defendant of a right asserted by the plaintiff, but which has in fact no existence in law, is not sufficient to entitle the plaintiff to a judgment establishing his right (u).

Judgment upon admissions made otherwise than on pleadings—A judgment may be given under this rule not only upon admissions made in the pleadings but upon admissions *otherwise* made. The words *or otherwise* in this rule are not confined to admissions made under r 1 or r 4 of this Order but are of general application and justify the giving of an immediate judgment when an admission is made by letter of facts which show that the defendant has no defence to the action (c). A judgment may be given under this rule even upon a verbal admission if it is clearly proved (c).

Orders which may be made under this rule—This rule 'was framed for the express purpose, that if there was no dispute between the parties, and if there was on the pleadings such an admission as to make it plain that the plaintiff was entitled

| | | |
|-----|--|--|
| (g) | | 81 <i>Gilbert v Smith</i> (1876) 2 C D 686 |
| (r) | | <i>Galstoun v E D Sassoon & Co Ltd</i> (1933) |
| | | 27 O W N 783 8-1 C 348 (1) A C 190 |
| (s) | | (u) <i>Chilton v Corporation of London</i> (1878) 7 C D 735 |
| | | (c) <i>Ellis v Allen</i> [1914] 1 Ch 904 |
| (t) | | (e) <i>Fe Beeny</i> [1884] 1 Ch 499 [order directing payment into Court] |

O. 12,
rr. 6, 7

to a particular order, he should be able to obtain that order at once upon motion. It must, however, be such an admission of facts as would show that the plaintiff is clearly entitled to the order asked for whether it be in the nature of a decree, or a judgment or anything else. The rule was not meant to apply when there is any serious question of law to be argued. But if there is an admission on the pleadings which clearly entitles the plaintiff to an order, then the intention was that he should not have to wait but might at once obtain any order which could have been made on an original hearing of the action. (x) An order amounting to what is called a preliminary decree in this Code may appropriately be made under this rule upon a simple motion. Where such an order was applied for under the corresponding English rule by a plaintiff in a suit for partition and the defendant contended that that would be giving a decree to the plaintiff and that the plaintiff should wait until the action was set down for trial the Court held that the plaintiff was entitled to an order directing the usual inquiries upon the admissions of the defendant and that he was not bound to wait. (y) [O 20 r 15]. Such orders have also been made in administration actions (z) [O 20 r 13] in actions for dissolution of a partnership (a) [O 20 r 15] in actions for partnership accounts (b) [O 20 r 15] in actions for accounts between principal and agent (c) [O 20, r 16] and in actions for the execution of the trusts of a settlement (d).

Practice—Motions in England under the corresponding English rule are brought on upon an ordinary motion day after notice to the other side. As to form of application, see *Daniel v. Ch.* Forms 270. The practice in England is when an order is made amounting to what is called a preliminary decree in this Code to adjourn the further hearing of the case without requiring any further prior hearing the words generally used in the order being "and without requiring any further prior hearing than this motion of the said cause the further hearing of the said cause is adjourned." (e) See *Beton on Decrees*, Vol. I, p. 399 Form No. 5.

"At any stage"—A plaintiff may move for judgment upon admissions in the written statement at any stage of the suit and notwithstanding that he has joined issue on the defence (f).

Co plaintiffs—An application under this rule for an order against a defendant on admissions of fact must be made by all the plaintiffs and not merely by some of them. If the application is made by some of the plaintiffs only, it must be refused (g).

Withdrawal of admission—Where it is shown that an admission was made by mistake the party may be allowed to amend his pleadings under O 6 r 17, for the purpose of withdrawing it upon such terms as to the Court may appear just (h).

Appeal—An order rejecting an application for judgment on admissions is a judgment within the meaning of cl. 13 of the Letters Patent and is appealable (i).

7. [New R. S. C., O. 32, r. 7.] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions, if evidence thereof is required

affidavit of signature

- (x) *Culbert v. Smith* (15 6) 2 C. D. 6-6, 6-6-6-6.
per Melh. L.J.
 (y) *Culbert v. Smith* (15 6) 2 C. D. 6-6. *Burnell v. Burnell* (15 9) 11 C. D. 213.
 (z) *Pe. Barker Hetherington v. Longway* (1 1) 10 C. D. 162.
 (a) *Thorp v. Hollisworth* (15 1) 3 C. D. 637.
 (b) *Turquand v. Wilson* (15 5) 1 C. D. 83.
 (c) *January v. Lodge* (1 1) 1 C. D. 612.

- (d) *Bennett v. Moore* (15 6) 1 C. D. 692.
 (e) *Bennett v. Moore* (15 6) 1 C. D. 692. 693.
Culbert v. Smith (15 6) 2 C. D. 6-6-6-6-6-6.
 (f) *Erown v. Pearson* (15 1) 21 C. D. 716.
 (g) *De Weydt & Co. v. North* [1-95] 2 Ch. 1-9.
 (h) *Hill v. East* [1-97] 3 Ch. 1-8.
 (i) *Koromili v. Monpial* (1919) 23 C. W. 101 541 C. 236.

8. [*New* R. S. C., O. 32, r. 8.] Notice to produce documents shall be in Form No 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

Notice to produce documents—It is always desirable when a document is in the possession or power of the opposite party to give him notice to produce the same for unless such notice is given secondary evidence of the document cannot be given see Indian Evidence Act 1872 s 65 cl (a) and s 66

9. [*New* R. S. C., O. 32, r. 9.] If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

See rr 2 and 8 above

ORDER XIII

Production, Impounding and Return of Documents

1. [Ss 138, 140] (1) The parties or their pleaders shall produce at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

Shall produce at the first hearing—This rule does not exclude the discretion of the Court to receive documentary evidence at a subsequent stage of the proceedings (j) See r 2 below and notes

Form of list of documents produced by Parties—See App H Form no 5

2. [S. 139.] No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1

(j) *Imbambal v Muten* (1918) 45 I A 3
80-81 45 Cal S 4 844 4 I C 513

Hari Pooni v Hari Pooni (1918) 45 I A 529
110 I C 536 (a) A I 555

O. 13,
rr. 2-4

shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

"Unless good cause is shown."—This rule has been enacted to prevent fraud by the late production of suspicious documents (l). But no suspicion can attach to certified copies of public documents, such as records of Government or records of judicial proceedings. Such copies therefore may be received in evidence though they have not been produced at the first hearing (l). The rule, however, is not confined to public documents only. The Court may, in its discretion, admit other documents also at a subsequent stage of the proceedings (m). See notes to r 1 above.

Appeal.—The fact that further documentary evidence is admitted *after* the first hearing is not a good ground of appeal (n). Nor can an appellate Court reject evidence admitted by the Court of first instance simply on that ground (o).

3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant
or inadmissible documents

Rejection of inadmissible documents.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given (p).

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is better to admit than to exclude the document (q).

4. [S. 141.] (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

Endorsements on documents admitted in evidence

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(k) See for instance *Parvatham v Lal Mohar*
132 I C

(l)

(m)

- 516, *Maung Tun Sein v Ko Tu* (1923)
6 Ind 337, 111 I C 472 (28) A R 198
(n) *Goshain v Rickmune* (1869) 12 W R P
C 32
(o) *Minakshi v Yelu* (1885) 8 Mad 373, *Harri*
Ram v Fori Ram (1925) 7 Pat 549, 110
I C 536 (28) A P 555
(p) *Jali v Bhobataran* (1890) 17 Cal 175,
Ramjibun v Oghore Nath (1895) 25 Cal
401
(q) *The Collector of Gorakhpur v Palakhari*
(1890) 12 All 1, at p 26

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

'Or initialled'—These words which occur after the word 'signed' in sub rr (1) and (2) are new

"Shall be endorsed"—The rule as to endorsement of documents admitted in evidence must be strictly followed. In *Sadik Husain Khan v Hashim Ali Khan* (r), where some of the documents were not so endorsed the Judicial Committee said,

Their Lordships with a view of insisting on the observance of the wholesome provisions of these statutes will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required. Documents admitted on the record without making the endorsement prescribed by this rule cannot be regarded as being legally before the Court (s) but documents should not be endorsed until they are proved (t). Where a document has been duly proved and put in before a commissioner appointed to take evidence and endorsed by him, it becomes part of the record and is evidence not withstanding the fact that the trial Court did not endorse it as required by this rule (u). The High Court of Madras has held that a mere endorsement under this rule does not necessarily imply that the Court has considered the question of the admissibility of the document and it may be rejected by the Court of appeal if insufficiently stamped (v).

5. [S. 141 A.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 where a document admitted in

Endorsements on copies of admitted entries in books accounts and record

evidence in the suit is an entry in a letter-book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party

(r) (1916) 43 I A 212 25 33 All 6 7 664.
(s) " 361 104 " 21

(t) *Feroz Din v Naib Khan* (1901) 9 Lah 24 112 I C 82 (22) 4 L 43
(u) *Ma Fa ma v Mom n L L* (1909) 2 Rang 164 118 I C 12 (20) 4 IC 211
(v) *Penianna v F. Narayana* (193) 53 Mal 13
1 11 8 9 (22) 4 M 5 *Ariakur v Urenakshi* (1943) 65 Mad L J 6 3 (33)
A M 231

O. 13, rr. 2-4 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

"Unless good cause be shown"

"no" such copies therefore may be received in evidence though they have not been produced at the first hearing (l). The rule, however, is not confined to public documents only. The Court may, in its discretion, admit other documents also at a subsequent stage of the proceedings (m). See notes to r. 1 above.

Appeal.—The fact that further documentary evidence is admitted *after* the first hearing is not a good ground of appeal (n). Nor can an appellate Court reject evidence admitted by the Court of first instance simply on that ground (o).

3. [S. 140.] The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents

Rejection of inadmissible documents.—Questions as to the admissibility of evidence should be decided as they arise, and should not be reserved until judgment in the case is given (p).

When a Court is doubtful as to whether a document is admissible or not, and its decision is open to appeal, it is better to admit than to exclude the document (q).

4. [S. 141.] (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

Endorsements on documents admitted in evidence

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(k) See for instance *Paradim v Lal Molar* (1931) 58 I. A. 254 10 Pat 654, 132 I. C.

(l)

(m)

518, *Maung Tun Sein v Ko Ta* (1928) 6 Rang 337, 111 I. C. 472 (1929) A. R. 106

(n) *Goshain v Rickmanee* (1869) 12 W. R. P. C. 32

(o)

(p)

(q) *The Collector of Gorakhpur v Palakdhari* (1890) 12 All. 1, at p. 20

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

"Or initialled"—These words which occur after the words in rr (1) and (2) are new.

"Shall be endorsed"—The rule as to endorsement of documents as evidence must be strictly followed. In *Sadik Hussain Khan v. Hashim Ali Khan* (1), where some of the documents were not so endorsed the Judicial Committee of "Their Lordships with a view of insisting on the observance of the provisions of these statutes, will in order to prevent injustice be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not so endorsed in the manner required. Documents admitted on the record without making the endorsement prescribed by this rule cannot be regarded as being legally before the Court (2), but documents should not be endorsed until they are proved (3). Where a document has been duly proved and put in before a commissioner appointed to take evidence and endorsed by him, it becomes part of the record and is evidence in the

and it may be rejected by the Court on any ground and is not stamped (4).

5. [S. 141 A.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party

(1) (1916) 43 I. A. 217, 218, 33 All. 677, 1916, 22 I. C. 134.
(2) *Secretary of State v. Shrimati* (1914) 5 Lah. 227, 228 I. C. 74 (24) A. L. 545, *Har Singh v. Jem Karam Chand* (1921) 8 Lah. 119, 11 I. C. 221 (27) A. L. 115, *Imam ul-Haqq v. Sir Lam* (1925) 2 Lah. 110, 11 I. C. 224 (24) A. L. 142.

(3) *Feroz Durrani v. Nawab Khan* (1909) 9 Lah. 224, 112 I. C. 83 (24) A. L. 427.
(4) *M. Farman v. M. N. Lohi* (1909) 7 Lah. 164, 113 I. C. 122 (25) A. L. 211.
(5) *Veakanna v. Parasuram* (1920) 53 Mad. 137, 120 I. C. 279 (27) A. M. 574, *Krishna v. Muralidhar* (1933) 65 Mad. L.J. 63 (33) A. M. 51.

O. 13,
rr. 5-9

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it

Bankers Books Evidence Act—See notes to O 7 r 17

Stamp—A copy or extract from an entry in an account book filed under the provisions of this rule and rule 7 does not require any stamp (c)

6. [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge

Endorsements on documents rejected as inadmissible in evidence

Or initialled —These words are new

7. [S. 142 A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit

Recording of admitted and return of rejected documents

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them

8. [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit

Court may order any document to be impounded

9. [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the

Return of admitted documents

document is impounded under rule 8, be entitled to receive back the same,

- (a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and
- (b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of.

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it

'Shall be entitled'—On an application being made by a party under this rule, the documents are necessarily returned if the application is in the proper form, the act of returning the documents is purely ministerial (x)

"And undertakes to produce the original if required to do so"—These words are new

10. [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice

(x) *G. J. J. v. The Emperor* (1911) 46 C. W. N. 600 667 "11 C. 666 (21) A. C. 433.

O. 13,
rr. 5-9

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it

Bankers Books Evidence Act—See notes to O 7 r 17

Stamp—A copy or extract from an entry in an account book filed under the provisions of this rule and rule 7 does not require any stamp (*w*)

6. [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub rule (1), together with a statement of its having been rejected and the endorsement shall be signed or initialled by the Judge

Endorsements on documents rejected as inadmissible in evidence

Or initialled —These words are new

7. [S. 142 A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit

Recording of admitted and return of rejected documents

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them

8. [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit

Court may order any document to be impounded

9. [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the

Return of admitted documents

document is impounded under rule 8, be entitled to receive back the same,

- (a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and
- (b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of.

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so.

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it

Shall be entitled —On an application being made by a party under this rule the documents are necessarily returned if the application is in the proper form the act of returning the documents is purely ministerial (x)

And undertakes to produce the original if required to do so —These words are new

10. [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice

(x) *Gurjantilal v. The Emperor* (1911) 6 C. W. N. 660 661 711 C. 665 (21) A. C. 473

O. 13,
rr. 10, 11 (3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

11. [S. 145.] The provisions herein contained as to documents shall, as far as may be, apply to all other material objects producible as evidence

Provisions as to documents applied to material objects

ORDER XIV.

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

O. 14, r. 1 1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other

Framing of issues

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue

(4) Issues are of two kinds (a) issues of fact, (b) issues of law

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence

Of the framing of issues—The plaint and written statement in a suit are called *pleadings* [O. 6, r. 1] Section 25 of the Evidence Act enacts that no fact need be proved at the hearing which a party has admitted by his pleadings unless the Court requires

proof thereof. Admissions on pleadings may be either actual or constructive (y) [O 8, rr 3, 4, 5]. Issues are to be framed in respect only of those facts which have been alleged by one party and either denied or not admitted by the other party (z). They must however be confined to *material* facts, that is to points on which the right decision of the case depends. The practice of raising issues which do not state the main questions in the suit but only various *subsidiary* matters of fact upon which there is no agreement between the parties is embarrassing, and must be avoided (a). Where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main questions of fact necessary to be decided and a party may have been prevented from adducing evidence a fresh issue may be directed to try the principal question of fact (b).

The duty of raising issues rests under the Code of Civil Procedure on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove (c). See also notes to O 8, r 5.

Omission to frame issues—Where a material fact stated in the plaint is denied or is not admitted in the written statement, the Court must frame an issue on the fact denied. What is the consequence of an omission to frame an issue of fact? The answer depends on the following considerations. If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court, and the Court decides the point *as if there was an issue framed on it*, the decision will not be set aside in appeal on the ground merely that no issue was framed. The reason is that mere omission to frame an issue is not fatal to the trial of a suit (d). But if the point denied in the written statement is not tried at all, or if tried, is tried imperfectly so as to cause failure of justice, the case will in appeal be remanded for a re trial after framing the necessary issue (e). In other words, omission to frame an issue is an *irregularity* which may or may not affect the disposal of a suit on the merits. If it does, the appellate Court should remand the case for a new trial to the lower Court after framing the necessary issue. If it does not the appellate Court should not remand the case (s 99). In *Mitna v Syud Fuzl* (f) their Lordships of the Privy Council said—

In this case the omission to raise the issues was brought before the notice of the appellate Court, the appellate Court expressed its regret and their Lordships are glad to observe that it did express its regret, that the principal Sudder Ameen had omitted to settle the issues. The [appellate] Court however, nevertheless conceived that it was not under any positive obligation to remand the case, but seeing that *the parties had gone to trial knowing what the real question between them was that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence* they thought it within their competence to affirm that decision without sending the case back for a re trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 35th section [now O 41, r 25] of the Civil Procedure Code....[Their Lordships] think that under all the circumstances of the case, *substantial justice having been done*, there has not been that fatal mis trial of the cause which vitiates all the proceedings and renders a new trial necessary.

Delay in raising an issue—In *Sayad Muhammad v Fatteh Muhammad* (g), their Lordships of the Privy Council said 'It does not quite appear at what period of

- (y) See *Apaji v Apa* (1901) 26 B.M. 735, 737.
- (z) See *Fateh Muhammad v Imam ud Din* (1920) 2 Lah. L. J. 184, 641 C. 106.
- (a) *West End Watch Co v Berna Watch Co* (1911) 35 B.M. 425, 101 C. 805.
- (b) *Oodagappa v Arubuthnot* (18 5) 14 B. L. R. 115, 147, 11 A. 269, 316.
- (c) *Ganoo v Shri Dev Sudhewar* (1902) 26 Bom. 360, 362.

- (d) *Mitna v Syed Fuzl* (1870) 13 M. L. A. 573.
- Katchelalevna v Kachurijaya* (1862) 12 M. L. A. 495.
- Balmakund v Dalu* (1903) 25 All. 494.
- (e) *Razan v Jankee* (1866) 11 M. L. A. 25.
- See Chandra Kunwar v Narpal Singh* (1907) 29 All. 184, 195, 34 I. A. 27, 36.
- (f) (1870) 13 M. L. A. 53, 583.
- (g) (1894) 22 I. A. 44, Cal. 325.

O. 13,
rr. 10, 11

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

11. [S. 145.] The provisions herein contained as to documents shall, as far as may be, apply to all other material objects producible as evidence

Provisions as to documents applied to material objects

ORDER XIV.

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

O. 14, r. 1

1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other

Framing of Issues

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue

(4) Issues are of two kinds (a) issues of fact, (b) issues of law

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence

Of the framing of issues — The plaint and written statement in a suit are called pleadings [O. 6 r. 1]. Section 58 of the Evidence Act enacts that no fact need be proved at the hearing which a party has admitted by his pleadings unless the Court requires

proof thereof. Admissions on pleadings may be either actual or constructive (y) [O. 8, rr 3, 4, 5] Issues are to be framed in respect only of those facts which have been alleged by one party and either denied or not admitted by the other party (z) They must, however, be confined to *material* facts, that is, to points on which the right decision of the case depends. The practice of raising issues which do not state the main questions in the suit, but only various *subsidiary* matters of fact upon which there is no agreement between the parties, is embarrassing, and must be avoided (a) Where an issue, though in terms covering the main question in the cause, does not sufficiently direct the attention of the parties to the main questions of fact necessary to be decided, and a party may have been prevented from adducing evidence, a fresh issue may be directed to try the principal question of fact (b).

"The duty of raising issues rests under the Code of Civil Procedure on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove" (c). See also notes to O. 9, r. 5.

Omission to frame issues — Where a material fact stated in the plaint is denied or is not admitted in the written statement, the Court must frame an issue on the fact denied. What is the consequence of an omission to frame an issue of fact? The answer depends on the following considerations. If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court, and the Court decides the point, *as if there was an issue framed on it*, the decision will not be set aside in appeal on the ground merely that no issue was framed. The reason is that mere omission to frame an issue is not fatal to the trial of a suit (d). But if the point denied in the written statement is not tried at all, or if tried, is tried imperfectly so as to cause failure of justice, the case will in appeal be remanded for a re trial after framing the necessary issue (e). In other words, omission to frame an issue is an *irregularity* which *may or may not* affect the disposal of a suit on the merits. If it does, the appellate Court should remand the case for a new trial to the lower Court after framing the necessary issue. If it does not the appellate Court should not remand the case (s 99). In *Utna v Syud Fazl* (f) their Lordships of the Privy Council said —

"In this case the omission to raise the issues was brought before the notice of the appellate Court, the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret, that the principal Sudder Ameen had omitted to settle the issues. The [appellate] Court, however, nevertheless conceived that it was not under any positive obligation to remand the case, but seeing that *the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence*, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 35th section [now O 41, r 25] of the Civil Procedure Code....[*Their Lordships*] think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mistrial of the cause which vitiates all the proceedings and renders a new trial necessary."

Delay in raising an issue—In *Sajid Muhammad v. Fatteh Muhammad* (9), their Lordships of the Privy Council said: "It does not quite appear at what period of

- (y) *Se papay* v *Aj r* (1902) 26 B m 715 717
 (z) *Se fahed Muhammad* v *Imam ul Din* (1909)
 2 Lah L J 188 841 f 106
 (a) *Best Paul* v *Witch* v *o Berna* *Witch* v *o*
 (1911) 3 B L 11 4 101 f 817
 (b) *Olayappa* v *Arulathul* (1875) 14 B f R
 115 142 11 A 26m 116
 (c) *Gumoo* v *Shri Bee Altheen* v (1902) 26 B m
 360 362

-

O. 14,
rr. 1, 2

the question of the sound disposing mind of the Diwan. was raised, and was material excepting in one respect. Whatever system of pleading may exist the object is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues, and it may perhaps be not altogether immaterial to observe that the question of the capacity of the Diwan does not appear to have been prominently raised at all events in the first instance. Their Lordships are however of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter.

Wrong Issue—If the first Court frames and tries wrong issues the appellate Court should lay down the proper issues and remand the case for a new trial (k). This however not necessary if the first Court frames a wrong issue but the judgment given a finding on the correct issue. In such a case the appellate Court need not remand the case (l).

Relief not founded on pleadings—As a rule relief not founded on the pleadings should not be granted. But where the substantial matters which constitute the title of all the parties are touched though obscurely in the issues, and they have been fully put in evidence and have formed the main subject of discussion before the Court the Court may grant a relief though it may not be founded on the pleadings. Thus in a case where the plaintiff and the defendant each claims to be exclusively entitled to certain lands the Court may if the above conditions are satisfied declare each to be entitled to a moiety (j). Similarly the Court may in a suit for ejectment pass a decree for redemption (k). But if a case not alleged by the plaintiff in the pleadings is disclosed in the evidence the Court should not deal with it unless a preliminary issue is raised on it and the defendant is given an opportunity of meeting it. If the plaintiff goes to trial deliberately on issues which disclose a case not made out in the pleadings the suit should be determined on those issues notwithstanding the defect in the form of the pleadings (m).

Variance between pleading and proof.—No amount of evidence can be allowed into upon a plea which was never put forward (n). It is impossible to counsel defendants by inferences of fact which are not only not consistent with the allegations that are to be found in the pleadings which constitute the case which the defendant has to meet but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the finding of a combination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded and by joining issue in the cause has undertaken to prove. This principle applies only to cardinal facts and cardinal issues and not to subsidiary facts and issues based thereon. In applying the principle the whole of the circumstances must be taken into account and carefully scrutinized (p).

2. [S. 146, 6th para.]

Issues of law and of fact. The Court requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence. Issues both of law and of fact and the Court must.

framing of issues—The plaintiff and written statement in a suit are called

r 1) Section 58 of the Evidence Act enacts that no fact need be proved if a party has a limited plea unless the Court requires

thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issue of fact until after the issues of law have been determined.

"Or any part thereof"—These words are new

Issue of fact—The rule gives no power to frame a preliminary issue of fact and the Bombay High Court has said that the practice of trying certain issues of fact separately is a dangerous practice (q). But in a case in which the trial of an issue as to the quantum of damages was postponed till after the trial of the issue as to liability, the Privy Council said that the course adopted was a very usual, very proper and a very convenient course (r).

3. [S. 147.] The Court may frame the issues from all or any of the following materials —

Materials from which issues may be framed

- allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;
- allegations made in the pleadings or in answers to interrogatories delivered in the suit,
- the contents of documents produced by either party

Issues not to be inconsistent with pleadings—Issues whether raised from the allegations in the pleadings or from other materials should not be inconsistent with the pleadings (s). Thus if I sue B to set aside a document on the ground that it was not executed by him and that it is a forgery the Court should not raise an issue as to whether the document was executed under coercion or undue influence. The latter issue assumes that the document was executed by the plaintiff while the case set up in the plaint is that it was not executed by him at all (t). But the plea that the document in suit was obtained by the defendant by fraud is not inconsistent with the plea that it was obtained by undue influence. Therefore where fraud is pleaded in the plaint and the plaintiff's counsel alleges at the hearing that the plaintiff was subjected to undue influence the Court may allow issues both as to fraud and undue influence (u).

Appeal—No appeal lies from an order refusing to frame an issue asked for by a party to a suit (v).

The High Court of Madras once held that an appeal lies under cl. 15 of the Letters Patent from an order made at the settlement of issues fixing a distant date for the hearing of the suit (w). But this decision has been disapproved in later cases (x).

(q) *Sawlatbai v Tulaji Rao* (1930) 54 Bom

(r) 24 1371 C 36 (3) A B 1 3

(s) " "

(t) " "

(u) " "

(v) " "

the pleadings was directed but one consolidated issue was allowed to be raised comprising pleas both of fraud and undue influence—a highly objectionable procedure indeed

(r) *Ebrahim v Fakhruddin* (1879) 4 Cal. 531, *Tularam v Alagappa* (1912) 35 Mad 1 81 C 340

(w) *P. v. P.* (1931) 14 Mad. 89

(x) *Durga Prasad v Mallikarjuna* (1901) 24 Mad 354 359 *Tularam v Alagappa* (1912) 35 Mad 1 8 19 81 C. 340

O. 14,
rr. 1, 2

the suit the question of the sound disposing mind of the Diwan.... was raised as a very material exception in one respect. Whatever system of pleading may exist the object of it is that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate to the issues, and it may perhaps be not altogether unreasonable to observe that the question of the capacity of the Diwan does not appear to have been prominently raised, at all events in the first instance. Their Lordships are however of opinion that they must assume that the question of his capacity was open upon the proceedings sufficiently to give each Court below the right to form a judgment upon the matter."

Wrong issue—If the first Court frames and tries wrong issues the appellate Court should lay down the proper issues, and remand the case for a new trial (k). This is however not necessary if the first Court frames a wrong issue, but the judgment gives a finding on the correct issue. In such a case the appellate Court need not remand the case (l).

Relief not founded on pleadings.—As a rule relief not founded on the pleadings should not be granted. But where the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues, and they have been fully put in evidence, and have formed the main subject of discussion in the Court the Court may grant a relief though it may not be founded on the pleadings. Thus in a case where the plaintiff and the defendant each claims to be exclusively entitled to certain lands, the Court may, if the above conditions are satisfied, direct each to be entitled to a moiety (j). Similarly the Court may in a suit for eye to pass a decree for redemption (k). But if a case not alleged by the plaintiff in the pleadings is disclosed in the evidence, the Court should not deal with it unless a special issue is raised on it and the defendant is given an opportunity of meeting it. If the parties go to trial deliberately on issues which disclose a case not made out in the pleadings the suit should be determined on those issues notwithstanding the defect in the form of the pleadings (m).

Variance between pleading and proof—No amount of evidence can be looked into upon a plea which was never put forward (n). "It is impossible to consider justice by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case which the defendant has to meet but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded and, by joining issue in the cause, has undertaken to prove. This principle applies not only to the main issue but to subordinate issues."

thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issue of fact until after the issues of law have been determined.

“Or any part thereof.”—These words are new

Issue of fact.—The rule gives no power to frame a preliminary issue of fact and the Bombay High Court has said that the practice of trying certain issues of fact separately is a dangerous practice (q). But in a case in which the trial of an issue as to the quantum of damages was postponed till after the trial of the issue as to liability, the Privy Council said that the course adopted was a very usual, very proper and a very convenient course (r).

3. [S. 147.] The Court may frame the issues from all or any of the following materials :—

Materials from which issues may be framed

- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party.

Issues not to be inconsistent with pleadings—Issues whether raised from the allegations in the pleadings or from other materials, should not be inconsistent with the pleadings (s). Thus if I sue B to set aside a document on the ground that it was not executed by him and that it is a forgery, the Court should not raise an issue as to whether the document was executed under coercion or undue influence. The latter issue assumes that the document was executed by the plaintiff, while the case set up in the plaint is that it was not executed by him at all (t). But the plea that the document in suit was obtained by the defendant by fraud is not inconsistent with the plea that it was obtained by undue influence. Therefore where fraud is pleaded in the plaint and the plaintiff's counsel alleges at the hearing that the plaintiff was subjected to undue influence, the Court may allow issues both as to fraud and undue influence (u).

Appeal.—No appeal lies from an order refusing to frame an issue asked for by a party to a suit (v).

The High Court of Madras once held that an appeal lies under cl 15 of the Letters Patent from an order made at the settlement of issues fixing a distant date for the hearing of the suit (w). But this decision has been disapproved in later cases (x).

(q) *Sorabhai v Tulaji Rao* (1932) 54 Bom 224, 137 I C 362 (32) A B 128

(r) *Narash Mohan v Brij Mohan* (1933) 37 C 11, 81 I C 340

(s)

(t)

(u)

the pleadings was directed, but one consolidated issue was allowed to be raised comprising pleas both of fraud and undue influence—a highly objectionable procedure indeed

(e) *Ebrahim v Fackhrunnissa* (1879) 4 Cal 531; *Tuljaram v Alagappa* (1912) 35 Mad. 1, 81 I C 340

(w) *R v R* (1891) 14 Mad. 88

(x) *Durga Prasad v Mallikarjuna* (1901) 24 Mad 358, 359, *Tuljaram v Alagappa* (1912) 35 Mad 1, 8, 10, 81 I C 340

O. 14,
rr. 4, 5

4. [S. 148.] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law then in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. [S. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Sub rule (1)—The first part of sub rule (1) leaves it to the discretion of the Court to amend the issues or frame additional issues as appears from the word "may" while the latter part makes it imperative on the Judge to amend the issues and frame additional issues as appears from the word "shall" (y)

May amend the issues or frame additional issues --As a general rule the Court should not frame even additional issues from materials other than those specified above in *3 Doddasappa v Pradhanappa (1925) 27 Bom L R 1318, 91 I C 426, (26) A B 33*. The Court may, however, under special circumstances, allow issues to be raised upon a matter which does not strictly come within the proper scope of the proceedings, provided

of one character into a suit or defence of a different and inconsistent character. Thus if A sues B for damages for wrongful occupation of his land, treating B as a trespasser, he should not be allowed to raise an additional issue claiming rent of the land from B, treating him as his tenant (b). But if a suit is brought on a mortgage, and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution, but had put their names on the document on the acknowledgment by the executant of his signature, it is perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s 59 of the Transfer of Property Act though the invalidity of the deed is not set up as a defence in the written statement. Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties (c). See notes to r 3 above, "Issues not to be inconsistent with the pleadings."

| | | | | | |
|---------|---------|---------|---------|---------|---------|
| $\{y\}$ | $\{x\}$ | $\{z\}$ | $\{w\}$ | $\{v\}$ | $\{u\}$ |
| $\{x\}$ | $\{y\}$ | $\{z\}$ | $\{w\}$ | $\{v\}$ | $\{u\}$ |
| $\{z\}$ | $\{x\}$ | $\{y\}$ | $\{w\}$ | $\{v\}$ | $\{u\}$ |
| $\{w\}$ | $\{x\}$ | $\{z\}$ | $\{y\}$ | $\{v\}$ | $\{u\}$ |
| $\{v\}$ | $\{x\}$ | $\{z\}$ | $\{w\}$ | $\{y\}$ | $\{u\}$ |
| $\{u\}$ | $\{x\}$ | $\{z\}$ | $\{w\}$ | $\{v\}$ | $\{y\}$ |

(b) *Narayan v Hari* (1899) 13 Bom 604
(c) *Shamu Potter v Abdul Kadir* (1914) 25 Mad.
607-301 A 218, 161 C 203

At any time before passing the decree — An additional issue may be raised even after the close of the argument on the case (d) In order to avoid multiplicity of proceedings an amendment of the plaint and an additional issue was allowed after all the witnesses had been examined although it introduced a new case of fraud on condition of the plaintiff paying all the costs of the action up to date (e)

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law may by agreement be stated in form of issues

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

Compare O 36 r 1

Form —As to form of agreement for issues to be tried see App II form No 1

Court if satisfied that agreement was executed in good faith may pronounce judgment

7. [S. 151.] Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,
 - (b) that they have a substantial interest in the decision of such question as aforesaid, and
 - (c) that the same is fit to be tried and decided,
- it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

(d) *Shamu Patil v Abdul Kadir* (1912) 33 Cal 607 611 612 39 I A 18 16 I C 250

(e) *Chartered Bank of India v Imperial Bank of India* (1930) 5 Cal 393 12 I C 772 (30) A. C. 534

O. 14,
rr. 4, 5

4. [S. 148.] Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. [S. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

Power to amend and
strike out issues

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced

Sub rule (1)—The first part of sub rule (1) leaves it to the discretion of the Court to amend the issues or frame additional issues as appears from the word 'may' while the latter part makes it imperative on the Judge to amend the issues and frame additional issues as appears from the word 'shall' (y)

May amend the issues or frame additional issues—As a general rule the Court should not frame even additional issues from materials other than those specified above in r 3 *Dodbasappa v Pradhanappa* (1925) 27 Bom L R 1318, 91 I C 426, ('26) A B 33 The Court may, however, under special circumstances allow issues to be raised upon a matter which does not strictly come within the proper scope of the proceedings, provided no injustice is done to either party (z) It follows that the Court should not frame any additional issue so as to make for either party a case which he had no intention of making for himself (a) Nor should it frame an additional issue so as to convert a suit or defence of one character into a suit or defence of a different and inconsistent character Thus if A sues B for damages for wrongful occupation of his land, treating B as a trespasser, he should not be allowed to raise an additional issue claiming rent of the land from B, treating him as his tenant (b) But if a suit is brought on a mortgage, and it transpires at the hearing that the witnesses to the mortgage deed were not present at its execution, but had put their names on the document on the acknowledgment by the executant of his signature, it is perfectly competent to the Judge to frame an additional issue as to whether the deed of mortgage was valid under s. 59 of the Transfer of Property Act though the invalidity of the deed is not set up as a defence in the written statement Every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties (c) See notes to r 3 above, "Issues not to be inconsistent with the pleadings"

(y)
(z)
(a)

160 161
(b) *Narayan v Hari* (1889) 12 Bom 664
(c) *Shamji Patil v Abdul Aziz* (1912) 35 Mad.
697, 39 I A 218 161 I C 200

At any time before passing the decree—An additional issue may be raised even after the close of the argument on the case (d) In order to avoid multiplicity of proceedings an amendment of the plaint and an additional issue was allowed after all the witnesses had been examined although it introduced a new case of fraud, on condition of the plaintiff paying all the costs of the action up to-date (e)

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

Questions of fact or law may by agreement be stated in form of issues

- (a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement,
- (b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct, or
- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute

Compare O 30 r 1

Form—As to form of agreement for issues to be tried see App II, form No 1

Court if satisfied that agreement was executed in good faith may pronounce judgment

7. [S. 151.] Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,
 - (b) that they have a substantial interest in the decision of such question as aforesaid, and
 - (c) that the same is fit to be tried and decided,
- it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

(d) *Shamu Patter v Abdul Kader* (1912) 33 Mad 607 611 612 39 I A 218 16 I C 250

(e) *Chartered Bank of India v Imperial Bank of India* (1930) 5 Cal 324 127 I C 774 (30) A. C. 534

O. 14, r. 7 and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement, and, upon the judgment so pronounced, a decree shall follow

ORDER XV

Disposal of the Suit at the first hearing

O 15,
rr 1-3

1. [S 152] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment

One of several defendants
not at issue

2. [S 153] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants

Admission of Claim by one of several defendants—A sues B and C upon a promissory note jointly passed by them B appears and admits the claim and a decree is passed against him The decree against B is no bar to the further prosecution of the suit against C (F) See notes to O 1 r 6 Joint liability on a contract

Parties at issue

3. [S 154] (1) Where the parties are at issue on some question of law or of fact and issues have been framed by the Court as here inbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either the party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

ORDER XVI.

Summoning and Attendance of Witnesses.

1. [S. 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Difference between the old section and the present rule This rule corresponds with s 159, C P C, 1882, except as to the time for application for writs and summonses, for which see next paragraph)

Time for application for witness summons.—Under s. 159 of the Code of 1882, the application for summonses to witnesses was to be made *after* the writ of summons was delivered or sent for service on the defendant *and before* the day fixed for the summons for the appearance of the defendant. Under the present rule, the application may be made *at any time after the institution of the suit*.

Whether witness summons can be refused.—A party is entitled as of right to summonses to witnesses (g). So long as the application is made after the institution of the suit, the Court is bound to issue the summons. It does not matter that the party had himself originally undertaken to bring his witnesses and has failed to do so (h). Nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal of the suit (i). The Court may in either of these cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to refuse to issue summonses (j). The only case in

(g)

(h)

(i)

(f) *Alkumil y Jidd (Ismi) IS All yim, Alif
Alumil y Kaji Alkumil (Ismi) u li +
Ismi Alkumil y Jidd (Ismi) u li +
Ismi Alkumil y Jidd (Ismi) u li +
Ismi Alkumil y Jidd (Ismi) u li +*

O. 16,
rr. 1, 2

which the Court has power to refuse to issue summonses is where the application is not made *bona fide* as where a decree holder attaches property belonging to a *muth* and, on the head of the *muth* objecting to the attachment applies to summon him as his own witness requiring his personal attendance in Court with the sole object of putting pressure upon him to relinquish his claim. In such a case the Court may, in the exercise of its inherent power to prevent the abuse of its own process [s. 151] refuse to issue the summons (A).

Remedy of party when witness summons refused.—Where a party applies for summonses to witnesses, but the application is refused he cannot appeal from the order of refusal. He must wait until the suit is disposed of, and if the decree in the suit goes against him he may appeal from the decree, and set forth the refusal of the lower Court to issue summonses as a ground of objection in the memorandum of appeal (s. 100). If the appellate Court finds that the refusal has injuriously affected the decision of the case it may set aside the decree, and direct the lower Court to issue the summonses, but if it finds that the refusal has not injuriously affected the decision it should not interfere with the decree (B) [see s. 99].

Form of summonses to witnesses.—See Schedule I, App. B, No. 13.

2. [S. 160] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Sub rule (2) is new

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49 r. 3 cl. (3)].

Travelling and other expenses.—A witness is entitled under this rule only to travelling expenses and other expenses of a similar nature, but he is not entitled to compensation for loss of time (m). The right to claim travelling expenses is not lost

(A) *Sarabhai v. Nataraja* (1905) 2 Hyd. 3
(B) *Jagpreet v. Datta* (1891) 16 All. 214

(m) *Sa. m. v. Prasannaiah* (1865) 2 Hyd. 225

merely because the witness did not apply for them before giving his evidence. The reason is that a witness is entitled to demand his travelling expenses at any time even after he has given his evidence (n). If a witness is summoned by the plaintiff, he is entitled to claim his travelling expenses from the plaintiff, though he has not been examined by the plaintiff, but is examined by the defendant as his witness (o). See also the undermentioned case (p).

Remedy of witness if travelling expenses not paid.—The only remedy is by an application to the Court that heard the case, no separate suit will lie to recover such expenses (q).

Default on part of process server.—Where a plaintiff pays into Court the process fee and the expenses of his witnesses, but the summons is not served owing to default on the part of the process server, it is illegal to dismiss his suit for want of proof in the absence of the witnesses (r).

3. [S. 161.] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness

4. [S. 162.] (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons, or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid.

Procedure where insufficient sum paid in.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the movable property of such party, or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid.

Expenses of witnesses detained more than one day

(n) *London, London and Mediterranean Bank*

v. *Mahomed* (1880) 4 B. M. 611

(o) *In re Julluck* (1904) 23 B. M. 64

(p) *Reference in the matter of* (19-3) 35 Cal. L. J. 119 76 L. C. 353

(q) *D. Das v. Hurreah Chunder* (1866) 5 W. L. 101 106

(r) *M. A. Pann v. Kishore Lal* (1904) 6 Cal. L. J. 414 25 L. C. 31 (25) 4 L. 36

O. 16,
rr. 4-9

Sale of movable property—Under this rule, if the expenses are not deposited only the movable property of the defaulting party may be attached and sold but not his immovable property (s)

5. [S. 163] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes, and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy

Time place and purpose of attendance to be specified in summons

Where hearing postponed—When a witness attends Court in pursuance of a summons on the day specified in the summons but the case is not reached on that day, it is not necessary to issue a fresh summons. He need only be warned that his attendance will be required on the day to which the hearing may be postponed (t)

6. [S. 164] Any person may be summoned to produce a document without being summoned to give evidence, and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same

Summons to produce document

7. [S. 165] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power

Power to require persons present in Court to give evidence or produce document

8. [S. 166.] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule

Summons how served

9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required

Time for serving summons

(s) *Sid Harish v Pahlaman* (1911) 40 C. N. 1 | (t) *Subbarayudu v Lancherumayya* (1903) 11 Mad. 10

10. [S 168.] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons the Court shall, if the certificate of the serving officer has not been verified by affidavit and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court touching the service or non service of the summons

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein, and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides

(3) In lieu of or at the time of issuing such proclamation or at any time afterwards the Court may in its discretion issue a warrant either with or without bail for the arrest of such person and may make an order for the attachment of his property to such amount as it thinks fit not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12

Provided that no Court of Small Causes shall make an order for the attachment of immovable property

Evidence Act S 69—Before dispensing with the evidence of an attesting witness under sec 69 of the Evidence Act the Court must see that all processes under rules (a) and (3) have been exhausted (u)

Appeal—An appeal lies from an order under this rule for the attachment of property [O 43 r 1 cl (g)]

If with summons attachment may be withdrawn

11. [S 169] Where at any time after the attachment of his property, the defendant appears and satisfies the Court

(a) that he did not without lawful excuse fail to comply with the summons or to attend for service and

O. 16,
rr. 11-13

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Scope of the rule.—R 11 applies to the case where the person served appears and satisfies the Court as to his failure to appear. The present rule applies to the case where the person does not appear or appears but fails so to satisfy the Court (c).

Imposition of fine.—Neither the issue of a proclamation nor an order for attachment under r 10 above is a condition precedent to the imposition of a fine under this rule (w).

Order releasing property from attachment.—In a case under the Code of 1882 the Court accepted the fine and costs even after sale of the property attached and refused to confirm the sale as the price realised was absurdly low. The auction purchaser If a similar rule 13 of this Order as a decree-

holder], r 90 and r 92

Contempt proceedings.—In the case of a proceeding before a Chartered High Court, the defaulting witness may also be proceeded against for contempt (y).

13. [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

(c) "

(w)

(x) *Badri Prasad v Tej Singh* (1910) 33 All 68,
71 C 100
(y) *Frahim v King-Emperor* (1926) 4 Rans
57, 58 I C 57, (26) A R 188.

14. [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

15. [S. 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place

16. [S. 173.] (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison

Sub rule (2) —This sub rule is new

17 [Ss. 174 175] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16

18. [S. 174, 5th para.] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which

Court may of its own accord summon as witnesses strangers to suit

Duty of persons summoned to give evidence or produce document

When they may depart

Application of rules 10 to 13

Procedure where witness apprehended cannot give evidence or produce document.

O. 16,
rr. 11-13

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

Scope of the rule.—R 11 applies to the case where the person served appears and satisfies the Court as to his failure to appear. The present rule applies to the case where the person does not appear or appears but fails so to satisfy the Court (c).

Imposition of fine.—Neither the issue of a proclamation nor an order for attachment under r 10 above is a condition precedent to the imposition of a fine under this rule (10).

Order releasing property from attachment.—In a case under the Code of 1882 the Court accepted the fine and costs even after sale of the property attached and refused to confirm the sale as the price realised was absurdly low. The auction purchaser

holder), r 90 and r 92

Contempt proceedings.—In the case of a proceeding before a Chartered High Court, the defaulting witness may also be proceeded against for contempt (y).

13. [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

(c) See *Sib Kumar v Secretary of State* (1920) 31 (nt) L.J. 383 65 I.C. 425
(y) *Munshi v. In re* (1925) 48 Mad. 943, 90 I.C. 941 (1-3) A.M. 1247
(z) *Badri Prasad v. Tej Singh* (1910) 33 All. 68, 71 C. 100
(y) *Ibrahim v. King Feroz* (1906) 4 Rang. 257, 93 I.C. 57, (1-6) A.R. 188

14. [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witnesses strangers to suit

15. [S. 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place

Duty of persons summoned to give evidence or produce document

16. [S. 173.] (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of

When they may depart

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison

Sub rule (2) — This sub rule is new

17 [Ss. 174-175.] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16

Application of rules 10 to 13

18. [S. 174, 5th para] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which

Procedure where witness apprehended cannot give evidence or produce document

O. 16, rr. 18-21 he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison

No witness to be ordered to attend in person unless resident within certain limits

19. [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court house

See O 26 r 4

20. [S. 177.] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit

Consequence of refusal of party to give evidence when called on by Court

Appeal.—An appeal lies from an order under this rule pronouncing judgment against a party [O 43 r 1 cl (b)]

21. [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable

Rules as to witnesses to apply to parties summoned

Duty of suitors to give evidence on their own behalf—In *Lal Kunuar v Chiranj Lal* (2) their Lordships of the Privy Council severely condemned the practice followed in some parts of India of advocates omitting to call their own client as a witness in the hope of forcing their opponents to call him as their witness in order that they themselves may have the opportunity of cross examining their own client when called by the other side. Referring to this practice their Lordships said It is a vicious practice unworthy of a high toned or reputable system of advocacy. It must embarrass and perplex judicial investigation and, it is to be feared too often enables fraud falsehood or chicanery to baffle justice

ORDER XVII

Adjournments.

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time
and adjourn hearing.

- (2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Costs of adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

May adjourn.—This rule gives a discretion to the Court to grant time to the parties and to adjourn the hearing of a suit. On the one hand, no adjournment should be granted if no sufficient cause is shown (a) On the other hand, the Court should not refuse an adjournment if sufficient cause is shown (b) What is sufficient cause is a question of fact in each case

Payment of costs as a condition precedent.—*A* sues *B* for damages. At the hearing of the suit *B* applies for an adjournment The hearing is adjourned on the terms that *B* should pay Rs 50 to *A* for costs before the next hearing, and that if he fails to do so, his defence would be struck off and the suit would be proceeded with *ex parte*. *B* fails to pay the costs The Court may proceed with the suit *ex parte* (c) But the Court cannot do so if the payment of costs was not a condition precedent to the hearing of *B*'s case (d)

Pauper suit.—The Rangoon High Court has held that payment of costs by the plaintiff may be made a condition precedent to his being granted an adjournment although he is suing in forma pauperis (e)

2. [S. 157.] Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Procedure if parties fail
to appear on day fixed

(c) *East Indian Railway Co v Jit Mal* (1925) | Rang 561, (28) A R 306

O. 17, r. 2

Distinction between O 9 and O 17—The provisions of O 9 by themselves do not apply to a case in which the plaintiff or defendant has already appeared but has failed to appear at an adjourned hearing of the suit or such a case the procedure is laid down in O 17 which deals with adjournments (f)

"One of the modes directed by Order IX"—The effect of this rule is to assimilate the procedure in cases where there is default of appearance at an adjourned hearing with that in cases where there is such default at the first hearing. The result is that though a party may have appeared at the first hearing but fails to appear at an adjourned hearing...

under this rule and O 9, r 3, for an order to set the dismissal aside (g), and if the defendant fails to appear at an adjourned hearing the Court may pass an ex parte decree under this rule and O 9, r 8. Under this rule and O 9, r 13, for a hearing, the Court may r 3, and the plaintiff may then, if so advised, either bring a fresh suit, or apply for an order to set the dismissal aside under this rule and O 9, r 4 (i).

After a decree has been passed, the Court has no jurisdiction to dismiss the suit under this rule and O 9, r 8, for plaintiff's default. This is because once a decree has been made in a suit the suit cannot be dismissed unless the decree is reversed on appeal (j).

May proceed under O 9 or make such other order as it thinks fit—The High Court of Bombay has held that where the plaintiff has made a case which, if uncontradicted, would entitle him to a decree, but does not appear at an adjourned hearing, the Court should not dismiss the suit under this rule and O 9, r 8, but should decide the case on the merits. The reason given is that O 9, r 8 does not apply where the plaintiff has made out a case which if uncontradicted, would entitle him to the relief claimed (k). On the other hand, the Allahabad High Court has held that the words "or make such other order as it thinks fit" do not empower the Court to dispose of the suit on the merits, but only to grant a further adjournment and if the Court does not adjourn the hearing, it should proceed under this rule and O 9, that is to say, dismiss the suit under O 9, r 8 if the plaintiff does not appear and pass an ex parte decree under O 9, r 8, if the defendant does not appear (l). In Calcutta it has been held that where there are no materials on the record the Court should proceed under r 2 above, but if there are materials on the record the Court ought to proceed under rule 3 (m). It has been held in some cases that if the Court refuses a further adjournment and dismisses the suit if the plaintiff does not appear, or passes an ex parte decree if the defendant does not appear, but omits to state whether the order was made under this rule or r 3 below, the order must be taken to have been made under this rule (n), unless it clearly appears from the proceedings that

(f) *Lunatia v Jiban* (1914) 41 Cal 956 23
I C 769

(g) *Hall v Sherman* (1877) 1 Mad 987

(h)

(i) *Alicar v Seshammal* (1887) 10 Mad 270

(j) *Lechini v Saran v Dalakant* (1914) 51 I A 314 at 61 51 I A 416
198 *Srinagani v Srinagani* (1933) 56

Mad 310 149 I C 374 (33) A M 55
(k) *Manjappa v Gowdappa* (1905) 7 Bom L 21

(l) "61"

(m)

(n)

there has been a decision on the merits (c). If a suit is decreed *ex parte* under this rule the defendant may apply to set aside the decree under O 9, r 13 (d).

There does not seem to be any doubt that default of appearance *before* hearing in a case of general adjournment as distinguished from an adjournment granted under r 3 to enable a party to perform any act necessary to the further progress of the suit, is within this rule and not under r 3 so that if the plaintiff does not appear the Court may dismiss the suit under this rule and O 9 r 8 and if the defendant does not appear it may pass an *ex parte* decree under this rule and O 9, r 6 (p).

"Adjourned hearing"—It has been held by the High Court of Calcutta that the word *adjourned* in this rule refers to an adjournment upon the application of parties granted under r 1 and not an adjournment necessitated by the rules of the Court relating to the regulation of its own business (q).

"Fail to appear"—See notes to O 9, r 9. Appearance.

Non appearance on day fixed for judgment.—A suit cannot be dismissed for non-appearance of parties on the day fixed for delivery of judgment (r).

Remedy—See notes to the next rule under the head *Remedy*.

3. [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence etc

Scope of the rule—The provisions of this rule do not apply unless—

(1) the hearing is adjourned on the application of a party to the suit as distinguished from an adjournment by the Court of its own motion (s).

(2) the hearing is adjourned on the application of the party who subsequently makes the default (t).

(3) the adjournment is granted to enable the party to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit and

(4) the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the Court.

*** Any other act**—A suer B to recover possession of certain lands B contends

missioner's fee is an act necessary to the further progress of the suit within the meaning of this rule (u).

Procedure to be followed under this rule—Rule 2 applies to cases where the hearing is adjourned for matter for what purpose and the parties or any of them fail to appear at the adjourned hearing. The present rule is directed to a case where the

(a) *Shah Muhammad v. Ch. Ishaq Matto* (1919)

41st L J 15 I C 90

(a1) *Jandayandars v. Pramadandars* (1932)

60 Cal 1331 (34) 4 C 16

(p)

(r) *Bura v. Teja* (19-7) 9 Lat L J 178 10 I C

4 (27) 4 I 848

(t) *Teeray v. Shama Churn* (19) 19 W I 313

Enatulla v. Jagan (1914) 41 Cal 928 3

I C 69

(f) *Mulne v. Kor* (19 4) 8 Rang 33 (4)

4 R 192

(u) *Shah Sahib v. Matomed* (189) 13 Mad 11

(f) *Yarabhadappa v. Ch. Annamma* (1894)

1 Mad 43 See *Tulsiram v. Daya*

Iram (19 5) 23 All L J 513 55 I C 444

(2) 4 A 604

(q)

O. 17, r. 3 hearing is adjourned at the instance of a party for some one or other of the purposes specified in the rule, and the party fails to perform the specified act or acts for which the adjournment was granted within the time allowed by the Court (v) In such a case, the rule says, "the Court may, notwithstanding such default, proceed to decide the suit forth with" These words do not mean that the Court may dismiss the suit if the plaintiff is in default, or pass a decree against the defendant if the defendant is in default (w) What they mean is that the Court may further adjourn the hearing, or it may, without granting any further adjournment, proceed to try the suit and take such evidence as may be tendered by the parties and decide the suit on the merits (x) Thus where an adjournment is granted to the plaintiff to amend the plaint, but the plaintiff fails to amend the plaint, and the Court refuses a further adjournment, the Court should not dismiss the suit for default but decide it on the merits (y) The word "forthwith" means "without granting any further adjournment" [contrast the words "at once pronounce judgment" in O 15, r 4] Where the adjournment is not for the purpose of performing any act necessary to the further progress of the suit, in other words, it is a general adjournment, default of appearance at the adjourned hearing comes within r 2 above and not under this rule (z)

Remedy.—Where a suit is disposed of under the first part of r 2 above, it is open to the party aggrieved by the order to proceed under O 9, r 9, or O 9, r 13, as the case may be, see notes to r 2 above, "One of the modes directed by Order 9" But where a case is decided under the present rule, the decision amounts to a decree, and the remedy of the party aggrieved is by way of appeal (a) or by way of review (b) As to what points may be taken in appeal and what in review, see the undermentioned case (c)

Case where default under this rule is coupled with default of appearance under rule 2—If the hearing of a suit is adjourned on the application of the plaintiff to enable him to produce his evidence or to perform any other act as mentioned in this rule, and the plaintiff does not appear at the adjourned hearing, should the Court proceed under this rule or under rule 2? The High Court of Madras has held that the Court should in such a case proceed under r 2 and dismiss the suit for default so that the plaintiff may have an opportunity to apply under O 9, r 9, to set aside the dismissal (d) The High Court of Bombay has held that the Court should proceed under rule 2 and dismiss the suit for default (e), unless the evidence has been closed in which case it should proceed under rule 3 and deal with the suit on the merits (f) The High Court of Lahore has held that if there are no sufficient materials on the record the Court should proceed under r 2 above (g), but if there are sufficient materials it should proceed to decide the suit under this rule (h) In Allahabad the balance of authority seems to be in favour of the

| | | | | | |
|-----|--|-----|--|-----|--|
| (v) | | (w) | <i>Sukhu v Ram Laloo</i> (1910) 41 All 663 | (b) | |
| (x) | | (y) | | (c) | |
| (z) | | (d) | | (e) | |
| | | (f) | | (g) | |
| | | (h) | | | |
| (a) | <i>Lala Prasad v Nand Kishore</i> (1899) 22 All 68 | | | | |
| | <i>Gaura Bibi v Ghafar</i> (1911) 34 All 123 | | | | |
| | <i>Jachamma v Sretam</i> | | | | |
| | | (A) | <i>Jhanda Singh v Sadar</i> (1904) 5 Lah 218 | | |
| | | | 1 C 453 (24) A L 545 | | |

view that the Court should proceed under r 2 and not under this rule (i) The Patna High Court has held that this rule does not apply unless the hearing has commenced (j) The High Court of Calcutta has held that in order to apply the procedure of rule 3 two elements must be present, viz (1) the adjournment must have been at the instance of the party and (2) there must be materials on the record for the Court to deal with the suit, and that the presence of the one element without the other does not justify the application of rule 3 (l)

"To whom time has been granted"—Where a party has paid the process fee for summoning witnesses, but the witnesses are not served, and the Court adjourns the hearing to enable its officer to serve the summonses, the adjournment does not amount to granting of time within the meaning of this rule and the rule does not apply (f)

Execution proceedings—The provisions of this Order do not apply to execution proceedings (m)

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

1. [S. 179, Explan.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin

Right to begin

Right to begin—The right to begin is to be determined by the rules of evidence. As a general rule the party on whom the burden of proof rests should begin. Sections 101-114 of the Indian Evidence Act I of 1872 deal with burden of proof. Section 102 of the Act provides that the burden of proof lies on that party who would fail if no evidence at all were given on either side. Thus if A sues B for the recovery of a piece of land of which B is in possession, the burden of proof lies on A, for if no evidence were given on either side, B would be entitled to retain his possession.

"Unless the defendant admits the facts alleged by the plaintiff."—"Facts" mean 'all material facts'. Thus where a defendant admits only some of the facts alleged by the plaintiff, it does not give him the right to begin (n)

Preliminary issue raised by defendant that suit does not lie—"Where the defendant raises a preliminary issue that the suit is barred as *res judicata*, the defendant has the right to begin (o)

Preliminary issue raised by respondent that appeal does not lie—In such a case, according to the Bombay High Court, the appellant has the right to begin. The decision was put on the ground of established practice in the Bombay High Court (p)

- (i) *Ganesh Lal v Debi Das* (1925) 47 All 140
146 85 I C 470 (25) A A 267 *Ram*
Adhin v Pami Bihari (1925) 47 All
181 185 85 I C 27 (25) A A 182 But
see *Badam v Nathu* (1903) 35 All 194
Gaura Bibi v Ghazala (1912) 34 All 123
12 I C 603
(j) *Mahabir Prasad v Shrodayal* (1928) 7 Pat
36, 107 I C 824, (24) A F 167

- (k) *Brojendra v Iromatha* (1933) 37 C W N
666 144 I C 46 (33) A C 412
(l) *Har as Rai v Varain Singh* (1915) Punj
Rec no 51 p 234 29 I C 938
(m) *Tirthasami v Annappayya* (1895) 18 Mad
131
(n) *Aghore v Prem Chund* (1880) 7 C L R 274
(o) *Palmasai v Aishabai* (1889) 12 Bom 454
(p) *Iustomji v Aessurji* (1884) 8 Bom 287, 289

O. 18,
rr. 2-4

2. [S. 179, 1st para., S. 180, 1st and 2nd paras.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case

The other party shall then state his case —Where there are two sets of defendants and their interests are practically the same, the rule is that after the plaintiff has closed his case both the defendants should state their case before any evidence is given by either defendant (g)

Some of the defendants supporting plaintiff's case —Where there are several defendants and some of them support the plaintiff's case the rule is that the plaintiff and such of the defendants as support his case, wholly or in part must address the Court and call their evidence in the first place and then the other party that is the other defendants, should address the Court and call their evidence (r)

Hearing of arguments —If in a case where a party, having an opportunity of addressing the Court does not do so the judgment cannot be set aside because it was delivered without hearing arguments (s)

3. [S. 180, 3rd para.] Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party, and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning, but the party beginning will then be entitled to reply generally on the whole case

4. [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge

Witnesses to be examined
in open Court

(g) *Sa Dukshina* (190) 29 Cal 39
(r) *Haji N. G. v. Sultan Mahomed Khan* (1908)
3. Bom 539

(s) *Haji v. Dett Ditta* (19 3) 4 Lah 384 77
1 C 308 (24) A L 107

Evidence of witnesses.—It is the duty of the Judge to examine every witness tendered, unless it appears clearly that the object of summoning a large number of witnesses is to obstruct or delay justice (i). It is not right for the Judge to select a certain number of witnesses and send away the rest, because he thinks that they would only prove the same facts as those already deposed to (u), or because he is satisfied of the evidence already recorded (v). If he does so, the Appellate Court may remand the case with a direction to him to take the evidence of the witnesses tendered by the party, but not examined by the Judge (w).

Evidence shall be taken "in open Court."—As to the examination of witnesses "on commission," see Order 26 below.

5. [S. 182.] In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 1 cl (4)].

Presence of parties—Where evidence is taken in the absence of the opposite party, it will be rejected by the Court of appeal if the objection to the reception of the evidence was taken before the Court trying the suit. If no such objection was taken, the appellate Court will not remand the case especially if the other evidence in the case is sufficient to support the decision of the lower Court (x). See Indian Evidence Act 1872, s 167.

"Shall be read over"—There is a difference of opinion whether, if the deposition is not read over to the witness as required by this rule or interpreted to him as required by r 6 below, it is admissible in evidence in trials for perjury and forgery, it being held in some cases that the deposition is not admissible in evidence (y), while in other cases that it is (z). The former view proceeds on the ground that the deposition not being read over or interpreted to the witness, it does not prove itself under sec 80 of the Evidence Act, 1872, and that it cannot be proved in any other way having regard to the provisions of sec 91 of that Act. The latter view proceeds on the ground that though the deposition does not in such a case prove itself under sec 80 of the Evidence Act, it may be proved in any other way, e.g., by the Judge who took it down, and that sec 91 of the Act is no bar to such proof.

(i) *Pamdhan v Payballab* (1870) 6 B L R App 10

(u) *Jeswant v Jet Singjee* (1841) 2 M J A 424

(v) *Ery Soodar v Aisoonnissa* (1874) 3 M W 63

(w) *Ahuda Balsh v Imam Ali* (1887) 9 All 339

(x) *Bommarav v Langasamy* (1855) 6 M J A 232

(y) *Empress v Mayadeb* (1881) 6 Cal 762 [dec'd]

sition not even signed by the Judge) *Kamatnathan v Emperor* (1905) 3 Mad 303

Emperor v Jogendra Nath (1914) 42 Cal 240 44 I C 571

Emperor v King Emperor (1919) 42 Mad 561 50 I C 957

Emperor v Nalob Ali (1924) 51 Cal 236 81 I C 803, (24) A C 704

(z) *Elahi Balsh v Emperor* (1918) 45 Cal 825 45 I C 254

Biogra v Emperor (1911) 3 Mad 141, 7 I C 414

Meango v Batiel (1918) Mad W N 237

O. 18,
rr. 5-8

Where a witness understands English and the deposition is read over by him instead of being read over to him, it is a substantial compliance with the rule (a)

Signature of witness—The rule does not require a witness to sign his evidence (b)

Signature of Judge—A prosecution for perjury cannot be sustained if the deposition is not signed by the Judge. The signing of the deposition by the Judge is made essential to the application of sec. 80 of the Evidence Act, 1872, by the section itself (c)

6. [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

When deposition to be interpreted

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

"Shall be interpreted"—See notes to r. 5 above "Shall be read over."

7. [New] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Evidence under section 138

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

Memorandum when evidence not taken down by Judge

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

person "in the presence and under the personal direction and superintendence of a Judge" as required by r 5 above. If evidence is dictated to a typist by a Judge, and no memorandum is made by him, the provisions of this rule and of rr 5 and 14 are not complied with. But the case is then one not of illegality but of irregularity (d)

(a) *Ramesh Chandra v Emperor* (1919) 46 Cal 885 901 501 C 880
(b) 46 Cal 885 900 501 C 880 *supra*

(c) *Empress v Majadeb* (1881) 6 Cal 782
(d) *Promode Nath v Barakkee* (1928) 55 Cal 1091 113 C 833 (29) A C 78

9. [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

When evidence may be taken in English

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Any particular question and answer may be taken down

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl. (4)]

11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it together with the decision of the Court thereon.

Questions objected to and allowed by Court

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

Where no objection is taken—If evidence has been admitted *without objection* in the Court of first instance, it must not be rejected by the appellate Court (e)

12. [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Remarks on demeanour of witnesses

Remarks on demeanour of witnesses—See the undermentioned case (f)

13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length, but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such

Memorandum of evidence in unappealable cases

(e) *Chinnai v Dinkur* (1887) 11 Bom 30
Bodhnarain v Omrao (1890) 13 M I A 519 5-2

(f) *Emperor v C Dunn* (192) 44 All 401,
66 I C 100 (22) A 4 107 [a criminal case]

O. 18, rr. 13-16 memorandum shall be written and signed by the Judge and shall form part of the record.

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r. 3, cl (4)]

14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, *he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court*

Judge unable to make such memorandum to record reasons of his inability

(2) Every memorandum so made shall form part of the record.

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r. 3 cl (4)]

15. [S. 191.] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it

Power to deal with evidence taken before another Judge

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

16. [S. 192.] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Power to examine witness immediately

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (4)]

Notice—For form of notice see App H form No 6

17. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit

Court may recall and examine witness

18. [New] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise

Power of Court to inspect

View by Judge—This rule does not entitle a Judge to put his own view on inspection in the place of evidence. Thus in an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's the conclusion of the Judge on a view by him of the two articles—such as two rival omnibuses that the defendant's article is calculated to deceive is not sufficient by itself to support an injunction. The Judge must be satisfied by independent evidence that there is at least a reasonable probability of deception (g)

ORDER XIX

Affidavits

1. [S. 194] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the Court thinks reasonable

Power to order any point to be proved by affidavit

O. 18, rr. 13-16 memorandum shall be written and signed by the Judge and shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court

Judge unable to make
a memorandum to re-
cord reasons of his inability

(2) Every memorandum so made shall form part of the record

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3 cl (4)]

15. [S. 191.] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it

Power to deal with evi-
dence taken before another
Judge

(2) The provisions of sub rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

16. [S. 192.] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided

Power to examine witness
immediately

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit

Chartered High Courts—This rule so far as it relates to the manner of taking evidence does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49 r 3 cl (4)]

Notice—For form of notice see App H form No 6

17. [S 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit

Court may recall and examine witness

18. [New] The Court may at any stage of a suit inspect any property or thing concerning which any question may arise

Power of Court to inspect

View by Judge—This rule does not entitle a Judge to put his own view on inspection in the place of evidence. Thus in an action of deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's the conclusion of the Judge, on a view by him of the two articles—such as two rival omnibuses, that the defendant's article is calculated to deceive is not sufficient by itself to support an injunction. The Judge must be satisfied by independent evidence that there is at least a reasonable probability of deception (g)

ORDER XIX

Affidavits

1. [S. 194] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable

Power to order any point to be proved by affidavit

O. 19,
rr. 1-3

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent

Power to order attendance of deponent for cross-examination

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs

3. [S. 196.] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated

Matters to which affidavits shall be confined

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same

Grounds of belief—The grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief (h)

ORDER XX

Judgment and Decree

O. 20, r. 1

1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders

Judgment when pronounced

See s 33 above

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)].

Evidence taken before another Judge—As a general rule judgment must be given upon evidence taken by the Judge before himself, and not upon evidence taken before another person (i) In the three following cases the Judge may give judgment upon evidence recorded by some other Judge or person —

- (1) Under O 18, r 15, when the Judge who has heard the evidence is prevented by death, transfer or other cause from concluding the trial of the suit
- (2) Under O 26, r 1, where the evidence has been taken by a *commissioner of a witness residing within the jurisdiction who is exempted under the Code from attending the Court or is unable to attend from sickness or infirmity*
- (3) Under O 26, r 4, where the evidence has been taken by a *commissioner of a witness residing beyond the jurisdiction and of other persons specified in the rule*

Notice to parties—Notice should be given in the manner prescribed by s 140 A judgment delivered without notice to parties is not a judgment pronounced within the meaning of this rule (j)

Judgment not pronounced—A judgment not pronounced in Court does not operate as a judgment, it operates only as minutes or memoranda made by the Judge who wrote it (k) The posting of a notice on the notice board of the Court announcing the result of a case is not a sufficient compliance with this rule (l)

Non compliance with rules 1, 2 and 3—Where a judgment is not pronounced, dated, or signed in conformity with the requirements of the Code, it constitutes a mere irregularity within the meaning of s 99, it affords no ground for reversal in appeal of the decree based on it (m)

2. [S. 199.] A Judge may pronounce a judgment written but not pronounced by his predecessor.

Power to pronounce judgment written by Judge's predecessor

Chartered High Courts This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)] The High Court of Bombay has held that where a Judge of the High Court dictates his judgment to a shorthand writer but does not see or approve the transcript, the transcript cannot be treated as his judgment, but a letter from him to the Prothonotary stating his final decision and the exact order made and asking that it should be communicated to the parties in Court may be treated as a judgment although it gives no reasons (n)

Written by his predecessor.—A Judge may pronounce a judgment written by his predecessor who has heard the evidence even though it was written after retirement or transfer and after he had left the judicial post he occupied when he heard the

(i) *Narankhai v Naroshankar* (1867) 4 B H C A C 98

(j) *Kharak v Lachman* (1905) 47 All 332 86 I C 869 (25) A A 293

(k) *Mahomed Akil v Asadunissa* (1867) 9 W R 1 (F B)

(l) *Nagiah v Seethamma* (1921) 41 Mad L J

385 65 I C 8 (21) A M 620 *Das Dahi v Hargovan* (1906) 39 Bom 455

(m) *Fort Gloster Jute Manufacturing Co v Chandra* (1919) 46 Cal 978 51 I C 405

(n) *Matheran Steam Light Tramway Co, Ltd v Lang* (1907) 51 Bom 261, 100 I C 941 (27) A B 113

O. 20,
rr. 2-4

evidence (o) The fact that the transferred officer himself pronounces the judgment does not make any difference (p)

May pronounce.—The word “may” leaves a Judge the option to pronounce a judgment according to his own view of the case though it may be different from the judgment written by his predecessor who heard the case (q).

Non-compliance with rules 1, 2 and 3.—See notes to r 1 above under the same head

3. [S. 202.] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

Judgment to be signed

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Shall not afterwards be altered.—A decree cannot be altered by a Court even with the consent of parties except in the modes prescribed by this rule (r) Where a District Judge delivered a judgment in open Court, but suspended the issue of the decree pending the production by the plaintiff of a certificate of succession, it was held that it was not competent to the Judge to cancel the judgment and deliver another judgment inconsistent with the first (s) But in a case where a defendant had given a wrong name the Court was entitled to insert the correct name in the decree either under O 1, r 10 or s 151 (t) Where it is held by one Judge that the Court fee paid on a plaint is sufficient, his successor has no power to alter that judgment and hold that it is insufficient (u)

Amendment.—S 152 enables the Court to correct clerical or arithmetical mistakes or errors arising from accidental slips in judgments, decrees or orders

Review.—See s 114 and O 47, r 1

Non compliance with rules 1, 2 and 3 —See notes to r 1 above under the same head

4. [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Judgments of Small Cause Courts

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Judgments of Small Cause Court.—The Madras High Court in one case had held that rule (1) is self contained and should be interpreted literally (t) But even following this ruling a Madras Judge set aside a judgment which clubbed all the issues together and did not give a separate finding on each (u) In a later case the Madras High Court has held that the rule must be read so as to be consistent with s 25 of the Provincial Small Cause Courts Act which confers revisional jurisdiction upon the High Court, and that though a Small Cause Court is not obliged to give reasons, yet the record must be made intelligible so that the High Court can satisfy itself that the decree or order is according to law (x) The Lahore High Court has held that the judgment must convey some indication that the Judge has applied his mind to the evidence on the record (y) and that though the judgment may be reduced to a minimum yet that minimum must be intelligible so as to enable the High Court to satisfy itself that it is according to law (z) The Calcutta High Court has said that if the Judge refers to the evidence and his judgment indicates that he did not consider a material portion of the evidence, the High Court is entitled to interfere (a)

Court invested with Small Cause Court powers.—A Court invested with Small Cause Court powers is governed by sub r (1) and not sub r (2) (b)

Unintelligible judgment.—If a judgment is unintelligible, the appellate Court may set it aside and remand the case to the lower Court for the recording of judgment according to law after hearing afresh the arguments of pleaders (c)

5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit

Court to state its decision on each issue

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Object of judgment.—The proper object of a judgment is to support by the most cogent reasons that suggest themselves the final conclusion at which the Judge has conscientiously arrived That object is defeated by the Judge elaborately recording the fluctuations of his mind from day to day in reference to the witnesses, the evidence, and the arguments It is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties e.g., when it finds a particular signature to be a forgery which both sides admit to be genuine (d)

(v) *K M Koppa v Ilaya* (1932) 42 Mad L J 585 70 I C 791 (3-) A M 360

(u) *Moudeen v Mo deen* (1925) 49 Mad L J 354 90 I C 908 (3-) A M 12 9

(x) *Mariyee v Ponniawamy* (1931) 55 Mad 671, 137 I C 361 (3-) A M 336

(y) *Kundan Lal v Shie Dayal* (1934) 10 Lah L J 214

(z) *Eadri Musir v Shankar Musir* (1931) 7 Luck 506, 136 I C 701 (3-) A O 144

(a) *Moolji v B N Riu Co* (1930) 35 C W N 124 137 I C 445 (3-) A C 257

(b) *Narayan v Bhagu* (1907) 31 Bom 314
Mauve Sa v Ma Uma (1931) 1 Rang 274 76 I C 600 (23) A R 252

(c) *Harbhagwan v Ahmad* (1932) 4 Lah L J 55 (3-) A L 12

(d) *Sri Jaghannadha v Sri Eroo Kulkore* (1876) 31 A 154

O. 20,
rr. 6-8

6. [S. 206, 1st and 2nd paras., S. 221.] (1) The decree shall agree with the judgment it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O. 49, r. 3, cl (5)]

How decrees should be drawn up.—Decrees should be drawn up in such a way as to make them self contained and capable of execution without referring to any other document (e) If a decree or any part of a decree is passed by consent of parties it should always so appear on the face of the decree when drawn up (f)

Sub rule (3).—This sub rule corresponds to s 221 of the Code of 1882

Power to amend decree.—See s 162 and notes thereto

7. [S. 205.] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree

Chartered High Courts.—This rule does not apply to Chartered High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction [O 49, r 3, cl (5)]

Date of decree.—The period of limitation for an appeal from a judgment runs from the date on which it is pronounced, and not from the date on which it is written and signed (g)

8. [New.] Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor, or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge has vacated office before signing decree

(e) *Joytara v. Mahomed* (1882) 8 Cal 975
(f) *Zahiruland v. Lechmi Narayan* (1931) 36 C W. N 612, 131 I C 316, (31) A FC 107

(g) *Sagarmal v. Lochmisharan* (1922) 1 Pat 771, 75 I C 679, (23) A F 129

Chartered High Courts—This rule does not apply to Chartered High Court in the exercise of their ordinary or extraordinary original civil jurisdiction [O 40 r 3, cl (5)]

9. [S. 207.] Where the subject matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement of survey, the decree shall specify such boundaries or numbers

Decree for recovery of immovable property

Decree for possession of land—A decree for possession of land carries with it possession of account books and other papers relating to the management of the land (h)

10. [S. 208.] Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had

Decree for delivery of movable property

Decree for delivery of movable property—This rule contemplates suits for the recovery of specific movable property, referred in arts 48 and 49 of the Limitation Act (i) The decree holder cannot execute the decree without having recourse to the procedure prescribed by O 21 r 31 he has not an option not to take delivery of the property and to fall back upon the money portion of the decree (j)

11. [S. 210.] (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable

Decree may direct payment by instalments

(2) After the passing of any such decree the Court may, on the application of the judgment debtor and with the consent of the decree holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment debtor, or the taking of security from him, or otherwise, as it thinks fit

Order after decree for payment by instalments

(h) *Sri Bharani v. Devasa* (1887) 11 Bom 435
(i) *Murugesu v. Jotharam* (1899) 22 Mad 478

(j) *Bal Mukunda v. Bengali Nagpur Ely* (1907) 55 Cal 26 103 I C 740 (27) A C 650

O. 20, r. 12

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

Inquiry as to mesne profits no longer a proceeding in execution—The provisions relating to mesne profits in the Code of 1882 were contained in ss 211 212 and 244. Those provisions have now been re-cast. The definition of mesne profits is relegated to s 2, cl 12. At the same time an important alteration has been made as regards procedure in determining the amount of mesne profits. Under the Code of 1882, the amount of mesne profits was to be determined in execution proceedings (x) [see C.P.C., 1882, s 244, cls (a) and (b)]. Under the present rule the amount must be determined by the decree and not in execution. An application for ascertainment of mesne profits under this rule is not a proceeding in execution but a proceeding in continuation of the original suit (x). Such an application cannot be dismissed for default under O 9 r 3, for that would involve dismissal of a claim which has already been decreed (y). But the rules as to abatement of suits apply to the application and if the legal representative of a deceased defendant is not joined the suit as against him with regard to the ascertainment of mesne profits will abate (2).

Decree for possession and mesne profits—In a suit for the recovery of possession of immovable property, the plaintiff may claim mesne profits which have accrued due during a period prior to the institution of the suit. He may also claim mesne profits which have accrued due subsequent to the institution of the suit. The decree to be passed in such a case will now be as follows—

- 1 That the defendant do put the plaintiff in possession of the property specified in the schedule annexed to the decree [To this extent the decree is final]

{ That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit [To this extent the decree is final]

- 2 Or [where accounts have to be taken of the mesne profits]—

{ That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit [To this extent the decree is preliminary see s 2, Explan]

- 3 That an inquiry be made as to the amount of mesne profits from the institution of the suit until the point of time specified in cl (c) of the section [To this extent the decree is preliminary] See Sch I, App D, Form No 23

The inquiry referred to above may be held before an officer of the Court appointed in that behalf, who must report to the Court the result of the inquiry. After that is done and the parties are heard on the report, a final decree will be passed in respect of the mesne profits.

Where decree silent as to mesne profit—Where a preliminary decree is silent as to mesne profits, the Court has no power to direct such enquiry by its final decree (a).

(w) Kidarnath v. Anant Prasad (1925) L. A. 188 4 lat 507 88 I C 842 (25) 1 PC 117

(x) Rudra Prasad v. Sarda (1925) 47 All 513 87 I C 3 - 55 A 593 Shanley v. Gangaram (19 51 52 Bom 360 103 I C 734, (25) A B 38 Bhata Ram v. Fozul Jinn (1925) 53 M. 223 20 I C 829 (26) A 1 141 Ammaraju v. Narasimha (19 25) 54 Mad I J 665 109 I C 628 (28) A

M 522

(y)

(1)

(a) Ghulshan v. Ahomatsa (1919) 42 Mad 296 297 51 I C 140 Pakhatuddin v. Official Trustees (1932) 8 Cal 178 190 9 I A 197 207

Decree erroneously directing mesne profits to be ascertained in execution.— If a decree erroneously directs mesne profits to be ascertained in execution, the decree is not for that reason a nullity and the Court of execution is bound to execute it (b)

Mesne profits where no date fixed.—Where a preliminary decree awards possession and mesne profits, but is silent as to the date up to which mesne profits are awarded, the decree holder is entitled to mesne profits up to the date of delivery of possession to him (c).

Joint Hindu family.—This rule applies not only where the plaintiff sues for possession of the *whole* of an immovable property, but also where he sues for possession of a *portion* thereof. But the portion must be a *specified* portion, that is, a portion to the profits of which the plaintiff is *exclusively* entitled. Hence the provisions of this rule do not apply to a suit for partition by a member of a joint Hindu family, for until partition no member is entitled to a *specific* share of the property (d). This does not mean that a member of a joint Hindu family is not entitled in a suit for partition to claim his share of the rents and profits of the joint property from which he may have been wrongfully excluded. He is entitled to such share (e), but the Court in deciding upon his claim must be guided, not by the provisions of this rule, but by the rules of Hindu law relating to partition (f). See notes to r. 18 below.

Procedure.—Where an appellate Court, disagreeing with the lower Court, finds that the plaintiff is entitled to possession, it should pass a preliminary decree for possession and direct an inquiry as to mesne profits; it is not proper merely to remand the case to the lower Court for disposal (g). The Madras High Court has added a clause to this rule as to which see the case in footnote (h).

Mesne profit.—The expression "mesne profits" is defined in sec 2, cl (2), as meaning those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.

The test set by the statutory definition of mesne profits is not what the plaintiff has lost by his exclusion, but what the defendant has, or might reasonably have, made by his wrongful possession. If the person charged has merely let the land to others, the rent which he has received would be the measure of the profits for which he is liable, unless there is evidence that a higher rent could with ordinary diligence have been obtained. But if the wrongdoers cultivate the land themselves, the cultivation profits are the primary consideration, and if it is contended that other and more profitable crops could have been grown, the true test is what the ordinary prudent agriculturist would have grown. So when the person in wrongful possession planted indigo for use in his adjacent factory, and it was proved that the ordinary farmer would have grown sugarcane, wheat or tobacco, the Privy Council assessed mesne profits on the profits of cultivation of these more profitable crops (i). When mesne profits were decreed in respect of land which had been in the wrongful possession of two co zamindars who had granted a lease to a putnidar, the co zamindars were liable for what they actually received from the putnidar, and the putnidar was liable for the profits he actually received and

(b) *Kemgang Swamy v Subbamma* (1930) 53

(c)

(d) *Prithi Pal v Jorahar* (1887) 14 Cal 493 509
14 I A. 37, *Shankar v Hardeo* (1883) 16

(e) Cal 397, 405 16 I A 71

(f)

(g)

(h)

(i)

Interest forming part of mesne profits.—It will be seen from the definition of mesne profits, that mesne profits consist of two items, namely, (1) profits of the property and (2) interest on such profits. Hence if a decree awards mesne profits, but says nothing about interest, that is, interest on the profits, it must be construed as including not only the profits, but the interest on such profits. This was decided by their Lordships of the Privy Council in *Girish Chunder v. Shoshu Shikareswar* (w). Therefore if the decree under rule 12 (1) is silent as to interest the Court passing a final decree under rule 12 (2) can award interest; but if the final decree under rule 12 (2) does not award interest the Court of execution cannot go behind the decree and award interest and the judgment creditor's remedy is by way of appeal from the decree (x). If the profits were payable from month to month, the interest thereon would be calculated month by month, and if they were payable from year to year, the interest would be calculated year by year. Calculating in this manner, the interest on the profits must be allowed up to the date of ascertainment of the aggregate amount of mesne profits (y), but in no case should it be allowed for a period longer than three years from the date of the decree (z). The reason is that the item of interest we are now considering forms an integral part of "mesne profits," and since mesne profits cannot be allowed for a period longer than three years from the date of the decree, so also the interest forming part thereof cannot be allowed for a longer period. It must not, however, be supposed that because "mesne profits" are defined as meaning "profits" plus "interest on such profits," therefore the Court must always allow interest on such profits. Mesne profits, as stated above, are in the nature of damages which the Court may award according to the justice of the case. And since the item of interest now under consideration forms part of mesne profits, it is equally in the discretion of the Court whether to allow such interest or not (a). For the same reason, the Court may, while allowing the claim for interest, direct the interest to be calculated not month by month or year by year, but in a manner less advantageous to the plaintiff. The mode of calculation indicated in the beginning of this paragraph applies only to those cases where the decree is silent as to the mode in which interest is to be calculated.

After the aggregate amount of mesne profits is ascertained, the plaintiff may apply to the Court for final decree for the amount so ascertained, and for interest on that amount, and the Court may award interest at such rate as it thinks fit (b). The date from which interest may be allowed is the date of the preliminary decree, and not the date on which the amount is ascertained (c). The rate of interest allowed is usually 6 per cent (d). See sec. 34.

Application for ascertaining future mesne profits.—The right to apply for ascertainment of future mesne profits arises not on the date of the decree directing an inquiry as to such profits, but on the happening of any one of the three events specified in sub rule (1) (e) (e). The application is an application in the suit, and if the suit is pending the law of limitation does not apply (f).

Notice through Court.—The notice of relinquishment of possession should be given through the Court. But where a judgment debtor gives such notice directly to

- (w) (1900) 27 Cal 951, 967, 27 I.A. 110, *Narpat Singh v. Har Gyan* (1903) 25 All 275. *Lalla Prasad v. Sri Ganeshji* (1922) 44 All 579, 67 I.C. 219 (2.) A.A. 117.
- (x) *Pankaj v. Ram* (1931) 54 Mad 955, 135 I.C. 305, (31) A.M. 650 F.B.
- (y) *Narpat v. Har Gyan* (1903) 25 All 275. *Ladharam v. Surnomoyi* (1903) 30 Cal 506.
- (z) (1900) 27 Cal 951, 969, 27 I.A. 110 *supra*.
- (a) (1900) 27 Cal 951, 969, 27 I.A. 110, *supra*.

- (b) *Girish Chunder v. Sanj Sekharswar* (1906) 33 Cal 329, 334, 335.
- (c) *Sri Ganeshji v. Lalla Prasad* (1924) 22 All L.J. 768, 82 I.C. 312, (24) A.A. 801.
- (d) *Patilla Bhuvan v. Chandra Mohun* (1908) 12 C.W.N. 285, 34 Cal 954.
- (e) *Harakhpan v. Jagdeo* (1925) 4 Pat 57, 84 I.C. 272, (25) A.P. 781.
- (f) *Bhotu Lam v. Foyal Lam* (1926) 5 Pat 223, 92 I.C. 629, (26) A.P. 141, *Shankar v. Anaram* (1928) 52 Bom 260, 109 I.C. 734, (28) A.B. 236.

O. 20, r. 12 the decree holder, and the latter does not object that it should be sent through the Court, he is not entitled to mesne profits after the date of the notice (g)

"Three years from the date of the decree"—"Decree" means a decree capable of execution. Thus if an appeal is preferred from a decree for mesne profits and the decree is confirmed in appeal, the period of three years is to be computed from the date of the appellate decree (h). Similarly, if a decree for mesne profits is taken to the Privy Council and is confirmed, the period of three years is to be counted from the date of the King's order in Council (i). See notes to s. 36, "What decree may be executed."

When a decree awards possession with mesne profits to be ascertained in an inquiry but specifies no time down to which mesne profits are to be computed, the decree cannot be construed as giving mesne profits for a period longer than three years from the date of the decree (j). The plaintiff therefore is not entitled to mesne profits for more than three years from the date of the decree, though possession was not delivered to him until after the expiration of the three years: note the words "whichever event first occurs" in sub r. (1), cl. (c). But in no case can mesne profits be awarded to the plaintiff for any period subsequent to an offer by the defendant to restore him possession (k).

Limitation.—As regards mesne profits accrued due prior to the institution of the suit, the defendant is only liable for the mesne profits accrued due during the three years before the date of the suit. A claim for mesne profits during a period preceding the three years next before the date of the suit is barred under the Limitation Act, 1908, s. 1, art. 109 (l).

Court fee.—Where in a suit for recovery of immovable property and for mesne profits antecedent to as well as subsequent to the institution of the suit the decree directs the profits to be ascertained in execution, the Court fee is payable with respect to the claim for such profits, but the fee cannot be claimed until the amount actually due on account of the profits has been ascertained (m).

Burden of proof.—The burden of proving the amount of mesne profits actually received is on the person who has received them, while that of proving the amount of profits that might with ordinary diligence have been received is on the person claiming them (n).

Order supplementing preliminary decree.—Where, after the passing of a preliminary decree, the Court determines the period and the mode of payment of the profits, the order is appealable as such (o). See

Appeal.—Under the Code of 1882 [s. 244] the amount of mesne profits was determined in execution proceedings, and the decision determining mesne profits, being a decree, was appealable as such. Under the present rule

(f)

(g)

- (k) *Raja Sashikanta v. Raja Sarat Chandra* (1921) 54 Cal. L.J. 415 428 429 70 I.C. 6, (21) A.C. 609
(l) *Kishanand v. Iqbal Karam* (1884) 10 Cal. 785 11 I.A. 68 *Abbas v. Fasih ud din* (1897) 24 Cal. 415

(p)

Mesne profits and jurisdiction—See notes to s 6 and s 39.

Res judicata.—See note under s 11—‘When Explanation V applies’ at p 85. Where after the passing of a preliminary decree under this rule the plaintiff applies in execution for ascertaining the mesne profits, wrongly believing that such profits are to be ascertained in execution proceedings, and the application is dismissed, the dismissal does not operate as *res judicata* so as to bar a subsequent application in the suit for ascertaining the mesne profits (q)

13. [S. 213.] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Judicature Act, 1875, s 10—The words of the present rule are almost the same as s 10 of the Judicature Act of 1875

Administration suit—Where a person dies leaving a will, his estate is administered by his executor, and where he dies intestate, it is administered by his administrator. The administration of the estate of a deceased person consists, first, in paying his funeral expenses, next his debts, and then the legacies under his will (if any). The residue of his estate is then divided among the *residuary legatees* under his will or amongst his heirs if he has left no will. In an administration suit, the Court takes upon itself to a large extent the functions of an executor or administrator, and administers the estate of the deceased. When an administration decree is made the Court has power to transfer to itself any suit that may be outstanding, but such suit should not be stayed if it would not lead to economy of administration (r). The Court usually insists on a formal administration decree being made before it proceeds in effect to administer the estate by passing orders for sale and so on (s)

(q) *Pamachandra v Sri Paja Bhujanga* (1924) 46 Mad LJ 46 79 IC 635 (24) AM 473

(r) *Benaridas v Sreemully Anjuna* (1933) 37

C W N 1078, (34) A C 33

(s) *Grimault and Co v Indji* (1930) 31 LR 414 125 IC 910, (21) A J 44

O. 20, r 13 The following persons may maintain an administration suit —

- (1) A creditor of the deceased, when his claim is not paid off by the legal representatives of the deceased (i)
- (2) A legatee, whether specific or pecuniary, where the legacy is not paid to him by the legal representatives of the deceased
- (3) The next of kin of the deceased, for their share in the estate of the deceased
- (4) An executor or administrator, when there are disputes amongst the legatees or next of kin as to the amount of the property left by the deceased and the amount to which the legatees or next of kin are entitled

Forms of plaint in administration suit—See Sch I, App A, forms Nos 41 to 43.

Preliminary decree—This rule provides that in an administration suit, the Court shall pass a *preliminary decree* before passing the final decree, directing accounts to be taken and inquiries to be made. There are thus two distinct stages in the suit and in the preliminary stage the suit can only be dismissed on the ground that there is no cause of action or that the suit is premature (u). For forms of preliminary decree, see Sch I, App D, forms Nos 17 and 19, and for forms of final decree, see forms Nos 18 and 20.

Insolvent estate—Sub rule (2) provides that when it appears in an administration suit that the estate of the deceased is insolvent the rules laid down in the Presidency Towns Insolvency Act, 1909, as to Presidency towns, and in the Provincial Insolvency Act, 1920, as to the other parts of British India where that applies, shall apply so far as regards (1) the respective rights of secured and unsecured creditors (2) debts and liabilities provable, and (3) the valuation of annuities and future and contingent liabilities. Note that this sub rule does not apply all the rules and principles of insolvency to insolvent estates, but only the rules in respect of the three heads enumerated above (v).

Rights of secured creditors under the Presidency Towns Insolvency Act—See s. 48 of the Act, and cls 9 to 17 of Sch II to the Act.

Rights of secured creditors under the Provincial Insolvency Act—See s. 47 of the Act.

Debts and liabilities provable under the Presidency Towns Insolvency Act—See sections 46 and 48 and Schedule II of the Presidency Towns Insolvency Act, 1909.

Debts and liabilities provable under the Provincial Insolvency Act—See ss. 45 and 46 of the Act.

Suit to recover assets improperly applied by Administrator General—This section does not apply to a suit brought by a creditor of the deceased against the Administrator General (to whom letters of administration have been granted) and against other creditors of the deceased to recover assets alleged to have been improperly paid by the Administrator General to those creditors in priority to the plaintiff (w).

Effect of decree in administration suit upon prior attachments—A decree in an administration suit is a decree in favour of all creditors of the deceased, and as all of them are included in the same decree it would be inequitable that one should be in a better position than another under that decree. The assets are therefore divided

(i) See *Cooper v Blissett* (1876) 1 Ch D 691, *Warrick v Fryer* (1876) 2 Ch D 109.

(u) *Halakhata Datta v Jad Nath* (1930) 57 Cal 1358, 129 IC 566 (31) A C 45.

(v) *Re D Lynne* (1889) 20 Ch D 417 *Varadachari v Adn Gen. of Madras* (1910) 38 Mad 500 503 2 IC 566.

(w) (1917) 38 Mad 500 2 IC 566 *supra*.

amongst all creditors pro rata. Even a creditor who has obtained an attachment on the state of the deceased prior to the decree in the administration suit is not entitled to priority over the other creditors. An attachment does not create a charge upon the property attached, and the Court will stay all proceedings in execution after the passing of the decree in the suit (x).

14. [S. 214.] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

- (a) specify a day on or before which the purchase-money shall be so paid, and
- (b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption the decree shall direct—

- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect, and
- (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

Difference between the old section and the present rule—This rule corresponds with s. 214 C. P. C. 1882 except in the following particulars—

- 1 The words "whose title thereto shall be deemed to have accrued from the date of such payment" are new. See notes below under those words.
- 2 Sub-rule (2) is also new. See notes below. Sub-rule (2) Rival pre-emptors.

O. 20, r. 14

Pre-emption—The right of pre-emption can only be exercised in respect of immovable property. *A* and *B*, both Mahomedans, are co-sharers of a house. If *B* sells his share to *X* for Rs. 500, *A* is entitled to pre-empt *B*'s share on payment of Rs. 500 that is to say, *A* as co-sharer may require *B* to sell his share to him in preference to *X*. The same rule applies if *A* and *B* are owners of adjoining houses. If *B* refuses to sell his share to *A*, *A* may institute a suit for pre-emption against *B* and *X*. It has been held by the High Court of Allahabad, that if the sale by *B* to *X* has been completed before the date of the suit, *B* having no longer any interest in the property, he is not a necessary party to the suit (y). If a decree is passed for *A*, and if he has not paid the amount of purchase money into Court, the decree should specify a day on or before which the purchase money should be paid into Court. If the amount is paid within the time fixed by the Court, *A* will be entitled to enter into possession of *B*'s share. But if he fails to pay the amount within that time, he will lose the benefit of the decree (z). If a decree is passed for *A* with costs, *A* may pay into Court the purchase money less the costs (a). As to extension of time for payment, see notes below.

It is important to note that the right of pre-emption is a personal right. This leads to the following results—

- 1 If the pre-emptor that is the person entitled to pre-emption, transfers the right to a third party, the right is lost and the transferee cannot maintain a suit for pre-emption (b).
- 2 It is not settled whether if the pre-emptor dies during the pendency of the suit for pre-emption, the right, according to Sunni Mahomedan Law, is extinguished (c), or whether it survives to his heirs or to his legal representatives (d).
- 3 If the pre-emptor transfers the right of pre-emption during the pendency of the suit for pre-emption, the right of pre-emption is lost, and the suit will be dismissed. And even if he obtains a decree and transfers the decree the right of pre-emption will be lost, and the Court will not allow execution of the decree. But if he obtains a decree, and transfers not the decree, but the property which is the subject of pre-emption, the right of pre-emption is not lost and he may execute the decree, though execution will not be allowed to the transferee (e).

"Whose title thereto shall be deemed to have accrued from the date of such payment"—These words have been added to make it clear that the title to the property vests in the plaintiff on payment of the purchase money, and that it is not necessary to complete the title that there should be a document in writing and registered as required by the Transfer of Property Act in the case of a sale of

an instrument of transfer (f)

The plaintiff's title accrues on payment of the purchase money and not from the date of the sale (g). No registered document is necessary to transfer the property (h).

(y)

(z)

(a)

(b)

(c)

20 All 88

(d)

(e)

(f)

463

(g) *And v. Wal* (1921) 5 Lah 466 65 I C

182 (25) A L 20.

(h) *Don Lal v. Harpal* (1929) 27 All L J 423.

116 I C 113 (29) A A 237

from the date of payment, though he cannot obtain possession by reason of the defendant being himself in possession in another capacity (i), or by reason of a usufructuary mortgagee being in possession (j)

Mesne profits—Upon a pre-emption decree the property and the right to mesne profits therefrom vest in the pre-emptor only from the date when he pays the amount of the purchase price finally decreed, until that time the original purchaser retains possession and is entitled to the rents and profits (k)

Extension of time for payment into Court—The High Court of Allahabad has held that a plaintiff who has obtained a decree can appeal within the period of limitation, whether or not he has made the payment on or before the day fixed (l). The mere filing, however, of an appeal does not operate as an extension of the time for payment (m). The time for payment (n) is extended. See notes to s 148, "

Sub rule (2) Rival pre-emptors—Sub r (2) prescribes the form of decree to be passed when there are rival pre-emptors. It is based upon the undermentioned rulings of the Allahabad High Court (p)

Pre-emption under the Mahomedan law—The Mahomedan law is the only system prevalent in British India which provides substantive rules relating to the right of pre-emption in a systematic form (q). The Manomedan law of pre-emption is applied by the Courts of British India to Mahomedans except in the Madras Presidency, the Punjab and Oudh. In the Madras Presidency, the right of pre-emption is not recognised by the Courts even as between Mahomedans, on the ground that it places a restriction upon liberty of transfer of property and is therefore opposed to equity and good conscience (r). Pre-emption in the Punjab is regulated by the Punjab Laws Act, 1872, and, in Oudh by the Oudh Laws Act, 1876. See Mulla's *Principles of Mahomedan Law*, "10th Ed, pp 158-162

Pre-emption by custom—The Sunni Mahomedan law of pre-emption applies by custom to Hindus in Behar (s) and Gujerat (t)

Pre-emption by contract—A right of pre-emption is occasionally given in mortgage deeds to the mortgagee, so that in case of a sale of the equity of redemption by the mortgagor, the mortgagee shall have the refusal of the property, and in such a case the price may or may not be fixed beforehand (u)

Vendor's title in pre-emption suit—A pre-emptor is not entitled in a pre-emption suit to put the vendor to proof of his title to the property which he purports to sell. The reason is that the principle of pre-emption is substitution. A pre-emptor is therefore bound to take the title which the vendee was ready to take (v)

(i) *Sita Ram v. Madho* (1914) 12 All. L. J. 521, 31 C. 876

(j) *Raghur Singh v. Jodha Singh* (1923) 45 All. 482, 31 C. 646, (23) A. A. 507

(k) *Deekinandan v. Sri Ram* (1890) 12 All. 234, *Deonandan v. Ramdhari* (1917) 44 I. A. 80, 44 Cal. 675, 39 I. C. 958

(l) *Kodai Singh v. Jauri Singh* (1891) 13 All. 376, *Hazir Khan v. Kale Khan* (1894) 16 All. 176, *Jaggur Nath v. Jokhu* (1896) 18 All. 23, 2-6

(m) (1896) 18 All. 223, 2-6, *supra*

(n) *Iarshadi Lal v. Ram Dial* (1880) 2 All. 774

(o) *Girdhari Singh v. Bhupal Singh* (1903) 45

All. 456, 74 I. C. 145, (23) A. A. 516

(p) *Kashi v. Mukhta* (1884) 6 All. 37, *Hulast v. Sheo Prasad* (1884) 6 All. 455, *Ajaub Nath v. Mathura* (1889) 11 All. 164

(q) *Zamir v. Daulat Pans* (1883) 5 All. 110, 113

(r) *Ibrahim v. Muni Mir* (1870) 6 M. H. C. 26

(s) *Fakir v. Emambulsh* (1863) B. L. R. Sup. Vol. 30, *Judu Lal v. Janki Koer* (1908) 30 Cal. 50

(t) *Gordhandas v. Prankor* (1869) 6 B. H. C. A. C. 63

(u) *Orby v. Trigg* (1721) 9 Modern 2

(v) *Sahodra v. Bageshwari* (1915) 37 All. 529, 23 I. C. 1000

O. 20,
rr. 15, 16

15. [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court, before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit

Decree in suit for dis-
solution of partnership

Preliminary decree directing accounts to be taken—The preliminary decree directing accounts to be taken should always contain a declaration of the rights of the parties and it should be in form No 21 Sch I, App D (w). After the accounts are taken, a final decree is passed directing that the partnership assets be applied, first in payment of the partnership debts, next, in payment of the costs of the suit and lastly, in payment to each partner of the amount found due to him on taking the accounts. If it turns out on taking the accounts that there is a balance due to the defendant, a decree may be passed in favour of the defendant (x). See Sch I App D form No 22

Appeal—A preliminary decree in a suit for the dissolution of a partnership or the taking of partnership accounts is appealable under s 96. But the appeal must be filed within the period prescribed by the law of limitation. If no appeal is preferred within the period of limitation the party aggrieved by such decree is precluded by virtue of the provisions of s 97 from disputing its correctness in an appeal from the final decree. See s 97 and notes thereto

Letters Patent appeal—Where a commissioner appointed to take accounts applies to the Court for directions and an order is made giving the directions the order being merely one regulating procedure and not a final adjudication of the rights of the parties, is not a "judgment" within the meaning of cl 13 of the Letters Patent of the High Court of Rangoon and is not appealable as such (y)

16. [S. 215 A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit

Decree in suit for account
between principal and
agent

Shall pass a preliminary decree directing accounts—If the fact

passing a preliminary decree directing an account to be taken the Court must be satisfied that the agent is liable to account (b)

- (w) *Thirukumaresa v Subbaraya* (1897) 20 Mad 315
(x) *Don Charan v Bulsai* (1904) 22 All L J 83 831 C 880 (24) A 4 54
(y) *Yeo Keng v Eong Seng & Co* (1924) 2 Rang 46 841 C 31 (25) A R 43
(z) *Rajhu ad v Ganpatji* (1900) 27 All 473

- (a) *Hirronath v Krishna Coomaz* (1887) 13 I A 123 14 Cal 147 1 Ill (wappa v Iellayappa) (1870) 53 Mad 470, 14 J C 7, (30) A M 721
(b) *Bharat Chandra v Kisan Chandra* (1925) 8 Cal 700 99 I C 944 (25) A C 1069.

Whether decree can be passed in favour of defendant—In a suit for account between principal and agent a decree can, if necessary, be passed in favour of the defendant on payment of the necessary Court fee (c) See notes to r 19 below

Appeal—See notes to r 15 above, 'Appeal'

Stay of proceedings—Where an appeal is pending against a preliminary decree, the Appellate Court may make an order under O 41, r 5, staying the inquiry into accounts pending the hearing of the appeal (d) See notes to O 41, r 5, 'Stay of proceedings under a decree'

17. [Ncu] The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised

Special directions as to accounts

Decree in suit for partition of property or separate possession of a share therein

18. [Ncu] Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector, deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

Receiver not rendered *functus officio*—A receiver appointed in a suit for partition does not after the passing of the decree under sub rule (1) become *functus officio* as regards agricultural land comprised in the suit. The Court may therefore grant an interim injunction restraining a party from interfering with the receiver's possession (e) See s 54 and notes thereto

(c) *Parmanand v Jagat* (1910) 32 All 525 61 C 163

(d) See *Balakrishnan v Khugnu* (1904) 31 Cal 722

(e) *Shankar Das v Behari Lal* (1935) 6 Lah 412 291 C 93 (20) A L 415 reversing (1935) 7 Lah L J 4 261 C 244 (25) A L 35

O. 20,
rr. 18, 19

"Giving such further directions"—These words are wide enough to include a direction for an inquiry into future mesne profits. But under the rule the direction should be in the preliminary decree. If no such direction is included in the preliminary decree, the Court has no power to direct an inquiry into future mesne profits by its final decree (f).

Joint Hindu family—In a suit for partition of joint Hindu family property, the property not being of the kind referred to in sub rule (1), a preliminary decree may be passed as provided by sub rule (2) (g), and for the purpose of working out the preliminary decree and adjusting the shares, the final decree may give one co parccener a charge over the share of another as an alternative to depriving a co parccener of some property (h). See notes to r 12 above 'Joint Hindu family'.

19. [S. 210.] (1) Where the defendant has been allowed a set off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set off had been claimed.

Appeal from decree relating to set-off

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

Appeal from decree relating to set off—This rule corresponds with s 216 of the Code of 1882 except as regards the provision as to the Court to which an appeal should lie from a decree passed in a suit in which a set off is claimed. The second paragraph of s 216 ran as follows —

"The decree of the Court with respect to any sum awarded to the defendant shall have the same effect and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff."

The present rule provides that appeals from decrees relating to set off shall lie to the Courts to which appeals in respect of the original claim would lie.

Decree for defendant where set off is claimed—It has been held by the Allahabad High Court that in a suit by a principal against his agent for accounts, the Court can grant a decree to the agent for the amount found due to him on the taking of accounts between the parties (i). The ground on which the decision is based is that a suit for accounts against an agent necessarily involves an undertaking by the principal to pay to the agent any sum that may be found due to him. Commenting on this case Phillips, J, in a Madras case (j) said "Thus, I think, is taking a

(f) *Ghuluzam v Ahamed* (1919) 47 Mad 298
81 I C 149

(g)

(h)

(i)

5-5 61 C 303 See also *Ram Chandra v. Baliga* (1924) 2 All L J 35 83 I C 800 (23) A A 234
(j) *Varad v. Ram* (1919) 42 Mad 83 830, 53 I C 234 (the defendant's claim for excess was in the case dismissed)

somewhat large view of the intention of a plaintiff in such a suit, for it could rarely be his intention to bring a suit in order that a decree might be given against him." But the Calcutta High Court has held that in a suit for an account the defendant may even claim an equitable set off on payment of Court fee (1). See notes to O 8, r 6.

20. [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court and at their expense.

Certified copies of judgment and decree to be furnished

ORDER XXI.

Execution of Decrees and Orders.

Of execution of decrees in general.—The present order is the longest Order in the whole Schedule. It consists of 103 rules. It is proposed here to give a summary of these rules, and at the same time a description of the different modes of execution, and the procedure to be observed. The references to the rules given in this summary are to the rules of the present Order.

A obtains a decree against *B* for Rs 5,000. Here *A* is the decree holder, *B* is the judgment debtor, and Rs 5,000 is the judgment debt. If *B* fails to satisfy the decree *A* may apply for execution of the decree against *B* a person, or against his property or both (r 30). But the Court may, in its discretion, refuse execution at the same time against the person and property of the judgment debtor (r 21). Execution against the person of the judgment debtor consists in arresting him and detaining him in jail. Execution against the property of a judgment debtor consists in attaching and selling his property, and paying the decree holder the amount of the judgment debt out of the sale proceeds.

Application for execution.—All proceedings in execution are commenced by an application for execution (r 10). The application for execution must be in writing [r 11 (2)] and should contain the particulars set forth in rr 11 (2) to 14. The only exception is where the decree is for the payment of money and the judgment debtor is in the precincts of the Court when the decree is passed, in which case the Court may order immediate execution on the oral application of the decree holder at the time of passing the decree [r 11 (1)]. If the application complies with the requirements of rr 11 (2) to 14, the Court will direct execution to issue (r 24). If he does not, the Court may reject it, or may require it to be amended (r 17). If the application is rejected, the decree holder may present another application properly framed.

Who may apply for execution.—The application for execution must be made by the decree holder. If the decree is transferred by the decree holder, the transferee may apply for execution (r 16). If the decree has been passed jointly in favour of more persons than one, any one of such persons may apply for execution (r 15). If the decree holder is dead, his legal representative may apply for execution (r 16).

Against whom execution may be applied for.—If the judgment debtor is living execution will be applied for against him. If he is dead, execution may be applied for against his legal representative. In the latter case, the decree may not be executed against the person of the legal representative, but only against the property of the

(1) *Surendra v Ashutosh* (1931) 35 C W N 17, 132 I C 195, (31) A C 358, *Surendra*

Nath v Atul Chandra (1917) 34 Cal 892.

O. 21

judgment debtor which has come to the hands of the legal representative and has not been duly disposed of by him (s 50) As to notice to the legal representative, see the next paragraph

Notice before ordering execution.—The law does not require any notice to be issued to the party against whom execution is applied for, except in the following two cases —

- 1 Where the application for execution is made more than one year after the date of the decree or more than one year after the date of the last order made on any previous application for execution
- 2 Where execution is applied for against the legal representative of the judgment debtor

In these two cases the Code provides that "the Court executing the decree *shall* issue a notice (r 22) There is one case in which it is *discretionary* with the Court to issue a notice before making an order for execution, and that is where the decree is for money and execution is sought against the *person* of the judgment debtor (r 37)

Execution against person of judgment debtor.—

(i) *Decrees for the payment of money*.—A obtains a decree against B for Rs 5 000 and costs [This is a money decree] B fails to pay the amount of the judgment debt, A applies for execution of the decree against B *a person* [r 11 (2), cl (i)] The decree being a money decree, the Court *may*, instead of issuing a warrant for B's arrest, issue a notice calling upon him to appear and show cause why he should not be committed to the civil prison in execution of the decree (r 37) If B appears and satisfies the Court that he is unable to pay the amount of the decree from poverty or other sufficient cause and if there are no circumstances which disentitle B to the indulgence of the Court, the Court may make an order disallowing A's application for B's arrest and detention [r 40 (1)] If B does not appear, the Court may make an order committing B to prison [r 40 (5)]

Where a warrant of arrest is issued, it should be executed by an officer of the Court appointed in that behalf (rr 24 25) If when the officer goes to execute the warrant B offers payment of the amount of the judgment debt (which must always be specified in the warrant), the officer should receive the payment and the warrant should not then be executed (r 38) But if no payment is made, B should be arrested and brought before the Court as soon as practicable (s 55) If no notice was issued prior to his arrest under r 37, it is open to B to show that he is unable to pay the amount of the decree from poverty or any other sufficient cause [r 40 (1)] If the Court is satisfied that B is unable to pay the amount of the decree from poverty or any other sufficient cause and if there are no other circumstances which would disentitle B to the indulgence of the Court, the Court will make an order directing B's release [r 40 (1)] Otherwise the Court will make an order committing B to prison [r 40 (5)] The prison will be a civil prison (s 55), and the term of detention in prison is six months if the amount of the decree exceeds Rs 50, and six weeks if the amount of the decree does not exceed Rs 50 (s 58). If while in prison, B pays the amount mentioned in the warrant to the officer in charge of the prison, or the decree is otherwise fully satisfied, as by attachment and sale of the property he will be released from detention (s 58) Otherwise he will be detained in prison until expiration of the term of his detention unless the decree holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment debtor A judgment debtor released from detention in any one of the above cases cannot be re-arrested in execution of the same decree [s 58 (2)], though the judgment debt has remained unpaid Thus does not mean that his liability to pay the debt ceases, for the decree still subsists, and A may yet execute the decree against B's property [s 58 (2)], though not against his person

No woman can be arrested in execution of a money decree [s 56]

(ii) *Decrees other than those for the payment of money*—A judgment debtor may be arrested and imprisoned not only in execution of a decree for the payment of money, but also in execution of other decrees (rr 31, 32, 33). The procedure to be followed in these cases is as follows. If the application is in proper form, the Court will issue a warrant for arrest of the judgment debtor (r 24). If the judgment debtor is arrested in execution of the warrant, he must be brought before the Court "as soon as practicable" (s 55). The Court will then make an order committing him to the civil prison. If, while in jail, the decree is fully satisfied, he will be released from detention [s 58 (1)], otherwise he will be detained in prison until expiration of the term of his detention unless the decree holder requests the Court to release him from detention, or omits to pay the subsistence allowance of the judgment debtor as provided by r 39.

Execution against property of judgment debtor—This subject may be considered under two heads namely (1) attachment, and (2) sale. The rules relating to attachment may be stated first and then the rules governing sale, for attachment precedes sale. Attachment is levied and the sale of the property attached is effected by an officer of the Court under a warrant issued from the Court.

Before considering the rules relating to attachment and sale, it is to be observed that there are certain kinds of property which are not liable to attachment or sale in execution of a decree. These are described in s 60. Subject to these exceptions all saleable property which belongs to the judgment debtor, or over which he has a disposing power which he may exercise for his own benefit is liable to attachment and sale in execution of a decree against him (s 60).

I Attachment—Attachable property belonging to a judgment debtor may be divided into two classes (1) movable and (2) immovable.

As to attachment of movable property—See rr 43 to 53.

Attachment of immovable property—If the property be immovable the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such transfer or charge. The order must be proclaimed at some place on or adjacent to the property and a copy of the order is to be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house (r 54).

Where an attachment has been made any private transfer of the property attached whether it be movable or immovable is void as against all claims enforceable under the attachment (r 64).

If a claim is preferred to any property attached in execution of a decree by any person other than a party to the suit, the procedure prescribed by rr 58 to 63 must be followed. If any questions arise in the course of execution proceedings between the parties to the suit, or their representatives they should be dealt with under s 47.

If during the pendency of the attachment the judgment debtor satisfies the decree through the Court, the attachment will be deemed to be withdrawn (r 55). Otherwise the Court will order the property to be sold (r 64). If the property attached is current coin or currency notes the Court may direct payment to the decree holder in satisfaction of his decree (r 56) for it is not necessary to sell coin or currency notes.

II Sale of attached property—If the property attached be movable property which is subject to speedy and natural decay it may be sold at once (r 43). Every sale in execution of a decree should be conducted by an officer of the Court except where the property to be sold is a negotiable instrument or a share in a corporation which the Court may order to be sold through a broker (r 76).

O. 21

After the property, whether movable or immovable, is attached, the first step to be taken with a view to its sale is to cause a proclamation to be made, stating the time and place of sale, and specifying the property to be sold, the revenue (if any) assessed upon the property, the encumbrances (if any) to which it is liable, the amount for the recovery of which the sale is ordered and such other particulars as the Court considers material for a purchaser to know in order to judge of the nature and value of the property (r 66) No sale should take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property calculated from the date on which a copy of the proclamation has been fixed on the Court house of the Judge ordering the sale, unless the judgment debtor consents in writing to the sale being held at an earlier date (r 68) The Court may in its discretion adjourn the sale from time to time, but if the sale is adjourned for a longer period than seven days a fresh proclamation should be made, unless the judgment debtor consents to waive it (r 69)

It is important to note that no holder of a decree, in execution of which property is sold, can bid for or purchase the property without the express permission of the Court (r 72)

Irregularity in the conduct of sale of attached property—No sale of immovable property can be set aside on the ground of irregularity in publishing or conducting the sale unless upon the facts proved the Court is satisfied that the party seeking to set aside the sale has sustained substantial injury by reason of such irregularity (r 90) As regards *movable property*, the rule is that a sale of movable property is not liable to be set aside in any case on the ground of irregularity in publishing or conducting the sale The only remedy open to the party who has sustained any injury by reason of such irregularity is to institute a suit for compensation against the person responsible for the irregularity But if such person be the purchaser himself, the party sustaining the injury may sue for the recovery of the specific property and for compensation in default of such recovery (r 78)

Disposal of sale proceeds—The sale proceeds of property sold in execution of a decree are applied in the manner prescribed by s 73

Resistance to delivery of possession to purchaser—Where immovable property is sold in execution of a decree, and the purchaser is resisted or obstructed in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction The Court will thereupon fix a day for investigating the matter, and summon the party against whom the application is made to appear and answer (rr 97 103)

Payment under decree

O. 21, r. 1

Modes of paying money
under decree

1. [S. 257.] (1) All money payable under a decree shall be paid as follows, namely —

- (a) into the Court whose duty it is to execute the decree; or
- (b) out of Court to the decree-holder; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

Retrospective effect of rules contained in this Order.—A comparison of this Order with the corresponding Chapter of the Code of 1882 will show that several changes have been introduced in matters of procedure so far as they relate to the execution of decrees. In this connection it is important to note that changes in matters of procedure are retrospective in effect and apply to pending proceedings (l)

"Money payable under a decree"—It is money payable under a decree that may be paid into Court under this rule. The word all does not imply that payment must be of the entire amount. A payment of a portion of the decretal amount is valid to the extent of such payment (m). Costs of an application awarded by an order under s. 35 cannot be said to be money payable under a decree. Hence such costs ought to be paid to the party direct, and not into Court (n).

Where an order has been made for the payment of money into Court on a certain date and the Court is closed on that day, a payment made on the following day is good payment for the purposes of the order (o).

Decree directing payment to decree holder.—Payment into Court is a valid compliance with a decree even though the decree directs payment to the decree holder (p).

When rule does not apply.—This rule does not apply where a decree is by its terms incapable of execution, as where it is provided by a consent decree that if the decretal amount is not paid it may be recovered by suit (q).

Notice of payment into Court.—Sub r. (2) which requires notice to be given to the decree holder where payment is made into Court is new. Payment of the decretal amount into Court operates as a satisfaction of the decree to that extent, though no notice of payment is given to the decree holder as provided by sub r. (2). Similarly where a decree is assigned by the decree holder, and the judgment debtor pays the decretal amount into Court without notice of the assignment, the payment operates as a satisfaction of the decree to that extent, though no notice of payment is given to the decree holder and the assignee is not entitled to execute the decree (r). But where interest is awarded by the decree on the decretal amount, the decree holder is entitled to interest until he receives notice of the payment into Court (s).

2. [S. 258.] (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-

Payment out of Court
to decree holder

holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly

- | | |
|--|---|
| (l) <i>Hazrat Akramnissa v. Fatmunnisa</i> (1894) 18 Bom 429 <i>Balkrishna v. Dnyu</i> (1895) 19 Bom 204 | 596 871 C 560 (25) A M 43 (payment into Court on r. opening day) |
| (m) <i>Goopji v. Namril</i> (1932) 11 Pat 96 141 1 C 29 (33) A 1 89 | (q) <i>Kunj Bihari v. B. nadeshra</i> (1933) 51 All 527 115 1 C 796 (23) A A 20 |
| (n) <i>Shankar v. Secretary of State</i> (1939) 10 Mad 120 | (r) <i>Tata Iron & Steel Co. Ltd. v. Baulgannath</i> (1933) 2 Pat 54 6 1 C 55 (4) A P 118 |
| (o) <i>Aramamudu v. Samiyappa</i> (1894) 21 Mad 385 | (s) <i>Pamaraya v. Sherbati</i> (1919) 42 Mad 576 50 1 C 410 <i>Jangpur Lajanti Bank v. Hrasubuddha</i> (1931) 35 C W N 510 135 1 C 29 (33) A C 111 |
| (p) <i>Hana v. Natu</i> (1911) 35 B 11 35 1 C 99 <i>Sanakaran v. Iaman</i> (1935) 48 Mad 1 J | |

Scope and application of the rule.—This rule provides that—

- (1) where any money payable under a decree of any kind is *paid out of Court*, or
- (2) where a decree is otherwise *adjusted* in whole or in part to the satisfaction of the decree holder,

the decree holder *shall* certify such payment or adjustment to the Court whose duty it is to execute the decree, so that the same may be recorded by that Court

If the decree holder fails to inform the Court of the payment or adjustment, it is open to the judgment-debtor to protect himself from execution of the decree by applying to the Court within 90 days from the date of the payment or adjustment (i) to issue a notice to the decree holder to show cause why the payment or adjustment should not be recorded as certified. If the payment or adjustment is not certified by either party, it shall not be recognised by any Court executing the decree. This will appear from the following

Illustration

A obtains a decree against B for Rs. 2,000. It is subsequently agreed between A and B that A should accept Rs. 1,000 in full satisfaction of the decree. B pays A Rs. 1,000 out of Court, but neither the payment nor adjustment is certified to the Court. A applies for execution of the full amount of the decree notwithstanding receipt by him of Rs. 1,000. B objects to execution on the ground that the decree has been adjusted and payment has been made. The payment, not being certified, cannot be recognized by the Court executing the decree, and the Court must direct execution to issue. It will not avail B that A had agreed to certify the payment to the Court, but has omitted to do so. See notes below under the head 'Fraud'.

History of sub rule 3.—The Codes of 1859 (s. 206) and 1877 (s. 258) provided that a payment or adjustment made out of Court should not be recognized by any Court executing the decree unless it had been certified to that Court. The Code of 1877 was amended in the year 1879 and the amendment provided that an uncertified payment or adjustment should not be recognized by any Court and the same provision occurred in the Code of 1882 (u). In the year 1888, the section was again altered, by providing that an uncertified payment or adjustment should not be recognized by any Court executing the decree, and this is the form in which the rule now stands.

Sub rule (3).—Sub rule (3) provides that an uncertified payment or adjustment shall not be recognized by any Court executing the decree. The words 'by any Court executing the decree' indicate the extent to which an uncertified payment or adjustment should not be recognized by a Court. These words show that the prohibition to take cognizance of an uncertified payment or adjustment is limited to the Court which is called upon to execute the decree. It is in execution proceedings alone that an uncertified payment or adjustment cannot be recognized by a Court. The rule does not prohibit a Court from taking cognizance of such payment or adjustment in proceedings other than execution proceedings. An uncertified payment or adjustment may therefore be recognized by a Court trying a suit for a relief based upon such payment or adjustment (i). This gives rise to the following questions —

1. Whether if the Court orders execution in the case put in the above illustration, B can maintain a suit against A for a declaration that the decree has been adjusted and for an injunction restraining A from executing the decree ?

(i) Limitation Act 1908 Sch. I art. 174

(u) *Haji Abdul Fakhim v. Khaja Khalil Arulh* (1887) 11 Bom. 6 [F. B.]

(v) *Swamirao v. Kashinath* (1891) 15 Bom. 419
Kalyan v. Kamla (1891) 13 All. 339
Ghanasham v. Kashiram (1892) 16 Bom.

509 *Jwar Chandra v. Haris Chandra* (1898) 25 Cal. 718. The operation of sub r. (3) is not excluded because a party proceeds by way of suit instead of proceeding by an application as required by s. 4. *Morvi v. Hasan* (1919) 43 Bom. 240 481 C. 135

O. 21, r. 2

2. Whether if *A* executes the decree notwithstanding the adjustment, and *B*'s property is sold in execution, *B* can maintain a suit against *A* to set aside the sale, on the ground that the decree having been adjusted, *A* ought not to have caused the same to be executed?

3. Whether if *A* executes the decree notwithstanding the adjustment, *B* can maintain a suit against *A* to recover damages for breach of the contract represented by the adjustment? In other words, whether, if *B* is compelled to pay in execution of the decree the full amount of the decree, namely, Rs. 2,000, he is entitled to recover back that sum from *A* as damages for breach of the contract on *A*'s part not to execute the decree?

Each of the suits referred to above would involve recognition of an uncertified adjustment, and *B*'s success in each would depend *inter alia* upon the recognition of such adjustment by the Court trying the suit. Now, it has been made sufficiently clear that the prohibition against the recognition of an uncertified adjustment is confined to Courts executing decrees, and does not extend to Courts trying suits. Therefore a Court trying any of the abovesuits would not be precluded from recognizing the adjustment though the adjustment has not been certified. But this circumstance is not of itself sufficient to entitle *B* to a decree, for in the first two cases there is an initial difficulty in *B*'s way. That difficulty is the bar of s. 47 which enjoins that all questions relating to the "execution, discharge or satisfaction" of a decree shall be determined by the Court executing the decree, and not by a separate suit.

As regards the first question it is quite true that if *B* brought a suit for an injunction restraining *A* from executing the decree, the Court trying the suit would recognize the adjustment though it had not been certified. But the Court cannot try the suit at all for such a suit is barred under s. 47, the principal question in the suit being whether *A* should be restrained from executing the decree. This being a question relating to "execution," cannot be tried in a separate suit (w). Hence the answer to the first question is in the negative.

The answer to the second question is also in the negative and for the same reasons. The suit being one to set aside the sale in execution, the principal question would be whether the proceedings in execution should be set aside and this question is also one relating to "execution" within the meaning of s. 47 and the suit would therefore be barred under that section (x). It is therefore immaterial whether the purchaser at the sale in execution is a stranger or the decree holder himself. There are two cases (y) both prior in date to the Allahabad decision cited above, in which the property was purchased by a stranger, and the suit was to set aside the sale on the ground that the decree had already been satisfied out of Court at the time the sale was held. In both these cases it was held that the person who bought the property having purchased it bona fide at an auction sale, the sale to him could not be set aside. But the question whether the suit was barred was not raised in either of those cases. According to the Allahabad decision cited above, the suit would be barred under s. 47.

The third question stands upon a different footing. The suit therein referred to is one for the recovery of damages for breach of the contract represented by the adjustment. The contract represented by the adjustment was to accept Rs. 1,000 in full satisfaction of the decree, and not to execute the decree for its full amount. If not withstanding the payment to *A* of Rs. 1,000 in pursuance of the adjustment *A* causes the decree to be executed and *B* is compelled to pay the amount of the decree (that

(w) *Atan v Motuk Lal* (1804) 21 Cal 437
Bargul v Bapanna (180-) 13 Mad 302
Jero Bindhu v Hari (1804) 31 Cal 440
Jam Lubhaya v M. J. Jandmal (192-) 3
 Lah 319 37 I C 593 (-) A L 478

[F B]
 (x) *Jaikaran v Raghunath* (1808) 20 All 254
 (y) *Idappa v Rameshchandra* (1807) 21 Bom
 463 *Mofaura Mohan v Ekoy Kumar*
 (1848) 15 Cal 557

is Rs 2 000) in execution, *B* may sue *A* to recover back that amount as damages for breach of the contract not to execute the decree. Such a suit is not barred under sec 47, for the principal question in the suit is not one relating to execution, but to the contract, its breach, and the amount of damages suffered by *B* in consequence of the breach. The answer to the third question is therefore in the affirmative (2). The Court trying the suit will take cognizance of the adjustment, and will direct *A* by its decree to repay Rs. 2 000 as and by way of damages to *B*, though the adjustment has not been certified. It may here be noted that if after the decree is satisfied out of Court, *A* assigns the decree to *X*, and *X* then proceeds to realize the decree by execution against *B*, *B* has no cause of action against *X*, and he is not entitled to recover from *X* as damages the amount paid by him in execution to *A*, even though *X* took the assignment with the knowledge that the decree had been satisfied (a).

The effect of non certification on the rights of parties may be summarised as follows. If the adjustment is not certified, it will not be recognized by any Court executing the decree, and if the decree holder applies for execution notwithstanding the adjustment, the Court will direct execution to issue and the judgment debtor will not be heard to say that the decree has been adjusted. Nor can he, even by instituting a regular suit for injunction obtain a stay of execution, for such a suit is barred under sec 47. Nor is it open to him, if his property be sold in execution to bring a suit to set aside the sale, for such a suit also is barred under sec 47 (b). His only remedy is to sue the decree holder for damages sustained by him by reason of the breach of the contract represented by the adjustment. He need not, however, wait until the decree against him is executed. His cause of action arises on the presentation of an application by the decree holder to execute the decree. Therefore where he has paid any money under the adjustment, he may sue the decree holder to recover it as soon as the decree holder applies to the Court for execution (c).

Suit by judgment debtor based upon uncertified adjustment—The three kinds of suit referred to above deserve careful consideration for they are typical of the modes in which the question of an uncertified adjustment frequently arises. But an uncertified adjustment may result in a conveyance as in the following case.—*A* obtains a decree against *B* for possession of immovable property. *A* then executes an ekrnama, whereby in consideration of Rs 156 paid to him by *B*, he relinquishes an interest in the property. Subsequently he sells the remaining part of the property to *C* by ekrnama and kabala are duly registered. *A* then applies for execution of the decree and obtains possession of the property. *B* sues *A* upon the two documents for a declaration of his right to the property and for recovery of possession thereof. Is the suit barred under sec 47? It has been held that it is not barred, and that *B* is entitled to a decree. The suit is not one for an injunction, and it cannot therefore be said to be directed to interfere with the execution of the decree. In fact the decree has already been executed. Nor is the suit one for setting aside a sale in execution, for there has been no sale. The suit is one for the recovery of property conveyed to *B* by two documents, both of which are duly registered. The documents no doubt constitute an adjustment of the decree, but, as already explained in sub r (3) do not bar a suit upon an uncertified adjustment (d).

(2) " " " "

Shree Pte v Maug San Myo (19 8) 6 Rang 573 (23) A 11 316

(a) *Krishna v Sarimuthu* (1919) 4 Mad 338 50 I C 584

(b) *Lakshmanchandra v Pandas* (1930) 57 Cal 403 118 I C 857 (9) A C 374 See note on this case at p 189

(c) *Medas Kalani in the matter of* (1907) 30 Mad 545

(d) *Iwar Chandra v Haris Chandra* (1898) 25 Cal 718

21, r. 2 The law on the point may be stated in one sentence. An uncertified payment or adjustment may be recognized by any Court except a Court executing the decree, and a suit based upon such payment or adjustment is maintainable unless it is barred by the provisions of sec. 47.

Suit by decree holder upon an uncertified adjustment.—This is the converse case. A obtains a decree against B for Rs. 315 and costs. B pays A Rs. 200, and induces A to give up the costs and accept a bond for the balance to be paid at the end of eight months. Neither the payment nor adjustment is certified to the Court. This does not preclude A from suing on the bond, for, as stated above, sub r. (3) only prohibits a Court executing a decree from recognizing an uncertified payment or adjustment (e). Under the repealed section 257A of the Code of 1882 the bond would be void if it provided for a payment of a sum in excess of the balance (f). This would no longer be the case unless the bond were a mortgage bond and an account was being taken under sec. 13 (c) of the Dekkan Agriculturists Relief Act, 1879 which makes the repealed sec. 257A applicable (g).

Money payable under a decree.—A decree directing the sale of mortgaged properties in default of payment is a decree for the payment of money whether there is a direction to pay personally or not (h). Income received by a mortgagee decree holder from the mortgaged property in his possession and for which he has to account and give credit for the surplus is not money payable under a decree within the meaning of this rule (i).

The Madras High Court has held that a decree which gives the judgment debtor an option of paying money in order to secure a reconveyance is not a decree under which money is payable within the meaning of this section (j).

Decree of any kind.—The words 'of any kind' in sub rule (1) did not occur in sec. 258 of the Code of 1877 or of 1882. They were inserted by the Code of 1908. Under the Codes of 1877 and 1882 it was held by the High Court of Calcutta that sec. 258 applied to the adjustment of any decree whatever may be the nature of the relief granted by the decree. In the Calcutta case the decree was one for possession of immovable property (k). On the other hand it was held by the Madras High Court that this section referred only to decrees under which money was payable and did not apply to other decrees e.g., decrees for possession of immovable property (l). It was in this state of authorities that the words 'of any kind' were inserted in sub rule (1). The High Court of Calcutta claims that these words were added to give effect to its rulings and to supersede the Madras rulings (m). The Bombay High Court also holds that the rule applies to the adjustment of any decree as for instance a decree for partition (n). The High Court of Madras holds that the only effect of the addition of the words 'of any kind' is that the decree is not required to be one exclusively for the payment of money as held by that Court under the Code of 1882, but that it may be a complex decree providing partly for the payment of money and partly for any other relief or reliefs e.g., delivery of possession of immovable property, in other words one of the reliefs granted by the decree must be for the payment of money and unless this is so, the adjustment does not require to be certified under this rule. The Madras High Court

(1)

(1) For thousand and one Somasundaram (1903)

(1) " 33rd 473

(2)

(3)

(4)

(5)

(6)

(f) See *Heera v. Iestonyk* (1898) 22 Bom. 693.(g) *Dhanram v. Ganpat* (1903) 27 Bom. 61.(h) *Dattatraya v. Narlo* (193) 34 B. in L. B. 404

138 I. C. 459 (3.) A. B. 23

lays stress on the word "the" before the word "decree" and says that the word "the decree" could only refer to what precedes, namely, a decree under which money is payable (o). Thus if a decree provides for the payment of money as well as for partition of immovable property, the adjustment must be certified as required by this rule (p), but not if it is exclusively for partition.

"Adjustment."—A composition scheme between a judgment debtor and his creditors including the decree holder is an adjustment within the meaning of this rule and may be certified as such (q). An oral agreement not to proceed against the judgment debtor beyond a certain limit is an agreement varying the terms of the decree and is therefore an adjustment which cannot be proved if not certified (r).

An executory contract may be an adjustment.—If the decree holder enters into a fresh contract with the judgment debtor for the satisfaction of the decree, the contract is legally enforceable and though still executory may amount to an adjustment of the decree (s).

Can a compromise effected in execution proceedings be enforced as superseding the decree?—See note under the heading "Adjustment of decree", at p. 170.

"Where the decree is adjusted in part."—A obtains a decree against B and C. A then enters into an agreement with B by which B is discharged from liability under the decree. The agreement constitutes an adjustment of a "part" of the decree within the meaning of this rule (t). If in the execution proceeding the parties come to an arrangement whereby part of the decretal amount is remitted and the balance made payable by instalments this is an adjustment in part and the decree can be executed for the balance (u).

Application for final decree.—An application for a final decree in a suit on a mortgage is not an application for execution. Therefore, the Court to which an application is made for a final decree is not a Court executing the decree. Hence such Court may recognize payments made by the mortgagor out of Court, though the payments have not been certified (v).

Mode of certifying.—Sub rule (2) says that if the decree holder fails to show cause the Court shall certify payment. The Court is not bound, if the decree holder does not appear, to certify the payment without requiring proof. If the payment is proved it is not open to the Court to go into the question whether the object of the payment was to defeat the rights of some third party (w), and if it is satisfied that payment has in fact been made it must certify payment (x).

Decree transferred for execution.—Certification to transferee Court.—If the decree has been transferred for execution to another Court, the transferee Court is the Court executing the decree and the adjustment must be certified to it (y).

Adjustment not certified if a third party's interest intervenes.—While a sale in execution of a money decree was pending confirmation the decree holders made an application to the Court stating that they had agreed to accept payment by instalments and praying that the adjustment should be certified. The lower Courts recorded the

| | | |
|-----|--|---|
| (o) | | v Narayan (1933) 57 Bom 616 115 IC 773 (35) A B 358 |
| (p) | | (t) Mahomed Khan Bahadur v Mahomed |
| (q) | | (u) |
| (r) | | (v) |
| (s) | | (w) |
| | | (x) |
| | | (y) |

21, r. 2 adjustment and set aside the sale. But the Privy Council in *Nankahal v Umrao* (2) reversed the decree on the ground that once a sale is effected the interest of a third party intervenes and there is nothing in the rule to suggest that such an interest can be disregarded.

This rule applies only to parties who stand in the relation of decree holder and judgment debtor at the date of payment or adjustment—*A* obtains a decree against *B* for Rs 5000. *B*, being unable to pay the amount of the decree in cash transfers certain immovable property to *C* in consideration of *C* undertaking to pay the amount of the decree to *A*. *C* pays the amount of the decree to *A* out of Court. Subsequently *C* obtains an assignment of the decree from *A*, and applies for execution against *B*. The payment of the decretal amount by *C* to *A*, though not certified, is a bar to execution, for the payment was made not by *B*, the judgment debtor, but by *C*, a third party, and this rule applies only where a payment is made out of Court by a judgment debtor to the decree holder (a). The High Court of Allahabad has applied the rule when the money is not payable under the decree to the decree holder, and has held that where by a consent decree in a suit by *A* against *B*, *B* agrees to pay a certain sum of money to *C*, and he makes the payment, such payment, if not certified, cannot be recognized by the Court executing the decree (b). Under sec 17 as understood in Bombay a decree holder purchaser at a Court sale stands on the same footing as a stranger. If he gives up the property purchased to the judgment debtor for a money consideration this is not an adjustment to which the rule applies in Bombay (c). It is perhaps unnecessary to state that the rule does not apply to a payment by the judgment debtor to the decree holder before the decree is passed (d).

Fraud—There is an earlier decision of the Madras High Court which lends colour to the view that where a decree is adjusted to the satisfaction of the decree holder, and he agrees to certify the adjustment to the Court, but omits to do so, and subsequently applies to the Court for execution of the decree, the judgment debtor may object to the execution and prove the adjustment in execution proceedings, and the Court executing the decree may take cognizance of the payment notwithstanding the provisions of this rule the reason given being that the suppression of the adjustment from the Court is not only a fraud upon the judgment debtor, but a fraud upon the Court (e). But in later cases the same High Court has said that if that be the effect of that decision, it is not good law (f). In a Bombay case (g) a decree for Rs 2,500 was adjusted by the judgment debtor paying and the decree holder accepting Rs 2,000 in full satisfaction of the decree, but the adjustment was not certified to the Court. The decree holder thereafter applied for execution of the decree. He omitted to state in his application as required by O 21, r 11 (a), that the decree was adjusted. It was held, following an earlier decision of the same Court (h) that it was a case of fraud upon the Court, and the application for execution was dismissed. But these cases have been overruled by a Full Bench of the same High Court, and it has been held that a Court executing a decree can in no case recognize a payment or adjustment not certified as required by this rule (i). The High Court of Calcutta has consistently held that it is not competent to a

(2) (1931) 59 I A 50, 25 C W N 381, 130

(a)

(b)

(c)

(d)

(e) *P*

(f) *P*

(g) *Hansa v Bhawa* (1916) 40 Bom 333, 33 I C 272

(h) *Trimbak v Hari* (1910) 31 Bom. 675, 7 I C

(i)

Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by this rule even if fraud is imputed to the decree holder (j). The same view has been taken by the Chief Court of the Punjab (k), by the High Court of Patna (l), the High Court of Rangoon (m) and by the Chief Court of Oudh (n).

The law allows the judgment debtor 90 days* to apply to have the payment or adjustment certified [Limitation Act, Sch I, art 17]. If he does not make the application, and the decree holder applies for execution within that period, he may in answer to the application for execution, apply to have the payment or adjustment certified, but this must be within 90 days. And it has been held that *objections* filed by a judgment debtor to the decree holder's application for execution may be treated as an *application to certify* the payment or adjustment, provided the objections are filed within 90 days of the adjustment (o). But the judgment debtor is not entitled to an extension of time even if fraud is established on the part of the decree holder. Such extension he can claim only under s 18 of the Limitation Act, and that section provides only for the case where an applicant has by means of fraud been kept from the knowledge of his right to make the application, it does not provide for the case where he has by means of fraud been kept from the exercise of his right to make the application (p).

Uncertified payment and limitation.—Subr (3) of this rule provides that an uncertified payment *shall not be recognized* by any Court executing the decree. The third paragraph of the old section provided that an uncertified payment or adjustment shall not be recognized *as a payment or adjustment of the decree* by any Court executing the decree. It was accordingly held under that section that there was nothing to prevent an uncertified payment from operating as a part payment within the meaning of s 20 of the Limitation Act so as to extend the period of limitation for applying for execution under that Act (q). The words *as a payment or adjustment of the decree* have been omitted in subr (3). Therefore under the present rule the Court cannot recognize an uncertified payment or adjustment *for any purpose whatever*. It follows that an uncertified payment can no longer operate as a part payment so as to extend the period of limitation for an application for the execution of a decree (r). This may be explained by an illustration. A obtains a decree against B in January, 1921 for Rs 4 000. B pays A out of Court Rs 2 000 in January 1923, but the payment is not certified. A applies for execution of the decree for the balance in January 1925 that is, more than three years after the date of the *decree* but within three years from the date of *payment* under the decree. Under the old section the payment, though not certified, operated as a fresh starting point for limitation and the application was therefore not barred. Under the present rule, the payment, not being certified, cannot be recognized by the Court even for the purpose of limitation, and the application must be rejected as barred by limitation.

O. 21, r. 2

There was at one time a conflict of decisions as to the meaning of "certify" and as to how payments made out of Court should be certified. The High Courts of Calcutta (i), Madras (ii) Bombay (iii), and Rangoon (iv), have held that where interest on the decretal amount has been paid by the judgment debtor out of Court, or where part payment has been made of the decretal amount by the judgment debtor out of Court, the decree holder may apply to "certify" the payment by an application made expressly for that purpose either prior or subsequent to the application for execution or he may 'certify' the payment by a declaration in an application for execution of the decree that he has received such payment [O 21, r 11 (e)]. The Allahabad High Court in a series of decisions (v) maintained that the payment or adjustment must be certified in a separate proceeding distinct from and prior to the application for execution, but in the recent Full Bench case of *Joti Prasad v. Srichand* (x) it has fallen into line with the other High Courts. A Full Bench of the Calcutta High Court has since held that when the decree holder certifies he makes no application but merely informs the Court of a fact and that the Court when recording the payment is not making a judicial order but performing a ministerial duty (y). The payment must be made within three years of the decree or of the last starting point of limitation to be effectual under section 20 of the Limitation Act (z) but it may be certified at any subsequent time by the decree holder (a).

Uncertified adjustment and estoppel—Since an uncertified adjustment cannot be recognized by the Court executing the decree, it cannot operate as an estoppel against the decree holder. A obtains a decree against B. The decree is adjusted but the adjustment is not certified to the Court. A receives payments under the adjustment and then applies for execution of the decree. The adjustment being uncertified the fact that A has received payments under the adjustment does not estop him from applying for execution (b).

Restitution of uncertified payment on reversal of decree in appeal—If a decree is reversed in appeal, the judgment debtor is entitled to recover back all

the payments made
the made
the made

Surety—A surety under sec. 145 for the performance of a decree is bound so long as the judgment debtor is bound and is not discharged by a payment which has not been certified (d).

Joint decree holders—See notes to O 21, r 15, 'Payment by judgment debtor out of Court to one of several holders of a joint decree

- (a) *Emuffman v. Sanchia Lal* (1916) 43 Cal 907 34 I C 608 (payment of interest)
Jahy v. Aljannas (1911) 28 C W 503 68 I C 200 (2) 11 C 30 *Madan v. Harulal* (1911) 4 C W 534 64 I C

- 6 9 F B.
(g) *Amor Krishna v. Jagat Bandhu* (1932) 59 Cal 70 157 I C 428 (21) A C 719
Overlun v. Jatintra v. Gopan (1918) 46 Cal 22 45 I C 903

(i)

(c)

(u)

(r)

- (a) *Joti Prasad v. Srichand* supra *Prakesh Singh v. Allahabad Bank* (1911) 1 Luck 429 93 I C 353 (27) A O 7

(w)

- (b) *Trimbak v. Hari* (1910) 34 Bom 575 71 C 940 *Jogendra v. Jorath* (1914) 19 Cal 1, J 126 21 I C 506

- (c) *Lasudeo v. Vishnu* (1897) 11 Bom 74

- (d) *Tamhi Eddy v. Dori Dally* (1916) 49 Mad 35 94 I C 52 (26) A M 674 *Tajani Kumar v. Mahalukmi Tank* (1931) 59 Cal 1334 139 I C 90 (32) J C 729

(z) (1910) 51 All 127 112 I C 73 (23) A A 1

MINOR.—An adjustment of a decree made by a guardian without obtaining the permission of the Court as required by O 32, r 7, cannot be certified under this rule (c)

Assignment of decree.—As the application under rule 16 is to be made to the Court which passed the decree the Bombay High Court has held that it is open to the judgment-debtor to prove an uncertified adjustment for the purpose of shewing that the applicant is not a transferee and that as the decree has already been satisfied, there was nothing to transfer (f). A similar view was taken in some Madras cases (g). But a Full Bench of the Madras High Court has differed from these cases on the ground that the application under r 16 is not merely for recognition as a transferee, but for execution as such transferee, and that it is incorrect to regard the Court which passed the decree as not being the executing Court as well. The Full Bench held that if there is no certified adjustment it is not permissible to argue that there is no decree to be transferred (h).

Representative.—The word "judgment debtor" in this rule includes persons claiming under him. Such persons therefore are as much precluded from setting up an uncertified adjustment in execution proceedings as the judgment debtor himself would be (i). Compare s 146.

Limitation for application under this rule.—A certificate of payment given by a decree holder to the Court is merely an intimation that he has received a sum of money and that the decree has in that way been wholly or partially satisfied (j). It is not an application for the Court has no judicial duty to perform with respect to it (k). Article 181 does not apply and a decree holder may therefore at any time certify a payment or an adjustment (l). The cases on the subject were reviewed by the Judicial Committee in *Prakash Singh v Allahabad Bank, Ltd* (m). Their Lordships held that the certification to the Court by a decree holder under rule 2 (1) even if made in the form of an application is not an application under art 181 of the Limitation Act, 1908, and is not subject to any period of limitation. The rule imposes a duty on the decree holder to certify and thus he may do at any time even after the execution of the decree would be time barred but for the payment certified. Their Lordships pointed out that certification at the instance of a judgment debtor under rule 2 (2) stands on a different footing. It is an application in which notice issues to the decree holder and it is subject to a period of 90 days, limitation under art 174 of the Limitation Act, 1908. The Privy Council did not decide whether certification by a decree holder is a step in aid of execution under art 182 (5) of the Limitation Act. This was, however, decided in the negative by a Full Bench of the Calcutta High Court in *Amar Krishna v Jagat Bandhu* (n). It cannot be a step in aid of execution for it is not an application but it may substantially amount

(e) *Arunachellam v Pamanadhan* (1906) 29 Ma 1
309 *Telchakkutty v Doraswami* (1924)
47 Mad 1 J 498 82 I C 528 (25) A M
230 [payment to Manager of Joint Hindu
family]

(f)

(g)

(h)

(i)

(j)

(k)

(l)

supra
(m) (1932) 56 I A 30 3 Luck 644 114 I C
541 (29) A 14 19
(n) (1932) 59 Cal 701 137 I C 422 (31) A C
719 on reviling *Jatintra v Gopas* (1918)
46 Cal 22 45 I C 903 *Lam Iharose v*
Itanman Lal (1932) 7 Luck 590 137 I C
764 (32) A O 144 F B, *Idon Prasad*
v Lal (1933) 55 All 223, (33)
A.A. 364

O. 21,
rr. 2, 3

in both these cases limitation is saved not by certification but by payment. The judgment debtor may apply even if the decree is not drawn up (o). Where the right to apply is barred by limitation, the judgment debtor is not entitled to agitate the matter as a proceeding under s. 47 (p).

that
idence
High
ndian

Criminal proceeding—The prohibition against the recognition of an uncertified payment or adjustment is confined to civil Courts executing decrees, and does not extend to criminal Courts. Hence an uncertified payment or adjustment may be recognised

It must, however, execution does not in presence of the offence executed' (t).

Courts executing Decrees

3. [New] Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure

Land situate in more than one jurisdiction—This rule is new. It gives effect to a ruling of the Calcutta High Court in the undermentioned case (u). The rule, when amplified, may be stated thus: where immovable property attached in execution of a

(o)

(p)

(q)

(91) *Abdul Karim v. Hakim* (1933) 14 Lah. 663
145 I.C. 924 (33) A.L.J. 896
Uga Shree
Ice v. Maung San Mye (1908) 6 Rang

(r)

(s)

(t)

(u) *Ram Lal v. Bama Sundari* (1886) 12 Cal. 307

decree forms one estate, of which a part is situate within the local limits of the jurisdiction of the Court executing the decree, and the rest beyond such limits, the Court executing the decree has the power to attach and sell *the whole estate*, though only a part thereof is situate within the local limits of its jurisdiction

4. [S. 223, 5th para.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6, and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself

5. [S. 223, 6th para.] Where the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed

Procedure where Court desires that its own decree shall be executed by another Court

6. [S. 224.] The Court sending a decree for execution shall send—

- (a) a copy of the decree,
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied, and
- (c) a copy of any order for the execution of the decree or, if no such order has been made, a certificate to that effect

O. 21,
rr. 6-8

Clause (a).—The omission to send a copy of the decree to the Court executing the decree does not prevent the decree-holder from applying to the Court for execution (c)

Clause (b).—The omission to transmit to the Court executing the decree the certificate referred to in cl (b) is not a "material" irregularity within the meaning of r 90 of this Order. Hence it is not a good ground for setting aside a sale in execution (w)

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of
decree etc to file same
without proof

Proof of jurisdiction.—The old section contained the words "or of the jurisdiction of the Court which passed it," after the words "or of the copies thereof." This gave rise to a conflict of opinion whether a Court to which a decree was sent for execution had the power to inquire whether the Court that passed the decree had jurisdiction to pass it and to refuse execution if it found that the decree was passed without jurisdiction. It was held in some cases that the Court had the power (x), and in others that it had not (y). The effect of the omission of these words is that a Court to which a decree is transferred for execution has now no power to question the jurisdiction of the Court which passed the decree under execution (z). A Full Bench of the Calcutta High Court has held that when a decree presented for execution was made by a Court which apparently had no jurisdiction the executing Court is entitled to refuse to execute it (a). The word 'apparently' has been explained by the same High Court to mean that the decree appears on the face of it to have been passed by a Court which had no jurisdiction (b). The Rangoon High Court has expressed emphatic dissent and holds that it is against public policy and good sense that the validity of a decree should be questioned by an executing Court (c). In a subsequent Full Bench decision Rankin J., has also criticised this decision in that it overlooks the case where a Court of execution is asked to execute a final decree after the preliminary decree on which it rests has been reversed on appeal (d). In such a case the Court of execution has power to determine whether the final decree is still subsisting.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or
order by Court to which it
is sent

- (v) *Ademma v Venkata* (1933) 56 Mad 692
144 I.C. 923 (33) A.M. 837, *Arimuthu v
Vayapuri* (1912) 35 Mad 589, 8 I.C. 652
- (w) *Abubakar v Mohidin* (1897) 20 Mad 10
- (z) *Haji Musa v Purnanand* (1891) 15 Bom
216, 219, *Bhagwantappa v Vishwanath*
(1904) 28 Bom 378. See also *Leake v
Daniel* (1866) 10 W.R. 11
- (y) *Chopani v Truman* (1843) 7 Bom 481,
Kasurthi v Rama (1894) 10 Bom 65
- (x) *Hari v Naraindas* (1914) 38 Bom 194, 23
I.C. 123, *Shrupal Rai v Harak Chand*
(1919) F.R. No. 22, p. 62, 46 I.C. 419,
Zaminidar of Ettayapuram v Chudamaram

(a)

- (b) *Kali Charan v Bhabuti* (1932) 60 Cal 191,
142 I.C. 60, (33) A.C. 85
- (c) *Nathan v Samson* (1932) 9 Rang 480, 135
I.C. 65, (31) A.R. 252, 1 B. overruling 8
Rang 544
- (d) *Talib Ali v Abdul Aziz* (1930) 57 Cal 1013,
123 I.C. 304, (23) A.C. 642; *Ugra
Narain v Basant* (1913) 17 C.W. 4,
864, 10 I.C. 639

Subordinate Court.—If a Munsiff in district X sends a decree passed by him for execution *direct* to a Munsiff in district Y, the latter has no jurisdiction to execute the decree. The proper course is for the Munsiff in district X to send the decree to the District Court of district Y, and the latter Court may then under this rule transfer the decree for execution to the Munsiff in that district (e)

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court
of decree transferred by
other Court

Application for Execution.

10. [S. 230, 1st para.] When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Application for execution

Who may apply for execution.—The person appearing on the face of the decree as the decree holder is entitled to execution, unless it be shown by some other person under O 21, r 16 that he has taken the place of the decree holder (f). When a decree holder had assigned the decree to a trustee who had not obtained recognition of the assignment under O 21, r 16 a joint application for execution by the decree holder and the trustee was admitted as an application by the decree holder (f1). If the decree holder is dead and the decree is for the recovery of a debt the representative of the decree holder must produce proof of his representative title under s 214 of the Succession Act, 1925 (g).

Court by which decree may be executed.—See s 38

"Court which passed the decree"—See s 37 as to the definition of "Court which passed a decree," and notes thereto

What decrees may be executed—See notes to s 36

"If the decree has been sent to another Court"—Where the decree of a District Court has been sent to the Court of a Munsiff for execution, and has not been returned to the District Court, the "proper Court" within the meaning of the Limitation Act, 1908, art 182 (5), in which to apply "for execution" of the decree is the Court of the Munsiff (h). In such a case an application to the transmitting Court is not an application in accordance with law under Art 182 of the Limitation Act (i).

11. [Ss. 256, 235.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at

Oral application

- | | | | | | | | |
|------|---|---|---|---|---|-----|---|
| (e) | " | " | " | " | " | (g) | <i>Bhagwan v. Hira</i> (1932) 31 Bom L R 1112, 140 I C 519 (3.) & B 516 |
| (f) | " | " | " | " | " | (h) | <i>Maharajah of Bobbili v. Varadaraja</i> (1916) 43 I A 235 39 Mad 640 36 I C 602. |
| (f1) | " | " | " | " | " | (i) | <i>Jatindra v. Mukendra</i> (1933) 60 Cal 1176 (33) A C 905 |

O. 21, rr. 6-8 Clause (a).—The omission to send a copy of the decree to the Court executing the decree does not prevent the decree-holder from applying to the Court for execution (i)

Clause (b).—The omission to transmit to the Court executing the decree the certificate referred to in cl (b) is not a "material" irregularity within the meaning of r 90 of this Order. Hence it is not a good ground for setting aside a sale in execution (w)

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court receiving copies of decree etc to file same without proof

Proof of jurisdiction—The old section contained the words "or of the jurisdiction of the Court which passed it," after the words "or of the copies thereof." This gave rise to a conflict of opinion whether a Court to which a decree was sent for execution had the power to inquire whether the Court that passed the decree had jurisdiction to pass it and to refuse execution if it found that the decree was passed without jurisdiction. It was held in some cases that the Court had the power (x), and in others that it had not (y). The effect of the omission of these words is that a Court to which a decree is transferred for execution has now no power to question the jurisdiction of the Court which passed the decree under execution (z). A Full Bench of the Calcutta High Court has held that when a decree presented for execution was made by a Court which apparently had no jurisdiction the executing Court is entitled to refuse to execute it (a). The word "apparently" has been explained by the same High Court to mean that the decree appears on the face of it to have been passed by a Court which had no jurisdiction (b). The Rangoon High Court has expressed emphatic dissent and holds that it is against public policy and good sense that the validity of a decree should be questioned by an executing Court (c). In a subsequent Full Bench decision Rankin, J., has also criticised this decision in that it overlooks the case where a Court of execution is asked to execute a final decree after the preliminary decree on which it rests has been reversed on appeal (d). In such a case the Court of execution has power to determine whether the final decree is still subsisting.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent

(e) *Ademba v. Venkata* (1933) 56 Mad 423.

(w)

(x)

(y)

(z)

(a)

(b) *Kale Charan v. Bidda* (1932) 80 Cal 191, 142 I C 80 (33) A C 85

(c) *Nathan v. Samson* (1932) 9 Rang 140 123 I C 65, (31) A R 252 J B overruling Rang 544

(d) *Talib Ali v. Abdul Aziz* (1930) 57 Cal 1013, 123 I C 305 (29) A C 440, *Legra Varata v. Basanta* (1913) 17 C W 863, 10 I C 630

Subordinate Court.—If a Munsiff in district X sends a decree passed by him for execution *direct* to a Munsiff in district Y, the latter has no jurisdiction to execute the decree. The proper course is for the Munsiff in district X to send the decree to the District Court of district Y, and the latter Court may then under this rule transfer the decree for execution to the Munsiff in that district (e)

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Application for Execution

10. [S. 230, 1st para.] When the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the Officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof.

Who may apply for execution—The person appearing on the face of the decree as the decree holder is entitled to execution, unless it be shown by some other person under O 21, r 16 that he has taken the place of the decree holder (f). When a decree

is dead and the decree is for the recovery of a debt the representative of the decree holder must produce proof of his representative title under s 214 of the Succession Act, 1925 (g)

Court by which decree may be executed.—See s 38

'Court which passed the decree'—See s 37 as to the definition of 'Court which passed a decree,' and notes thereto

What decrees may be executed—See notes to s 36

'If the decree has been sent to another Court'—Where the decree of a District Court has been sent to the Court of a Munsiff for execution, and has not been returned to the District Court, the proper Court within the meaning of the Limitation Act, 1908, art 182 (5), in which to apply for execution of the decree is the Court of the Munsiff (h). In such a case an application to the transmitting Court is not an application in accordance with law under Art 182 of the Limitation Act (i)

11. [Ss. 256, 235.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at

(e) *Devi Dyal v. Moharaj* (1895) 22 Cal 761
(f) *Jasoda v. Kartivash* (1891) 18 Cal 639
 Nadirshaw v. Jural Ramdas (1909) 31
 130 L.R. 30 1181 C 694 (1909) A 11 79
(g) *Harmandi Lal v. Deep Chand* (1937) 14 Lah
 744 145 L C 72 (33) A 1 634

(g)
(h)
(i)

O. 21, r. 11 the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor prior to the preparation of a warrant if he is within the precincts of the Court

(2) Save as otherwise provided by sub rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely —

- (a) the number of the suit ,
- (b) the names of the parties ,
- (c) the date of the decree ,
- (d) whether any appeal has been preferred from the decree ,
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ,
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ,
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed ,
- (h) the amount of the costs (if any) awarded ,
- (i) the name of the person against whom execution of the decree is sought , and
- (j) the mode in which the assistance of the Court is required whether—
 - (i) by the delivery of any property specifically decreed ,
 - (ii) by the attachment and sale, or by the sale without attachment, of any property ,

(iii) by the arrest and detention in prison of any person ;

(iv) by the appointment of a receiver ;

(v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

Sub rule (1) corresponds with s 256 of the Code of 1882 and sub rule (2) with s 235

Difference between old section 256 and sub-rule (1) —Section 256 of the Code of 1882 was as follows —

“ When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one thousand rupees, the Court may, when passing the decree, on the oral application of the decree holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his movable property within the same limits ”

Power to direct immediate
execution of decree for
money not exceeding
Rs 1000

Sub rule (1) differs from s 256 in the following particulars —

- 1 Under s 256 immediate execution could only be issued if the amount of the decree did not exceed Rs 1,000 Under the present rule there is no limit to the amount of the decree But the decree must be one for the payment of money
- 2 As a general rule, a decree holder seeking to arrest the judgment debtor must present an application in writing to the Court, and the Court may then direct a warrant to issue for the arrest of the judgment debtor who, as a rule, cannot be arrested without a warrant S 256 of the Code of 1882 dispensed with a written application, and enabled the Court to issue a warrant for the arrest of the judgment debtor on an oral application Sub rule (1) goes further, and empowers the Court to order immediate arrest of the judgment debtor prior to the preparation of a warrant, if he is within the precincts of the Court
- 3 Execution can no longer issue against the movable property of the judgment debtor on an oral application as it could under s. 256

Privilege from arrest —The privilege from arrest under civil process conferred by s 135 of this Code does not extend to a judgment-debtor against whom an order has been made for immediate arrest under this sub rule See s 135 sub s (3)

Alterations in sub rule (2) —Sub rule (2) corresponds with s 235 of the Code of 1882 except in the following particulars —

- 1 In cl (g), the words ‘ together with particulars of any cross decree, whether passed before or after the date of the decrees ought to be executed,’ are new
- 2 In cl (j), sub-cl (ii), the words ‘ or by the sale without attachment,’ are new
- 3 Cl. (j), sub-cl (iv), is new.

s. 21, r. 11

The application shall be verified.—An application for execution may be verified by any person acquainted with the facts of the case. It may therefore be verified by a person who holds a general power of attorney from the decree holder, notwithstanding that the decree holder may be residing within the jurisdiction of the Court (j). Where the application is made by a person other than the decree holder all that is necessary is that the Court should be satisfied that such person is acquainted with the facts of the case. It is not necessary that it should be verified *after* the application for permission to verify it has been made, nor is it necessary that the verification should be made in the presence of the Court (k).

The application shall state whether any payment or adjustment has been made.—If the judgment debtor has paid any money into Court under rule 1 (a) this fact should be stated in the application (l). A reference in the application to a judgment showing that a sum was realised in execution was held to be a sufficient compliance with the rule (ll).

The application shall state the date of the decree.—The date of the decree means the date on which the judgment was pronounced (m). See O 20, r. 7.

The application shall specify the mode in which the assistance of the Court is required.—Where an application did not specify the mode in which the assistance of the Court was required it was rejected (n). An application for a payment out of the sale proceeds of another decree holder's sale is a sufficient compliance with the rule (o). An application stated the name of the defendant incorrectly and did not give a list of the property sought to be attached and when the Court required it to be amended, it was withdrawn. This was held not to be an application in accordance with law within the meaning of art. 182 of the Limitation Act (p). See r. 17 below.

Fresh application not necessary after transfer of decree.—If an application for execution is made to the Court which passed the decree and that Court transmits it to the Court where the immovable property sought to be sold is situate, it will not be necessary to have a fresh application before the Court makes the order for sale (q).

Process fee.—There is no provision in the Code making it obligatory on a decree holder to pay process fee with his application for execution. A Munsiff returned an application which was presented without process fee on the last day of limitation, so that when it was represented the next day it was out of time. It was held that the Munsiff should have admitted the application and given time for payment of process fee. The date of first presentation was therefore the date for purposes of limitation (r).

Sub-rule (3).—This sub-rule is new. The Court may under this sub-rule require the applicant to produce a certified copy of the decree, but a copy of the ordering portion of the decree is sufficient (s). Such copy, however, is not a necessary annexure to an application for execution. An application, therefore, which is not accompanied by a copy of the decree, cannot be said to be an application not 'in accordance with law' within the meaning of art. 182 (5) of sch. I of the Limitation Act (t).

Amendment of application.—See r. 17 below.

| | |
|--|--------|
| (j) <i>Balar v. Udit Sarain</i> (1904) 28 All 154. | (p) .. |
| (k) <i>Kharasia v. Umed</i> (1923) 28 C. W. N. 687, 80 I.C. 215 (21) A.L. 811. | (q) .. |
| (l) <i>Gopalji v. Sumrit</i> (1932) 11 Pat. 706 141 I.C. 297 (33) A.P. 89. | (r) .. |
| (ll) <i>Kangal Chandra v. Sandul</i> (1933) 33 C.W. 163. | (s) .. |
| (m) .. | (t) .. |
| (n) .. | (u) .. |
| (o) .. | (v) .. |

12. [S. 236.] Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of movable property not in judgment-debtor's possession

Failure to annex inventory.—Where no such inventory as is required by this rule is annexed to the application for execution, the application cannot be said to be one "in accordance with law" within the meaning of art 182 of the Limitation Act, 1908 (u). When the decree is executed under sec 52 against the legal representative of a deceased person no inventory is necessary (v).

13. [S. 237.] Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

Application for attachment of immovable property to contain certain particulars

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers, and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

Clause (a)—In cl (a), the words and in case such property can be identified or numbers, are new

14. [S. 238.] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors

Power to require certified extract from Collector's register in certain cases

Alteration in the law—Under the old section in the case of an application for the attachment of land registered in the Collector's Office it was necessary that the application should be accompanied by a certified extract from the register of such office. Under the present rule the Court may at its option require the applicant to produce such extract. The object is to save the applicant the costs of procuring such extract

(u) *Abdul Fakh Khan v Maula* (1915) 3* All 82* 291 (4*9)

(v) *Eirduchand v Eadrajshah* (1906) 24 Bom L R 1322 95 L C 941, (27) A E 52.

O. 21, r. 15

15. { S. 231. } (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

Application for execution
by joint decree holder

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Alterations in the rule.—This rule corresponds with sec 231 of the Code of 1892 except in the following particulars —

- 1 The words "or his or their representatives" which occurred in sec 231 after the words "one or more of such persons" have been omitted in view of the provisions of sec 146 See notes below under the head 'Any one or more of such persons.'
- 2 The words 'unless the decree imposes any condition to the contrary' occurring in sub rule (1) are new See notes below under the same words

What is a joint decree—A decree jointly passed in favour of more persons than one is a joint decree A and B obtain a decree against C for Rs. 5,000, this is a joint decree It is not the less a joint decree, because the shares of A and B in the decretal amount have been determined by the decree Thus if it is determined by the decree that the share of A is Rs 2,000 and the share of B is Rs. 3,000 the decree is still a joint decree But though the decree in such a case is a joint decree, the interest of A and B being determined by the decree, either of them may apply for execution to the extent of his interest (w)

Application by one of several decree holders for execution of the whole decree—Ordinarily all the decree holders in a joint decree must join in an application for execution of the decree The present rule provides for the case in which all the holders are unable or are unwilling to join in the application and enables one of them to apply for the benefit of all of them. The rule provides that if the Court is satisfied that the application is made in good faith and that the applicant is unable or unwilling to join in the application, the Court may allow the application and make such order as it deems necessary for protecting the interests of the other decree holders and of the judgment debtor (z)

this rule it is not obligatory upon the Court to do so (y) If the application is allowed, the Court will under sub r (2) make such order as it deems necessary for protecting the interests of the other decree holders and of the judgment debtor (z)

(w) *Murrah Chunder v Kaluandari* (1883) 9 Cal 482 10 I.A. 4
(z) *Sheik Ahmed v Shahzada* (1880) 7 C.L.R. 837

(y) *Durga Das v Dewraj* (1906) 33 Cal. 508
(z) *Tarasundari v Beharwal* (1868) 1 N.L.R.A. C 29

Decree in favour of coparceners.—A decree in favour of coparceners in a joint and undivided Mitakshara family is a joint decree. But if one of two coparceners dies the survivor is entitled to execute the whole decree. This is not a case of transfer by operation of law but it is a case of total extinction of that interest and if the applicant does not state in the application that he is applying as survivor and the Court is made aware in the course of the execution proceedings of the death of the coparcener, this is not a fatal defect as there is no occasion for the Court to pass orders under sub rule (a).

“Unless the decree imposes any condition to the contrary.”—The provisions of this rule do not apply where by the terms of the decree execution has been made dependent on all the decree holders joining in the application (b).

Application by one of several decree holders for execution in respect of his share of the decree.—The application under this rule by one of several holders of a joint decree must be for the execution of the whole decree and further, it must also be for the benefit of the other decree holders as well as himself. A joint decree cannot be executed by one of several joint holders in respect of what he considers to be his share in the decree (c). Thus, if a decree is passed for A and B for Rs. 5,000, the decree is joint, and neither A nor B can apply for execution of his proportionate share of the decree. But one of several holders of a joint decree may apply for execution of the decree to the extent of his interest therein, if the extent of such interest is determined by the decree. Thus, if in a suit for possession of land by A and B against C the Court has declared each of the plaintiffs to be entitled to a moiety of the land, the Court may allow either plaintiff to execute the decree to the extent of his one half share, though the decree is a joint decree (d).

The rule set forth above that one of several holders of a joint decree is not entitled to execution in respect of his share of the decree, but that he must apply for execution of the whole decree, applies only in those cases where the whole decree has remained unsatisfied. That rule does not apply where a joint decree has been satisfied in part before the date of the application for execution. In such a case, execution cannot issue for the whole decree, but only for so much thereof as has remained unsatisfied. This subject is considered in the next following paragraph.

An application for execution by a joint decree holder with regard to a certain portion of the decree giving up the rest, the other decree holders being parties to the application and standing by, is not illegal as contravening the provisions of this rule but there cannot be any subsequent execution for the balance of the same decree (e).

Payment by judgment debtor out of Court to one of several holders of a joint decree.—A obtains a decree against C for Rs. 5,000. C may pay the amount of the decree into Court (r. 1), and the Court will then pay the amount to A on his application. If C does not adopt that course and pays the amount to A out of Court (r. 1), C must see that A, the decree holder, certifies the payment to the Court. If A fails to certify the payment, C may apply to the Court to record the payment as certified. If C also fails to do so, the Court executing the decree will not recognise the payment and will order execution (r. 2) if A, notwithstanding payment to him of the amount of the decree out of Court, applies for execution of the decree against C.

(a) *Pameshwar v. Pam. Patan* (1933) 12 Pat. 42
140 I.C. 333 (32) A.L. 359

(b) *Jarand v. Abdulla* (1894) 6 All. 69

(c) “ “ “

31 dnajur Zamindary Co. Ltd. (1919)
4 Ind. L.J. 55 53 I.C. 83 69
Nondar v. Kunwar Jang (1927) 2 Luck
59 B.L. 206 (26) A.C. 615

(d) *Hurrah Chudner v. Kallawnder* (1933) 9
Cal. 422 10 I.A. 4

(e) *Gopendra v. Miti Lal* (1929) 45 Cal. 12 (23)
A.C. 529 *Kenzal Chandra v. Nandal*
(1933) 33 C.W. 163.

O. 21, r. 15 But if there are two or more decree holders, and the payment is made by the judgment debtor to one of them, the question arises whether the other decree holders have the right to execute the decree? The following illustrations supply the answer —

- I (1) *A* and *B* obtain a decree against *C* for Rs 5 000. *C* pays *B* his (*B*'s) share of the decretal amount out of Court and the payment is certified to the Court. *A* then applies under this rule for execution of the whole decree. *A* cannot execute for more than his own share as the decree has been satisfied as to *B*'s share (*f*)
- (2) If in the above case, the payment is not certified to the Court but *B* admits the payment *A* will be limited to his share in execution (*g*) But if *B* does not admit the payment, the Court will allow execution to issue for the whole decree

II *A* and *B* obtain a decree against *C* for Rs 5 000. *C* pays the whole amount of the decree to *B* out of Court, and the payment is certified to the Court. *A* then applies for execution of the decree to the extent of his own share. Is *A* entitled to execute the decree to the extent of his share, in spite of the fact that *B* has certified satisfaction of the whole decree? It has been held that he is, for one of several joint decree holders is not competent to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of more than his own share of the decree, without the concurrence of the other decree holders (*h*). Moreover *A* has another remedy besides execution against *C* and that is a suit against *B* to recover his share from him for *B* has by his certificate admitted receipt of the whole amount of the decree (*i*). But if *A* asks to execute the whole decree then it has been said that the Court will issue notice to *B*, and if *B* says that *A*'s application is fraudulent the Court may dismiss the application (*j*).

Any one or more of such persons* — This expression includes persons claiming under such persons. A transferee of a decree within the meaning of r. 16 below is such a person (*k*).

Amendment — The Patna High Court has held that an application by one decree holder of a joint decree is invalid unless it states that it is for the benefit of all and that the defect cannot be cured by amendment (*l*). The Lahore and Calcutta High Courts however say that this is incorrect for rule 11 does not require that the names of all persons interested in the decree should be inserted in the application and that the Court can issue notice to the others and pass orders for the protection of the interests of all the decree holders (*m*).

Appeal — An order determining any question mentioned or referred to in sec 47

This is illustrated by the following cases —

(1) *A* and *B* obtain a decree against *C*. *A* alone applies for execution of the whole decree. *C* (the judgment debtor) contends that *A* alone should not be allowed to

| | |
|-----|--|
| (f) | Mad 183 |
| (g) | <i>Gurusami v. Sivanmalai</i> (1933) 56 Mad 316 140 I C 872 (33) A 31 15 |
| (h) | (k) <i>Dugar B. Ksh. v. Fakir</i> (1899) 26 Cal 250 (l) <i>M. K. v. The Midnapur Zamindari Co. Ltd</i> (1919) 41 at L.J. 5 5 531 C 8 3 |
| | (m) <i>Nasrudin v. Dost Mahammad</i> (1933) 14 Lah 212 139 I C 151 (33) A L 635 <i>Ghanaya Lal v. Maitho Prasad</i> (1933) 135 I C 207 (31) A L 600 <i>Chakrabarti v. Daulat Mohan</i> (19 6) 30 C W V 56- 96 I C 69 (24) A L 811 |
| (i) | |

execute the whole decree. Here the question being one *between the decree holder on the one hand and the judgment debtor on the other*, any order made upon the application is appealable as a decree. If A's application is allowed, C may appeal from the order, and if the application is disallowed, A may appeal from the order (n)

(2) But if the objection to execution was raised not by C, the judgment debtor, but by B, the other decree holder, the question being *between the decree holders inter se*, no appeal will lie from an order either granting or refusing the application (o)

Limitation.—See Limitation Act, Sch. I, art. 182, Explan. 1

16. [S. 232.] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution .

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others

Alterations in the law —

- 1 The words, or if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree have been added to the first paragraph to make it clear that the rule is not confined in its application to a transferee of the *whole* decree, but extends to a transferee of the interest of any holder of a *joint* decree. This was, in fact, the interpretation put upon the old section (p)
- 2 The words, 'if that Court thinks fit,' which occurred in the old section in the first paragraph before the words the decree may be executed have been omitted. See notes below, Right to execution does not depend upon discretion of Court "

"Decree"—The expression 'decree' in the first paragraph and the first proviso of this rule is not confined to a money-decree. It includes a mortgage decree (q). The second proviso is confined to money-decrees

(n) *Lakshmi v. Ponnappa* (1894) 17 Mad. 324
(o) *Ratanlal v. Poo Gulab* (1894) 23 Bom. 623
(p) *Muthunarayana v. Eelikkuska* (1896) 19

Mad. 306
(q) *Srinivasa v. Thakur* (1929) 42 All. 544,
54 I.C. 43 See also *Audhak v. Sako*
Jagat (1888) 10 All. 570

O. 21, r. 16

Rule of procedure.—This rule regulates procedure and does not affect substantive rights. The transferee of a decree cannot execute it until he has obtained an order under this rule, but the transfer operates from the date of the transfer and the transferee is entitled without obtaining an order under this rule to object to an attachment of the decree made subsequent to the transfer (r). If a liquidator has transferred a decree before the company is dissolved, he may execute a written assignment for the purpose of this rule after dissolution and after he has ceased to be liquidator (s).

Application for execution by transferee of decree.—No order should be made under this rule for the execution of a decree on the application of a transferee of the decree unless—

- I the decree has been transferred by *assignment in writing* or by *operation of law* [an oral assignment is not sufficient (t)],
- II the application for execution is made to the Court which passed the decree, and
- III where the decree has been transferred by assignment, *notice* of the application has been given to the transferor and the judgment debtor.

The rule does not require an independent application by the transferee for recognition as transferee. All that the rule enjoins is that a transferee seeking execution should give notice of the application for execution to the transferor and the judgment debtor (u). See notes below, "Transfer of decree against a company in liquidation". On the other hand until an order for execution is made in favour of the transferee he has not acquired the status of a decree holder. See sec 2 (3).

I Who may apply for execution under this rule—The following persons, and no others may apply for execution under this rule (v) —

- (a) The transferee of a decree under an assignment in writing [A transferee under an oral assignment has no *locus standi* to apply for execution under this rule (u)].
- (b) The transferee of a decree by *operation of law*, e.g., the legal representative of a deceased decree holder, or the Official Assignee in the case of an insolvent decree holder, or the purchaser of a decree at a court sale in execution of a decree against the decree holder (r 53) (x). A transfer of property by A to B, which is the subject matter of a suit by A against C, does not amount to a transfer by operation of law of a decree subsequently obtained

is executed, but the transfer in that case is not by operation of law, but by an assignment in writing (z). A transfer by operation of law means a transfer on death or by devolution or by succession. Therefore the fact that the applicant has obtained a judgment declaring him to be entitled to the decree does not make him a transferee by operation of law entitled

| | |
|-----|--|
| (r) | 335 60 I C 249 (24) A.B. 426. |
| (s) | (1r) <i>Parata v D garnbar</i> (1891) 15 Dom 397 |
| (t) | (x) <i>See Gaur Sundar v Hem Chunder</i> (1849) 16 |
| (u) | (al 305 |
| (v) | (y) " |
| | (z) " |

to execution (a) This rule does not recognize an equitable assignment of a decree The dicta in a Bombay case recognizing such an assignment (b) have not been accepted by the other High Courts (c) Rankin, C.J., has pointed out that the omission of the words 'and if that Court thinks fit' which occurred in the section of the old Code gives the Court no discretion and shows that a person entitled in equity only, does not come under the rule (d)

(c) A transferee under an assignment in writing or by operation of law from the transferee mentioned in cls (a) and (b), whether by immediate or mesne assignment (e)

Explanation I—The expression transferee in cls (a) (b) and (c) is not confined to a transferee of the whole decree, but includes a transferee of a portion of the decree (f) or, where the decree is a joint one the transferee of the interest of any one of the decree holders (g) The mortgagee of a decree by an assignment in writing by way of mortgage is a transferee of a fractional interest in the decree and is entitled to execution under this rule (h) On the other hand if a decree awards a substantial relief plus costs, the decree is one and indivisible and it can be transferred only as a whole (i)

Illustrations of Explanation I

1 A who holds a decree against B for Rs 5 000 transfers his interest in the decree to the extent of Rs 2 500 to X Here X is in the position of a joint decree holder (r 15 above) The application for execution may be made by A, or it may be made by A, the decree holder or by A and X both together In any case the application must be for execution of the whole decree *Aishore v Gishorne & Co* (1890) 17 Cal 341, *Gyamonee v Radha* (1890) 5 Cal 592 and not merely for the portion transferred

2 A and B obtain a decree against C for Rs 5 000 A assigns his interest in the decree to X Here X occupies the double character of a transferee within the meaning of this rule and of a transferee of an interest in a joint decree within the meaning of r 15 Hence any application that X may make for execution will be governed by the provisions both of this and the preceding rule *Dar Bux v Fatih* (1899) 26 Cal 250

Explanation II—A person to whom a party to a suit agrees to transfer any decree that may be passed in the suit is not a transferee within the meaning of this rule

Illustration

A sues B to recover Rs 5 000 During the pendency of the suit A agrees with C to transfer to him any decree that may be passed in his favour in the suit A decree is subsequently passed for A C is not a transferee within the meaning of this rule and he is not entitled to execute the decree against B The word decree holder in this rule means a person in whose favour a decree has already been passed When A agreed to assign to C there was no decree in existence *Basrooruttill v Ramachandra* (1907) 17 Mad L J 391

(a) *Mahadeo v Anandrao* (1933) 57 Bom 513 145 I C 79 (33) A B 36 *Ibiden* *Musa v Am runnista* (18 6) 4 I C 66 2 Cal 37

(b) *Purmanandas v Lallobdas* (1887) 11 Bom 506

(c) See *Basrooruttill v Ramachandra* (1906) 17 Mad L J 391 and *Mathurapore Zamindary Co Ltd v Bhasaram* (12-4) 51 (al) 703 711 80 I C 881 (24) A C 661 *Malik Fakir Iahaman v Med Kotul* (19 6) 51st 511 96 I C 448 (6) A L 30

(d) *Prabashree v Pashtal* (193) 59 Cal 79 13 I C 857 (3) A C 453

(e) *Sri Amar Chandra v Suresh Chandra* (1900) 27 Cal 48 *Ganga v Jankub* (1900) 2 Cal 60

(f) *Kishore v Gishorne and Co* (1891) 17 Cal 341 *Endoors v Venkatachannulu* (1910) 33 Mad 20 3 I C 444 doubted in *Moham Chand v Ganga Ram* (1917) 1 R no 15 p 55 33 I C 654

Muthiah v Corndias (19 1) 44 Mal 919 63 I C 33 (1) A M 592 (11)

(g) *Muth narayana v Balakrishna* (1906) 19 Mad 306

(h) *Pam Sahas v Maftin Lal* (19-6) 44 All 43 94 I C 36 (76) A A 346 *Naj n d anath v Ambraha am* (1979) 2 Cal 549 (79) A C 66

(i) *Ramchand a v Abdel* (1913) 35 All 74 191 I C 304 *Amal Sahas Pasula* (1974) 2 Lab L J 1 55 I C 93 *Nayanika v Trimal* (1933) 35 Bom L L 1162 (34) A B 59

O. 21, r. 16

Explanation III—A person who is entitled under a decree to an assignment of a previous decree obtained by *A* against *B*, but who has not obtained such assignment, is not a transferee of the previous decree, so as to entitle him to apply for execution of it. But he will be entitled to apply if he has obtained an assignment *before* the date of the application (*j*)

Explanation IV—A person to whom the holder of a decree for possession of immovable property sells a portion of the property is not a transferee of the decree within the meaning of this rule, and he is not therefore entitled to execute the decree. A transfer of property is not the same thing as a transfer of a decree (*l*)

Explanation V—A transferee of a decree awarding maintenance is entitled to execution under this section. The reason is that though a right to future maintenance cannot be transferred having regard to the provisions of s 6, cl (d) of the Transfer of Property Act, 1882, there is no objection to a transfer of such right when it is awarded by a decree. The transferee therefore of such a decree is entitled to recover by execution maintenance that has fallen due. He cannot, of course, attach maintenance before it has fallen due (*l*). See s 60, sub s (1), cl (n), and notes thereto on p 225 above

Benamidar—*A* obtains a decree against *B*. *C* purchases the decree from *A* in the name of *D*. Here *C* is the real transferee, and *D* is *benamidar* or ostensible transferee. Is *D* entitled to take out execution of the decree? Yes, according to the High Court of Allahabad (*m*). No, according to the High Court of Calcutta, but if he has succeeded in taking out execution (as where it is not brought to the notice of the Court that he is a *benamidar*), the application for execution made by him will save a subsequent application by *C* from the bar of limitation (*n*)

Where the alleged transferee of a decree is found to be the *benamidar* of a judgment debtor, the Court is bound by the second proviso to this rule to refuse to allow the decree to be executed against the other judgment debtors in favour of the alleged transferee (*o*)

has held that where a decree has been transferred by assignment in writing, the transferee alone can apply for execution under this rule, though he may be a mere *benamidar*, and that the real transferee is not entitled to apply under this rule (*q*). But in a latter case in which the real transferee, his *benamidar* the ostensible transferee, and the original decree holder or transferor, were all dead and there was a contest between their legal representatives, the Madras High Court said that rule 16 was not exhaustive and that the Court had power to inquire who was the real owner entitled to execution (*r*)

(j) *Jandu v Sarla* (1925) 27 Bom L R 1109,
90 I C 561, (25) A B 472

(k) " " " " " "

" " " " " "

" " " " " "

(l) *Asad Ali v Haidar Ali* (1911) 38 Cal 14, 6

J L 816 See however, *Endoor v*

Janakachalinsulu (1910) 33 Mad 80, 3

J C 444

(m) *Kamla Prasad v Indomti* (1915) 37 All 414

29 I C 393

(n) *Abdul v Chukhan* (1879) 5 C L R 253

Gour Sundar v Hem Chunder (1889) 16

Cal 335, *Ballishan v Bedmati* (1893)

20 Cal 394 395

(o) *Annabattalla v Annabattalla* (1915) 28 I C

906

(p) *Manikham v Tutappa* (1898) 21 Mad 348,

Abdul v Chukhan (1878) 5 C L R 253

(q) *Palanisappa v Subramania* (1915) 44 Mad

553 84 I C 400 (25) A B 701 follow

ed in *Gurukul v Gurukul* (1917) 8 Lah

53, 100 I C 545 (27) A L 110

(r) *Bala Arisam v Durrada* (1927) 53 Mad

1 J 904, 105 I C 405, (27) A B 607

II Application for execution by a transferee should be made to the Court which passed the decree — A transferee of a decree must apply for execution to the Court which passed the decree, though the decree has been sent for execution to another Court (s) The Court to which a decree has been transmitted for execution has no jurisdiction to make an order for execution on the application of a transferee of the decree If such an order is made, it is illegal, and it must be set aside in appeal (t) As to the definition of "Court which passed the decree," see s 37 and notes thereto

III Notice shall be given to the transferor and the judgment debtor — Notice is not necessary when the assignment is by operation of law but only if the decree is transferred by an assignment in writing (u) The notice which is required by the first proviso is not notice of the assignment but notice of the application for execution of the decree (v) The provisions of the rule as to notice are mandatory, and if execution is issued without notice, the proceedings in execution are void (w) But in a case where the assignee of a mortgagee's decree for sale gave notice to the mortgagee and the mortgagor but not to a puisne mortgagee the sale was confirmed but it was held not to pass the rights of the puisne mortgagee (x) The object of the notice is to enable the transferor and the judgment debtor to raise such objections as regards the assignment as may be available to them, e g, that the consideration money was not fully paid, or that the transferee is a *benamidar* for some of the judgment debtors (y), or that the judgment debtor has already satisfied the decree (z) The object of issuing notices to the transferor and the judgment debtor is to determine once and for all and in the presence of all parties concerned the validity of the assignment (a) It cannot be said that notice is necessary each time the assignee comes in to get the decree executed (a) for after the first order in his favour he has acquired the status of a decree holder The transferee cannot accept the assignment and at the same time plead fraud to escape paying the consideration for the assignment (b) If the property of the judgment-debtor is attached without hearing his objections the attachment is illegal, even if the Court subsequently hears his objections and confirms the attachment after such hearing (c) Where the judgment debtor is dead, the notice required by this rule should be given to his legal representative (d) Where no notice is given as required by this rule, it is in the discretion of the Court to grant time to the transferee to enable him to serve the notice (e) The Patna High Court has held that the notice required by this rule need not be in writing (f) The notice cannot be served on the attorneys of the judgment-debtor after the end of the suit in which they were retained (g)

Where on an application by the transferee of a decree to have his name substituted as decree holder, no objection is taken by the judgment-debtor as to the validity of the transfer, the judgment debtor will be precluded from questioning the validity of the

| | | | |
|-----|-------------------------|-----|---|
| (s) | " " " " " " " " " " " " | (y) | |
| (t) | " " " " " " " " " " " " | (z) | |
| (u) | " " " " " " " " " " " " | (a) | |
| (v) | " " " " " " " " " " " " | (b) | " |
| (w) | " " " " " " " " " " " " | (c) | |
| (x) | " " " " " " " " " " " " | (d) | <i>Khushroobhai v Hormasjee</i> (1887) 11 Bom 727 |
| (y) | " " " " " " " " " " " " | (e) | <i>Maharaja Sir Pameshwar v Haridar</i> (1920) 5 Pat L J 390 57 I C 250 |
| | " " " " " " " " " " " " | (f) | <i>Musammal Bhagwanta v Dewan Zamir</i> (1944) 3 Pat 526 75 I C 766 (24) A P 56 |
| (z) | " " " " " " " " " " " " | (g) | <i>Rangudas v Burjorji</i> (1932) 34 Bom L R 615 133 I C 329 (32) A B 33 |

O. 21, r. 16

Explanation III—A person who is entitled under a decree to an assignment of a previous decree obtained by A against B, but who has not obtained such assignment, is not a transferee of the previous decree, so as to entitle him to apply for execution of it. But he will be entitled to apply if he has obtained an assignment before the date of the application (j)

Explanation II—A person to whom the holder of a decree for possession of immovable property sells a portion of the property is not a transferee of the decree within the meaning of this rule, and he is not therefore entitled to execute the decree. A transfer of property is not the same thing as a transfer of a decree (k)

Explanation I—A transferee of a decree awarding maintenance is entitled to execution under this section. The reason is that though a right to future maintenance cannot be transferred having regard to the provisions of s. 6 cl. (d) of the Transfer of Property Act 1882, there is no objection to a transfer of such right when it is awarded by a decree. The transferee therefore of such a decree is entitled to recover by execution maintenance that has fallen due. He cannot, of course, attach maintenance before it has fallen due (l). See s. 50 sub s. (1) cl. (m) and notes thereto on p. 225 above.

Benamidar—I obtains a decree against B. C purchases the decree from A in the name of D. Here C is the real transferee, and D is *benamidar* or ostensible transferee. Is D entitled to take out execution of the decree? Yes according to the High Court of Allahabad (m). No, according to the High Court of Calcutta, but if he has succeeded in taking out execution (as where it is not brought to the notice of the Court that he is a *benamidar*) the application for execution made by him will save a subsequent application by C from the bar of limitation (n).

Where the alleged transferee of a decree is found to be the *benamidar* of a judgment debtor, the Court is bound by the second proviso to this rule to refuse to allow the decree to be executed against the other judgment debtors in favour of the alleged transferee (o).

It has been held in some cases that the mere fact that an order for execution has been made on the application of a *benamidar* does not preclude the real transferee from applying under this rule to continue the execution proceedings himself, but the real transferee will be bound by proceedings in execution up to that date (j). The High Court of Madras has held that where a decree has been transferred by assignment in writing the transferee alone can apply for execution under this rule, though he may be a mere *benamidar*, and that the real transferee is not entitled to apply under this rule (q). But in a latter case in which the real transferee, his *benamidar* the ostensible transferee, and the original decree holder or transferor, were all dead and there was a contest between their legal representatives, the Madras High Court said that rule 16 was not exhaustive and that the Court had power to inquire who was the real owner entitled to execution (r).

(j) *Pandit v. Sarla* (1925) 27 Bom. L. R. 1109
90 I. C. 561 (25) A. B. 472

(k) —

(l) *Asad Ali v. Haydar Ali* (1911) 59 Cal. 13 6
I. C. 826. See however *Endoori v. Venkatachalaiah* (1910) 33 Mad. 80 3
I. C. 444

(m) *Kamta Prasad v. Indomti* (1915) 37 All. 414
29 I. C. 593

(n) *Abd. I. v. Chukin* (1879) 5 C. L. R. 53
Cair Sundar v. Hem Chunder (1889) 16
Cal. 355. *Balishah v. Bedmati* (1893)
20 Cal. 338 395

(o) *Annabattulla v. Annabattilla* (1915) 28 I. C.
906

(p) —

(q) —

(r) —

.21, r. 16 transfer on an application by the transferee for execution of the decree (A) Similarly where no objection is taken by the judgment-debtor that no notice was given to the transferor, he will be precluded from raising that objection at a subsequent stage of the execution proceedings (i) But if the judgment debtor omits, in a proceeding under this rule, to object to the validity of the decree he will not be precluded from doing so, in a subsequent suit (j)

There is nothing to preclude a transferee of a decree from applying under sec 39 to the Court which passed the decree to send the decree for execution to another Court (k) But the notice required by this rule must be issued by the Court which passed the decree and not by the Court to which the decree is sent for execution (l)

The High Court of Calcutta has held that the mere issue of a notice under this rule does not operate as a revivor within the meaning of arts 182 and 183 of the Limitation Act (m), but the High Courts of Allahabad and Madras have held that it does. According to these Courts a mere application by the transferee for substituting his name for that of the decree holder operates as a revivor of the decree and gives a fresh starting point of limitation for executing the decree (n) And the Madras Court has held that an application by the transferee to bring the representative of the deceased judgment-debtor on the record to serve him with notice under this rule has the same effect (o)

Execution does not depend upon discretion of Court.—In the old section the words were *and if that Court thinks fit, the decree may be executed*," &c It was accordingly held under that section that the Court had a discretion to grant or refuse an application for execution made by a transferee (p) The words *if that Court thinks fit*" have been omitted in this rule. Therefore if the conditions specified in this rule are satisfied, a transferee of a decree is entitled to execution as of right like the original decree holder (q)

Transfer of decree for the payment of money against two or more persons to one of them.—This subject may be considered under the following two heads —

1 Where the whole decree has been transferred

2 Where the decree is a joint one, and part only of the decree has been transferred

First as regards transfer of the whole decree.—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several,

the decree is wholly extinguished. The transferee cannot execute

but his remedy against them is by a

d been satisfied by him. The object of

of all reliefs

more appro

ule cannot

the decree

in the name of a transferee (s),

(A) T

(193-) 11 Pat 94 131 & v .

(j) *Brayal v E. M. Atkinson* (1920) 5 Pat 1 J 639, 67 I C 707

(k) *Ram Charan v Salik Ram* (1930) 52 All 200 (20) A A 623

(n) *Yam Singh v Tola Singh* (1901) 20

301 *Anantadas v Anwar* (1908) 18 Mad L J 24 *Uohan Singh v Jagat Singh* (19-8) 50 All 621 109 I C 432 (25) A A 299

(o) *Mahalinga v Appanachariar* (1907) 30 Mad 641

(p) *Megh Narayan v Radha* (1870) 4 B L R A L 200, *Iarcata v Dyanambar* (1891) 15 Bom 307

(q) *Prasannah v Hanifat* (1932) 59 Cal 297 137 I C 657, (32) A C 459

(r) *Anant v Nagappa* (1908) 32 Bom 195 197

(s) *Ramajya v Krishnamurti* (1917) 40 Mad 296 32 I C 952

Illustrations

(a) A obtains a decree against B and C for Rs 5 000. B satisfies the decree by paying Rs 5 000 to A. In such a case C is bound to pay to B his (C's) share of the judgment debt. If C fails to contribute his share, B's remedy is by way of suit against C to recover the amount [This illustration is merely introductory]

(b) A obtains a decree against B and C for Rs 5 000. B purchases the decree from A. Here B's position is exactly the same as in ill (a), that is to say the decree must be taken as having been satisfied by B. B cannot therefore execute the decree against C and his only remedy is to bring a suit against C for contribution. *Saroop Chunder v Troylolhonath* (1866) 9 W. R. 230

(c) A obtains a decree against B and C for Rs 5 000. A dies and on his death the decree passes to B as his heir. The position is the same as in ill (b). *Banarasi v Maharani* (1883) 5 All. 27

Next as regards transfer of a portion of a joint decree—Where a decree has been passed jointly in favour of two or more persons, and the interest of any decree holder in such decree has been transferred by assignment or by operation of law to one of several judgment-debtors the decree is extinguished to the extent of the interest so transferred and execution can only issue for the rest of the decree.

Illustration

A and B obtain a decree against C and D for Rs 5 000. A's share of the decree is Rs 2 000. A dies and on his death his interest in the decree passes to C as his heir. The decree is extinguished to the extent of Rs 2 000 and neither B (as decree holder) nor C (as transferee of A's interest in the decree) can execute the decree against D for more than Rs 3 000. *Pogose v Fukurooddeen* (1877) 25 W. R. 313. *Banarasi v Maharani* (1883) 5 All. 27

In the converse case where one of several judgment debtors dies and the decree holder succeeds to his estate as heir, the proviso does not apply and the decree holder is entitled to execute a proportionate part of the decree (f)

Decree for the payment of money—The expression 'decree for the payment of money' in the second proviso to the rule does not include mortgage decrees (u). Such a decree is not a decree for the payment of money until a personal decree is passed against the mortgagor (v).

It has been held by the High Court of Bombay that the expression 'decree for the payment of money against two or more persons' means a *personal* decree for the payment of money against two or more defendants. Hence the proviso does not apply when the decree is not against the defendants *personally*. A obtains a decree against B as the legal representative of X and against C as the legal representative of Y for Rs 20 000 to be paid out of the estate of X and Y. A dies leaving B as his heir, and on his death the decree passes to him by operation of law. The decree not being a personal decree against B and C, B is entitled as transferee of A's decree, to have the decree executed against the estate of Y (w). The High Court of Madras has dissented from this view. According to that Court the fact that one of the defendants is directed by the decree to pay the amount of the decree out of the family property in his hands does not make the decree any the less a decree for payment of money against him (x).

(f) *Mad. Anu v Malik Anu* (1930) 54 All. 444 13 I C 50 (32) A. A. 704
(u) *Lalithani & nph v Manager Court of Wards* (1911) 14 (3) L. J. 639 12 I C 70
Ajathathu v Jammachandru (1914) 47 Mad. 944 8-1 I C 441 (74) A. M. 901
Chidambaram v Subbarayer (1906) 42 Mad.

508 93 I C 58, (26) A. M. 6-3.
(v) *Chidambaram v Subbarayer* (1906) 42 Mad. 508 93 I C 58 (76) A. M. 6-3.
(w) *Panachand v Sundrabai* (1907) 31 Bom. 392
(x) *Sadogopa v Selammal* (1900) 43 Mad. L. J. 61 21 I C 261 (27) A. M. 510

21, r. 16 transfer on an application by the transferee for execution of the decree (h) Similarly where no objection is taken by the judgment-debtor that no notice was given to the transferor, he will be precluded from raising that objection at a subsequent stage of the execution proceedings (i) But if the judgment debtor omits, in a proceeding under this rule, to object to the validity of the decree he will not be precluded from doing so in a subsequent suit (j)

There is nothing to preclude a transferee of a decree from applying under sec 39 to the Court which passed the decree to send the decree for execution to another Court (l) But the notice required by this rule must be issued by the Court which *passed the decree* and not by the Court to which the decree is sent for execution (l)

The High Court of Calcutta has held that the mere issue of a notice under this rule does not operate as a revivor within the meaning of arts 182 and 183 of the Limitation Act (m) but the High Courts of Allahabad and Madras have held that it does According to these Courts a mere application by the transferee for substituting his name for that of the decree holder operates as a revivor of the decree and gives a fresh starting point of limitation for executing the decree (n) And the Madras Court has held that an application by the transferee to bring the representative of the deceased judgment debtor on the record to serve him with notice under this rule has the same effect (o)

Execution does not depend upon discretion of Court—In the old section the words were *and if that Court thinks fit*, the decree may be executed" &c It was accordingly held under that section that the Court had a discretion to grant or refuse an application for execution made by a transferee (p) The words 'if that Court thinks fit' have been omitted in this rule Therefore if the conditions specified in this rule are satisfied, a transferee of a decree is entitled to execution as of right like the original decree holder (q)

Transfer of decree for the payment of money against two or more persons to one of them—This subject may be considered under the following two heads —

1 Where the whole decree has been transferred

2 Where the decree is a joint one and part only of the decree has been transferred

First as regards transfer of the whole decree—Where a decree for the payment of money has been transferred by assignment or by operation of law to one of several judgment debtors, the decree is wholly extinguished The transferee cannot *execute* the decree against the other judgment debtors but his remedy against them is by a *regular suit* for contribution as if the decree had been satisfied by him The object of the second proviso to the rule is not to deprive the judgment debtor transferee of all reliefs but to impose upon him the duty of proceeding by what was considered a more appropriate procedure, that is, a suit for contribution (r) The provision of this rule cannot be evaded by the judgment debtor who satisfies the decree taking a transfer of the decree in the name of a *benamidar* (s)

- | | |
|--|--|
| <p>(h) <i>Taj Singh v Jagan Lal</i> (1916) 38 All 789 35 I C 234 <i>Durka Das v. Muhammad</i> (1915) 47 All 86 80 I C 72 (25) A A 117 <i>Prithvi Chand v. Satya Kinkar</i> (1932) 11 Pat 94 137 I C 47 (3-) A P 168</p> <p>(i) <i>Braslet v. E. M. Atkinson</i> (1920) 5 Pat 168</p> <p>(n) <i>Palam Singh v. Tota Singh</i> (1907) 29 All 1</p> | <p>301 <i>Annamalai v. Pamar</i> (1905) 1602</p> <p>(o)</p> <p>(p) <i>Megh Narayan v. Radha</i> (1870) 4 B.L. 1. A. 200, <i>Parvata v. Digambar</i> (1891) 15 Bom 207</p> <p>(q)</p> <p>(r)</p> <p>(s)</p> |
|--|--|

Illustrations

(a) A obtains a decree against B and C for Rs 5 000. B satisfies the decree by paying Rs 5 000 to A. In such a case C is bound to pay to B his (C's) share of the judgment debt. If C fails to contribute his share, B's remedy is by way of suit against C to recover the amount. [This illustration is merely introductory]

(b) A obtains a decree against B and C for Rs 5 000. B purchases the decree from A. Here B's position is exactly the same as in ill (a), that is to say, the decree must be taken as having been satisfied by B. B cannot therefore execute the decree against C and his only remedy is to bring a suit against C for contribution. *Saroop Chunder v Troylolkhonath* (1866) 9 W R 230

(c) A obtains a decree against B and C for Rs 5,000. A dies, and on his death the decree passes to B as his heir. The position is the same as in ill (b). *Banarasi v Maharani* (1883) 5 All 27

Next as regards transfer of a portion of a joint decree—Where a decree has been passed jointly in favour of two or more persons and the interest of any decree holder in such decree has been transferred by assignment or by operation of law to one of several judgment-debtors, the decree is extinguished to the extent of the interest so transferred and execution can only issue for the rest of the decree.

Illustration

A and B obtain a decree against C and D for Rs 5 000. A's share of the decree is Rs 2 000. A dies and on his death his interest in the decree passes to C as his heir. The decree is extinguished to the extent of Rs 2 000 and neither B (as decree holder) nor C (as transferee of A's interest in the decree) can execute the decree against D for more than Rs 3 000. *Pogose v Fukurooddeen* (1870) 25 W R 313, *Banarasi v Maharani* (1883) 5 All 27

In the converse case where one of several judgment debtors dies and the decree holder succeeds to his estate as heir, the proviso does not apply and the decree holder is entitled to execute a proportionate part of the decree (f)

"Decree for the payment of money"—The expression "decree for the payment of money" in the second proviso to the rule does not include mortgage decrees (u). Such a decree is not a decree for the payment of money until a personal decree is passed against the mortgagor (v)

It has been held by the High Court of Bombay that the expression "decree for the payment of money against two or more persons," means a *personal* decree for the payment of money against two or more defendants. Hence the proviso does not apply when the decree is not against the defendants *personally*. A obtains a decree against B as the legal representative of X and against C as the legal representative of Y for Rs 20 000 to be paid out of the estate of X and Y. A dies leaving B as his heir, and on his death the decree passes to him by operation of law. The decree not being a personal decree against B and C, B is entitled, as transferee of A's decree, to have the decree executed against the estate of Y (w). The High Court of Madras has dissented from this view. According to that Court the fact that one of the defendants is directed by the decree to pay the amount of the decree out of the family property in his hands does not make the decree any the less a decree for payment of money against him (x).

(f) *Mad. Asa v. Malik Aziz* (1932) 54 All.

(u) " " " " " "

" " " " " "

508 93 I C 58 (26) A M 623

(r) *Chudambara v Subbarayar* (1926) 43 Mad 508 93 I C 58 (26) A M 623

(w) *Panarhand v Sundralai* (1907) 31 Bom 308

(x) *Sadogopa v Sellammal* (1922) 43 Mad L J 61, 72 I C 261 (27) A M 510

O. 21, r. 16 Again the expression "decree for the payment of money against two or more persons" means a decree against two or more persons jointly. Hence the rule laid down in the second proviso does not apply where the decree is not passed against the defendants jointly. In a suit by A against B and C, A obtains a decree against B for Rs. 90 and against C for Rs. 30. A then assigns the decree to C. The decree not being a joint decree, C may execute the decree passed against B for Rs. 90 (y).

Award—The Calcutta High Court has held that a transferee of an award filed in Court under the provisions of the Arbitration Act, 1899, is entitled to apply for execution under this rule (z). See notes to r. 29 below.

Decree for rent—Under s. 148 of the Bengal Tenancy Act, 1885 an assignee of a decree for rent obtained by a landlord cannot apply for execution unless the landlord's interest in the land has become vested in him, and this bar applies to assignees of decrees for rent obtained by co-sharer landlords (z1).

Transfer pending execution—In *Venkatachalam v. Ramaswami*, (a) a Full

proceeding. This decision overrules a previous Full Bench case (b) where the same High Court held that the transferee or legal representative could not be brought

under the Code or
approval a judgment of
"it must follow that

Some cases have put a slightly different construction on O. 21, r. 16. Thus in an Allahabad case (f) a single Judge held that rule 16 only applies to an original application for substitution and execution, and that it does not apply to an application to be brought on the record of a pending application. Again in two Patna cases (g) the Court held

- | | |
|------|---|
| (y) | <i>Akhu v. Surendra</i> (1926) 30 C. W. N. 723 |
| (z) | 94 I. C. 378 (28) A. C. 957 <i>Rajnath v. Ram</i> |
| (z1) | <i>Bharos</i> (1927) 49 All. 509 104 I. C. 116 |
| | (27) A. A. 165 F. B. <i>Mirza Mahomed</i> |
| | <i>Sujjad Mirza</i> (1928) 3 Luck. 128 105 |
| | I. C. 611 (28) A. O. 30 |
| (a) | <i>Kedarnath v. Anant Prasad</i> (1922) 50 I. A. 189 190 4 Pat. 507 89 I. C. 482 (25) |
| | A. I. C. 117 |
| (b) | <i>Mohan Singh v. Jagat Singh</i> (1928) 60 All. 621 109 I. C. 412 (29) A. A. 293 |
| (c) | <i>Mammat v. Rajah</i> (1910) 14 C. W. N. 75 3 I. C. 324 <i>Dwarbailash v. Fatat</i> |
| | (1899) 26 Cal. 250, <i>Kalyanbhai v. Ghan</i> |
| | <i>Shamat</i> (1920) 5 Bom. 29 |
| (f) | <i>Mathu Chellur v. Lodi Gorindas</i> (1921) 44 |
| | Mad. 919 69 I. C. 627 (21) A. M. 599, |
| (g) | <i>Mist. Gilab v. Mohammad Zaffar</i> (1921) |
| | 6 Pat. L. J. 308 6 I. C. 30 (21) A. P. |
| | 180 <i>Mist. Bhagwan v. Devdas Zamir</i> |
| | (1924) 3 Pat. 595 78 I. C. 768 (24) A. P. |
| | 576 |

that though the application to be brought on the record to carry on the pending proceeding was under O 21, r 16, yet no notice to the judgment debtor was necessary **O. 21**

Transfer during pendency of an appeal in execution proceedings—Even before *Palaniappa* s case was overruled it was held that when an appellant decree holder dies during the pendency of the appeal in execution proceedings his legal representative can be brought on the record (h)

Transfer pending execution of a transferred decree—A further complication arises when the decree holder dies or assigns the decree after it has been transferred for execution by another Court. In such a case the order under O 21 r 16 cannot be made by the Court executing the decree (i). But it has been held that if the decree holder dies after the decree is transferred for execution his legal representatives may either obtain an order from the original Court and carry on the proceeding or that they may carry on the proceeding in the execution Court and subsequently produce before that Court the necessary order under this rule (j)

Appeal—An order determining any question between the judgment debtor and the representative of the decree holder (s 47) is a decree (s 2) and is therefore appealable as such (s 96). A transferee of a decree is a representative of the decree holder within the meaning of sec 47. Therefore an order refusing to recognize the transferee of a decree or dismissing his application for execution on the objection of the judgment debtor is a decree, and appealable as such (k)

Suit by transferee—A transferee of a decree whose application is rejected under this rule on the ground that the transfer is not valid is not precluded from instituting a regular suit for a declaration of the validity of the transfer. Such a suit is not barred by the provisions of sec 47 (l)

Equities enforceable against original decree holder—See sec 49 and note thereto

Transfer of decree against a company in liquidation—Where a decree against a company in liquidation is transferred pending the winding up proceedings, and the liquidator refuses to recognize the transferee the transferee may apply to the executing Court under sec 47 (3) to be substituted for the original decree holder to enable him to prove his claim before the liquidator. Sec 171 of the Indian Companies Act 1913, is no bar to the granting of such an application (m)

Transfer of decree pending attachment—The attachment of a decree for the payment of money does not prevent a valid transfer of the decree, and the transferee is entitled to be substituted in place of the transferor and to apply under this rule for execution (n)

- (h) *Sundayee v Krishna* (19 8) 51 Mad 858
110 I C 66 (28) A M
(i) *Amor Chandra v Gura Prosunna* (1900)
27 Cal 488, *Tameshar v Thalur Prasad*
(1903) 25 All 443

- (190) 2 Mad 383 *Hardita v Vagalia*
(19) 4 Lah L J 239 79 I C 546 (22)
A L 396 See also *Ram Bahadur v Day*
ranji (1911) 3 Lat 344 78 I C 433
(23) A P 16 where 4 and B each

(l) " " " " "

(m) *Kashi v The Union Bank of India* (1919) 41
All 432 50 I C 115

(n) *He ariram v Kedar Nath* (1912) 7 Pat 726
113 I C 63 (29) A P 1

0.21, r. 17

17. [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11. sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialed by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Changes in the law — This rule corresponds with s 245 of the Code of 1882 except in the following particulars —

1 The words "may allow the defect to be remedied" in sub rule (1), have been substituted for the words "may allow it [application] to be remedied" as being more comprehensive and covering the case of omission to produce a copy of the decree as now required by r 11 (3)

2 Sub rule (2) is new See notes below, "Sub rule (2) limitation"

Sub rule (1) — The rule requires a preliminary scrutiny of the execution application

Court (o) The Court should in each case exercise its discretion, and where an amendment ought to be allowed it should allow the amendment (p) Thus where an application is not signed, it should not reject the application, but allow it to be amended (q) The amendment may be allowed even after the application for execution is registered provided the execution of the decree has not at the date of the application for amendment become barred by limitation (r) But the High Court of Madras has held that where

(o) *Aurangabad v. Smt. Chharubala* (1932) 59 Cal 1266, 140 I C 747, (32) A C 766

(p) *Fazlur v. Altaf* (1884) 10 Cal 341

(q) *Ganesh Das v. Fattah Chand* (1920) 2 Lah L J 104 55 I C 16 *Choudhury v. Srimati* (1922) 1 Pat 149 69 I C 200, (22) A P

400 [Interest wrongly calculated]
(r) *Ganendra v. Sri Sri Shyam* (1918) 27 Cal L J 898 44 I C 553 *Rai Bihari v. Ram Bahadur* (1923) 2 Pat 328 71 I C 741 (23) A P 61, *Chattrani v. Bhanna* (1933) 2 Pat 787, 792, 74 I C 144 (3) A P 208

an application for amendment is made after the expiration of 12 years provided by s 48. O. 2 the Court has a discretion either to accept or to reject it (s)

Sub rule (2) limitation—Article 182 of the Limitation Act provides *inter alia* that the first application for execution must be made within three years from the date of the decree. If the decree has not been executed, and it is necessary to make further application each successive application must be made within three years from the date of the "last application", or (since the amendment made by Act 9 of 1927) from the date of the final order passed on the last application. But the "last application" in each case must have been one "in accordance with law", otherwise it will not be a fresh starting point for limitation. An application which does not comply with the requirements of rules 11 to 14 of this order is not one "in accordance with law" (t). Sub rule (2) is therefore important with reference to limitation for if an application is defective with reference to rules 11 to 14 and is returned for amendment within a fixed time, it will, when so amended, be an application in accordance with law as from the date when it was first presented. Under the old section it was held that where an order was made for amending an application for execution and the amendment was made, the application should be deemed to have been presented not on the date when it was first presented, but on the date when it was amended. The result was that if the amendment was not made until after the expiration of the period of limitation the application was time barred though the amendment was made within the time fixed by the Court (u). Those decisions are no longer law. Compare s 149. But under the present rule limitation will not be saved if the application does not comply with the requirements of rules 11 to 14 and is not amended within the time allowed by the Court (v). On the other hand substantial compliance with rules 11 to 14 is all that is necessary, and if the application does so comply with these rules, it will be in accordance with law, and will be effectual to stay the progress of limitation whether the Court admits or rejects or returns it for amendment (w). Sub r (2) applies only if the application is returned for amendment for non compliance with the provisions of rr 11 to 14, and the application is subsequently amended. Sub r (2) does not in terms apply to cases where an application is returned for amendment for some other reason (x). But the same rule was applied when an application was wrongly returned for non payment of process fee on the ground that the act of Court should prejudice no man (y).

Illustration.

The last day for presenting an application for execution is 31st July 1925. The decree holder presents the application on that day. The application does not comply with the requirements of O 21, r 11 (2). The Court may under this rule return the application for amendment and fix a date within which it should be amended. If the application is amended within the time fixed by the Court it will be deemed to have been presented on 31st July 1925. Further it will be deemed to have been an application "in accordance with law" within the meaning of art 182 of the Limitation Act, 1908, so as to give a fresh starting point of limitation.

- (s) *Lemary v Jaya Parlagadda* (1923) 45 Mad L. J. 651, 76 L. C. 750 (24) A M 367
Sankaran v Ambu (1951) 49 Mad L. J. 612, 92 L. C. 102 (26) A M 260

(t)

(u)

- 579
 (r) *Sangliya v Muthu* (1931) 61 Mad L. J. 516
 (w) *Pulamby v Damodar* (1926) 53 Cal 664, 94 L. C. 166 (26) A C 1077, *Abdul Karim*

(v)

(x)

(y)

O. 21, r. 17

17. [S. 245.] (1) On receiving an application for the execution of a decree as provided by rule 11 sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

Procedure on receiving application for execution of decree

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Changes in the law—This rule corresponds with s. 245 of the Code of 1882 except in the following particulars —

1 The words "may allow the defect to be remedied" in sub rule (1), have been substituted for the words "may allow it [application] to be remedied" as being more comprehensive and covering the case of omission to produce a copy of the decree as now required by r. 11 (3)

2 Sub rule (2) is new See notes below, 'Sub rule (2) limitation'

Sub rule (1) —The rule requires a preliminary scrutiny of the execution application and if the requirements of rules 11 to 14 are not complied with the Court may reject the application or allow time for its amendment. But that does not mean that after the application has got on the file, the application cannot be amended with leave of the Court (a) The Court should in each case exercise its discretion, and where an amend

become barred by limitation (r) But the High Court of Madras has held that where

(a) *Aourangul v. Smriti Charudata* (1932) 59 Cal 1206, 140 I C 747, (32) A C 766

(p) *Fazloor v. Alfaf* (1884) 10 Cal 541

(g) *Ganesh Das v. Fattah Chand* (1920) 2 Lah L J 104 55 I C 16. *Chowdhury v. Drimati* (1922) 1 Pat 149 69 I C 200, (22) A P

400 [interest wrongly calculated]
(r) *Ganendra v. Sri Sri Shyam* (1918) 27 Cal L J 398 44 I C 553. *Raj Bahadur v. Ram Bahadur* (1925) 2 Pat 324, 71 I C 741 (23) A P 61. *Chakraborty v. Bhagwan* (1929) 2 Pat 787, 792, 74 I C 144, (4) A 1 209

an application for amendment is made after the expiration of 12 years provided by s 48, O. 21, the Court has a discretion either to accept or to reject it (a)

Sub rule (2) limitation—Article 182 of the Limitation Act provides *inter alia* that the first application for execution must be made within three years from the date of the decree. If the decree has not been executed, and it is necessary to make further application each successive application must be made within three years from the date of the 'last application', or (since the amendment made by Act 9 of 1927) from the date of the final order passed on the last application. But the last application in each case must have been one "in accordance with law", otherwise it will not be a fresh starting point for limitation. An application which does not comply with the requirements of rules 11 to 14 of this order is not one "in accordance with law" (t). Sub rule (2) is therefore important with reference to limitation for if an application is defective with reference to rules 11 to 14 and is returned for amendment within a fixed time, it will, when so amended, be an application in accordance with law as from the date when it was first presented. Under the old section it was held that where an order was made for amending an application for execution and the amendment was made, the application should be deemed to have been presented not on the date when it was first presented, but on the date when it was amended. The result was that if the amendment was not made until after the expiration of the period of limitation the application was time barred though the amendment was made within the time fixed by the Court (u). Those decisions are no longer law. Compare s 149. But under the present rule limitation will not be saved if the application does not comply with the requirements of rules 11 to 14 and is not amended within the time allowed by the Court (t). On the other hand substantial compliance with rules 11 to 14 is all that is necessary, and if the application does so comply with these rules, it will be in accordance with law, and will be effectual to stay the progress of limitation whether the Court admits or rejects or returns it for amendment (w). Sub r (2) applies only if the application is returned for amendment for non compliance with the provisions of rr 11 to 14, and the application is subsequently amended. Sub r (2) does not in terms apply to cases where an application is returned for amendment for some other reason (x). But the same rule was applied when an application was wrongly returned for non payment of process fee on the ground that the act of Court should prejudice no man (y).

Illustration

The last day for presenting an application for execution is 31st July 1925. The decree holder presents the application on that day. The application does not comply with the requirements of O 21, r 11(2). The Court may under this rule return the application for amendment and fix a date within which it should be amended. If the application is amended within the time fixed by the Court it will be deemed to have been presented on 31st July 1925. Further it will be deemed to have been an application "in accordance with law" within the meaning of art 182 of the Limitation Act, 1908, so as to give a fresh starting point of limitation.

- (a) *Iemuri v Raja Yariagadla* (19-3) 45 Mad L J 651 "61 C 750 (-4) A M 36" *Sankaran v Ambu* (1925) 49 Mad L J 639 92 I C 109 (26) A M 260
- (t) *Jayar v Thondakyn* (1898) 17 Cal 631 639 *Gopal Sah v Janki Koor* (1896) 23 Cal 214 = 3 *Saikarpanda v Jhamappa* (1930) 32 Bom L R 1364 129 I C 159 (31) A R 124
- (u) *Gopal Sah v Janki Koor* (1896) 23 Cal 217 *Jaykumath v Venkatesa* (1903) 26 Mad 101. See also *Mahara v Musammal Anuraga* (1910) 14 C W N 451 5 I C

- 59
- (c) *Sangliya v Mathu* (1931) 61 Mad L J 516.
- (w) *Pitamber v Damodar* (1926) 53 Cal 664 94 I C 166 (26) A C 1977, *Abdul Karim v Lakshmanaswami* (1924) 27 Mad L J 475 112 I C 36 (25) A M 411 *Acogobind v Mast Kandanbani* (1937) 11 Pat 346, 135 I C 91 (32) A J 222
- (x) See *Lakshmi v Dacarta* (1923) 2 Pat 809 811 "41 C 174 (24) A P 23
- (y) *Driphtaj v Bhagwan* (1930) 5 Luck 454 124 L C 445 (30) A O 63

O. 21,
rr. 17, 18

Where on an application for execution presented by an agent it is objected that the agent is not duly authorized, and the agent thereupon files a power of attorney, the Court should not dismiss the application, but treat it as having been filed on the date on which the power-of-attorney was filed (z).

Discretion to allow amendment—The Privy Council will not interfere.—If the Court of first instance has allowed an amendment and the Court of appeal thinks that the discretion has been properly exercised it is idle to ask the Privy Council to interfere (a)

18. [S. 246.] (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Execution in case of cross decrees

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

(x) *Ganga Ram v Dina Nath* (1912) Punj Rec No 118, p 494, 18 I C 526 { (y) *Abdulla v Ganesh* (1932) 60 I A 83, 60 Cal 662, 142 I C 326, (32) A FC 68

Illustrations

(a) *A* holds a decree against *B* for Rs. 1,000. *B* holds a decree against *A* for the payment of Rs. 1,000 in case *A* fails to deliver certain goods at a future day. *B* cannot treat his decree as a cross-decree under this rule. O. 21,

(b) *A* and *B*, co plaintiffs, obtain a decree for Rs. 1,000 against *C*, and *C* obtains a decree for Rs. 1,000 against *B*. *C* cannot treat his decree as a cross decree under this rule.

(c) *A* obtains a decree against *B* for Rs. 1,000. *C* who is a trustee for *B*, obtains a decree on behalf of *B* against *A* for Rs. 1,000. *B* cannot treat *C*'s decree as a cross-decree under this rule.

(d) *A*, *B*, *C*, *D* and *E* are jointly and severally liable for Rs. 1,000 under a decree obtained by *F*. *A* obtains a decree for Rs. 100 against *F* singly and applies for execution to the Court in which the joint-decree is being executed. *F* may treat his joint decree as a cross decree under this rule.

Changes in the law —

- 1 The words "where applications are made to a Court for the execution of cross-decree" in sub rule (1) are new. They give effect to certain decisions noted below under the head "Application of the rule".
- 2 The words "separate suits" in sub rule (1) are new. They have been added to show that, for the purposes of execution, a counter claim is not a separate suit (b).
- 3 Sub rule (4) and the illustration thereto, that is, ill. (d) are both new. This sub rule gives effect to the decisions noted under the head "Sub rule (4)".

Application of the rule—The meaning of sub rule (1) may be explained by the following illustration. *A* holds a decree against *B* for Rs. 5,000. *B* holds a decree against *A* for Rs. 3,000. *A* and *B* each applies for execution of his decree to Court *X* which has jurisdiction to execute both decrees. The decrees being cross decrees they will be set off against each other. Hence *B*, who is the holder of the decree for the smaller amount, will not be allowed to take out execution of his decree. Execution will only be allowed of *A*'s decree to the extent of Rs. 2,000, being the difference between the amount of his and *B*'s decree. If the decree held by *B* was also for Rs. 5,000 neither party should be allowed to take out execution, and satisfaction should be entered upon both decrees.

This rule does not apply unless—

- (1) the cross decrees are for the payment of two *sums of money*,
- (2) the decrees have been obtained in *separate suits* [see notes above under the head "Alterations in the rule"],
- (3) both the decrees are capable of execution *at the same time* [ill. (1)], and *by the same Court*, and
- (4) the decree holder in one of the suits in which the decrees have been passed is the judgment debtor in the other, and each party fills *the same character in both the suits* [ills. (b) and (c)].

If the cross decrees fulfil the above conditions it is also necessary, that both decrees should be before the executing Court for execution, and that applications should have been made for execution of both decrees. If either decree holder omits to apply for

21, r. 18 execution of his decree, the other decree holder may take out execution of his decree for its full amount (c) Note the words with which the rule begins.

"Cross decrees in separate suits"—An order for payment of mesne profits made under s 144 is a decree by virtue of s 2 (2) Hence it has been held that there is no distinction for the purposes of this rule between a decree in a *suit* and a decree in a *proceeding* under s 144 A obtains a decree against B In execution of the decree B a property is sold and it is purchased by A The decree is reversed in appeal, and A is directed to deliver possession of the property to B and to pay to B Rs 712 for mesne profits B applies for execution against A in respect of Rs 712 A claims to set off another decree obtained by him against B The set off may be allowed under this rule (d)

"Cross decrees for the payment of two sums of money"—A sues B on a mortgage and obtains a decree for Rs 1,800 to be realized by sale of the mortgaged property B obtains a decree against A for Rs 2,000 Here A's decree, though it is one for sale in enforcement of a mortgage, and not strictly for the payment of money may be set off against B's decree, by virtue of the provisions of r 20 of this order (e) But it has been doubted if this can be done before the amount due on the mortgage has been ascertained (f)

Where execution is taken out for the smaller sum—This rule provides that where applications are made for the execution of cross decrees, one for a larger amount and the other for a smaller amount, execution should be taken out only for the difference This means that the decree for the smaller amount cannot be executed at all and no separate execution should issue of that decree (g) It is to be noted however that if the Court in contravention of the provisions of this rule, allows execution to issue of the decree for the smaller sum and a sale is made in such execution, the sale is not void the reason being that "a purchaser under a sale in execution is not bound to inquire whether the judgment debtor had a cross judgment of a higher amount (h)

Same character in both suits—The provisions of this rule do not apply unless the decree holder in one suit is the judgment debtor in the other, and each party fills the same character in both suits A holds a money decree against B B holds a decree for sale passed in a suit brought by him as mortgagee against C, the mortgagor and against A, a purchaser of a portion of the mortgaged property from C A applies for execution of his decree against B B is not entitled to set off his decree against A's decree The reason is that A does not fill the same character in both the suits The decree held by A is in his favour personally which he may execute against B by the arrest of his person or the attachment of his property This cannot be said of B's decree against A, for A is not ordered by the decree personally to pay any sum of money, but is only given an option to pay, if he wishes to save the property in which he is interested (i) If in the case put above C, the mortgagor, was the holder of the money decree against B instead of A, and C applied for execution against B B (the mortgagee) could have set off his decree against C (j) But a firm name is only a description of the individual partners and so a decree against a firm can be set off against a decree in favour of a partner (k)

(c)

(g)

(h)

(i)

(d) *Adra ta v The Chittagong Co. Ltd* (1923)

28 C W N 988 84 I C 747, (2a) A C 103

(e) See *Krushnan v Venkataswami* (1906) 29 Mad 218(f) *Calstann v Radhakissen* (1931) 55 Cal 850 129 I C 40 (31) A C 23.(j) *Nagar Mal v Pam Chand* (1911) 33 All 40 81 C 230(k) *Administrator General v Sultanali* (1927) 29 Bom L R 396 104 I C 319 (27) A B 35

Assignment of decree.—If *A*, who has obtained a decree against *B*, attaches in execution of his decree a decree held by *B* against *C*, *A* is an assignee of *B*'s decree within the meaning of this rule (l) [See O 21, r 53 (3)] It has been held by the High Court of Calcutta that a decree obtained against the assignor in a suit pending at the date of the assignment may be set off against the decree assigned, if the assignee had notice of such suit (m) *A* obtains a decree against *B* for Rs 5,000. *B* then sues *A* for Rs 2,000. Pending *B*'s suit *C* obtains a transfer of *A*'s decree with notice of the suit. A decree is then passed for *B* in his suit against *A*. *C* applies for execution against *B* of the whole decree for Rs 5,000. He is not entitled to execute for more than Rs 2,000 as the transfer was taken with notice of *B*'s suit. See notes to s 49.

Sub rule (4).—This sub rule gives effect to the decisions in the undermentioned cases where it was held that the holder of a decree passed jointly and severally against several judgment-debtors one of whom holds a decree against such decree holder singly may treat his joint decree as a cross-decree (n) See ill (1) to the sub rule.

19. [S. 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then,—

Execution in case of cross claims under same decree

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree.

Object of the rule.—The object of this rule is to prevent each side executing a decree in respect of sums due, whether for costs or otherwise under the same decree (o).

Application of the rule.—This rule is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. *A*, a mortgagor, sues *B*, the mortgagee for redemption. A decree is passed in the suit, ordering that upon *A* paying to *B* Rs 1,000 (mortgage debt) on a day fixed by the Court *B* should reconvey the mortgaged property to *A*, and that if such payment is not made within the time fixed by the Court the property should be sold. At the same time *A* is awarded costs, Rs 100, to be paid by *B*. Here both the sums being payable under the same decree, the provisions of the present rule apply, though *B*'s remedy, if *A* failed to pay the mortgage debt, would be by sale of the mortgaged property, and *A*'s remedy if *B* failed to pay the costs, would be against *B* personally. Hence *A*, being entitled to the smaller amount (Rs 100), cannot take out execution against *B* (p). *B*, being entitled to the larger amount (Rs 1,000), is alone entitled to take out execution. But he cannot take out execution for more than Rs 900, which is the same thing as saying that he must reconvey the property to *A*, if *A* paid Rs 900 and he cannot insist on payment of the

(l) *Adulata v The Chittagong Co., Ltd* (1923) 28 C W N 988 84 J C 747 (35)
A C 102

(m) *Kruto Jaman v Kedar Nath* (1899) 16 Cal 619

(n) *Hury Doyal v Din Doyal* (1883) 9 Cal 479

Ram Sukh Das v Tota Ram (1892) 14 All 339

(o) *Bhagwan v Patan* (1894) 16 All 393 at p 397
Senkatasaranyana v Purada (1913) 44

Mad L J 590 72 J C 865 (23) A.M. 628.

(p) *Sankara v Gopala* (1900) 23 Mad. 121

O. 21,
rr. 19-22

full sum of Rs 1,000 as a condition of reconveyance (g) The point to be noted is that in the case of cross claims under the same decree, execution may be taken out only by the party entitled to the larger sum The party entitled to the smaller sum is not entitled to take out execution It follows from this that if *A* is entitled to recover from *B* some profits amounting to Rs 445 under a decree, and *B* is entitled to recover from *A* under the same decree costs amounting to Rs 855, *A* being entitled to the smaller sum cannot take out execution against *B*, though *B* a claim to execute his decree for costs is barred by limitation (r) It may also be noted that if the party entitled to the larger sum executed the decree for the full amount without deducting the smaller sum, the party entitled to the smaller sum may be awarded a refund of that sum under s 151 of the Code (s)

Cross-decrees and cross-claims in mortgage suits

20. [New.] The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

Object of the rule.—This rule is new. It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to mortgage decrees The rule shows impliedly that the expression "decree for the payment of money" and other similar expressions in the Code do not include a decree for sale in enforcement of a mortgage or charge See in particular s 34, s 73 and O 21, r 53

The High Courts of Allahabad and Madras have held that a simple decree for recovery of money can be set off against a decree for recovery of money by enforcement of a mortgage or charge (t) See notes to r 18 above, "Cross decrees for the payment, etc

21. [S. 230, 2nd para.] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution

Simultaneous execution against person and property.—An order refusing execution at the same time against the person and property of the judgment-debtor amounts to a decree under s 2, cl (2), read with s 47, and it is therefore appealable (u)

But though the Court has a discretion to refuse simultaneous execution, it cannot decline to order execution against the person of the judgment debtor on the ground that the decree holder should proceed in the first place against his property (v)

Notice to show cause
against execut on in certain
cases

22. [S. 248.] (1) Where an application for execution is made—

- (a) more than one year after the date of the decree, or
- (b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

(g) *Bhagwan v Ratan* (1894) 16 All 395, *Jahr v Gopal* (1884) 6 All 351
(r) *Madappa v Jaki* (1916) 40 Bom. 60, 30 I C 893
(s) *Annanda v Atul* (1919) 24 C W N 405 56 I C 753

(t) *Nagar Jai v Ram Chand* (1919) 33 All 240 8 I C 835, *Venkata v Dorasami* (1932) 56 Mad 339 140 I C 374 (33) A 31. 63
(u) *Chena v Ghicobhai* (1883) 7 Bom. 301
(v) *Hargobind v Hakim* (1926) 6 Lab 544 93 I C 61 (26) A L 110

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

Changes in the law—Sub rule (2) is new See note below, 'Sub rule (2)'

The Court shall issue a notice—It is not enough merely to take out a notice. The notice must be *served* upon the judgment debtor or upon his legal representative (w)

Omission to give notice—This rule provides that except where notice is dispensed with under sub r (2) the Court executing the decree *shall* issue a notice to the person against whom execution is applied for if the application for execution is made more than one year after the date of the decree or if it is made against the legal representative of the judgment debtor. This gives rise to the question whether the omission to give notice as required by this rule renders a sale in execution of the decree absolutely void for want of jurisdiction, or whether the omission is a mere irregularity so as to render the sale merely voidable, that is valid until it is set aside. In *Gopal Chunder v Gunamoni Das* (x) the High Court of Calcutta held that a notice under this rule is necessary in order that the Court should obtain jurisdiction to sell the property by way of execution, and that the omission to give notice is by itself sufficient to render the sale void. This decision was approved by the Privy Council in *Raghunath Das v Sunder Das* (y). In *Raghunath Das*'s case the judgment debtor became insolvent pending the attachment. No notice was given to the Official Assignee as required by cl (b) of sub r (1), and it was held that the sale was a nullity. Since the notice under this rule affords the very foundation of the jurisdiction, it follows that where execution is issued without previously issuing a notice required under sub rule (1) and property belonging to the judgment debtor is sold in execution the sale is a nullity.

(w) *Gurudas v Bhojapure Zeminary Co* Ld (1921) 25 C W N 92 64 I C 476 (21) A C 609

(x) (1903) 20 Cal 370 [no notice to legal

(y) . . .

Mad 988 60 I C 90 (4) A M 431 (F B) dissenting from the views expressed in *Isakhranganathan v Somasundaram* (1900) 45 Mad 875 50 I C 61 (20) A M 93 and *Dorasami v Chidambaram* (1904) 47 Mad 63 51 I C 46 (24) A M 130 *Chanda Prasad v Musat Jumnaz* (1908) 49 All 830 10 I C 239 (25) A A 74 *Monnatha v Ursat Lakshmi* (1908) 55 Cal 98 105 I C 65 (28) A C 60 *Panday v Kannamal* (1929) 7 Rang 110 117 I C 254 (29) A K 161

O. 21, r. 22 whether the property is purchased by the decree holder (O 21, r 72) (a), or by a third party (a) It makes no difference whether the property sold is movable or immovable (b) But the object of the rule is to give the judgment debtor an opportunity to show cause why the execution should not proceed, and if the judgment-debtor is aware of the proceeding the Court has jurisdiction to hold the sale (c)

Notice to wrong person as legal representative—The principle laid down in *Raghunath Das's* case applies where no notice is given. But what if notice is given and served, upon a person who proves not to be the legal representative? The leading case upon the subject is *Mallaryun v Narhari* (d). A decree was passed against a person, who afterwards died, and in executing the decree against his estate, a person was served as his legal representative with notice under this rule. The person served objected that he was not the legal representative of the deceased. The executing Court decided and as it turned out subsequently, decided erroneously, that he was to be treated as such representative [see s 47]. After that the execution proceedings went on with the result that certain property belonging to the deceased judgment debtor was sold and purchased by a third party. The question arose whether the sale was void as made without jurisdiction, or whether it was merely voidable. Their Lordships of the Privy Council held that a notice having been served in fact, though upon a wrong person, the Court had jurisdiction to sell the property, and the sale was not void. Their Lordships further held that the omission to give notice to the right person constituted a serious irregularity and that the sale was therefore voidable, that is to say, it was valid until it was set aside under O 21, r 90, or by an independent suit brought within a year as provided by art 12 cl (a) of the Limitation Act. Their Lordships said "He (the person served) contended that he was not the right person, but the Court, having received his protest, decided that he was the right person and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right (e)". But if the decree holder knows who the legal representative of the deceased judgment debtor is, and deliberately serves the notice upon a wrong person as his legal representative, and there is no adjudication by the executing Court as to who the legal representative is, the sale has been held to be absolutely void (f).

Omission to give notice to one of several legal representatives.—In the execution of a mortgagee's decree for sale the decree holder omitted to give notice to one of the legal representatives of the mortgagor. It was held that the sale in execution of the decree was not wholly void but that it should be set aside to the extent of the share of that legal representative (g).

More than one year after the date of the decree—The term 'decree' in sub r (1), cl (a), means the decree capable of execution. Thus where an appeal is preferred from a decree and the appeal is dismissed for default under O 41, r 11, the decree

(a) *Panditji Dattaraj v Durgaji Dattaraj* (1851)

(a)

(d)

(e)

(f) *Shah v Shah* (1821) 45 Dow 410
63 IC 248 (21) A B 385 (suit by auction purchaser for possession—Shah J held that the sale was void—Maclean C J, held that the sale was voidable but that the purchaser was not entitled to possession)

(b) *Sahdeo v Ghanram* (1834) 21 Cal 19 (where the property sold was an elephant)

(c) *Fakhrul v Rani* (1928) 7 Pat 90 117 IC

(g) *Manmoharandhra v Pabannanetra* (1931) 58 Cal 8 139 IC 670, (31) AC 355

of the lower Court is the decree capable of execution, and the period of one year is to be calculated from the date of that decree (h) See notes to sec 36, "What decree may be executed" Even where the decretal amount is made payable by instalments, the period of one year must be calculated from the date of the decree, and not from the date of default (i) No notice under r 22 is necessary if the application is made within a year of a previous application under O 2, r 16 (i1)

More than one notice—In one case the High Court of Patna held that once the original decree has been put into execution after notice as provided by this rule, no fresh notice need be served for every subsequent application for execution made more than one year from the date of the last order for execution (j), but this case was overruled by a Special Bench of the same High Court where it was held that the rule applies to every application, and that in every case a year after the last order made for execution a fresh notice must be served (k)

The High Court of Madras has held that where property is attached on an application for execution, no notice need be given to the judgment-debtor of the *application for sale*, though the latter application is made more than a year after the previous *application for execution* (l)

Irregular service of notice—Irregularity in the service of notice as distinguished from non-service is a material irregularity within the meaning of O 21, r 90 (m)

Death of judgment debtor pending execution—Notice to legal representative—If execution proceedings have begun against a judgment debtor they can be continued after his death against his legal representative See sec 50 But notice under this rule must be given to the legal representative (n)

Death of judgment-debtor pending execution by transferee Court—See notes to sec 50

"Court executing the decree"—It may either be the Court which passed the decree or the Court to which the decree is sent for execution

Sub rule (2)—This sub rule is new It enables the Court to issue execution without issuing a notice as provided by sub rule (1) in cases where the issue of a notice may involve an unreasonable delay or defeat the ends of justice Where the Court dispenses with notice under sub rule (1) it should record its reasons (o) But if the Court omits to record its reasons the omission is a mere irregularity (p)

Limitation to set aside sale for want of notice—An application to set aside a sale which is void, *et q* for want of notice under this rule is governed by art 181, and not art 166 of Sch I of the Limitation Act (q)

Appeal—An application to set aside a sale held without notice as required by sub r (1) falls within sec 47, and hence a second appeal lies (r)

(h) *Shyam v Mfandal Satinath* (1917) 44 Cal 954 38 IC 493

(i) *Kora Lal v Punjab National Bank* (1923)

(i1)

(j)

(k)

(l)

(m)

(n)

(o)

(p)

(q)

(r)

(s)

(t)

(u)

(v)

(w)

(x)

(y)

(z)

(aa)

(ab)

(ac)

(ad)

(ae)

(af)

(ag)

(ah)

(ai)

(aj)

(ak)

(al)

(am)

(an)

(ao)

(ap)

(aq)

(ar)

(as)

(at)

(au)

(av)

(aw)

(ax)

(ay)

(az)

(ba)

(bb)

(bc)

(bd)

(be)

(bf)

(bg)

(bh)

(bi)

(bj)

(bk)

(bl)

(bm)

(bn)

(bo)

(bp)

(bq)

(br)

(bs)

(bt)

(bu)

(bv)

(bw)

(bx)

(by)

(bz)

(ca)

(cb)

(cc)

(cd)

(ce)

(cf)

(cg)

(ch)

(ci)

(cj)

(ck)

(cl)

(cm)

(cn)

(co)

(cp)

(cq)

(cr)

(cs)

(ct)

(cu)

(cv)

(cw)

(cx)

(cy)

(cz)

(da)

(db)

(dc)

(dd)

(de)

(df)

(dg)

(dh)

(di)

(dj)

(dk)

(dl)

(dm)

(dn)

(do)

(dp)

(dq)

(dr)

(ds)

(dt)

(du)

(dv)

(dw)

(dx)

(dy)

(dz)

(ea)

(eb)

(ec)

(ed)

(ee)

(ef)

(eg)

(eh)

(ei)

(ej)

(ek)

(el)

(em)

(en)

(eo)

(ep)

(eq)

(er)

(es)

(et)

(eu)

(ev)

(ew)

(ex)

(ey)

(ez)

(fa)

(fb)

(fc)

(fd)

(fe)

(ff)

(fg)

(fh)

(fi)

(fj)

(fk)

(fl)

(fm)

(fn)

(fo)

(fp)

(fq)

(fr)

(fs)

(ft)

(fu)

(fv)

(fw)

(fx)

(fy)

(fz)

(ga)

(gb)

(gc)

(gd)

(ge)

(gf)

(gg)

(gh)

(gi)

(gj)

(gk)

(gl)

(gm)

(gn)

(go)

(gp)

(gq)

(gr)

(gs)

(gt)

(gu)

(gv)

(gw)

(gx)

(gy)

(gz)

(ha)

(hb)

(hc)

(hd)

(he)

(hf)

(hg)

(hh)

(hi)

(hj)

(hk)

(hl)

(hm)

(hn)

(ho)

(hp)

(hq)

(hr)

(hs)

(ht)

(hu)

(hv)

(hw)

(hx)

(hy)

(hz)

(ia)

(ib)

(ic)

(id)

(ie)

(if)

(ig)

(ih)

(ii)

(ij)

(ik)

(il)

(im)

(in)

(io)

(ip)

(iq)

(ir)

(is)

(it)

(iu)

(iv)

(iw)

(ix)

(iy)

(iz)

(ja)

(jb)

(jc)

(jd)

(je)

(jf)

(jg)

(jh)

(ji)

(jj)

(jk)

(jl)

(jm)

(jn)

(jo)

(jp)

(jq)

(jr)

(js)

(jt)

(ju)

(jv)

(jw)

(jx)

(jy)

(jz)

(ka)

(kb)

O. 21,
rr. 22-24

Decree against two or more persons jointly.—Art. 182 of the Limitation Act, 1908, applies to decrees of Courts other than Chartered High Courts. Under Explanation I to that article when a decree has been passed jointly against more persons than one an application for execution of the decree, if made against any one or more of them, shall take effect against them all. Therefore an order of execution made under this rule in the other judgment debtors is appended. Therefore if a joint decree made against one of several judgment debtors does not operate against other judgment-debtors to whom no notice is given under this rule (z).

Notice under this rule is not to be issued under this rule if the debtor is dead (z).

debtor was dead (z)

Art 183 of the Limitation Act, which provides that a decree shall not be executed until its date unless an order for mere issue and service of a notice under this rule does not (z)

23. [S. 249.] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Process for execution.

24. [Ss. 230, 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless

| | |
|--|--|
| (a) <i>Krishnaiah v. Gayendra</i> (1917) 49 Mad 1127, 40 I C 608 | (w) <i>Damodar v. Sonaji</i> (1903) 27 Bom 622 |
| (c) <i>Kadiresar v. Mohim Chandra</i> (1902) 6 C W N 656 | (z) " |
| (u) " | (y) " |
| (v) " | (z) " |

it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed

Unless it sees cause to the contrary—See notes to O 21, r 37, under the head 'Whether an executing Court has discretion to refuse or suspend attachment of judgment debtor's property

Delegation of authority to execute—The officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution. It is not necessary that the "proper officer" should himself execute all warrants sent to him (a) But a warrant addressed to the *peon* of a Court cannot be executed by a *Nawab* (b)

Arrest without warrant—Where an officer of the Court arrests a judgment debtor without having the warrant in his possession at the time of arrest, the arrest is illegal (c)

"Shall be sealed"—The provisions of this rule being mandatory the omission of the Court's seal on the warrant renders the attachment illegal (d)

Specification of day on or before which warrant should be executed—The warrant should specify the date on or before which it is to be executed. Resistance to the execution of a warrant which does not specify such date is not illegal (e). Moreover, a warrant cannot be executed after the expiration of the date specified in the warrant for its execution (f). If the warrant is extended, the date to which it is extended must be specified on the warrant. If this is not done, the warrant is not a good warrant, and resistance to its execution after the date originally specified in it does not amount to an offence under s 186 of the Indian Penal Code (g)

25 [S. 343.] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court

Endorsement on process

(a) " "

(b)

(c) *Empress v Amar Nath* (1833) 5 All 318

(d) *Khadir Bux v King-Emperor* (1918) 31 at LJ 636 49 IC 171, *Ladra Gope v*

(e) "

(f)

(g)

O. 21, Decree against two or more persons jointly.—Art. 182 of the Limitation
rr. 22-24

them, shall take effect against them all. Therefore an order of revivor of a joint decree made under this rule is not a

that "the date of issue of notice" means the date when the Court passes the order for

debtor was dead (x)

Art 183 of the Limitation Act, which applies to decrees of Chartered High Courts, provides *inter alia* that a decree of such Court can be enforced within twelve years from its date unless the decree has been *revived*. The High Court of Calcutta has held that an order for execution operates as a revivor within the meaning of this article (y), but mere issue and service of a notice under this rule does not (z)

23. [S. 249.] (1) Where the person to whom notice is issued under the last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Process for execution.

24. [Ss. 250, 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless

| | |
|---|---|
| (x) <i>Krishnaswami v. Gayendra</i> (1917) 19 Mad 1127, 40 IC 608 | (u) <i>Damodar v. Sonny</i> (1903) 27 Bom 622 |
| (t) <i>Kantareswar v. Mohan Chandra</i> (1902) 6 C W N 656 | (x) " " " " |
| (u) " " " " | (y) " " " " |
| (v) " " " " | (z) " " " " |

it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date, the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

Unless it sees cause to the contrary.—See notes to O 21, r. 37, under the head "Whether an executing Court has discretion to refuse or suspend attachment of judgment debtor's property."

Delegation of authority to execute—The officer to whom a warrant is delivered for execution under this rule may deliver it to his subordinate for execution. It is not necessary that the "proper officer" should himself execute all warrants sent to him (a). But a warrant addressed to the *person* of a Court cannot be executed by a *Nazir* (b).

Arrest without warrant.—Where an officer of the Court arrests a judgment debtor without having the warrant in his possession at the time of arrest, the arrest is illegal(c)

"Shall be sealed"—The provisions of this rule being mandatory, the omission of the Court's seal on the warrant renders the attachment illegal (*d*)

Specification of day on or before which warrant should be executed—The warrant should specify the date on or before which it is to be executed. Resistance to the execution of a warrant which does not specify such date is not illegal (e). Moreover, a warrant cannot be executed after the expiration of the date specified in the warrant for its execution (f). If the warrant is extended, the date to which it is extended must be specified on the warrant. If this is not done, the warrant is not a good warrant, and resistance to its execution after the date originally specified in it does not amount to an offence under s. 186 of the Indian Penal Code (g).

25. [S. 343.] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it

Endorsement on process

was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(g) $g(x) = x^2 - 2x + 1$

(b)

(c) *Empress v Amar Nath* (1883) 5 All. 318

(d) *Khudir Bux v King-Emperor* (1918) 3 Pat L.J. 636, 49 I.C. 171. *Badri Gope v*

(e) .

① 。

(g) 21 C.F.R. 401.401.

O. 21,
rr. 25-28

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result

Stay of execution

26. [S. 239, 240.] (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto

(2) Where the property or person of the judgment debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the Court may require such security from, or impose such conditions upon, the judgment debtor as it thinks fit

Power to require security from or impose conditions upon judgment-debtor

Stay of execution—See notes under the same head to sec 47

27. [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment debtor from being retaken in execution of the decree sent for execution

Liability of judgment debtor discharged

Contrast with this the provisions of sec 58 sub s (4)

28. [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution

Order of Court which passed decree or of appellate Court to be binding upon Court applied to

29. [S. 243.] Where a suit is pending in any Court O.

Stay of execution pending
suit between decree holder
and judgment-debtor

against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Pending in any Court.—If a suit is pending before a Joint Subordinate Judge he may stay execution in the Court of the Subordinate Judge for he is a Judge of the same Court (A). In the case last cited the Bombay High Court said that the Court in which the suit is pending is the Court authorized to stay execution and that if a decree is transferred for execution and a suit is pending against the decree holder in the transferor Court that Court would have power to stay execution in the transferee Court. Similarly if a suit is pending against the decree holder in the transferee Court the latter Court has power to stay execution (1).

Security.—The Court has ample discretion and if it thinks fit need not require security (3)

Whether provisions of Code relating to execution of decrees apply to an award filed under the Arbitration Act, 1889—*The High Court of Bombay has held that an award filed in Court under sec 11 of the Indian Arbitration Act 9 of 1889 is not a decree, although it is enforceable, as provided by sec 15 of that Act, as if it were a decree. The execution therefore of such an award cannot be stayed under this rule (l). On the other hand, the High Court of Calcutta holds that an award filed in Court under sec 11 of the Arbitration Act being enforceable under sec 15 of the Act as if it were a decree of the Court, the provisions of the Code applicable to the execution of decrees apply to an award so filed. It has thus been held that an award against a firm stands on the same footing as a decree against a firm for the purposes of O 21, r 50 (l) and that a transfer of an award stands on the same footing as a transfer of a decree for the purposes of O 21, r 16 (m). The High Court of Allahabad takes the same view as the Calcutta High Court (n). No such question, however, can arise where a decree is passed in terms of an award under para 16 of Sch II of the Code (o) for the award in that case is merged in the decree.*

Appeal—The Punjab Court has held that the Court can in its inherent jurisdiction stay execution proceedings pending the decision of an appeal in the judgment debtor's suit (p). But the Calcutta High Court considers that it is not necessary to have recourse to the inherent jurisdiction and construes the words "until the pending suit has been decided" to mean until the claim in the pending suit has been finally decided, i.e., after all rights of appeal have been exhausted (q). See note to sec. 47, "Changes introduced by the section."

- | | | | |
|-----|---|-----|--|
| (h) | 33 both L R 3,0 <i>supra</i> | (m) | |
| (i) | | (n) | |
| (j) | | (o) | |
| (k) | <i>Trubhucan las v Jiranchand</i> (1911) 35 Dom 196 8 I C 179 | (p) | |
| (l) | <i>Lous Dreyfus & Co v Purusottam Das</i> (1920) 47 Cal 29, 56 I C 325 | (q) | |

O. 21,
rr. 30, 31

Mode of execution.

30. [S. 254.] Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property, or by both.

Decree for payment of money

Alternative to some other relief.—See O 20, r 10

Property charged with payment of decretal amount.—No attachment is necessary where by a consent-decree certain property is charged with payment of the decretal amount and liberty is given to the decree holder to sell the property in case of default of payment (r) The Court has no authority to decline to make an order of committal to civil prison on the ground that the decree holder should proceed in the first instance against the property of the judgment debtor (s)

31. [S. 259.] (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both

Decree for specific movable property

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

(r) *Jaganath v. Debi Prasad* (1923) 2 Pat 768, 73 I C 509 (24) A P 258 | (s) *Harshan v. Halim* (1928) 6 Lah 548 107 I C 495 (28) A L 110

Alterations in the rule.—The words "or for the recovery of a wife," which occurred in the corresponding sec 259 of the Code of 1882 after the words "share in a specific movable," have been omitted, for there can be no decree under the law for the recovery of a wife, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both, under r 32.

Decree for specific movable property.—Where a decree directs recovery of specific movable property and for payment of the price thereof if the property be not delivered, the decree holder is not entitled to execute the money part of the decree before applying for delivery of the property (t). As to the cases in which a decree may be passed for the delivery of specific movable property, see Specific Relief Act I of 1877, s 11.

Rule when not applicable.—It has been held by the High Court of Calcutta that this rule does not apply where the property sought to be attached is not in the possession of the judgment debtor (u).

32. [S. 260, R. S. C., O. 42, r. 30.] (1) Where the party

against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced *in the case of a decree for restitution of conjugal rights by the attachment of his property or in the case of a decree for the specific performance of a contract or, for an injunction* (v) by his detention in the civil prison, or by the attachment of his property or by both.

Decree for specific performance, for restitution of conjugal rights, or for an injunction

it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or in the case of a decree for the specific performance of a contract or, for an injunction (v) by his detention in the civil prison, or by the attachment of his property or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as he thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(t) *Balmakunda v. Bengal Nagpur Rail way Co. Ltd.* (19-3) 55 Cal 26, 103 I C 740 (27) A C 65.

(u) *Padmanunil v. Chundi Dat* (1896) 1 C W N

70

(v) The italicized words were added by Act 29 of 1923.

O. 21, r. 32

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, *in lieu of or in addition to all or any of the processes aforesaid*, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration

4, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.

Alterations in the rule.—Sub rules (2) and (5) are new. See notes below under the head "Sub rule (5)".

The words "or for an order requiring the performance of, or abstinence from, any other particular act" which occurred in s. 200 of the Code of 1882 have been omitted, and in lieu thereof the words "or for an injunction" have been substituted. See notes below under the head "Sub rule (1) decree for injunction".

Specific performance.—As to specific performance of contracts, see Specific Relief Act I of 1877, ss 12-30.

Injunction.—As to perpetual injunctions, see Specific Relief Act I of 1877, ss 34-37.

Restitution of conjugal rights.—The words italicized in sub rule (1) were added by Act 29 of 1923. Having regard to those words, a decree for restitution of conjugal rights can no longer be enforced by detention in the civil prison, whether it be against a husband or a wife. As to a decree against a husband, see also r 33 below.

Sub-rule (1): decree for injunction.—Sub rule (1) applies to both prohibitory and mandatory injunctions (u). Where an injunction has been granted, on each successive breach of it, the decree may be enforced under this rule by an application made within three years of such breach under art 181 of the Limitation Act (x). A separate suit to enforce the injunction is barred by the provisions of s 47 (y). If the decree is enforced

(u)

(x)

see Ram Saran v. Chatar Singh (1903)
23 All 465, Bhagwan Das v. Sukhlal
(1906) 28 All 300
(y) 46 Cal 103, 45 I L R 864, supra

by the imprisonment of the defendant, the period of imprisonment should not at any one time exceed six months see s 58

Where a woman, who had been directed by a decree to refrain from preventing her daughter returning to her husband, *permitted* the daughter, who was of age, to reside in her house, it was held that such conduct did not constitute a breach of the direction under the decree so as to render it punishable under this rule (z)

It was held under the old section that an order directing a defendant to render accounts within a specified time was an "order requiring the performance of a particular act" within the meaning of that section, and that disobedience to the order was punishable under that section (a) The words "performance of or abstention from any other particular act" which occurred in the old section were held to have a very wide general meaning, and they have been omitted from this rule, and the word "injunction" has been substituted Hence disobedience to an order directing a party to render accounts can no longer be punished under this rule, as such an order cannot be said to be an "injunction" within the meaning of this rule (b)

Opportunity of obeying the decree.—All that the Court has to see before directing execution to issue under this rule is whether the party bound by the decree has had an *opportunity* of obeying the decree or injunction and has wilfully failed to obey it If the party has had the opportunity and has *wilfully* failed to obey the decree, the Court may order execution to issue under this rule without giving him any further opportunity, and it is not obligatory upon the Court in such a case to serve a notice upon the party calling upon him to obey the decree or injunction (c)

Where an application is made under this rule, but the party bound by the decree has had no opportunity of obeying the decree, the application will be dismissed But the dismissal of the application is no bar to another application made after an opportunity has been afforded to the party of obeying the decree Thus if a decree is made directing the defendant to deliver certain articles necessary for the performance of the duties of priest in a temple to the plaintiff, the plaintiff is not entitled to execute the decree under this rule unless it is proved that he went to the temple after notice to the defendant to receive the articles from him (and thereby afforded an opportunity to the defendant to comply with the decree) and that the defendant failed to deliver the articles If such an opportunity has not been afforded, the plaintiff's application will be dismissed, but its dismissal will be no bar to a subsequent application after such opportunity has been afforded (d)

"Party against whom a decree for injunction has been passed."—See notes to s 50, Decree for injunction

Sub rule (5)—This sub rule is new It corresponds to O 42, r 30, of the English Rules In the absence of any provision in the old section similar to the one contained in this sub rule, it was held that where a decree directed the defendant to remove an obstruction, such as pulling down a wall or opening a path way, and the defendant failed to obey the decree, it was not competent to the Court to depute any of its officers to remove the obstruction, as that was not one of the modes of execution sanctioned under that section (e) Under the present rule, the Court may direct the act to be done so far as practicable by the decree holder or some other person appointed by the Court (f) But the Court has no power under this rule to order the police to see that

(a) *Ajnani Kuar v Suraj Prasad* (1877) 1 All 501

(e) 784 211 A 89

(a) *Degambar v Kallj Nath* (1881) 7 Cal 654

Raghunath v Ganpatji (1905) 2nd All 374

(b) *Arjun v King Emperor* (1918) 3 Pat L J 108 411 C 37

(c) *Durga Das v Durrat* (1906) 33 Cal 306

(f)

(d) *Kashore Bun v Dakanath* (1894) 21 Cal

O. 21,
rr. 32, 33

its decree is carried out. Thus where a decree is passed declaring the plaintiff's right to perform certain ceremonies in a temple and restraining the defendant from obstructing the plaintiff's from performing the ceremonies, the Court has no power under this rule to order the police to see that the plaintiffs performed the ceremonies without interference on the part of the defendants (g). But it would appear that the Court will under this rule direct an application to be made to the Revenue authorities, for the Privy Council said that the provisions of the rule were sufficient to provide for the enforcement of a decree for specific performance of a contract of sale and an implied covenant to apply to the Revenue authorities for their sanction to the transfer (h).

The expression "the act required to be done" means what has to be done to enforce the injunction (i). Hence if a defendant is directed by a decree to demolish

from by a
junctions
which a

33. [Now]. (1) *Notwithstanding anything in rule 32, the Court, either at the time of passing a decree against a husband for the restitution of conjugal rights or at any time afterwards, may order that the decree shall be executed in the manner provided in this rule.*

Discretion of Court in
executing decrees for resti-
tution of conjugal rights

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

h (1923) 5 Lsh L J
A L 333
Smith (1919) 46 Cal
Irendra (1933) 28 C

Amendment of the rule.—The italicized words in sub rule (1) were added by Act 29 of 1923. The words "and the decree holder is the wife" which occurred in sub rule (2) after the words "under sub rule (1)" were omitted by the same Act. The effect of this omission is that the present rule applies to a decree for restitution of conjugal rights passed against a husband. The words "shall be executed in the manner provided in this rule" in sub r (1) have been substituted for the words "shall not be executed by detention in prison". See as to the latter words the undermentioned case (i). See r 32 above and note the alterations made in that rule by the same Act.

34. [Ss. 261, 262.] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court

Decree for execution of document or endorsement of negotiable instrument

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the documents so delivered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely —

"C D, Judge of the Court of
(or as the case may be), for A B, in a suit by E F against A B",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

O. 21,
rr. 34, 35

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

Sub rule (1) decree for execution of a document—Where the document to be executed relates to some property, the property must be the subject matter of a suit. If it is not a regular suit must be brought to enforce execution of the document (m)

Sub rule (6) Registration—This sub rule is new. It gives effect to a decision of the Allahabad High Court that if a document requires registration it must be registered though executed by the Court (n). At the same time provision is made for the registration of documents, though their registration is optional if the decree holder desires to have them registered.

Appeal—An appeal lies from an order under this rule on an objection to the draft of a document or of an endorsement (O 43 r 1 cl (i))

35. [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

Decree for immovable property

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Alterations in the rule—Sub rules (2) and (3) are new. See notes below

(m) *Sa ad ramani v. Behary Lal* (1920) 25 C. W. N. 68 61 F. 535 | (n) *Kanah a Lal v. Kali Dhan* (1880) 7 All. 392

Bound by the decree—The forfeiture of a lease destroys the rights of the sub-lessee, and in a suit for ejectment of the lessee there is no necessity to implead the sub-lessee (o). He is a person bound by the decree and the decree in ejectment of the lessee can be executed against him although he is not a party (p). O. 21

Sub rule (2)—A plaintiff who is entitled to possession jointly with other persons may be granted a decree for joint possession, whether the plaintiff was originally in possession and was subsequently dispossessed (q), or whether he had never been in possession (r). But the Court has a discretion in the matter (s) and joint possession was refused where the defendant had been 24 years in separate possession with the acquiescence of the plaintiff (t). Sub rule (2), which is new, has been inserted to remove the difficulty experienced in executing decrees obtained for joint possession of immovable property as against co-sharers and persons holding under them.

Resistance to delivery of possession to decree holder—If a person has succeeded in getting a decree for possession of a certain property, he is entitled under this rule to get an order from the Court for delivery of that property to him by any person bound by the decree. He need not invoke the assistance of the Court if he can get possession peaceably. But he may apply under this rule or rule 36 for the assistance of the Court to put him in possession. If he is resisted or obstructed in obtaining possession through the Court the procedure to be followed is that prescribed by rules 97 to 103 of this order (u).

Actual and formal possession—The possession referred to in sub rules (1) and (3) is *has* or *actual* possession, while that referred to in sub r (2) and r 36 below is *formal* or *symbolical* possession. *Formal* or *symbolical* possession is delivered by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming by beat of drum or other customary mode, at some convenient place, the substance of the decree.

Rules 35 and 36 refer to cases where a suit is brought for possession of immovable property, and a decree is passed in the suit for the delivery of the property to the decree holder. Rules 95 and 96 refer to cases where immovable property belonging to a judgment debtor is sold in execution of a decree passed against him and the purchaser is resisted in obtaining possession through the Court. In both cases the possession may be either actual or symbolical. If the immovable property of which possession is directed by the decree to be delivered to the decree holder is in the possession of the judgment debtor, *actual* possession must be delivered to the decree holder under r 35 (1). Where it is in the possession of a tenant or other person entitled to occupy the same only *symbolical* possession can be delivered, and that is to be done under r 36. Likewise where immovable property is sold in execution of a decree, and possession is sought by the auction purchaser, *actual* possession must be delivered to him under r 95, if the property is in the possession of the judgment debtor. But if the property is in the possession of a tenant or other person entitled to occupy the same, only *symbolical* possession can be delivered, and that is to be done under r 96.

There are thus three cases in which the law allows symbolical possession to be given, namely, the cases contemplated by sub rule (2) of the present rule, by r 36 and by r 96 of this Order. *Symbolical* possession given in such cases operates as *actual* possession.

(o) *Pamulendur v. Pujraj* (1923) 50 Cal

(p) "

(q) "

(r) "

(s) "

(t) "

(u) "

also *Sarabjit v. Raj Kumar* (1922) 44 All 5 631 C 806 (2-) A A 16a

(s) *Watson & Co v. Rimbhand Dutt* (1900) 18 Cal 10 171 A 110

(t) *Hanuman Iyengar v. Mathura Iyengar* (1908) 26 All L J 932 1121 C 143 (78) A A 472 F B

(u) *Kiron Soah v. Official Assignee* (1933) 61 Cal 8 143 C 341 (33) A C 246

O. 21,
rr. 34, 35

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

Sub-rule (1): decree for execution of a document.—Where the document to be executed relates to some property, the property must be the subject matter of a suit. If it is not a regular suit must be brought to enforce execution of the document (m)

Sub-rule (6): Registration.—This sub rule is new. It gives effect to a decision of the Allahabad High Court that if a document requires registration, it must be registered, though executed by the Court (n). At the same time provision is made for the registration of documents, though their registration is optional, if the decree holder desires to have them registered.

Appeal.—An appeal lies from an order under this rule on an objection to the draft of a document or of an endorsement [O 43, r 1, cl (i)]

35. [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

Decree for immovable property

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

Alterations in the rule.—Sub rules (2) and (3) are new. See notes below.

(m) *Sandamoni v. Behary Lal* (1920) 25 C. W. N. 68, 81 I. C. 533

(n) *Kanahia Lal v. Rati Dhan* (1880) 2 A. 392

Bound by the decree—The forfeiture of a lease destroys the rights of the sub-lessee and in a suit for ejectment of the lessee there is no necessity to implead the sub-lessee (o) He is a person bound by the decree and the decree in ejectment of the lessee can be executed against him although he is not a party (p) O. 21

Sub rule (2)—A plaintiff who is entitled to possession jointly with other persons may be granted a decree for joint possession, whether the plaintiff was originally in possession and was subsequently dispossessed (q), or whether he had never been in possession (r) But the Court has a discretion in the matter (s) and joint possession was refused where the defendant had been 24 years in separate possession with the acquiescence of the plaintiff (t) Sub rule (2) which is new, has been inserted to remove the difficulty experienced in executing decrees obtained for joint possession of immovable property as against co-sharers and persons holding under them

Resistance to delivery of possession to decree holder—If a person has succeeded in getting a decree for possession of a certain property, he is entitled under this rule to get an order from the Court for delivery of that property to him by any person bound by the decree He need not invoke the assistance of the Court if he can get possession peaceably But he may apply under this rule or rule 36 for the assistance of the Court to put him in possession If he is resisted or obstructed in obtaining possession through the Court the procedure to be followed is that prescribed by rules 97 to 103 of this order (u)

Actual and formal possession—The possession referred to in sub rules (1) and (3) is *actual* possession while that referred to in sub r (2) and r 36 below is *formal* or *symbolical* possession *Formal* or *symbolical* possession is delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode at some convenient place, the substance of the decree

Rules 3, and 36 refer to cases where a suit is brought for possession of immovable property and a decree is passed in the suit for the delivery of the property to the decree holder Rules 95 and 96 refer to cases where immovable property belonging to a judgment debtor is sold in execution of a decree passed against him, and the purchaser is resisted in obtaining possession through the Court In both cases the possession may be either actual or symbolical If the immovable property of which possession is directed by the decree to be delivered to the decree holder is in the possession of the judgment debtor, *actual* possession must be delivered to the decree holder under r 35 (1) Where it is in the possession of a tenant or other person entitled to occupy the same only *symbolical* possession can be delivered and that is to be done under r 36 Likewise where immovable property is sold in execution of a decree and possession is sought by the auction purchaser *actual* possession must be delivered to him under r 95 if the property is in the possession of the judgment debtor But if the property is in the possession of a tenant or other person entitled to occupy the same only *symbolical* possession can be delivered and that is to be done under r 96

There are thus three cases in which the law allows symbolical possession to be given, namely the cases contemplated by sub rule (2) of the present rule by r 36 and by r 96 of this Order *Symbolical* possession given in such cases operates as *actual* possession

(o) *Indulgentia v. Dinray* (19 3) 50 Cal 419 9* 1 C 910 (3) A C 691

(p) "

(q) "

(r) "

..

also *Sarabjit v. Raj Kumar* (19 2) 44 All 5 631 C 806 (--) A A 16

(s) *Watson & Co v. Ramchand Dutt* (1890) 18 Cal 10 171 A 110

(t) *Hanuman Prasad v. Math ra Prasad* (1909) 6 All L J 932 11-1 C 143 (23) A A 4* 1 B

(u) *Kiron Soahi v. Official Assgnee* (1933) 6 Cal 8 143 1 C 331 (33) A C 246

O. 21, r. 35 against the judgment debtor, but not against third persons who were not parties to the decree (1). In other words, *symbolical possession* is no possession at all as against third parties. This distinction is of great importance in the law of limitation. The rule to be deduced from the cases on the subject is that where in execution of a decree *symbolical possession* is delivered of immovable property to the person entitled to possession thereof, and such person subsequently institutes a suit for *actual possession*, the *symbolical possession* is to be treated as actual possession where the suit is against the *judgment debtor* or his *representatives* and the period of 12 years allowed for such a suit is to be calculated not from the date of sale, but from the date of the subsequent dispossession [ill (2)]. But where a suit for actual possession is instituted against a third party claiming to be in possession of the property adversely to the judgment-debtor, no account is taken of the *symbolical possession* of the plaintiff in determining the period of limitation, and the period of 12 years is to be calculated, not from the date on which *symbolical possession* was delivered to the plaintiff, but from the date on which the possession of such third party became adverse as against the judgment debtor [ill (1)].

Illustrations

(1) *P* obtains a decree against *D*. In execution of the decree certain property alleged to belong to *D* is sold, and is purchased by *A*. *A* applies for possession, and is placed in *symbolical possession* of the property. *C* has been in possession of the property adversely to *D* for 10 years prior to the date on which *A* is placed in *symbolical possession*. *C* continues to be in possession of the property as before. After three years *A* sues *C* for possession. The defence is that *C* has been in adverse possession for more than twelve years, and the suit is therefore barred under art 144 of the Limitation Act. *A* contends that this *symbolical possession* operated to break the continuity of the adverse possession of *C*, and that the period of twelve years allowed by art 144 for a suit for possession should be calculated from the date on which *symbolical possession* was delivered to him. The suit is barred, for *A*'s possession, being merely *symbolical*, did not operate at all as possession as against *C* who was not a party to the suit, and it could not therefore break the continuity of *C*'s possession (iv). In other words, delivery of *symbolical possession* to *A* did not amount to a dispossession of *C*.

(2) *A* obtains a decree against *B* for possession of certain immovable property. The property being in the occupancy of *B*'s tenants *symbolical possession* is delivered to *A* under r 36. Subsequently *B* dispossesses *A* by receiving the rents and profits. *A* thereupon sues *B* for actual possession. The period of limitation for such a suit is twelve years from the date of dispossession (x). The same principles apply where a person is placed in *symbolical possession* under sub rule (2) of this rule in cases where the decree is one for joint possession, and also where he is placed in *symbolical possession* under r 90 of this Order (y).

Note—It will be observed that in ill (2) the suit is against the judgment debtor, and in ill (1) it is against a third person who was not a party to the suit. *Symbolical possession* operates as actual possession against the judgment debtor, that being the only means by which, as between the parties, the order of the Court can be effectively carried out. But it does not operate as actual possession against third persons who were not

(r)

(z)

Royal Singh v. Duniar Lal (1884) 10 Cal 593

— " — " 5 Cal

H. v. A. v. H. (1902) 3 L. R. 130 10 1 C 781 (28) 4 O 8

(y) Jorob in the v. L. v. L. (1899) 18 Cal 531 [F B]

(uc) Harihar v. Shierom (1890) 19 Bom 620.

parties to the suit, and the reason for this is very plain. A suit might be brought, and a decree obtained, by a person who has neither title nor possession, against another person who has neither title nor possession, and if the delivery of symbolical possession in such a suit were to constitute actual possession as against the true owner who had been in actual possession for many years, and who was no party to the suit, it would operate most unjustly (2).

It has already been stated that where a judgment debtor himself is in possession actual possession must be delivered to the person entitled to possession under sub r (1) of this rule or under r 95, as the case may be. If symbolical possession is delivered in a case where actual possession ought to have been delivered, the decree holder can refuse to accept such possession and claim to be given *has* possession, and if he does not do so a second execution application for *has* possession will not be maintainable (a). If after accepting symbolical possession he wishes to get *has* possession he must file a suit for the purpose. The question then arises as to whether limitation should run from the date when the symbolical possession was given. The High Court of Calcutta has held that the delivery of symbolical possession *even erroneously* is not a nullity and it operates as *actual possession* against the judgment debtor and his representatives, for it is said that after all it is possession obtained *through an officer of the Court and by process of law*, and the judgment debtor must be taken to be a party to the proceeding relating to the taking of possession. From this point of view, a suit for *actual possession* may be brought at any time within 12 years from the date on which symbolical possession is given (b). On the other hand, a Full Bench of the Bombay High Court has held that symbolical possession given in circumstances in which actual possession ought to have been given is a *nullity*, and the period of limitation for a suit for actual possession is 12 years from the date of sale. The reason given by the High Court of Bombay is that symbolical possession is not actual possession nor is it equivalent to actual possession except where the Code expressly or by implication provides that it shall have that effect, and there is no section of the Code which provides that where symbolical possession is given in a case in which actual possession ought to have been given, such possession should be treated as equivalent to actual possession (c). The High Court of Allahabad has taken the same view as the Bombay High Court (d). In an earlier case (e), the Madras High Court took the same view as the High Court of Calcutta, but in later cases it has followed the Bombay ruling (f).

Illustration

In execution of a decree obtained by A against B certain property belonging to B is sold, and is purchased by C in the year 1895. B is in possession of the property at the date of sale. C applies for possession, but instead of actual possession being delivered to him under r 95, symbolical possession is given to him in the year 1905. C subsequently sues B for actual possession in the year 1908, that is more than 12 years after the date of sale, but within 12 years from the date of delivery of symbolical possession. According to the Bombay and Allahabad High Courts, the suit is barred by limitation, according to the Calcutta High Court, it is not.

It has been held by a Full Bench of the Oudh Court that where a sale is of an undivided share in a property, delivery of possession by means of beat of drum is a valid

| | |
|---|--|
| (x) <i>Ranjit Singh v Bannarsi Lal</i> (1824) 10 Cal 933 93 | (1897) 18 Bom 722 <i>Shrudhar v Ginpatti</i> |
| (a) " " " " " " | (1919) 47 Bom 559 51 I C 72 <i>Tafhu</i> |
| (b) " " " " " " | <i>nath v Konduba</i> (1922) 24 Bom L R 499 |
| (c) " " " " " " | 65 I C 91 (22) A B 2 |
| (d) " " " " " " | (d) <i>Jang Bahadur v Hanwant</i> (1921) 43 All 520 63 I C 212 (21) A A 9 |
| (e) " " " " " " | (e) <i>Gosind v Venkata</i> (1907) 17 Mad L J 538 |
| (f) " " " " " " | (f) <i>Gosindarain v Jethaperumal</i> (1917) 44 11 C 333 <i>Kamappa v Bhimaraddi</i> (1923) 49 Mad L J 303 66 I C 439, (—) A.M. 1140 |

O. 21,
rr. 35-37

and effective delivery of possession within O. 21, r. 93, and that it is sufficient to give to the auction purchaser a fresh start for limitation. Stuart, C.J., observed that the distinction between actual and symbolical possession had little to do in such cases and that the real question was whether the delivery was effective in the circumstances of each particular case. *Gulab Khan v. Ataulah* (1925) 3 Luck 506, 110 IC 70, (25) A.O. 251. In the Full Bench Bombay case referred to above the sale was also of an undivided share, but the question whether that circumstance made any difference was not before the Court. All that the Bombay case decided was that when in a case where actual possession ought to have been delivered mere symbolical possession is delivered, the delivery of symbolical possession does not give to the purchaser a fresh start for limitation.

Sub rule (2) affixing copy of warrant—Where in a case falling within sub r. (2) of the present rule or rule 36 below, or r. 96 below, no copy of the warrant is affixed but the substance of the decree is proclaimed by beat of drum in the presence of the judgment debtor, the possession so delivered is good symbolical possession and carries with it all the incidents of such possession as against the judgment debtor, if he had notice of the proceedings (g), but not if he had no such notice (h).

36. [S. 264.] Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the

Decree for delivery of immovable property when in occupancy of tenant

decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Symbolical possession—See notes to r. 35 above

"Other person entitled to occupy the same"—A person disturbing the possession of another without any right legitimately derived from any competent person to do so, is not a person entitled to occupy the property within the meaning of this rule (i). He is no more than a trespasser.

Arrest and detention in the civil prison

37. [S. 245 B.] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court

Discretionary power to permit judgment-debtor to show cause against detention in prison

(g)

(h)

Jan v. (1911) 3 Lah. L. J. 154 59 IL 771
(-1) A.L. 36 [no symbolical possession obtained at all under decree for joint possession—suit for possession not maintainable]

(i) *Ibrahim v. Feroz Ahmad* (1922) 43 Mad. L. J. 170 70 IC 25 (-3) A.M. 25

may, instead of issuing a warrant for his arrest, issue a notice O. 2 calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

Warrant to whom addressed.—A warrant of arrest must show the name and designation of the person to whom it is issued for execution. If this is not shewn, the warrant is defective and the rescue of a person arrested on such a defective warrant is not an offence under s. 225B, Indian Penal Code (j). For form of warrant of arrest see Appendix E, Form No. 12.

Discretionary power to issue notice under this rule—When a decree is for the payment of money, and execution is applied for against the person of the judgment debtor, the Court has jurisdiction under rule 30 to issue a warrant of arrest without previously serving notice on the judgment debtor (k), but the Court may issue a notice to the judgment debtor calling upon him to show cause why he should not be committed to the civil prison in execution of the decree. The notice gives the debtor an opportunity of appearing before the Court within the time fixed and it is not a judicial exercise of discretion for the Court to issue a warrant and a notice simultaneously (l). As to the procedure to be followed when the judgment debtor appears in pursuance of the notice, see r. 40 below.

Whether an executing Court has discretion to refuse or suspend attachment of judgment debtor's property—A Court executing a decree may, in its discretion under r. 40 below, allow an application for the arrest or imprisonment of a judgment debtor. But there is no rule which empowers the Court, in express terms, where an application is made for attachment of the judgment debtor's property, to give time to the judgment debtor to pay the judgment debt and for that purpose to stay execution. O. 21, r. 24 (1) provides that "when the preliminary measures required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree." In a Calcutta case under s. 250 of the Code of 1852, it was held that when an application is made for attachment of the property of a judgment debtor, the Court has no power to refuse or stay execution except in the cases expressly provided for by the Code (m). As to the words "unless it sees cause to the contrary" it was held that they referred only to the express provisions contained in the Code itself, such as s. 246 (now r. 18 above), s. 243 (now r. 29 above), etc., but that they did not give any discretion to the Court to refuse or stay execution. In a later case under the present Code it was held that the Court has inherent power under s. 151 to defer the issue or operation of its own process and that it may in a proper case grant time to the judgment-debtor. In that case the Subordinate Judge gave five days time to the judgment debtor and it was held by Mukerjee, J., that the time was rightly granted in the circumstances of the case. Graham, J., did not express any definite opinion as to the validity of the order, but said that there might be circumstances in which the Court would have discretion to grant reasonable time, e.g., in the case of illness of the judgment debtor (n). Assuming that the Court has an inherent power to allow time to a

(j) *Fattu v. Emperor* (1932) 55 All. 109, (32) A. A. 632.

(k) *Sulkaangshu v. Harsharan* (1932) 36 C. W. N. 809, 133 I. C. 434 (32) A. C. 847.

(l) *Puna Mahlon v. Emperor* (1932) 11 Lat.

743 (32) A. P. 315
(m) *Ishan Chunder v. Ishanoolah* (1854) 10 Cal. 817.

(n) *Galdoun v. F. E. Dinshaw* (1927) 31 C. W. N. 653 660-661 664-661 665 102 I. C. 513, (27) A. C. 541.

O. 21,
rr. 37-39

judgment debtor, it should not, it is submitted be exercised in a case where the judgment debtor is unable to pay the judgment debt immediately and says that he would be able to do so if time was allowed to him

Privilege from arrest —(see s 135, sub section (2))

38. [S. 317.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the cost (if any) to which he is liable, be sooner paid

Warrant for arrest to
direct judgment-debtor to
be brought up

39. [Ss. 339, 340.] (1) No judgment debtor shall be arrested in execution of a decree unless and until the decree holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court

subsistence allowance

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment debtor has been arrested by monthly payments in advance before the first day of each month

(4) The first payments shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

40. [S. 37A.] (1) Where a judgment-debtor appears O.

Proceedings on appearance of judgment-debtor in obedience to notice of arrest

before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment

of money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely —

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree holder in the execution of the decree ,
- (c) any undue preference given by the judgment-debtor to any of his other creditors ,
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ,
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree

(3) While any of the matters mentioned in sub rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or

O. 21, leave him in the custody of an officer of the Court, or release
rr. 40, 41 him on his furnishing security, to the satisfaction of the Court,
for his appearance when required by the Court

(4) A judgment-debtor released under this rule may be re arrested

(5) Where the Court does not make an order under sub rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison

Imprisonment for debt.—Under this rule the Court has a discretion to refuse to

the arrest of A (o)

Imprisonment for debt was abolished in England by the Debtors Act 1869 (32 & 33
Act c. 62) s. 4 except in certain excepted cases and the Debtors Act 1878 (41 & 42
s. 7

Sub rule (3)—The security should not be personal security (p)

Appeal.—An order rejecting an application for the arrest of a judgment debtor falls within s. 47 and is appealable as a decree (q)

Attachment of Property

41. [Cf s. 267.] Where a decree is for the payment of money the decree holder may apply to the Court for an order that—

Examination of judgment debtor as to his property

(a) the judgment debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree, and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents

Objects of the rule.—The object of this rule is to obtain discovery for purposes

"Any and what other property"—This refers to property which is liable to

If the mortgagee claims that he is in possession as mortgagee, he may be examined under this rule (s) See note to r 62 below

What property may not be attached—See s 60

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

Attachment under a preliminary decree—In a suit by *A* against *B* for the recovery of possession of immovable property and for mesne profits, a preliminary decree is passed against *B* for the delivery of the property to *A*, and an inquiry is directed as to the mesne profits due by *B* to *A*. *B* delivers possession of the property to *A*. Subsequently while the inquiry as to mesne profits is still pending, *A* applies for attachment of certain property belonging to *B*. The attachment may be allowed under this rule (t) See O 20, r 12

43. [S. 269.] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor the attachment shall be made by actual seizure, and the attaching officer

Attachment of movable property other than agricultural produce in possession of judgment-debtor

shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

Movable property in possession of judgment debtor—This rule provides for attachment of movable property in the possession of the judgment debtor. As to movable property not in possession of the judgment-debtor see r 4b below

Rule not applicable to a share in movable property.—The rule is not applicable if the judgment debtor is only entitled to a share in movable property. The Court should under rule 60 release the whole property and the decree holder may proceed under r 47 (u)

Attachment by actual seizure

Warrant of attachment is executed in which goods belonging to the seizure within the meaning of the to the possession of a third person, for the amount of the decree the

(s) *In re Premji* (1893) 17 Bom 514. See *Mudhan Mohan v Gokul Das* (1886) 10 MIA 563-571 as to attachment of property in possession of a mortgagee
(t) See *Shirofis Moyee v Wooma Moyee* (1867)

8 W R 9
(u) *Rajendra Nath v District Board* (1932) 59 Cal 838 137 I L 672 (3.) A L 408
(v) *Multan Chand v Bank of Madras* (1904) 27 Mad 316

O. 21, leave him in the custody of an officer of the Court, or release
rr. 40, 41 him on his furnishing security, to the satisfaction of the Court,
for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Imprisonment for debt.—Under this rule the Court has a discretion to refuse to

the arrest of A (o)

Imprisonment for debt was abolished in England by the Debtors Act, 1869 (32 & 33 Vict., c. 62) s. 4 except in certain excepted cases, and the Debtors Act, 1878 (41 & 42 Vict., c. 34) was passed to give a discretion even in the excepted cases. The intention and effect of the law in England is that a fraudulent and dishonest debtor shall be punished but that an honest debtor shall not (o).

Sub-rule (3).—The security should not be personal security (p)

Appeal.—An order respecting an application for the arrest of a judgment debtor falls within s. 47, and is appealable as a decree (g)

Attachment of Property.

41. [Cf s. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

Examination of judgment debtor as to judgment debtor's property

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Objects of the rule.—The object of this rule is to obtain discovery for purposes

"Any and what other property."—This refers to property which is liable to

If the mortgagee claims that he is in possession as mortgagee, he may be examined under this rule (e) See note to r 62 below

What property may not be attached—See s 60

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

Attachment under a preliminary decree—In a suit by A against B for the recovery of possession of immovable property and for mesne profits a preliminary decree is passed against B for the delivery of the property to A, and an inquiry is directed as to the mesne profits due by B to A B delivers possession of the property to A Subsequently while the inquiry as to mesne profits is still pending, A applies for attachment of certain property belonging to B The attachment may be allowed under this rule (f) See O 20, r 12

43. [S. 269.] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor the attachment shall be made by actual seizure, and the attaching officer

Attachment of movable property other than agricultural produce in possession of judgment-debtor

shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once

Movable property in possession of judgment debtor—This rule provides for attachment of movable property in the possession of the judgment debtor As to movable property not in possession of the judgment debtor see r 46 below

Rule not applicable to a share in movable property—The rule is not applicable if the judgment debtor is only entitled to a share in movable property The Court should under rule 60 release the whole property and the decree holder may proceed under r 47 (u)

Attachment by actual seizure—Where a warrant of attachment is executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment-debtor are stored it amounts to actual seizure within the meaning of the present rule (t) If the movable property is delivered to the possession of a third person not an officer of the Court on his executing a bond for the amount of the decree the

(e) *In re Premji* (1903) 17 Bm 514 See *Mu dhun Mohun v Gokul Doss* (1886) 10 MIA 563 571 as to attachment of property in possession of a mortgagee
(f) See *Sharada Moyee v Hooma Moyee* (1867)

8 W R 9
(u) *Lajendra Nath v District Board* (1932) 59 Cal 804 13 I C 6 - (3) A C 405
(v) *Mulvan Chand v Bank of Madras* (1904) 27 Mad 316

O. 21, leave him in the custody of an officer of the Court, or release
rr. 40, 41 him on his furnishing security, to the satisfaction of the Court,
for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Imprisonment for debt—Under this rule the Court has a discretion to refuse to

the arrest of A (a)

Imprisonment for debt was abolished in England by the Debtors Act, 1869 (32 & 33

Sub rule (3).—The security should not be personal security (p).

Appeal.—An order rejecting an application for the arrest of a judgment debtor falls within s. 47, and is appealable as a decree (q).

Attachment of Property

41. [Cf s. 267.] Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—

Examination of judgment debtor as to his property

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

for purposes decrees directed

(a) *Lala Das v. Mina Mal* (1922) 4 Lah. L. J. 266, 79 I. C. 551, (2-) A. L. 259

(b) *Murray v. Ingram* (1879) 12 Ch. D. 338, 343, per Jessel M.R.

(c) *Dharam v. Ashutipati* (1929) 54 Cal. 782, 106

(q) I. C. 66 (28) A. C. 6, (1912) 4 Lah. L. J. 266, 78 I. C. 551, (22)

A. L. 259 *supra*

(r) *National Bank of India Ltd. v. Ghurnani* (1910) 43 Cal. 285, 34 I. C. 297

"Any and what other property"—This refers to property which is liable to attachment and sale under the decree against the judgment-debtor. Property of a judgment-debtor which he has mortgaged is *prima facie* liable to be seized in execution of a decree against him, and the fact that he has mortgaged it will not prevent its being attached and sold in execution of the decree subject to the mortgage debt (see s. 73). If the mortgagee claims that he is in possession as mortgagee, he may be examined under this rule (e). See note to r. 62 below.

What property may not be attached—See s. 60

42. [S. 255.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter amount of which to be subsequently determined

Attachment under a preliminary decree—In a suit by A against B for the recovery of possession of immovable property and for mesne profits, a preliminary decree is passed against B for the delivery of the property to A, and an inquiry is directed as to the mesne profits due by B to A. B delivers possession of the property to A. Subsequently while the inquiry as to mesne profits is still pending, A applies for attachment of certain property belonging to B. The attachment may be allowed under this rule (f). See O. 20, r. 12.

43. [S. 269.] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

Attachment of movable property other than agricultural produce in possession of judgment-debtor

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Movable property in possession of judgment-debtor—This rule provides for attachment of movable property in the possession of the judgment-debtor. As to movable property not in possession of the judgment-debtor see r. 46 below.

Rule not applicable to a share in movable property—The rule is not applicable to a share in movable property. The Court decree holder may proceed.

Attachment by actual seizure—Where a warrant of attachment is executed by affixing it to the outer door of the warehouse in which goods belonging to the judgment-debtor are stored, it amounts to attachment under the present rule (g). If the movable property is in the possession of a person who is not an officer of the Court, on his executing a

(a) *In re Premji* (1893) 17 Bom. 511. See *Mudhun Mohun v. Gokul Doss* (1886) 10 M.L.A. 563, 571 as to attachment of property in possession of a mortgagee.
(c) See *Shirodi Moysa v. Wooma Moysa* (1867).

8 W. R. 9
(a) *Rajendra Nath v. District Board* (1832) 59 Cal. 804, 1371 C. 672 (3) A.C. 408
(c) *Mulvan Chand v. Bank of Madras* (1901) 27 Mad. 316

O. 21, property is no longer under attachment and if the third person sells it the sale is not void
rr. 43, 44 under s 64 of the Code (w)

Security bond to produce attached property.—Goods attached under this rule by an Amin are made over by him to a third person for safe custody on his passing a bond undertaking to produce them in Court. The surety fails to produce the goods when required by the Court. Is the decree holder entitled to proceed against the surety under s 145 (c)? No, according to the Madras High Court, there being no order of the Court as contemplated by cl (c) of s 145 (x). Yes, according to the Allahabad High Court (y).

Rateable distribution.—See notes to s 73, "Assets held by a Court," Case II

44. [New] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

Attachment of agricultural produce

- (a) where such produce is a growing crop, on the land on which such crop has grown, or
- (b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain, and the produce shall thereupon be deemed to have passed into the possession of the Court

Attachment of agricultural produce.—This and the following rule provide for the attachment of agricultural produce. Both these rules are new. Growing crops are under this Code included in the category of movable property [see s 2, cl (13)]. But the procedure relating to the *actual seizure* of movables cannot be applied in its entirety to growing crops, for considerable injury would result to both parties if such crops were allowed to be removed on attachment like other movable property. With a view to prevent such injury, and to secure to both parties the fullest value from the property attached it is enacted by the next following rule that where agricultural produce is attached the Court should make such arrangements for the custody thereof as it may deem sufficient and subject to such conditions as may be imposed by the Court, the judgment debtor should be allowed to continue to perform all acts of husbandry and if he endeavours to defeat the attachment by neglecting the crop, the decree holder should be allowed to intervene and protect his interests.

(w) *Lakshmichand v M P I R M Chettiar*
(1930) 8 Rang 491 126 I C 2 3 (30)
A R 247

(x) *Rajah of Venkatagiri v Sura* (1910) 29 Mad
LJ 472 69 I C 134

(y)

45. [New] (1) Where agricultural produce is attached, O.
 the Court shall make such arrangements
 for the custody thereof as it may deem
 sufficient and, for the purpose of enabling
 the Court to make such arrangements,
 every application for the attachment of a growing crop
 shall specify the time at which it is likely to be fit to be cut or
 gathered

Provisions as to agricul-
 tural produce under
 attachment

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment-debtor fails to do all or any of such acts, the decree holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered

Time at which the crop is likely to be cut or gathered —The decree holder should specify in the application for attachment the time at which the crop is likely to be cut or gathered. The object is to enable the Court to make necessary arrangements for the custody of the crop [sub r (1)]. If the application is presented within twenty days before the maturity of a crop not lending itself to storage it should be refused [sub r (5)]. See notes to r 44 above

The following are some of the more important rules relating to the attachment of debts —

1 It is not necessary for the purpose of attaching a debt that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of attachment. *B* delivers certain goods to his agent *C* for sale. The goods are sold by *C* and the sale proceeds are received by him. In execution of a decree obtained by *A* against *B*, *A* may attach the sale proceeds in the hands of *C*, though the exact amount due to *B* may not then have been ascertained (*c*).

2 The attachment of a debt does not prevent the judgment debtor from suing his debtor or from taking any other step necessary for the recovery thereof, but he is not entitled to *receive payment* thereof from his debtor unless the claim in respect of which the debt is attached is first satisfied. *C* owes a debt to *B*. The debt is attached in execution of a decree obtained by *A* against *B*. This does not preclude *B* from suing *C* to recover the debt, or from *prosecuting the suit* if a suit has already been instituted, but he cannot receive *payment* of the debt from *C* unless he first satisfies *A*'s decree (*d*). See sub rule (1), cl. (i).

Attachment of mortgage debt.—*A* executes a mortgage of immovable property to *B* to secure payment of Rs. 5,000 lent to him by *B*. It is provided by the mortgage bond that if *A* fails to pay the mortgage debt on the due date, *B* should have the right to sue *A* personally for the debt, and also to realise the debt by the sale of the mortgaged property. In such a case *B*'s interest in the mortgage bond comprises (1) the right to sue *A* personally for the mortgage debt and (2) the right to realise the debt by sale of the mortgaged property. If *C* obtains a decree against *B* for Rs. 5,000 and seeks in execution of the decree to attach the mortgage debt due to *B*, how is the attachment effected? Is the mortgage debt a debt not secured by a negotiable instrument within the meaning of this rule and attachable in the mode prescribed by this rule or being secured by a mortgage of immovable property is it immovable property within the meaning of r. 54 and attachable in the mode prescribed by that rule? The answer afforded by the decisions on the subject, eliminating what are merely *obiter dicta* (*e*), is that a mortgage debt is a debt within the meaning of this rule and it is therefore to be attached in the manner prescribed by this rule. Again if the mortgage debt due to *B* is attached under this rule in execution of *C*'s decree, and sold in execution and purchased by *P*, what are the rights of *P*? The answer is that they are the same as those of *B*, the mortgagee. *P* may sue *A* for a personal decree against him. He may also sue him for a decree for the sale of the mortgaged property (*f*). It does not make any difference that the mortgage bond gives a right to the mortgagee to enter into possession and that he is in possession at the date of the attachment (*g*). The cases referred to above were all cases either of a simple mortgage or of a hypothecation bond. As regards usufructuary mortgages, it was held by the High Court of Bombay in a case where the bond provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and that the mortgage was to be redeemed on the expiration of the term by payment of the mortgage debt, that there was no debt which the mortgagee was entitled to recover at the date of the attachment and that the interest of the mortgagee could only be attached in the mode

(c) *Matho Das v. Purnji* (1894) 16 All. 286.

(d) *Shib Singh v. Sida Ram* (1891) 13 All. 76.
Bibi v. Collector of Etawah (1895) 17 All. 194, 221 A. 51.

(e) *Appanna v. Scott* (1886) 9 Mad. 5. *Sami v. Krishnasami* (1885) 10 Mad. 163.

(f) *Karim uddin v. Yash Chand* (1893) 15 All. 131, *Debenra Kumar v. Tap Lal* (1885) 12 Cal. 516, *Kas Nath Das v. Saitulike*

(1893) 20 Cal. 805. *Bilder v. Ramchandra* (1895) 19 B. m. 121. *Taratal v. Bai Kashi* (1901) 25 B. m. 303. *Munappa v. Subraman* (1895) 18 Mad. 43. *Naraja v. The North Indian Bank* (1914) 37 Mad. 51. 131 C. 91. *Lal Umrav v. Lal Singh* (1904) 22 All. L. J. 841. 843. 601 C. 80 (24) A. A. 796.

(g) *Chullide v. Othenam* (1914) 27 Mad. L. J. 239, 261 C. 504.

O. 21, r. 46 Attachment of d i share
and other property not
in possession of judgment
d btor

46. [S. 268.] (1) In the case of—

- (a) a debt not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,
- (c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;
- (iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be fixed on some conspicuous part of the Court-house and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same

Attachment of debt.—A debt cannot be attached unless it is *actually due* from the garnishee (judgment debtor s debtor) to the judgment debtor. It may be either presently payable, or payable in the future by reason of a *present obligation* (2). As stated by their Lordships of the Privy Council in the undermentioned case (a) *an existing debt*, though payable at a future day, may be attached. But only such debts can be attached as the judgment debtor could deal with properly and without violation of the rights of third persons (b). For instances of attachable debts, see notes to s. 60, "Debts."

(a) *Tupper v. Jones* (1875) 1 B 30 Q B 591 592
Robb v. Stanton (1883) 11 Q B D 518 527
Chatterton v. Walney (1881) 17 Ch D
 378 383 *Jacobson v. Jacobson* (1928)
 50 All 507, 103 I C 223 (28) A A
 103

(a) *Singh Tuffnazzool v. Rughoonath* (1861) 14
 MIA 40 50
 (b) *Badeley v. Consett, Ltd.* [1894] 53
 Ch D 239, *Dunn v. Frech* (1890) 24
 QBD 519, *Campion v. Palmer* (1890) 2
 I R 445

The following are some of the more important rules relating to the attachment of debts—

1 It is not necessary for the purpose of attaching a debt that the exact amount of the debt should be stated, provided there is a debt *actually due* at the time of attachment. *B* delivers certain goods to his agent *C* for sale. The goods are sold by *C* and the sale proceeds are received by him. In execution of a decree obtained by *A* against *B*, *A* may attach the sale proceeds in the hands of *C*, though the exact amount due to *B* may not then have been ascertained (*c*).

2 The attachment of a debt does not prevent the judgment debtor from suing his debtor or from taking any other step necessary for the recovery thereof, but he is not entitled to receive payment thereof from his debtor unless the claim in respect of which the debt is attached is first satisfied. *C* owes a debt to *B*. The debt is attached in execution of a decree obtained by *A* against *B*. This does not preclude *B* from suing *C* to recover the debt, or from prosecuting the suit if a suit has already been instituted, but he cannot receive payment of the debt from *C* unless he first satisfies *A*'s decree (*d*). See sub rule (1), cl. (1).

Attachment of mortgage debt.—*A* executes a mortgage of immovable property to *B* to secure payment of Rs. 5,000 lent to him by *B*. It is provided by the mortgage bond that if *A* fails to pay the mortgage debt on the due date, *B* should have the right to sue *A* personally for the debt, and also to realise the debt by the sale of the mortgaged property. In such a case *B*'s interest in the mortgage bond comprises (1) the right to sue *A* personally for the mortgage debt and (2) the right to realise the debt by sale of the mortgaged property. If *C* obtains a decree against *B* for Rs. 5,000 and seeks in execution of the decree to attach the mortgage debt due to *B*, how is the attachment effected? Is the mortgage debt a debt not secured by a negotiable instrument within the meaning of this rule and attachable in the mode prescribed by this rule or, being secured by a mortgage of immovable property is it immovable property within the meaning of r. 54 and attachable in the mode prescribed by that rule? The answer afforded by the decisions on the subject, eliminating what are merely *obiter dicta* (*e*), is that a mortgage debt is a debt within the meaning of this rule and it is therefore to be attached in the manner prescribed by this rule. Again if the mortgage debt due to *B* is attached under this rule in execution of *C*'s decree, and sold in execution and purchased by *P*, what are the rights of *P*? The answer is that they are the same as those of *B*, the mortgagee. *P* may sue *A* for a personal decree against him. He may also sue him for a decree for the sale of the mortgaged property (*f*). It does not make any difference that the mortgage bond gives a right to the mortgagee to enter into possession and that he is in possession at the date of the attachment (*g*). The cases referred to above were all cases either of a simple mortgage or of a hypothecation bond. As regards usufructuary mortgages, it was held by the High Court of Bombay in a case where the bond provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and that the mortgage was to be redeemed on the expiration of the term by payment of the mortgage debt, that there was no debt which the mortgagee was entitled to recover at the date of the attachment and that the interest of the mortgagee could only be attached in the mode

(c) *Matto Das v. Pimji* (1891) 16 All. 246

(d) *Shib Singh v. Sita Ram* (1891) 15 All. 76
Bis v. Collector of Etawah (1895) 17 All. 194 221 A. 31

(e) *Appanna v. Scott* (1886) 9 Mad. 5. *Nami v. Krishnasami* (1887) 10 Mad. 163

(f) *Karim un nissa v. Jai Chand* (1893) 15 All. 181, *Debnara Kumar v. Papp Lal* (1895) 12 Cal. 546. *Kaninh Das v. Nalabar*

(1893) 20 Cal. 815. *Bildee v. Ramchandra* (1895) 19 Bom. 121. *Torrad v. Bai Kashu* (1902) 26 Bom. 313. *Munappa v. Subramana* (1895) 18 Mad. 43. *Natraja v. The South Indian Bank* (1914) 37 Mad. 51 131 C. 91. *Lal Mirao v. Lal Singh* (1914) 2 All. L. J. 840 843 801 C. 80 (24) A. 4. 796

(g) *Chulide v. Othman* (1914) 2 Mad. L.J. 219 261 C. 54

at Asansol. The Court may issue a prohibitory order restraining *B* from receiving and *C* from paying the debt, and it will not be necessary to transfer the execution proceeding to the Court of the place where *C* resides as in the case last cited which was a case of a simple contract debt (*s*)

Claims over which Courts in British India have no jurisdiction, *e.g.*, a debt due to the judgment debtor from a non resident foreigner in respect of which no suit could be brought by the judgment-debtor in a British Indian Court, are not debts liable to be attached under this rule (*t*). The general rule as to the situs of a debt is the residence of the debtor. It has been suggested that this is subject to an exception which situates the debt at the place where it is properly payable. The Privy Council referred to this rule and exception and held that if the debtor and creditor are residents of Indore the debt cannot be attached by the High Court of Bombay in the absence of a contract expressly or impliedly providing for payment of the debt in Bombay (*u*). But where a judgment is recovered in the High Court of Bombay against a foreign corporation which submitted to jurisdiction, and a bank in Bombay owes the Corporation, a debt payable in Bombay, the High Court of Bombay has jurisdiction to attach the debt and direct the bank to pay the amount of the debt into Court (*t*).

Movable property not in possession of the judgment debtor.—If the judgment debtor has transferred his property to the possession of a third person the attachment must be made by a prohibitory order. The rule does not justify the sealing up of the third person's warehouse in which the goods are stored (*u*).

Shares.—A deed of transfer of shares in a company which does not comply with the formalities prescribed by the Indian Companies Act and the Articles of Association of the Company is invalid as against a subsequent purchaser of the shares in execution of a decree against the shareholder (*x*). See rr 79 and 80 below.

Life policy.—Where a life policy is payable on proof to the satisfaction of the directors of the death of the assured the policy amount cannot be said to be a debt, due by the company before such proof is given (*y*).

Sub rule (3) payment into Court.—*A* obtains a decree against *B*. In execution of the decree *A* attaches a debt due ostensibly from *C* to *D*, but alleged by *A* to be in reality due from *C* to *B*. In such a case, if the Court orders the amount of the debt to be paid into Court, it is incumbent upon the Court to provide by its order that the money when deposited should not be paid to the decree holder [*A*] until adjudication of the question as to who is entitled to the money, *B* or *D* (*z*).

Garnishee order.—Company in liquidation.—Where a judgment is recovered against a company which is in voluntary liquidation, the invariable practice of the Courts is to stay execution of the judgment unless there are very exceptional reasons for exercising its discretion otherwise. Thus if *A* obtains a decree against a limited company and the company thereafter goes into liquidation, and a debt is due by *D* to the company, the debt forms part of the general assets of the Company, and is divisible among the creditors *pari passu* and for this reason *A* is not entitled to a garnishee order against *D* (*a*).

(*s*) *Dharanidhar v. P. D. Sethi* (1933) 60 Cal 78—143 I C 785 (33) A C 39

(*t*) *Ghanshamlat v. Dhannali* (1891) 5 Bom 249

(*u*) *Chaturbhuj v. Chun Lal* (1933) 60 I A 111—57 Bom 474 143 I C 111 (33) A I C 150

(*v*) *Swiss Bank Corporation v. Forthmische Industriale Bank* [1933] 1 K B 63

(*w*) *Nagarmal v. Emperor* (1932) 11 Pat 49

139 I C 634 (37) A P 29

(*x*) *Nagbhisnam v. Ramchandra* (1933) 45 Mad 53—111 I C 659 (23) A M 41

(*y*) *John v. Sambam Rty* (1924) 56 Mal L J 299 121 I C 155 (24) A M 34

(*z*) *Haranath v. Haradas* (1916) 43 Cal 269 23 I C 50

(*a*) *Anglo-Baltic and Mediterranean Bank v. Barber & Co* [1941] 2 K B 410

O. 21,
r. 47, 48

47. [New] Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way

Attachment of share in
movables

Attachment of share in movables—This rule is new. It provides for the attachment of a share or interest in *movable property* belonging to the judgment debtor and others in co ownership. Such a share or interest is obviously incapable of actual seizure and provision has therefore been made for the issue to the judgment debtor of a notice prohibiting him from transferring his share or interest in any way. If the property is wrongly attached by seizure it must be released under rule 60 and the *debtor* holder may then proceed under this rule (b)

The procedure of this rule should be followed in the case of an attachment under s. 386 of the Criminal Procedure Code (c)

48. [New] (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct, and, upon notice of the order to such officer as the Government may, by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be

Attachment of salary or
allowances of public officer
or servant of railway com-
pany or local authority

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(b) *Punjab Nath v. Dist. Ct. Board* (1932) 5 J. Cal. 808, 137 I. C. 67, (32) A. C. 403. (c) *Narasanna v. Emperor* (1932) 62 Mad. L.J. 14, 138 I. C. 548 (32) A. M. 559.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule

Attachment of salary of public officer, etc.—This rule is new. It provides a special procedure for the attachment of the salary of public officers railway servants and servants of local authorities. The rule follows upon the lines of section 151 sub section (3) of the Army Act (44 and 45 Vict., c 58) which it may be observed applied only to officers of the army. Under the Code of 1882 the salary of a public officer or railway servant could not be attached unless the disbursing officer was within the local limits of the jurisdiction of the Court executing the decree (d). This led to considerable inconvenience in the execution of decrees and put the decree holder in many cases to an enormous expense. The present rule substitutes a less expensive and at the same time more effective machinery for the execution of decrees against this class of judgment debtors. Under it the salary of a public officer or a railway servant of a local authority may be attached *whether the judgment debtor or the disbursing officer is or is not within the local limits of the jurisdiction of the Court executing the decree*. A Court to which a decree is transferred for execution has the same power (e). As to how much of the salary of such persons may be attached see s 60 clis (h) and (i).

Sub rule (3) Liability of Government.—Sub r (3) provides that if an attachment order is not returned in accordance with the provisions of sub r (2) the Government shall be liable for such sum as should have been stopped out of the judgment debtor's pay. But no order can be made against the Government unless the Government is on the record (f).

49. [New 53 & 54 Vict., c. 39, s. 23, R.S.C., O. 46, rr. 1A and 1B.] (1) Save as otherwise provided

Attachment of partner-
ship property

by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the

(d) *Pango Ja ram v. J. Krishna* (1883) 1 B.M. 44. *Amad Khan v. Dir ee* (1904) 24 B.L. 108. *Abdul Gafar v. Albyn* (1903) 30 Cal. 113.

(e) *Kunwar Lal v. Lala Erns* (1906) 1 Luck. 46. 91 L.C. 1145 (—) A.O. 112.
(f) *Nadar Vel v. Eddulph* (1912) Punj. Rec. n. 93 S. 3. 11 L.C. 3.

O. 21, r. 49 same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other order as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served

Attachment of partnership property—This rule is new. The first three sub-rules are a reproduction of the English Partnership Act 1890 [53 and 54 Vict., c. 30], s. 23. The last three rules correspond to O. 46, rr. 1A and 1B of the English Rules. As to suits by and against firms, see O. 30 below.

The object of this rule is to put an end to the practice of attaching in the ordinary way partnership assets under a judgment against a single partner (q). It therefore provides that no execution can issue against any partnership property except on a decree passed against the firm or against the partners in the firm as such (h) but a judgment creditor of a partner in a firm may apply for an order charging that partner's interest, and for a receiver. The share of a partner in a partnership business is liable to attachment under s. 60 (i). See notes to r. 50 under the head Where decree has been passed against a firm."

"Against the partners in the firm as such"—These words in sub-r (1) do not occur in s. 23 of the English Partnership Act. They have been added to show that the operation of this rule is not ousted by the mere circumstance that the decree is passed, not against the firm, but against the partners constituting it, where those partners have been sued as such

existing

1871

(1) (1)

Eastaph v. Madan Lal (1931) 53
130 I. C. 87 (31) A. C. 16
was the law before the present
is into force. *Karimkhan v.*

Conservator of Forests (1873) 4 B. & C. 222

(1) *Jagat Chunder v. Jeevan Chunder* (1933) 20
Cal. 693

'Direct accounts'—It has been held in England under the Partnership Act, s 23 sub s 2 of which sub r (2) is a reproduction that the discretion given to *direct accounts* should only be exercised under special circumstances as for instance, with a view to a dissolution. The decision is based upon the words 'if a charge had been made in favour of the decree holder by such partner'. These words, it has been said should be read with s 31, sub s 1, of the English Partnership Act, which provides that an assignment by a partner of his share in the partnership either absolute or *by way of charge*, does not, as against the other partners entitle the assignee, during the continuance of the partnership, to require *any accounts* of the partnership transaction but entitles the assignee only to receive the share of the profits of the assigning partner and the assignee must accept the account of profits agreed to by the partners. Relying upon these provisions, Rigby L J, said 'I think it plain that the intention of the legislature was that *under ordinary circumstances* in dealing with a case under sub s 2 of s 23 [sub r (2) of this rule], the analogy of an assignment by a partner of his share should be adhered to' (j).

Charging order and insolvency—A charging order under this rule upon a judgment debtor's interest in a partnership is not an attachment within the meaning of section 9 of the Presidency towns Insolvency Act, 1909 (k). Moreover being a proceeding *in invitum* it is not a transaction protected by s 57 of the Presidency towns Insolvency Act (l).

50. [New R. S. C., O. 48A, r. 8.] (1)

Execution of decree against firm

Where a decree has been passed against a firm, execution may be granted—

- (a) against any property of the partnership,
- (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner,
- (c) against any person who has been individually served as a partner with a summons and has failed to appear

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or where such liability is disputed may order that the liability of such

(j) *Prosser Janson & Co v Hutchinson & Co* [1891] 2 Q B 161

(k) *Culam Muttika v Maitra Lal* (1931) 54

(l) (1) 6-4 190 I C 8 (31) A C 16"
(2) *H v Southwood* [1891] 1 Q B 317
Insolvent Act 1909 s 53

O. 21, r. 50 person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

Scope of the rule—This rule is new. It is a reproduction of O 484, r 8, of the English Rules. Execution under this rule can only be granted where a decree has been passed against a firm. A decree passed against a firm must perforce be in the firm's name. Under this rule execution may be granted against the partnership property. It may also be granted against the partners, in which case the decree holder may proceed against the separate property of the partners. It must not be supposed, however, that where a decree has been passed against a firm, execution will be granted as a matter of course against all the partners, in certain cases, special leave is necessary to issue execution against a partner. It is only when execution is applied for against a person referred to in sub r (1), cls (b) and (c), that it will be granted as of course. But where execution is sought against any other person alleged to be a partner, the decree holder must apply to the Court which passed the decree for leave to execute the decree against him. Thus if in a suit against a firm a person has been individually served as a partner with the writ of summons, but fails to appear at the hearing, and a decree is passed against the firm, the decree holder is entitled to execution against him as a matter of course, see cl (c) of sub r (1). But a decree holder is not entitled to execution as of course against a person who is sought to be made liable as a partner, but who was not served with the summons and who did not appear at the hearing. In such a case the decree holder must apply for leave to execute the decree against such person. If such person admits the liability, the Court may grant leave without further inquiry (m). But if he disputes the liability the Court may direct an issue to determine whether he was a partner or held himself out to be a partner in the defendant firm (n). These rules follow from the peculiar nature of a suit against a firm and from the special rules as to service of summons in such a suit. To understand the present rule, it is necessary to peruse rules 3, 6 and 7 of Order 30. The important point to note is that where persons are sued as partners in the name of their firm, it is not necessary that the summons should be served upon each one of them or indeed upon any one of them. It may be served upon any one or more of the partners, or at the principal place of the firm's business upon any person having the control or management of the business though he may not be a partner.

"Where a decree has been passed against a firm"—Execution under this rule can only be granted where a decree has been passed against a firm in the firm's name. A decree cannot be passed against a firm, unless the suit is against partners in the name of their firm. And, conversely, where a suit is against partners in the name of their firm, the decree must be against the firm in the firm's name. See O 30, r 6, and notes thereto.

Charging order—See notes under the same heading to r 52, at p 766

(m) *Jagat Chandra v. Gurung* (1905) 53 Cal 214, 19-220 01 IL 804 (20) AC 271. (n) *Davis v. Hyman & Co* 1903] 1 KB 654

"Against any property of the partnership"—"Property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such." See r 49 (1) above.

"Against any person who has appeared."—See O 30, rr 3, 5, 6 and 7, and notes.

"Against any person who has been individually served."—See O 30, r 5, and notes.

Sub rule (2). Leave to issue execution.—Order 30 deals with suits by or against firms. Rule 1 provides that two or more persons being liable as co partners may be sued in the firm's name. It does not matter that the firm is dissolved at the date of the suit, so long as the claim in respect of which the suit is brought arose during the continuance of the partnership (o). But where a firm is dissolved to the knowledge of the plaintiff before the institution of the suit, the plaintiff is bound to serve the summons upon every person within British India whom it is sought to make liable as provided by O 30, r 3. No order can be made under sub rule (2) against a former partner who has, to the knowledge of the plaintiff, left the firm before the institution of the suit. The reason is that O 30, r 3 overrides sub r (2) of the present rule. Sub r (2) applies only where there has been no dissolution or none to the knowledge of the plaintiff. Where there has been a dissolution to the knowledge of the plaintiff, an outgoing partner cannot be made liable unless he has been served with the summons in accordance with the proviso to rule 3 of Order 30 (p).

O 21, r 50, is not controlled by O 30, r 2 (3). A suit is brought by a firm against A. On A's application the names of the partners of the firm are disclosed by the attorneys for the firm under O 30, r 2. A then files a counter claim against the firm. The firm's suit is dismissed, and a decree is passed against the firm on the counter claim. A takes out execution against A whose name was given by the firm's attorneys as one of the partners of the firm. A denies that he was a partner and says that he did not instruct the firm's attorneys to give his name as a partner. There is nothing in the provisions of O 30, r 2 (3) to preclude A from raising this contention and the question whether he is a partner or not should be decided in the manner provided by O 21, r 50 (2) (q).

The application under sub r (2) is ancillary to the application for execution and can be made so long as the application for execution is not barred by limitation under art 182 of the Limitation Act (r).

Execution against legal representatives.—If a partner has died the suit against the firm cannot include the legal representatives of the deceased partner, though they may be added as defendants and served with summons under O 30, r 3 if it is sought to make the separate estate of the deceased partner liable. Sub rule (2) which is subject to O 30, r 3 does not empower the Court to give leave to execute the decree against the legal representatives (s). If a decree against a firm makes a partner personally liable under sub-rule (1) (a) or (1) (b), it may be executed against his legal representatives after notice under r 22 (i).

Issue to determine liability.—A Bench of the Bombay High Court has held that the issue as to the liability of the persons not served is not limited to the question

- | | |
|---|--|
| (o) <i>Flinn v. Watson</i> [1899] 1 Q.B. 714, 716. | (s) <i>Mather & Co. v. Ibrahim</i> (1907) 51 B.M. 908. |
| (p) <i>Higgin v. Cor. Sons, Larkley & Co.</i> [1894] 1 Q.B. 792. | 103 L.C. 81 (27) A.B. 541 J. Inf. v. |
| (q) <i>Naturalist v. Watson & Co.</i> (1907) 51 B.M. 794, 105 L.C. 56 (27) A.B. 44. | <i>British</i> (1907) 51 B.M. 883, 119 L.C. 893. |
| (r) <i>Elavran v. Himp</i> (1903) 31 B.M. 1112, 140 L.C. 53 (32) A.B. 516. | (20) A.M. 311 <i>Jam. v. Arjun v. Jam.</i> |
| <i>Lombay Co. v. Kishan Singh</i> (1903) 31 B.M. 37, 134 L.C. 1026 (31) A.L. 36. | <i>Prasut</i> (1900) 5 All. 954, 13 L.C. 71. |
| | (31) A.A. 65. |
| | (t) <i>Jagat Chandra v. Gurney</i> (1907) 53 Cal. 214. |
| | 25 B.L.C. 824 (26) A.C. 21. |

O. 21, r. 50 as to whether they were partners but that such persons may raise a general issue as to liability. If the decree is an award decree they may plead that it is not binding on them as that particular partner had no power to refer the disputes to arbitration (u). On the other hand a single Judge of the same High Court had held that the issue is limited to the question of partnership and that the alleged partner who denies that he is a partner cannot plead in the alternative that the firm is not liable (v), for he cannot both deny the partnership and claim to defend the action on behalf of the firm (w).

Court which passed the decree—The leave required under sub rule (2) to execute the decree against a person other than a person named in sub rule (1) (b) or (1) (c) must be obtained from the Court which passed the decree. The Patna High Court holds that if the decree is transferred for execution to another Court the transferee Court is not empowered to grant such leave as that would be making a new decree (x). On the other hand the Allahabad High Court has held that the transferee Court may grant such leave (y).

Where decree transferred for execution—An ex parte order under sub rule (2) granting leave to execute the decree and transferring the decree for execution to another Court does not preclude the transferee Court from determining the question whether the decree transferred was a nullity (z).

Sub rule (3)—An ex parte order made under sub rule (2) above is not within sub rule (3). Sub rule 3 contemplates an order where the liability has been tried and determined (a). As a proceeding under this rule is subject to the same conditions as to appeal as a decree an appeal from an order under the sub rule should be stamped ad valorem as a regular appeal (b). But the proceeding is a subsidiary proceeding and not a suit so that a new trial cannot be ordered under s. 38 of the Presidency Small Cause Courts Act (c). On the other hand for the purpose of a reference under s. 8 of the Indian Civil and Criminal Justice Act, Bom. Act 2 of 1864 such a proceeding has been held to be a suit (d).

Sub rule (4)—This sub rule relates to persons other than those referred to in sub r (1) cls (b) and (c). The summons to appear and answer in sub r (4) does not mean the writ of summons. It means a summons or a notice to appear and answer the application specified in sub r (2). The object of sub r (4) is to give an opportunity to a person against whom the decree holder seeks to execute the decree other than such a person as is referred to in sub r (1) cls (b) and (c) of disputing his liability as a partner if he desires to do so (e).

Minor partner—The proviso to sub r (1) declares that nothing in that sub rule should be deemed to limit or otherwise affect the provisions of s. 247 of the Contract Act. The combined effect of that section and the present rule is that where decree has been passed against a firm containing a minor who is admitted to the benefits of a partnership execution may be granted against the property of the firm including the share of such minor in the property of the firm but it cannot be granted against the separate property of the minor. Having regard to the definition of a firm in

(u) *Bhagwan v. Hira* (1930) 31 Bom. L.R. 111, 140 I.C. 519 (3) A.B. 517.

(v) *In re Malabar Forests & Pulp Co.* (193) 31 Bom. L.R. 617, 138 I.C. 314 (3) A.B. 334.

(w) *Wells & Co. v. Mel'car & Co.* (1935) A.B. 1.

(x) *Gulu Ram v. Sheonant Lai* (193) 22 Pat. 540, 141 I.C. 61 (3) A.P. 3 J. *Hasaniz from S. Lal Prasad v. C. M. & Co.* (1914) 43 All. 794, 61 I.C. 401 (1) A.A. 199.

(y) *33 All. 391 supra*
(z) *Wells & Co. v. Hobb* (1935) 31 Bom. L.R. 503, 115 I.C. 865 (3) A.A. 330.

(a) (1939) 37 All. L.J. 553, 115 I.C. 865 (3) A.A. 390 supra.

(b) *Blutnath v. Barind* (1933) 60 Cal. 530, 101 I.C. 100, 29 A.C. 616.

(c)

(d)

(e) *Jagat Chandra v. Gannu* (1936) 53 Cal. 114, 0 I.C. 84 (1) A.C. 1.
J. Prasad v. Bhagyanadas (1934) 61 Bom. L.R. 1037, 63 I.C. 67 (3) A.B. 66.
Mathura das v. Elrakam (1935) 51 Bom. 940, 105 I.C. 81 (1) A.B. 551.

see 239 of the Contract Act, and to a minor's inability to contract, "the share of such minor in the property of the firm" mentioned in s. 247, is merely his right to participate in the property of the firm after its obligations have been discharged (f)

Award.—It has been held by the High Courts of Calcutta (g), Bombay (h) and Allahabad (i), that an award against a firm under s. 11 of the Indian Arbitration Act, 1899, stands on the same footing as a decree, and that the provisions of this rule apply to such an award. In the case of an award "the Court which passed the decree" referred to in sub r. (2) is the Court in which the award is filed (j). Under the rules of the Bombay High Court the application must be made by an originating summons (k).

Insolvency of firm.—Where a decree has been passed against a firm, execution may be taken out against any partner who was served with the summons. The insolvency of the firm is no bar to execution against individual partners (l).

51. [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of negotiable instruments

The proper method of attaching a promissory note in the hands of an individual is by its actual seizure, and not by the issue of a prohibitory order, for if it is not seized the promisee may negotiate it and mere notice will not avail against a holder in due course (m). But notice of the order of attachment to the debtor or promisor is sufficient protection against his paying the amount due to the promisee or anyone else (n).

52. [S. 272.] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or Officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued.

Attachment of property in custody of Court or public officer

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

(f) *Sanjay Charan Mandal v. Krishnadhan Banerji* (19 2) 49 I C 108 49 Cal 580

(g) 67 I C 14 (2) A 10 3

(h) " " " " " "

(i) " " " " " "

(j) (193) A 1 433

(k) *Sulal Messrs Clement Fils & Co* (19 1) 43 All 391 61 I C 401 (21) A 1 193

(l) (19 3) 27 C W 656 608 77 I C 868 (24) A C 117 *supra* *Mandal v. Bharat Spinning & Weaving Co* (1933) 35 Bom L R 941 147 I C 587 (33) A B 433

(m) 35 Bom L R 941 *supra*

(n) *Fauzho Das v. Tirth Das* (19 5) 7 Lah L J 165 29 I C 158 (25) A L 379

(o) *Subramania v. Chokkalingam* (19 3) 45 Mad 415 7 I C 189 (3) A M 31

(p) *Namagiri v. Mutha Velappa* (19 9) 56 Mad 1 J 70 111 I C 89 (24) A M 940

O. 21, r. 52

Attachment of dividends in the hands of Official Assignee—The Official Assignee is a public officer within the meaning of this rule, and moneys in his hand payable by way of dividend to a creditor of an insolvent may be attached in execution of a decree against the creditor in the manner provided by this rule (a)

Attachment of property in the hands of a receiver—A receiver is an officer of the Court. No attachment therefore of money in the hands of a receiver can be made *without leave of the Court (p)*, but the leave must be applied for in the suit in which the receiver was appointed (q)

Charging order.—When the assets of a firm are in the hands of a receiver appointed in a partnership suit, a decree holder seeking execution against the firm may apply for a charging order. The Bombay High Court had held that he should file an application for execution under rule 11 and then obtain an attachment under this rule by notice to the receiver. He should then apply, not in his own suit but in the partnership suit, for payment or for leave to levy execution under rule 50 and for a charging order. If there are ample assets the Judge in the partnership suit may direct the receiver to make immediate payment. But if the assets require nursing, then in order on the one hand to gain time and on the other to protect the decree holder, the Judge will make a charging order (r). The effect of the charging order is to constitute the decree holder a secured creditor and to give him a priority over other creditors although he undertakes to deal with the charge subject to the further orders of the Court (s). The Court dissented from a judgment of Macleod, J., which held that the procedure was to apply for a charging order and not to apply for execution against the assets in the hands of the receiver (t). The Court also dissented from the view expressed in other Bombay cases that assets held by the receiver must necessarily be distributed equally (u).

A charging order may also be made when a decree holder seeks to attach movable property of which a receiver has been appointed. See notes "Attachment of movable property in the hands of a receiver" under r. 54.

Anticipatory attachment—This rule does not permit an anticipatory attachment of money *expected to reach* the hands of a public officer, but applies only to money actually in his hands. An attachment made before the money has reached the hands of the officer is invalid (v).

Priority—There is a conflict of decisions as to whether if a fund in Court is attached by several decree holders, they are entitled to share ratably or whether they are to be paid in the order of their attachments. As to partnership assets in the hands of a receiver, the High Court of Bombay held in one case that, no one judgment creditor of a firm is entitled to priority over others by attaching the partnership assets, and that they should be distributed pro rata among all the judgment creditors (w). On the other hand, it was held in a recent case that the judgment creditor who first took out execution against the assets was entitled to have his decree satisfied to the full in priority over other

(a) *Hurda Jal v. Hajji Adam* (1925) 49 Bom. 638
8th I.C. 1011 (25) A.B. 344

(p) *Mahomed v. Mahomed* (1893) 21 Cal. 85
Akhan v. Ali Mahomed (1893) 16 Bom. 57

(q) *Bai Rukhnabai v. Fadul* (1930) 54 Bom. 667
127 I.C. 481 (30) A.B. 451

(r) *Bai Rukhnabai v. Fadul* (1933) 54 Bom. 667
127 I.C. 491 (30) A.B. 451 P. 2, overruling *Demankhware v. Jafarali* (1927) 25 Bom. I.R. 689
106 I.C. 284 (27) A.B. 405
Kewry v. Allal (1898) 34 Ch. D. 345
Kid v. Thomas (1900) 2 Ch. 344
In re Gibson and Levy (1913) 2 K.B. 527

(s) 54 Bom. 667 *supra*

(t) *A. Han Ismail & Co. v. Fakhari* (1910) 34 Bom. 444
4 I.C. 135

(u) *Khan v. Ali Mahomed* (1897) 16 Bom. 577
Shidlinappa v. Shankarappa (1904) 29 Bom. 146

(v) *Tribeni v. Fakhari* (1899) 22 Bom. 30 com. mented upon in *Limbai v. I.C. 18* (1913) 39 Bom. 89 at p. 85, 28 I.C. 18
Tiruvaranjal v. Thiruvengal (1914) 6 Mad. L.J. 364
24 I.C. 617
Thakur das v. Joseph (1917) 44 Cal. 107
24 I.C. 516

(w) *Khan v. Ali Mahomed* (1862) 16 Bom. 577

non attaching creditors (x) It is submitted with great respect that the latter decision is incorrect Where a receiver is appointed in an administration suit, and a creditor of the deceased obtains a decree against the legal representative of the deceased after such appointment, he is not entitled to execute the decree against the estate of the deceased (y)

The following propositions have been laid down by a Full Bench of the Madras High Court in *Visvanadhan v Arunachalam* (2), overruling *Katum v Haji Mahomed* (a), an earlier decision of the same High Court

(1) Where the property attached is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court, and it is the duty of the attaching Court, if the property attached is money, to call upon the custody Court to pay it into the attaching Court and in other cases, to provide for the realisation of the property, and to divide the money or proceeds rateably between the attaching decree holder and the other decree holders who are entitled to distribution under sec 73 of the Code of Civil Procedure, viz, those who have applied to it for execution before the receipt of such assets

(2) Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time If the other decree holders want to share in the rateable distribution they must apply in time to the first attaching Court The power conferred on the custody Court by the proviso to O 21, r 52, to determine claims to priority, etc, does not entitle the custody Court itself to distribute the assets rateably among the attaching decree holders

(3) When the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of sec 73 of the Code of Civil Procedure, only when so much of the money standing to the credit of the judgment debtor as is necessary to satisfy the decree holders who have applied to it for execution, is ordered to be transferred to the credit of the first attaching creditor's suit

The Calcutta High Court (b) has followed *Katum v Haji Mahomed*, but this was before the Full Bench case, and the case was one in which the custody Court was also the attaching Court The Calcutta High Court has also held that the custody Court has no authority to make rateable distribution (c)

Form—See Sch I, App E, No 7

53. [S. 273.] (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) if the decrees were passed by the same Court, then by order of such Court, and,

(x) *Kesserbas v Anku* (1927) 29 Bom L R 615 100 IC 113 (27) A B 394 Ven

(y) " " " " " "

(c) (1921) 44 Mad 100 60 IC 307 (21) A M

218 *Narhuappa v Subbar* (1923) 46 Mad 506 513 7 IC 80 (23) A M 505
Harecharan v Kedernath (1931) 35 C W N 517

(a) *Katum v Haji Mahomed* (1915) 38 Mad 21 29 IC 23

(b) *Thakurdas v Joseph* (1917) 44 Cal 1072 41 IC 516

(c) *Kamini Fumar v Sasanka* (1933) 37 C W N 220 146 IC 791 (33) A C 814

D 21, r 53

(b) if the decree sought to be attached was passed by another Court then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice or

(ii) the holder of the decree sought to be executed or his judgment debtor applies to the Court receiving such notice to execute his own decree

(2) Where a Court makes an order under clause (a) sub rule (1) or receives an application under sub head (ii) clause (b) of the said sub rule it shall on the application of the creditor who has attached the decree or his judgment-debtor proceed to execute the attached decree and apply the proceeds in satisfaction of the decree sought to be executed

(3) The holder of a decree sought to be executed by attachment of another decree of the nature specified in sub rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder of the same

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub rule (1) the attachment shall be made by a notice by the Court which passed the decree sought to be executed to the holder of the decree sought to be attached prohibiting him from transferring or charging the same in any way and where such decree has been passed by any other Court and by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was issued

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and do as may reasonably be required

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree the Court making an order of attachment under this rule shall give notice of such order to the judgment debtor bound by the decree

attached; and no payment or adjustment of the attached O. 2
decree made by the judgment-debtor in contravention of such
order after receipt of notice thereof, either through the Court
or otherwise, shall be recognized by any Court so long as the
attachment remains in force

Alterations in the rule—This rule corresponds with sec 273 of the Code of 1882 except in the following particulars —

- 1 The words ' or for sale in enforcement of a mortgage or charge ' in sub r (1) are new See notes below, " Attachment and realization of decrees "
- 2 The words ' or his judgment debtor ' in sub r (1) cl (b) sub head (u) are new These words give effect to the opinion expressed by Maclean, C J in the undermentioned case (d)
- 3 Sub rules (3) and (6) are also new See notes below under these sub rules

Attachment and realization of decrees—For the purpose of this rule decrees have been divided into two classes, namely —

- (1) decrees for the payment of money or for sale in enforcement of a mortgage or charge, and
- (2) other decrees

First, as to attachment of decrees—Decrees of the first class are attached in the manner prescribed by sub r (1). Decrees of the second class are attached in the manner prescribed by sub r (4).

Next as to realization of attached decrees—Decrees of the first class are realized in the manner prescribed by sub r (2). There is no provision in this rule for the realization of decree of the 2nd class e.g. a decree for partition (e) or for foreclosure of a mortgage (f). These decrees are realized by a sale of the decree itself. But decrees of the first class that is money decrees (g) and mortgage-decrees are not realized by sale (h). They can only be realized in the manner prescribed by sub r (2). The reason of this distinction is as follows:—

"Decrees are not expressly mentioned in sec 60 as property liable to attachment and sale. Hence they are attachable and saleable as comprised in the expression "all other saleable property" which occurs in that section. Being liable to attachment as saleable property they can be sold in execution of another decree. But money decrees and mortgage decrees must not be sold because the present rule prescribes special procedure for the realization of such decrees [sub r (2)]. But for this provision, money decrees and mortgage decrees would have to be realized by sale like other decrees. The special procedure prescribed by sub-r (2) is an exception to the general rule that property when attached can only be realized by sale.

Under the old section decrees were divided into two classes namely —

- (1) decrees for the payment of money and
- (2) other decrees

(f) *Parhwa D n v Bays Lal* (1904) 6 All 91
(g) *Sultan Iwar v Culart Lal* (1880) 2 All

+90 Trucengoda v Fy...
 Mad 418 Salandro 5...
 (1-93) 20 Jal 111...
 Prasad (193) 12 Pa...
 (3) A P 317
 (A) T...
 59 IC 541...
 B...
 300 "C...

O. 21, r. 53 • There was no specific provision for decrees for sale in enforcement of a mortgage. Hence the question arose whether such decrees belonged to the first class or the second class. The decisions on the subject were conflicting (1). To remove this doubt, the words "or for sale in enforcement of a mortgage or charge" have been inserted in sub r (1). These words make it clear that mortgage decrees should be attached and realized in the same manner as money decrees [see sub rr (3) and (2)].

Decrees for dissolution of partnership—A decree for the dissolution of a firm and for the taking of accounts, where a receiver has been appointed by the decree for the sale of the assets of the firm and for the payment of the partnership debts is a "decree for the payment of money" within the meaning of this rule, though part of the partner ship assets consists of immovable properties (3).

Decrees other than money decrees and mortgage decrees—D1 holds a decree against J for partition of certain property passed in Court X. D2 obtains a decree against D1 for Rs 6,000 in Court Y. If D1 fails to satisfy the decree obtained against him by D2, D2 may apply to Court Y to execute his decree by attachment and sale of the decree held by D1 against J. The decree held by D1, being neither a money-decree nor a mortgage-decree, the only mode of realizing it in execution of D2's decree is by attachment and sale (1).

Money decrees and mortgage decrees.—Where the decree attached is a money decree or a mortgage decree, it can only be realized by execution, it cannot be sold in execution. For this purpose, two applications must be made, one for attachment of the decree, and the other for its execution. The application for attachment must be made by the holder of the decree sought to be executed to the Court which passed it. But the application for execution of the attached decree must be made to the Court which passed the decree attached, and it may be made either by the holder of the decree sought to be executed or by the holder of the decree attached, as in the following illustrations.

(a) *Where the decree sought to be executed and the decree sought to be attached are passed by the same Court*—D1 holds a decree against J for Rs 5,000 passed by Court X. This is a money decree. D2 obtains a decree against D1 also in Court X for Rs 1,000. If D2 seeks to attach D1's decree in execution of his decree, he should apply to Court X for attachment, and either he or D1 may then apply to that Court for execution of the decree held by D1 against J. D2 can apply for execution, for he is deemed to be the representative of D1 [see sub r (3)].

(b) *Where the decree sought to be executed and the decree sought to be attached are passed by different Courts*—D1 sues J on a mortgage, and obtains a decree for sale of the mortgaged property under O 34, r 5 in Court X. This is a mortgage decree. D2 obtains a decree against D1 for Rs 6,000 in Court Y, and in execution of his decree applies to Court Y for attachment of the mortgage decree held by D1 against J. The attachment is to be made by the issue to Court X of a notice by Court Y requesting Court X to stay execution of D1's decree against J unless and until—

- (i) the notice is cancelled by Court Y, or
- (ii) an application is made to Court X by D2 or D1 to execute the decree held by D1 against J.

If an application is made by D2 or D1 to Court X to execute the decree held by D1 against J, Court X will proceed to execute the decree and the nett proceeds that may be realized in execution will be applied in satisfaction of D2's decree.

(1) See *Delhi and London Bank Ltd v Parthab Singh* (1903) 28 All 771 (mortgage-decree held not to be a money-decree). *Vaidhi nallazamy v Somasundaram* (1905) 23 Mad 473 (mortgage-decree held to be

a money decree)
(1) *Sudhigappa v Shanirappa* (1903) 27 Bom 556
(1) *Sudarsan v Manindra* (1931) 55 Cal 934
133 I C 181 (32) A C 90

If in the case put above, Court X does not stay execution of D1's decree on receiving the notice from Court Y, and proceeds with the execution in spite of the notice, the proceedings will be deemed to be *ultra vires*, and a sale held in execution of that decree will be set aside as void (1)

Sub rule (1) - Stay—The stay under sub r (1) (b) is only a limited stay and does not prevent either the holder of the decree sought to be executed or his judgment debtor from seeking to execute the original decree (m)

O. 21, r. 53

• There was no specific provision for decrees for sale in enforcement of a mortgage. Hence the question arose whether such decrees belonged to the first class or the second class. The decisions on the subject were conflicting (i). To remove this doubt the words 'or for sale in enforcement of a mortgage or charge' have been inserted in sub r (1). These words make it clear that mortgage-decrees should be attached and realized in the same manner as money decrees [see sub rr (1) and (2)].

Decrees for dissolution of partnership—A decree for the dissolution of a firm and for the taking of accounts, where a receiver has been appointed by the decree for the sale of the assets of the firm and for the payment of the partnership debts is a decree for the payment of money ' within the meaning of this rule, though part of the partnership assets consists of immovable properties (j).

Decrees other than money decrees and mortgage decrees—D1 holds a decree against J for partition of certain property passed in Court X. D2 obtains a decree against D1 for Rs 6 000 in Court Y. If D1 fails to satisfy the decree obtained against him by D2, D2 may apply to Court Y to execute his decree by attachment and sale of the decree held by D1 against J. The decree held by D1, being neither a money-decree nor a mortgage-decree the only mode of realizing it in execution of D2's decree is by attachment and sale (k).

Money decrees and mortgage decrees—Where the decree attached is a money decree or a mortgage decree, it can only be realized by execution, it cannot be sold in execution. For this purpose, two applications must be made one for attachment of the decree and the other for its execution. The application for attachment must be made by the holder of the decree sought to be executed to the Court which passed it. But the application for execution of the attached decree must be made to the Court which passed the decree attached and it may be made either by the holder of the decree sought to be executed or by the holder of the decree attached, as in the following illustrations

decree held by D1 against J. D2 can apply for execution for he is deemed to be representative of D1 [see sub r (3)].

(b) *Where the decree sought to be executed and the decree sought to be attached are passed by different Courts*—D1 sues J on a mortgage, and obtains a decree for sale of the mortgaged property under O 34 r 5 in Court X. This is a mortgage decree. D2 obtains a decree against D1 for Rs 6 000 in Court Y. D2 may apply to Court Y for attachment of the mortgage decree held by D1 against J. The application for execution of the attached decree is to be made by the issue to Court X of an application for execution of D1's decree against J unless and until—

- (i) the notice is cancelled by Court X, or
- (ii) an application is made to Court X by D2 or D1 to execute the decree held by D1 against J.

... held by
that

If in the case put above, Court X does not stay execution of D1's decree on receiving the notice from Court Y, and proceeds with the execution in spite of the notice, the proceedings will be deemed to be *ultra vires*, and a sale held in execution of that decree will be set aside as void (l)

Sub rule (1) Stay—The stay under sub r (1) (b) is only a limited stay and does not prevent either the holder of the decree sought to be executed or his judgment debtor from seeking to execute the original decree (m)

Sub rule (3) Representative—This sub rule is new It gives effect to the undermentioned decisions (n) under the Code of 1882 It declares in effect that one who attaches a decree is a *representative* of the decree holder within the meaning of s 47 Thus in the cases put above D2 is the representative of D1.

A holds a money decree against B, and B holds a money decree against C A in execution of his decree against B, attaches the decree of B against C Before the attachment C had paid the amount of his decree to B, but the adjustment was not recorded or certified Under O 21, r 2, the payment cannot be recognised and A is entitled to execute the attached decree (n1)

A holds a money-decree against B B holds a decree for sale in enforcement of a mortgage against C A attaches in execution of his own decree the decree held by B against C C brings into Court from time to time sums of money for satisfaction of the decree held against him by B Since A is the "representative" of B, the payments made by C, become forthwith available to A, and operate from their respective dates as partial satisfaction also of the decree held by A against B Hence interest on the decree held by A runs only up to the dates of the deposit, and not up to the date when A withdraws the moneys from Court (o)

As the attaching decree holder is the representative of the holder of the attached decree, it has been held that if the latter decree is reversed on appeal restitution may be claimed against the attaching decree holder if he has realized the attached decree (p)

Sub rule (3) does not apply if the attachment is not of the decree but merely of money paid into Court under r 89 in order to set aside a sale in execution of a decree (q)

Sub rule (6) Adjustment of attached decree—This sub rule is new The latter part of the rule gives effect to a Bombay decision that where a decree is attached, no adjustment of the decree subsequent to the attachment can be recognized by the Court (r) see O 2, r 2 A Full Bench of the Madras High Court has held that though the attachment is effected by notice to the Court under sub r (1) yet a payment or adjustment made by the judgment-debtor in ignorance of the attachment and before he has received notice of the order of attachment under sub r (6) is valid This sub rule merely provides, in cases of bona fide transactions by judgment debtors, an exception to the general rule laid down in s 64 above (s) In the case of an order of attachment communicated to the Court which passed the decree by a notice signed by

- (l)
 (m)
 (n) *Subramanian v. Subramanian* (1933) 11 Rang 400
 16 Mad 10 *Krishnan v. Venkatarathnam*
 (1906) 29 Mad 318
 (n1) *C. S. Arumugam v. Subramanian* (1933) 11 Rang
 400 145 IC 525 (33) A R 239
 (o) *Malan Mohan v. Bishnupada* (1933) 35 Cal
 L J 109 64 IC 200 (21) A C 520

- (p)
 (q)
 (r)
 (s)
 (t) *Paja Sir S. R. M. M. A. Firm v. Burma Oil
 Co* (1931) 9 Rang 140 134 IC 806
 (31) A R 185

O. 21
rr. 53, 54

"Decree."—A decree, whereby *B* was compelled to deliver up possession of certain lands to *C*, is reversed in appeal, and *B* is declared to be entitled to recover back possession from *C* with mesne profits. *A* obtains a decree against *B*, and applies in execution of his decree to attach *B*'s right to recover mesne profits from *C*. The right is not attachable, for it is not a decree. "The language [of this rule] seems to apply only to cases where the right attached is a right expressly settled by the decree, and not a right arising from the decree by way of restitution" (u)

54. [S. 274.] (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Attachment shall be made.—The attachment is not effective to invalidate a subsequent transfer unless an order of attachment is first made and the other things prescribed by the rule have been done (1) See notes to s. 64 "Where an attachment has been made"

Immovable property.—The equity of redemption of a mortgagor is "immovable property within the meaning of this rule (1c) The life interest taken by a Parsi widow under her husband's will in the income of his immovable property is not movable but immovable property, and is attachable under this rule (2)

Previous contract of sale.—A contract of sale does not create any charge which will prevail over the attachment. If *A* agrees to sell immovable property to *B*, and before the conveyance is executed a creditor *C* attaches the property, the subsequent sale by *A* to *B* will be subject to the claim of *C* enforceable under the attachment (3) In some cases, however, it has been held that the contractual obligation prevails over the attachment (2)

Proof of service of prohibitory order.—Where it is found as a fact that a prohibitory order was duly served on all the judgment debtors, the destruction of part of the record which afforded proof of the service of notice does not render the execution-sale invalid (a)

(u) *Tasudeva v. Varajana* (1901) 24 Mad 341 345

(v) *Nagar Mull v. Benares Bank* (1930) 9 Pat 892, 129 I C 342 (31) A P 68, dissenting from *Venkataramiah v. Pankaja Sankhaya* (1919) 42 Mad 3, 48 I C 232; *Kuralat v. Jagatpita* (1929) 8 Pat 1, 111 I C 797, (24) A P 800

(w) *Parashram v. Corrida* (1897) 21 Bom 226, *Parendra Nath v. Marfan & Co* (1921) 33

(x) Col I J 7 13 62 I C 167 (21) A C 801

(y)

(z)

(a) *Abdohammad Albuli v. Alraza* (1921) 1 I 703 83 I C 879, (31) A A 747

Mortgage debt—The sale of a mortgage debt in execution of a decree carries with it the security and an attachment of the property under this rule is not necessary, see notes to r 46, 'Attachment of mortgage debt'

Court house—A copy must be affixed to a conspicuous part of the Court house in every case and in the office of the Collector when the land attached is land paying revenue to Government (b)

Attachment of immovable property in the hands of a receiver—If a receiver has been appointed of the immovable property sought to be attached, application must be made to the Court that appointed the receiver for leave to ignore the receivership altogether, so far as that property is concerned. If the Court gives leave the property is attached by the procedure prescribed by this rule exactly as if no receiver had been appointed. The Court instead of giving leave may make a charging order (c). See notes to r 52 above, 'charging order'

Omission to beat drum—Such an omission is a 'material irregularity' within the meaning of r 90 of this Order (d)

Land paying revenue to Government—Shrotriyam villages in the Madras Presidency are lands paying "revenue" to Government within the meaning of this rule (e)

Proclamation of sale—See r 64 below and notes thereto. See also notes to s 64, "Where an attachment has been made"

Removal of attachment after satisfaction of decree **55. [S. 275.] Where—**

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

Alterations in the rule —

- 1 The words 'or certified to the Court' in cl (b) are new. The effect of these words is to place satisfaction certified under r 2 of this Order on the same footing as satisfaction made through the Court
- 2 The latter part of the rule commencing with the words 'the attachment shall be deemed to be withdrawn' etc., is new. Under the old section an express order was necessary for the withdrawal of the attachment. No

(b) *A. Annadurai v. Ben nath* (1931) 54 Cal 134 135 531 (41) A C 67

(c) *Pratapmal v. Chund* (1937) 60 Cal 345 1411 C 147 (33) A C 417

(d) *Trimbak v. Nana* (1886) 10 Bom 504

Papendra v. Tulara (1933) 55 All 192, (35) A A 74

(e) *Channamma v. Ket. dhi* (1923) 46 Mad 736 751 C 393 (24) A 31 17 See also *Shreedhar v. Jee* (1937) 7 Lab. L. J 501, 504 541 C 541 (25) A L 543

O. 21,
rr. 55-57

such order is necessary under the present rule. The attachment is to be deemed to be withdrawn on the happening of any of the events specified in cl^s (a), (b) and (c).

Relation of this rule to s 73—See notes to s 73, "Assets not available for rateable distribution."

* The attachment shall be deemed to be withdrawn.—A's property is attached in execution of a decree obtained against him by B. C, another judgment creditor of A, applies for execution of his decree, but no attachment is issued upon his application. On the date fixed for the sale A pays into Court the amount payable under B's decree. The next day C applies for sale of the property. C is not entitled to have the property sold because the effect of the payment into Court was the withdrawal of the attachment under this rule, and there being no attachment under C's decree no sale can be ordered in execution of his decree (f).

56. [S. 27.] Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Order for payment of coin or currency notes to party entitled under decree

57. [New] Where any property has been attached in execution of a decree but by reason of the decree holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Determination of attachment

Object of the rule.—The object of the rule is to put a stop to the practice of making orders striking off proceedings or removing proceedings from the file a form of order for which there was no justification under any of the earlier Codes (g) and which made it doubtful whether the attachment ceased or it still continued. This subject has already been discussed in the notes to s 64 under the head "Effect of striking off execution proceedings or of removing them from the file."

By reason of the decree holder's default.—The provisions of this rule that the attachment should cease upon the dismissal of the application for execution do not apply unless the dismissal was on the ground of "default" on the part of the decree holder (h). The word "default" is not confined to default in appearance or in payment of process fees or in production of documents but includes failure to do what a decree holder is bound to do that is to proceed with his application for execution. Failure, therefore, to give notice to the judgment debtor prior to the drawing up of the

(f) *Sorabji v. Fela* (1915) 30 Bom 150, 17 I C 911; *Uttamajra v. Lila Sah* (1905) 28 M J 200; *S. C. Sorabji v. Fela* discussed in the notes to s 73 under the head "Assets held by a Court."

(g) *Dhan Chant v. Billa* (1919) PooJ Rec no 154 pp 410-414 G-1 (1919).
(h) *Amr Palash v. Kan* 2 (1919) S I All 400 15 I C 40.

proclamation as required by r 66 of this Order, is default within the meaning of this rule (i) Where a sale in execution of a decree is set aside for any reason other than this default on the part of the decree holder, the antecedent attachment is revived so as to support a second application for execution of the decree by sale of the same property and no fresh attachment is necessary (j)

Upon the dismissal of such application the attachment shall cease—These words are imperative A Court therefore has no power while dismissing an application for default on the part of the decree holder to direct by its order that the attachment shall continue Thus where an executing Court made an order that “the execution case is accordingly dismissed, the properties will remain under attachment,” it was held that the order being one dismissing the application for execution, the attachment ceased by virtue of the provisions of this rule notwithstanding the direction that the attachment should continue (k) In an Allahabad case, the order ran in these terms “The execution case should for the time being be dismissed but the attachment shall remain in force” The Court held that it was in effect an order *adjourning* the proceedings and was therefore valid (l) In a later Allahabad case the executing Court struck off the file an application of its own motion and without any default on the part of the decree holder. It was held that there was no dismissal of the application within the meaning of this rule and that the attachment had not ceased (m) These questions derive importance from the fact that an alienation of property after the attachment has ceased is not within the prohibition contained in s 64.

Attachment before judgment—A Full Bench of the High Court of Madras has held that the words “property attached in execution of a decree” apply to property attached before judgment So when an execution application for the sale of property attached before judgment was dismissed for default, the attachment though it was made before judgment, ceases (n) A sues B and obtains an order for attachment before judgment A then obtains a decree in the suit against B Thereafter A applies for execution of the decree, but the application is dismissed for default of prosecution The dismissal of the application puts an end to the attachment before judgment This is directly opposed to the decisions of the High Courts of Allahabad (o) and Calcutta (p), where it was held that the words “attached in execution of a decree” do not include an attachment before judgment The High Court of Bombay has followed the Madras decision (q)

Investigation of claims and objections

58. [S. 278.] (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court

Investigation of claims to, and objections to attachment of, attached property

| | | | |
|-----|--|-----|--|
| (i) | | (m) | <i>Byas v Paghunath</i> (1926) 43 All 693, 27 I C 102 (26) A A 734 on appeal <i>Byas v Pudra</i> (1930) 32 Bom L R 144 1, 0 I C 60 (27) A PC 254 |
| (j) | | (n) | |
| (k) | | (o) | |
| (l) | | (p) | <i>G. Sankar v. J. Sankar</i> Cal (1911) 16 Cal L J 26 14 I C 345 <i>Shahmad Khan v. Shahid</i> <i>Shahid Khan</i> (1929) 56 Cal 416, 119 I C 113 (29) A C 465 |
| (m) | | (q) | <i>Hira v. Shrinagar</i> (1931) 52 Bom 623, 131 I C 973 (31) A B 550 |

D. 21, r. 58 shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postplacement of sale

Rules 58 to 63—The e rules deal with investigation of claims preferred to property attached in execution of a decree and of objections to the attachment of such property.

Scope of the rule—Objections to attachment raised by a party to the suit in which the decree under execution was passed or his representative fall within the scope of s. 47. Objections to attachment raised by a third party come under the present rule. This distinction is important in two ways—

I Where an objection to attachment is made by a party to the suit or his representative the objector should proceed by an application under s 47 a separate suit for the purpose is barred But where an objection to attachment is made by a third party the objector may either proceed by an application under this rule or he may bring a regular suit to establish his objection failure to proceed by an application under this rule is no bar to a separate suit The object of this rule is to give a claimant a speedy and summary remedy but the rule does not deprive him of his remedy by suit The summary remedy given by this rule is alternative to the remedy by way of suit (r) See notes to s 47 Objections to attachment or sale by third parties and notes to r 63 below Payment by claimant under protest

2 An order made under s 47 allowing or disallowing an objection to attachment
r 117 (2) (a) or (b) 60 61 or (7)
le (s) and the
establish the
right which he claims to the property in dispute (r 63) Such suit must be brought
with in one year from the date of the order [Limitation Act art 11] (i) but subject
to such suit the order is conclusive (u) see r 63

The following illustration shows the operation of r 59(3). In execution of a decree obtained by A against B certain property alleged to belong to B is attached. If the property attached is claimed by C, C may bring a regular suit for a declaration that the property attached belongs to him and for removal of the attachment. Or if he desires to avail himself of the speedy remedy provided by this rule, he may present an application

(r) 1 *chapa* Lal v. National Fund of India
(1913) 40 Cal 528 40 ILA 58 18 ILR
19 400 Lar 5 gh v. (Hus (18 6) 18
All 410 Krishna b) 1 t v. 1 kr
(1904) 18 Mnd 13 17 R of n th v
s ro h Kan a (18) 3 flo CG

(s) Abdul v. H t n t (188) 4 All 100
The j n n v. (corrupt) 1 t (18 4) 24 1

353

(1) *Il val nk r v \ ran* (1894) 18 B n 06
(u) *I h m I x v t b l f ad r* (1895) 3^a al
477 (1^a) *ran v l phol nup v* (1894)
24 (al 563 *So thar Lal v* 4^{me} 4
Irrahat (1894) 15 (al 5 l 5 B 15 l A
1 3

O. 21,
rr. 58, 59

existence (r 66), and if it was satisfied that no debt existed, it should abstain from proceeding to sell the debt (d) But this view has since been dissented from, and it has been held that the words "possessed of" in rr 60 and 61 are not restricted to objects capable of physical possession, but apply also to objects capable of constructive possession, such as a debt Moreover, the word "property" in the present rule is wide enough to include a debt As to a garnishee's right to set-off, see notes to r 46 above

S 170, Bengal Tenancy Act, excludes rule 58—Section 170 of the Bengal Tenancy Act bars claims under rule 58 in all cases If a tenure is attached in execution of a rent decree it is not open to a third party to make a claim under this rule that the tenure belongs not to the judgment debtor but to him (e)

Appeal—No appeal lies under the Code from an order made in a claim case where the claimant is not the representative of the judgment debtor (f) [see notes to s 47 "Objections to attachment or sale by parties or their representatives," and "Objections to attachment by third parties"] A landlord in execution of a decree in a rent suit attached the surplus sale proceeds of the sale of the tenure in execution of his decree in a previous rent suit A claim was then preferred by a mortgagee of the tenure The Court held that as the mortgagee was not a representative of judgment debtor no appeal lay from the order allowing his claim (g) It has been held by the High Court of Madras, that an appeal lies from such an order under cl 15 of the Letters Patent, and that where such an appeal is preferred the period of limitation for the suit contemplated by r 63 below is to be calculated from the date of the order made on appeal (h) The High Court of Rangoon has held that there is no appeal from an order under this rule under the Letters Patent (i) The Calcutta High Court has held that whether the order is a judgment or not r 63 prevents an appeal under the Letters Patent (j)

59. [S. 279.] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced
by claimant

"Some interest"—These words mean "such interest as would make the possession of the judgment debtor possession not on his own account, but on account of or in trust for the claimant (k)

"Or was possessed of"—These words mean "was possessed of for himself, and not as trustee for the judgment debtor" See the next rule and the notes thereto

Limits of inquiry under rules 59 to 61—In *Sardhani Lal v Ambika Pershad* (l), their Lordships of the Privy Council said "the Code does not prescribe the extent to which the investigation should go, and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Court at the time, leaving the aggrieved party to bring the suit which the law allows to him" [see r 63] Rules 59 to 62 provide for a summary investigation into possession as distinct from a

(d) " " (25) 4 R 11

(e)

(f)

(g)

(h)

(i) *Jamal Brothers & Co Ltd v Chit Moh & Co* (1927) 5 Rang 381, 104 IC 330 (27) 1 R 37

(j) *Kularam v Matilal* (1917) 60 Cal 914 147 IC 303 (33) A C 715

(k) *Bhagwan v Khettar Moni* (1896) 1 C W 617 62 8 ibh ipathi v Narayanasami (1902) 27 M 1 500

(l) (1888) 15 I A 121 126 15 Cal 521 526

thorough trial of *ultimate right*. It is impossible to separate altogether the question of possession and of title. Thus if the judgment debtor was in possession, he may have been in possession as agent or trustee for another (rr 60 61) and this has to be inquired into. To that extent the title may be part of the inquiry in a claim case, but no ultimate questions of trust are intended to be thrashed out (m). In execution of a decree obtained by A against B three pieces of Government securities are attached. The securities stand in the name of C. C applies for removal of the attachment under r 58, alleging that the securities belong to him and they are held by him on his own account. A alleges that the securities are held by C *benami* for B. It is not open to the Court under these circumstances to inquire whether C, in whose name the securities stand is merely a *benamidar* for B. The property must therefore be released from attachment (n), and the question whether C is merely a *benamidar* is a question of title, which should be the subject of a suit under r 63. Similarly if the property attached is claimed by a person as a *Mutawali* under a deed of wakf, and it is proved that he has been in possession as *Mutawali* for upwards of 20 years, the property must be released from attachment. The Court has no power under these rules to decide whether the deed of wakf is valid (o). The words "possession of the judgment debtor or of some person in trust for him" in rr 60 and 61 refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the judgment debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances (p). If, instead of determining the question of possession, the Court determines the question of title, and disposes of the application on the question of title, the order is open to revision under sec 115 of the Code (q). Similarly where a Court ought to inquire into the question whether the possession of the judgment debtor was on his own account or on account of some other person but it refuses to do so the order is open to revision. The word *conclusive* in r 63 means non appealable, it does not mean not capable of revision (r). When the Court omitted to notice that the sale deed under which the claimant professed to be in possession was invalid for want of registration the order allowing the claim was reversed in revision (s).

Partition after attachment—If an undivided share of a coparcener in the whole property is attached and that share is converted by partition into a defined portion held in severalty, the attachment operates on that portion only and the other coparceners are entitled to have their shares released from attachment (t).

60. [s. 280.] Where upon the said investigation the

Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of

Release of property from attachment

the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account

- (m) (1887) 14 Cal 61, 60 s. pra.
(n) *Appanayya v. J. L. Krishna* (1905) 45 Mad LJ 613 s. 1 (184) (25) 4 M 58 (1915) 24 Mad LJ 3 s. 1 (1915) 24 Mad LJ 3 s. 1 (1915) 24 Cal 61 supra (1911) 15 Cal 80 supra.
(o) *Johnson v. J. J. Wells* (1923) 1 Kan. 661 (6) (25) 4 R 13.
(p) *Hirday v. B. N. N. N.* (1930) 34 C W N 254 13 1 (6) (3) 4 (3) 4.
(q) *Someshwar v. Mandal* (1934) 34 B m L J 296 13 1 (6) (3) 4 B 210.
(r) (1900) 23 Cal 515 supra.
(s) (1887) 14 Cal 617 supra. *Kanjimmal v. N. N. N.* (1915) 24 Mad LJ 32 s. 1 (1915) 24 Cal 617 supra.

O.21, r. 60 or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment.

Limits of inquiry under rules 59-61.—See notes to r 59 above under the same head

Property in possession of some person not in trust for judgment debtor—*A* obtained a decree against *B* as the heir and legal representative of his deceased father, and in execution of the decree attached certain money in the hands of *C* due to the estate of the deceased. Prior to the date of the decree an order had been made by the High Court under secs 17 and 18 of the Administrator General's Act 2 of 1874 [now Act 3 of 1913, ss 10 and 11], authorising the Administrator General to collect the assets of the deceased. It was held on the application of the Administrator General that the attachment should be removed. As the order under the Administrator General's Act authorised the Administrator General to realise the debt from *C* as part of the assets of the deceased, the amount in the hands of *C* could not be said to be property in the possession of a third person in trust for the judgment-debtor *B* (u). See notes to r 62 below

Property in possession of a judgment debtor not on his own account but on account of or in trust for some other persons—Such property, if attached should be released from attachment under this rule. *A* consigned goods by railway to *B*, and *B* had made specific advances against them, and the goods on arrival at the railway station were attached in execution of a decree against *A*, it was held that the goods though in the hands of the Railway Company were in the possession of *A*, but 'on account of or in trust for' *B*, and should therefore be released from attachment on *B*'s application (v).

Partly on his own account—If the judgment debtor is only entitled to a share in the property attached, and it is attached by seizure under r 43 it must be released under this rule and the decree holder may then proceed under r 47 (u).

Effect of order of release—An order made under this rule releasing the property attached from attachment is only provisional and liable to be set aside by a regular suit (r 63). "It is not conclusive, a suit may be brought to claim the property, notwithstanding the order" (x). It has not the effect therefore of putting an end to an attachment duly made, so as to leave the claimant free to deal with the property as he likes. In the case of movable property in the possession of the judgment debtor which is attached by seizure under r 43 the release from seizure determines the attachment and a fresh seizure is necessary (y). But in the case of immovable property if a suit is brought by the decree holder to establish his right to attach the property and the decree is in his favour, it has the effect of setting aside the order of release and of maintaining the attachment originally made. The result is that any private transfer of the property by the claimant, though made after an order under this rule releasing the property from attachment, will be void under sec 64, if the right to attach is subsequently established by suit

(u) *Bhargava v Administrator General of Bombay* (1839) 7 L.R. 429

(v) *Self v Bhimvel* (1897) 21 Bom. 287

(w) *Montra Nath v District Board* (1912) 59 Cal. 808 137 I.C. 672 (32) A.C. 404

(x) *Sardhani Lal v Anil Lal Iyengar* (1844) 15 Cal. 521 15 I.A. 123

(y) *Leitch v Macdonald v M F J J M Chatterjee* (1931) 8 Rang. 411, 166 I.C. 223 (30) A.R. 247

under r 63 (2) In execution of a decree obtained by *A* against *B* certain property standing in the name of *C* (*B*'s son) is attached *C* objects to the attachment and the property is released from attachment under this rule *C* afterwards mortgages the property to *M* *A* then sues *B* and *C* for a declaration that *B*, and not *C* is the real owner of the property, and a decree is passed in his favour The property is then re-attached and sold in execution of *A*'s decree, and purchased by *P* The mortgage to *M* is a transfer contrary to the attachment within the meaning of sec 64 and *P* takes the property free from the mortgage The second attachment in such a case relates back to the date of the first attachment Similarly any payment made by a debtor to his creditor, though after the attachment on the debt has been raised cannot prevail over the attaching decree holder who eventually succeeds in a suit brought by him under rule 63 (a) If pending confirmation of a sale the property has been released from attachment, the sale may be confirmed after the decree holder finally succeeds in his suit under rule 63 (b) In the case, however, of an attachment before judgment it is obligatory upon the Court to withdraw such attachment upon the dismissal of the suit [O 38 r 9] and the reversal of the judgment of dismissal on appeal does not operate to revive the attachment which has been withdrawn (c)

Appeal—See notes to r 58 above, 'Appeal'

Revision—See notes to r 59 above Limits of inquiry under rules 59 to 61

61. [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim

Disallowance of claim to property attached

Limits of inquiry under rr 59 to 61—See notes to r 59 above under the same head

Effect of order under this rule—An order in favour of a decree holder made under this rule does not enure for the benefit of other decree holders who are not parties to the proceedings (d)

Disallowance of claim—An order disallowing a claim under this rule is not a nullity and cannot be said to have been made without jurisdiction merely because the Court erroneously omits to decide the question of *possession* but disallows the claim on *some other ground* Such an order therefore is conclusive unless a suit is filed by the claimant as provided by r 63 of this Order (e)

Appeal—See notes to r 58 above Appeal

Revision—See notes to r 59 above Limits of inquiry under rules 59 to 61

- | | |
|--|--|
| <p>(1) <i>Jonamali v. Prosunno</i> (1896) 23 Cal 8 J <i>Pam Chandra v. Muteswar</i> (1906) 33 Cal 1134 <i>Pratap Chandra v. Sarat Chandra</i> (11) 25 CWN 544 62 IC 348 41 <i>Amrit Khan v. Bannudkar</i> (1909) 31 All 36 1 IC 951 <i>Lala v. Kushir</i> (1906) 1134 48 40 <i>Ankaya v. Manjiv</i> (1907) 45 Maj 84 62 IC 61 <i>M. G. Nasse. In the matter of</i> (1907) 1134 11411 615 (1) A 1 <i>Harechandra v. Joy Chant</i> (1907) 5 Cal 1 (1) A 5 4</p> | <p>(a) (1907) 45 Maj 84 62 IC 64 (1) A 1 16 s pra (b) <i>Ram Kahan v. Lahu Kundan Lal</i> (1930) 5 Lu k 60 121 IC 9 (3) A O 263 (c) <i>ar rama v. Meherban</i> (1911) 15 Cal LJ 43 911 914 <i>Pratap Chandra v. Sarat</i> <i>Chandra</i> (1907) 25 CWN 544 62 IC 348 (f) <i>Jay Nath v. Ganesh</i> (1906) 14 All 413 (1) <i>Jayram Das v. J. Nath</i> (1912) 34 All 363 1411 2</p> |
|--|--|

D. 21, r. 62

62. [S. 282.] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of encumbrancer

Scope of the rule.—This rule is an enabling rule, empowering the Court to make an order continuing the attachment subject to a mortgage if the Court is satisfied that the property attached is subject to a mortgage in favour of some person *not in possession*. If the mortgage is proved the Court should make an order continuing the attachment subject to the mortgage. It should not direct the property to be sold with notice of the mortgage. Such an order can be made under rule 66 but is outside the scope of this rule (f). In a Rangoon case (g) the Court, however, took quite the opposite view. It held that there was a connection between rules 62 and 66 and that unless a mortgage was proved under rule 62 it should not be notified under rule 66 and that an incumbrance which was merely alleged to exist should not be notified. The Lahore High Court, however, has said that the object of notifying an incumbrance is to warn the purchaser that he is buying the property subject to the claim which may be put forward against the property, but it does not mean that the incumbrance, charge or any other claim has been established (h). See also rule 66 (e). The decisions are conflicting as to whether an order which refuses to recognize a mortgage or a charge and directs the continuance of an attachment *free* from such mortgage or charge is to be referred to rule 66 or to this rule. The Bombay High Court and an old Allahabad case refer it to rule 66 (i). But the Madras High Court and a recent Allahabad case decide that rule 53 applies (j). The latter view cuts down the mortgagee's time for suing to one year, see s. 63. But the Lahore High Court which also applies s. 53 has observed that a person who chooses to take advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits (k).

"Subject to a mortgage"—The Code clearly makes a distinction between the case in which property is expressly sold subject to a mortgage and the case in which notice of an alleged mortgage is given in the proclamation of sale. The former is provided for by the present rule and the latter by r 66 below. In the former case the Court, *after being satisfied of the existence of the mortgage* sells only the judgment-debtor's equity of redemption, that is to say, the purchaser buys the property *subject to the mortgage*. In the latter case he buys the property with notice of the mortgage *and subject to such risk as the notice might involve*, the executing Court *does not decide whether the mortgage subsists or not*. Such being the case, if there is in reality a subsisting mortgage, then the purchaser has to redeem it. If, on the other hand, the mortgage specified in the proclamation of sale turns out invalid, the purchaser acquires the property free from liability for the mortgage. The point to be noted is that mere notice of an alleged mortgage in the proclamation of sale does not preclude the purchaser from questioning the validity of the mortgage (1). So when the plaintiff purchased a house at a Court sale and a right

- (f) *Hriday v Binode* (1930) 34 U W Y 254,
127 I C 670 (30) A C 390
(g) *Maing Aung Myot v Maung Tha Hmat*
(1931) 9 Rang 367 13; I C 716 (31)
A R 310
(h)
(i)
(j) *All L. J. 502*
1. eluv v Arumugam (1920) 38 Mad L J 537
56 I C 481, *Lakshmanan v Iarasam*
(1919) 37 Mad L J 159 52 I O. 7-0
Deba Das v Maharaj Rupchand (1927)
43 All 903 10. I C 792 (27) A A 593

- (A) Nawal Kishora v Khyapa Ram (1930) 11
Lah 363 120 I C 6 J (29) A L 865
- (K) Shiv Kunwar v Sheo Prasad (1906) 28 AH
418 Ganesh v Purshottam (1909) 33 Bom
311 11 C 106 Narayan v Chandra (1911)
35 Bom 2 5 10 I C 613 Jauri Jai v
Radha Kishan (1913) 33 AB 257 20 I C
182 Kalidas v Prasanna Kumar (1910)
47 Cal 446 55 I C 189 Apha Sitan v
Mohabbat Khan (1911) 43 All 409 63 I
C 295 (21) A 79 Roshan Lal v
Lalla (1922) 44 All 74 63 I C 790
(21) A A 443 Sharda v Joti Ram
(1914) 30 Bom L R 1156 (29) A B
444

of residence of two ladies was notified, he was not estopped from suing to evict them on the ground that they in fact had no such right (m). And it is also to be noted that if the mortgage specified in the proclamation proves to be invalid, the judgment-debtor is not entitled to claim from the purchaser the amount alleged to have been due on the mortgage (n).

"Mortgage in favour of some person not in possession."—It has been held by the High Court of Bombay that where a mortgagee is in possession of the mortgaged property at the time of attachment, he can claim to have the attachment removed under r. 60, the reason given being that a mortgagee cannot be said to be in possession as a trustee for the judgment-debtor (o). The High Court of Patna has taken the contrary view (p). See notes to r. 41 above. See also s 73 (l).

Attachment of property agreed to be sold.—An agreement for a sale of immovable property does not create any interest in or charge on the property, even if earnest money has been paid. The property may therefore be attached after the agreement, and a sale thereof in execution will pass a good title to the auction purchaser (q). But it is otherwise where the purchase money has been paid and possession delivered, for the purchaser is in that case entitled to a charge on the property (r).

63. [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Saving of suits to establish right to attached property.

Alteration in the rule.—S 283 of the Code of 1882 ran as follows: "The party against whom an order under sections 280, 281 or 282 [now rr 60, 61 or 62] is passed may institute a suit to establish the right which he claims," etc. The present rule, on the other hand, says that "where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims, etc." The specific reference to the previous sections or rules has been omitted. A corresponding change has also been made in the Limitation Act, 1908, Sch I, art. 11. See notes below, "Order against party to a claim or objection."

Parties to suits under this rule.—This rule provides that unless the party against whom an order is made institutes a suit to establish the right which he claims to the property in dispute [within the period of a year from the date of the order as provided by art 11 of the Limitation Act, 1908], the order made against him shall be conclusive (s). Now the party against whom an order may be made may be the decree-holder (r 60), or the claimant including an incumbrancer (r 61), or even the judgment-debtor. The result, therefore, is as follows:—

1. The decree holder against whom an order is made under r 60 may sue the successful claimant for a declaration of his right to attach and sell the property released from attachment (t). To such a suit the judgment debtor is not a necessary party (u).

- | | | |
|-----|-----------------|---|
| (m) | " " " " " " " " | s 54 |
| (n) | " " " " " " " " | (r) <i>Lakshmand v Chadooram</i> (1900) 24 Bom 403. See also Transfer of Property Act, 1882 s 55 (6) (b). |
| (o) | " " " " " " " " | (s) <i>Mohammad Ali v Mst. Esmullah</i> (1937) 35 C W N 324 125 I. C 647 (30). |
| (p) | " " " " " " " " | A. P. C. 235 |
| (q) | " " " " " " " " | (t) <i>Mitchell v Mathura Dass</i> (1885) 12 I.A. 150 |
| | " " " " " " " " | (u) <i>Ghani Lam v Manpal Chand</i> (1906) 23 All. 41 |

O. 21, r. 63

2 The claimant whose claim has been disallowed under r 61 may sue the decree holder to establish his right to the property attached (1) To such a suit the judgment debtor is a necessary party (w) And since the right conferred by this rule is not a personal one confined to the original claimant, a purchaser of the interest of the original claimant can also bring a declaratory suit under this rule (x)

3 A attaches a house in execution of a decree against B The property is claimed by C The Court allows C's claim, and the property is released from attachment This is an order against A, the decree holder (r 60) Does it also amount to an order against the judgment-debtor? In other words, can it be said by reason of the fact that C's claim to the property is allowed that the order operates also against B, the judgment-debtor? Assuming that the order does operate against B, it can only do so if B is deemed to be a party against whom an order is made" within the meaning of this rule If so, B must bring a declaratory suit against C, within a year from the date of the order, other wise the order against him would be conclusive But it has been held that a judgment debtor who is not in fact a party to the claim proceedings does not in the eye of the law become such by reason solely of his being the judgment-debtor Unless therefore he is a party in fact, the order is not binding upon him, and he may institute a suit even after the lapse of one year from the date of the order provided he does so within the ordinary period of limitation applicable to the suit, to establish his title to, and recover possession of, the property from the claimant [C] (y) But if he was a party in fact, the order would be binding on him unless he brought the suit within the period of one year

Alienation by claimant after order in his favour.—A purchaser of property from a claimant, after an order has been passed in the claimant's favour removing the attachment on the property, but before the institution of a suit by the decree holder against the claimant under this rule, is an alienee pendente lite, and is not therefore a necessary party to the suit The alienee, however, takes the property subject to the provisions of s 52 of the Transfer of Property Act (z) In execution of a decree obtained by A against B certain property alleged to belong to B is attached C claims the property C's claim is allowed, and the attachment is removed C then sells the property to D A then sues B and C for a declaration that at the date of attachment the property belonged to B and that he was entitled to attach it D is not a necessary party to the suit But the alienation by C to D will be affected by the doctrine of *lis pendens* as laid down in s 52 of the Transfer of Property Act, 1882

Period of limitation for suit under this rule.—The period of limitation for a suit under this rule is one year from the date of the order [Limitation Act, 1908, Sch I, art 11] In *Sardhari Lal v Ambika Pershad* (a), the Judicial Committee said

It [that is, the order] is not conclusive, a suit may be brought to claim the property notwithstanding the order, but then the law of limitation says that the plaintiff must be prompt in bringing his suit The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales and for that reason a year is fixed as the time within which the suit must be brought If the claimant is unsuccessful the period of limitation for his suit is curtailed but as to this the Lahore High Court has said that a person who chooses to take advantage of a summary procedure must suffer its disadvantages as well as enjoy its benefits (b) Where an appeal is preferred from

(r) *Narayan Rao v Balkrishna* (1880) 4 Bom 529

(w) *Ghani Fam v Mangal Chand* (1906) 28 All 41 43

(z) .
(y)

dar Das (1914) PooJ Rec n 84 p 230
22 I C 797

(z) *Krishnapur v Abul Kheir* (1915) 34 MaJ 532 35 I C 11
Narain v Shuddi Ka
(1915) 27 Bom L R 931 931 C 90 (23)
A B 413

(a) (1883) 15 I A 123 1-7 15 Cal 521

(b) *Narain v Ghore v Khajoli Jam* (1917) 11 Lah 363 1-0 I C 67 (2) A L 865

the order, the period of one year is to be calculated from the date of the appellate order (c) But although the period of limitation runs from the date of the order art 11 of the Limitation Act does not apply unless the attachment has actually been effected in pursuance of the order (d)

Suit may be a step in aid of execution.—*A* in execution of a money decree against *B* attached immovable property *C* objected that the property belonged to him and the property was released from attachment *A* filed a suit under this rule to establish his right to attach *A*'s suit was dismissed It was held that *A*'s plaint in the suit under rule 63 was a step in aid of execution of his money decree against *B* (e)

Suit not necessary if the property is released from attachment within the period of limitation—Where after an order disallowing a claimant's claim and

attachment on payment by the judgment debtor to be decree holder of the amount of the decree (g), it is not incumbent upon the claimant to institute a suit under this rule or to prosecute the suit if he has already brought one, and he will not be affected by any of the consequences which result from a failure to institute a suit under this rule In execution of a decree obtained by *A* against *B* certain property alleged to belong to *B* is attached *C* claims the property as his own, but the claim is disallowed Within one year from the date of the order *A*'s application for execution is dismissed under r 57 above *C* is not bound to bring a suit under this rule and if *A* makes a fresh application for execution and the property is again attached *C* may again take an objection to the attachment (h)

Scope of suit under this rule Consequential relief—This rule provides that a party against whom the order referred to in this rule is made may institute a suit "to establish his right to the property in dispute The words to establish his right to the property are it has been held wide enough to cover a suit not only for a declaration but a suit for a declaration and consequential relief (i) Thus a plaintiff may under this rule sue to establish his right to the goods attached, and for damages in respect of the wrongful attachment Where the goods have already been sold he may sue for the value of the goods (j) He may also claim the full value of the goods where the goods have depreciated owing to a fall in the market between the date of attachment and the date of sale (k) But he is not bound to claim any consequential relief (l) If he sues for a declaration of his title and obtains a decree he is entitled to bring a suit for possession against the auction purchaser Such a suit is not barred by the provisions of O 2, r 2 above (m)

A suit under this rule is not limited by any special standard of evidence or of law The claimant may if necessary, thrash out his title in the fullest and most ultimate sense

- | | |
|--|--|
| (c) <i>Venugopal v Venkatasubbiah</i> (1915) 39 Mad 1196 9 I C 387 | |
| (d) <i>Muthia Chetti v Palanappa</i> (19 2) 55 I A 256 51 Mad 349 109 I C 626 (5) A I C 139 | (h) |
| (e) <i>Hassan Shah v Mohammad</i> (1930) 6 Luck 234 1 41 C 4 (3) A O 464 | (i) |
| (f) <i>Nayammunna v Nacharathu</i> (19 4) 51 Cal 318 83 I C 233 (24) A C 44 <i>Kumara v Theraswami</i> (19 5) 44 Mad L J 616 8 I C 630 (5) A M 1113 <i>Fateh Din v Qutub Din</i> (19 3) 3 Lah 61 C 543 (2) A L 104 <i>Mast Lants v Kotte Lal</i> (1931) 53 All 914 133 I C 314 (31) A A 614 <i>Pun Fikalue v Pun Nath</i> (1931) 6 Luck 461 131 I C 72 (31) A O 13 B | (j) (191 140 Mad 55 56 I C 440 sup (k) <i>Kusumamohan v Haranath Das</i> (19 1) 17 Cal 436 17 I A 17 (l) <i>U So Thien v O A I M F m</i> (19 3) 51 Ind 600 116 I C 364 (5) A R 34 (m) <i>Imbu v Kellamma</i> (1901) 14 Mad 23 25 <i>Kr Anam v Lakshma Pre</i> (1906) 23 Mad 151 <i>Venkatasa v I ganesarada</i> (19 0) 56 Mad L J 50 110 I C 551 (5) A M 84 |
| (g) <i>Mandil v Nathulal</i> (19 1) 45 Bom 561 5 | |

O. 21, r. 63 But if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be. So, too, the decree holder may make out his debtor's title exactly as if it were a suit for possession by the debtor (n) |

"Subject to the result of such suit, the order shall be conclusive"—This means that unless the suit is brought as provided by this rule, the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceeding, the right denied to him by the order (o) A obtains a decree against B, and in execution of the decree attaches certain property alleged to belong to B. C claims that he is in possession of the property under a sale from B of a date prior to the attachment, and applies that the property be released from attachment. The executing Court finds that C was in possession at the date of the attachment, but that the sale to him was fictitious and disallows C's claim. No suit is brought by C within the period of a year to establish his right to the property. The property is then sold in execution, and purchased by P. P then sues C for possession. C is precluded in this suit from again asserting his right as purchaser from B. No suit having been brought by him within the period of limitation, the order disallowing his claim became *conclusive* against him under this rule. Similarly if A in execution of a decree against B attaches a debt alleged to be due by C to B, and C objects to the attachment on the ground that no such debt is due, and C's objection is overruled, but C brings no suit under this rule, he will be precluded in a suit against him by the execution purchaser of the debt from contending that no debt was due by him to B (p). The result would be the same even if C had brought a suit against A and B to establish his right to the debt, and the suit had been dismissed. The result of failure to file the suit as also of the dismissal of the suit if one is filed, is that the order becomes conclusive not only as regards the parties to the order or the suit, but also as regards the auction purchaser. In either case C cannot assert his claim in a substantive suit against the auction purchaser, nor can he set it up by way of defence to a suit against him by the auction purchaser (q).

The order is conclusive as against the party against whom it is made—A obtains a decree against B, and attaches B's property in execution of his decree. C claiming to be a mortgagee of the property puts in a claim under r. 63. A contends that the mortgage is not valid, but his contention is disallowed. No suit is instituted by A as required by the present rule, and the order becomes conclusive against him. The property is then sold subject to C's mortgage, and it is purchased by A. Subsequently C sues A (purchaser) and B (mortgagor) to recover the mortgage debt by sale of the mortgaged property. B, not being a party to the claim proceedings, may contend in C's suit that the mortgage is not valid, but A cannot, for the order became conclusive against him. The fact that B, the judgment-debtor, can impeach the validity of the mortgage, and that the property purchased by A is the property which belonged to B does not entitle A to be placed in B's position so as to give him the same right to attack the mortgage as B has (r). See notes above, 'Parties to suits under this rule,' para 3.

Property in respect of which order is conclusive—An order in a claim case is conclusive only as regards the particular property in dispute (s)

(n) *Dof munnessa v Nacharola* (1914) 57 Cal 518 83 L C 233 (24) A C 744
Vasudev v Pkath (1910) 25 Bom 79
 89 81 C 679

(p)

225

(q)

(r)

(s) *Ashraf Bhai v Awalladi Didi* (1917) 44 Cal 698, 37 I C 887

Order "against" party to a claim or objection :—

1. An order made on an application which does not come within the scope of r. 58 is not an order to which the present rule applies (f)

2 *Order dismissing a claim for default.*—Section 283 of the Code of 1882 ran as follows : "The party against whom an order under sections 280, 281, or 282 is passed may institute a suit," etc. It was accordingly held in some cases that the order referred to in sec. 283 must be one made *after investigation* of the claim as contemplated by sections 280, 281 and 282, and that an order dismissing a claim *for default and without investigation* did not come under that section. Accordingly it was held that an order dismissing a claim for default did not become "conclusive" against the party against whom it was made so as to preclude him from instituting a suit more than one year after the date of the order, provided the suit was within the ordinary period of limitation (u). The language of the present rule is more comprehensive than the language of sec. 283. This rule makes no reference to the previous rules, namely, rules 60, 61 and 62, and a corresponding change has also been made in art. 11 of the Limitation Act. The result is that the rule applies to every order made *against* a party to a claim preferred or an objection made under r. 58, even if the order was made *for default and without investigation* (v). But this does not take away the right of the party to apply to have the order of dismissal for default set aside (w).

3 *Order refusing to investigate a claim on the ground of delay*—Where a claim or objection is preferred under r. 58, and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the order is one made "against" the claimant or objector within the meaning of this rule (x).

4. An order on a claim petition stating that as the petition was filed late the claim

Such an order is
But an order in
by this Court,

petition dismissed," has been held not to be an order "against" the claimant (z). Similarly where a mortgagee applied that the sale proceeds should be kept in Court to satisfy his mortgage, but the application was dismissed on the ground that the sale had already taken place and the Court had no jurisdiction to hear the application, it was held that there was no order "against" the mortgagee (a). Where A preferred a claim to the property attached on the ground that he was entitled to a share in the property, and the Court made an order in these terms, namely, "Whatever right the judgment debtor has will pass by the sale, the claim does not require any further investigation, the claim put forward will be noted in the sale proclamation," it was held that it was not an order "against" the claimant (b).

(f) *Balakrishna v. Rangun* (1922) 45 Mad. 70, 69

(u)

U. N. S. 487

(v) *Navendra Lal v. Fani Bhushan Das* (1918) 45 Cal. 745, 44 I.C. 265. *Satendra Nath v. Shera* (1921) 26 C.W.N. 126, 64 I.C. 715, (22) A.C. 166. *Gopal Singh v. Ganpatrao* (1916) P.W. Rec. no. 66, p. 201, 35 I.C. 321. *Udattarainam v. Jangannayakamma* (1918) 41 Mad. 905, 39-40 I.C. 270. *Gulab v. Mutas sadi Lal* (1919) 41 All. 625, 50 I.C. 714. *Debi Prasad v. Mahanay Popchand* (1927) 49 All. 903, 102 I.C. 722 (27) A.C. 593, *contra* *Gokul v. Mohan Lali* (1916) 40 All. 325, 44 I.C. 1005 which decision, it is submitted, is erroneous. *Maug Pya v. Ma Hla Ayn* (19-3) 1

Rang 481 76 I.C. 811, (24) A.R. 42. *Gobardhan v. Mukund* (1924) 45 All. 438, 74 I.C. 1024 (23) A.A. 435. *Trimbat v. Ziparu* (1933) 57 Bom. 213, 144 I.C.

(w)

(x)

U. N. S. 487 A.A. 435. *Arumma v. Moidin* (1924) 47 Mad. 160, 77 I.C. 264, (24) A.M. 111. *Kumara v. Thera-*

(y)

(z)

(a)

(b)

Subject to the result of such suit the order shall be conclusive — This means that unless the suit is brought as provided by this rule the party against whom the order is made cannot assert, either as plaintiff or as defendant in any other suit or as a party to any other proceeding the right denied to him by the order (a) A obtains a decree against B, and in execution of the decree attaches certain property alleged to belong to B C claims that he is in possession of the property under a sale from B of a date prior to the attachment, and applies that the property be released from attachment The executing Court finds that C was in possession at the date of the attachment, but that the sale to him was fictitious and disallows C's claim No suit is brought by C within the period of a year to establish his right to the property The property is then sold in execution, and purchased by P P then sues C for possession C is precluded in ' ' No suit having been brought by C, C is precluded from asserting his claim because con- cussion of

The order is conclusive as against the party against whom it is made—
A obtains a decree against *B*, and attaches *B*'s property in execution of his
 claim under r 53. *A*
 allowed. No suit is
 as conclusive against
 is purchased by *A*

Property in respect of which order is conclusive—An order in a claim case is conclusive only as regards the particular property in dispute (s)

(p) 203
(q)
(r)
(s) *Asana B b l v Auralpadi B b l (1917)*
Cal 693 37 I C 887

Order "against" party to a claim or objection —

1 An order made on an application which does not come within the scope of r 58 is not an order to which the present rule applies (t)

2 *Order dismissing a claim for default*—Section 283 of the Code of 1882 ran as follows 'The party against whom an order under sections 280, 281, or 282 is passed may institute a suit,' etc. It was accordingly held in some cases that the order referred to in sec 283 must be one made *after investigation* of the claim *as contemplated by sections 280, 281 and 282*, and that an order dismissing a claim for default and *without investigation* did not come under that section. Accordingly it was held that an order dismissing a claim for default did not become "conclusive" against the party against whom it was made so as to preclude him from instituting a suit more than one year after the date of the order, provided the suit was within the ordinary period of limitation (u). The language of the present rule is more comprehensive than the language of sec 283. This rule makes no reference to the previous rules, namely, rules 60, 61 and 62, and a corresponding change has also been made in art. 11 of the Limitation Act. The result is that the rule applies to every order made *against* a party to a claim preferred or an objection made under r 58, even if the order was made for *default and without investigation* (v). But this does not take away the right of the party to apply to have the order of dismissal for default set aside (w).

3 *Order refusing to investigate a claim on the ground of delay*—Where a claim or objection is preferred under r 58, and the Court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the order is one made 'against' the claimant or objector within the meaning of this rule (x).

4 An order on a claim petition stating that as the petition was filed late the claim will be notified to the bidders, is in effect an order rejecting the claim. Such an order is one made 'against' the claimant within the meaning of this rule (y). But an order in these terms, namely, 'Sale stopped' the claim cannot be investigated by this Court, petition dismissed has been held not to be an order against the claimant (z). Similarly where a mortgagee applied that the sale proceeds should be kept in Court to satisfy his mortgage but the application was dismissed on the ground that the sale had already taken place and the Court had no jurisdiction to hear the application, it was held that there was no order 'against' the mortgagee (a). Where A preferred a claim to the property attached on the ground that he was entitled to a share in the property, and the Court made an order in these terms, namely, 'Whatever right the judgment debtor has will pass by the sale the claim does not require any further investigation the claim put forward will be noted in the sale proclamation, it was held that it was not an order 'against' the claimant (b).

(t)

(u)

(v) *Vaondra Lal v. Fani Bhusan Das* (1918) 45 Cal 45 41 IC 265 *Satendra Nath v. Shreea* (1911) 26 CW 126 64 IC 13 (2) AC 166 *Gopal Singh v. Ganpatrai* (1916) Punj Rec no 66 p 201 35 IC 321 *Venkataratnam v. Jangannayakamma* (1918) 41 Mad 985 925 p 6 44 IC 270 *Gulab v. Mutas eadi Lal* (1910) 41 All 63 50 IC 74 *Debi Prasad v. Maharaj Juechand* (1914) 49 All 903 102 IC 72 (2) A.A. 593 contra *Gokul v. Mohri Bibi* (1918) 40 All 325 44 IC 105 which decision it is submitted is erroneous *Mang Pya v. Ma Hia Aye* (1933) 1

Rang 481 76 IC 811 (24) A.R. 42 *Gobardhan v. Mulundi* (1914) 45 All 438 74 IC 1024 (3) A.A. 435 *Trimbak*

(w)

(x)

(y) *Narayana v. Jangannayakamma* (1918) 41 Mad 131 41 IC 616 617 618 87 IC 635 (5) A.M. 1113

(z) *Venkataratnam v. Jangannayakamma* (1918) 41 Mad 985 481 IC 20 (F.B.)

(a) *Lakshmi v. Kallappa* (1921) 41 Mad 11 194 63 IC 431 (21) A.M. 444

(b) *Abdul Kader v. Somarundaram* (1927) 43 Mad 131 46 711 IC 618 (27) A.M. 70 *Sahara v. Ali* (1923) 44 Mad 131 161 72 IC 85 (23) A.M. 223

D. 21, r. 63

5 If in point of fact there has been no attachment, art 11 of the Limitation Act cannot apply, for "unless there has been an attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached, and without such an order there is no terminus a quo for the running of limitation, and with this limitation itself is non-existent." So when a mortgagee preferred a claim in the belief that there was an attachment over the property mortgaged, and it is subsequently proved that the order of attachment had never been carried out, the Privy Council held that the order passed rejecting the claim was a nullity and art 11 did not apply to the mortgagee's subsequent suit on his mortgage (c)

6 See also notes to r 62 above, "Scope of the rule"

7 There is a material difference between an order which falls under this rule and an order which falls under r 66 below. In the one case if the party affected does not sue within 12 months to set it aside, it becomes conclusive. In the other case it has no such effect (d)

8 No suit can lie under this rule unless there has been an order either allowing or disallowing an objection to attachment. A person is not entitled to object to an attachment and then to withdraw the attachment and bring a suit under this rule (e)

Orders in proceedings for attachment before judgment.—Rules 53 to 63 apply to claims preferred to property attached before judgment (f). But a Provincial Court of Small Causes has no power to attach immovable property before judgment, and an order made by such Court adjudicating a claim to property so attached is *ultra vires* (g). See notes to sec 7 on p 23 above.

Suit for refund of purchase money.—This rule applies to a suit to establish the title to property. If A purchases property from B, and B claims the property as purchaser, but his claim is disallowed, B sues A for a refund of the purchase money more than a year after the date of the order, but within the ordinary period of limitation. The suit is not barred by limitation. The reason is that r 63 does not apply to such a suit (h).

Revival of attachment on the suit being decreed.—See notes to r 60 above. Effect of order of release.

Payment by claimant under protest.—If the claimant fails, and the attachment is not removed, he is not compelled to bring a suit under this rule for a declaration of his title to the property. He may prevent the sale of the property by paying the decretal amount to the decree holder, and then sue for it as money paid under compulsion of law, i.e., under pressure of execution proceedings (i). Further, the claimant is not bound to take proceedings at all under the Code to set aside the attachment. He may pay the amount of the decree under protest, and then sue as stated above (j). See notes to r 64 below.

(c) *M. Th. Chetty v. Palaniappa* (1929) 55

(g)

(h)

(i)

(b)

(c)

(f)

(j) *Secretary of State (1890) 14 I M 23*
Shayya Lal v. National Bank of India
 (1913) 40 Cal 534 40 I A 56 18 I C
 949. See also *Mahadax v. Prabhu*
 (19-1) 43 All 2-2 60 I C 881 (-1) A A
 81 [let attached admitted to feed c]

Jurisdiction.—In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the value of the suit for purposes of jurisdiction is not the value of the property, but the decretal amount (l). But where the plaintiff sues not only for a declaration that the property is not attachable, but for a declaration of his title to the property as against the decree holder and the judgment debtor, the value of the suit for purposes of jurisdiction is the value of the property (l).

Presidency Small Cause Court.—The Presidency Small Cause Court has power to execute its own decrees and its jurisdiction is not ousted by the fact that the claimant values his claim in excess of the pecuniary jurisdiction of the Court. Under the Rules of Practice the claim is made by filing a suit and the decision in the claim suit is final (m).

Burden of proof.—The burden of proof in a suit under this rule lies on the plaintiff as in other cases, and not on the defendant (n). If the plaintiff claims under a deed, but the plaintiff must prove the deed (ol); and this has also been so decided by the Privy Council (o2).

date of the attachment C's possession was for 11 years only, and at the date of the suit it was for upwards of 12 years. According to the Madras High Court the period of C's possession is to be counted upto the date of the suit, and A's suit is therefore barred, the reason given being that attachment could not prevent the running of time in favour of C. On the other hand, according to the Bombay High Court, the period of C's possession must be counted only upto the date of attachment, and hence A's suit is not barred, the reason given being that the real question in such a case was whether the judgment debtor [B] had a subsisting right to the property at the date of attachment (q). According to the Calcutta High Court also the material date is the date of attachment (r).

Fraudulent transfer by judgment debtor.—Where a claim is made to the property attached by one claiming to be a transferee from the judgment debtor, and the claim is disallowed, and the claimant subsequently institutes a suit under this rule to establish his title to the property, it is open to the attaching creditor to plead in defence

- | | |
|--|--|
| <p>(l) <i>Sardar Begam v. Meher Chand</i> (1918) Punj Rec no 82 p 293 18 I.C. 870. <i>Narayana v. Aiyasami</i> (1916) 39 Mad 60. 31 I.C. 184.</p> <p>(m) <i>Judim band v. Jhamechand</i> (1932) 59 Cal 82 131 I.C. 183 (30) A.C. 6.</p> <p>(n) <i>Nankh Jany. Bhuri</i> (1902) 30 All 321. <i>Jayappa v. Venkayamma</i> (1924) 47 Mad 133 14 I.C. 202 (24) A.M. 770. <i>J. Jany. Aham</i> (1921) 3 Lah L.J. 104. <i>6 I.C. 6</i> (21) A.L.J. 4. <i>J. J. 4 P. M. Firm v. Mungu Da Eya</i> (1927) 5 Jank 252 103 I.C. 228 (27) A.P.</p> | <p>237 I.C. <i>Janki Das v. Gultar</i> (1929) 12 Lah 763, 131 I.C. 383 (37) A.L. 763. <i>Mahomed Ali v. Mast Bismillah</i> (1930) 33 E.W.N. 324 53 Bom L.R. 155 134 I.C. 647 (30) A.P.C. 255.</p> <p>(o) <i>Jamakar v. Askarun</i> (1915) 22 Cal. L.J. 27. 20 I.C. 855. <i>Appathurai v. A.L.A. P. R. M. Vellayann Chettar</i> (1932) 55 Mad 748, 137 I.C. 879 (30) A.M. 304.</p> <p>(ol) <i>Abdul Sattar v. Hira Dei</i> (1933) 55 All 226 144 I.C. 1002 (33) A.A. 198 over ruling 30 All 321 <i>supra</i>.</p> <p>(o2) <i>F. F. A. P. M. Firm v. Mungu Da Eya</i> (1927) 5 Rang 852 105 I.C. 748 (27) A.P.C. 237.</p> <p>(p) <i>Sedam v. Venku</i> (1901) 11 Mad L.J. 244. <i>Janginatha v. Srirama</i> (1925) 49 Mad L.J. 656 90 I.C. 1057 (26) A.M. 42.</p> <p>(q) <i>Faendoo v. Eknath</i> (1911) 33 Bom 79 84-90 81 C. 632.</p> <p>(r) <i>Naj. Bunesa v. Nackeradd n</i> (1924) 51 Cal 344 233 I.C. 233 (24) A.C. 744.</p> |
|--|--|

O. 21, r. 63

5 If in point of fact there has been no attachment, art 11 of the Limitation Act cannot apply, for ' unless there has been an attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached, and without such an order there is no terminus a quo for the running of limitation, and with this limitation itself is non-existent ' So when a mortgagee preferred a claim in the belief that there was an attachment over the property mortgaged, and it is subsequently proved that the order of attachment had never been carried out, the Privy Council held that the order passed rejecting the claim was a nullity and art 11 did not apply to the mortgagee's subsequent suit on his mortgage (c)

6 See also notes to r 62 above, " Scope of the rule "

7 There is a material difference between an order which falls under this rule and an order which falls under r 66 below In the one case if the party affected does not sue within 12 months to set it aside, it becomes conclusive In the other case it has no such effect (d)

8 No suit can lie under this rule unless there has been an order either allowing or disallowing an objection to attachment A person is not entitled to object to an attachment and then to withdraw the attachment and bring a suit under this rule (e)

Orders in proceedings for attachment before judgment.—Rules 53 to 63 apply to claims preferred to property attached before judgment (f) But a Provincial Court of Small Causes has no power to attach immovable property before judgment, and an order made by such Court adjudicating a claim to property so attached is *ultra vires* (g) See notes to sec 7 on p 23 above

Suit for refund of purchase money.—This rule applies to a suit to establish the plaintiff's right to the property in dispute It does not apply to a case where a plaintiff whose claim to the property is disallowed under r 61 sues the judgment debtor for a refund of the money paid by him for the purchase of the property A sells certain property to B C obtains a decree against A and attaches the property in execution B claims the property as purchaser, but his claim is disallowed B sues A for a refund of the purchase money more than a year after the date of the order, but within the ordinary period of limitation The suit is not barred by limitation The reason is that r 63 does not apply to such a suit (h)

Revival of attachment on the suit being decreed.—See notes to r 60 above Effect of order of release '

Payment by claimant under protest.—If the claimant fails, and the attachment is not removed he is not compelled to bring a suit under this rule for a declaration of his title to the property he may prevent the sale of the property by paying the decretal

amount of the decree under protest, and then sue as stated above (j) See notes to r 60 below

(c) *Muthiah Chetty v. Palaniappa* (1928) 55
1 A 206, 260 51 Mad 349 109 IC 8-6

(g) " " " " " " " " " " " "

(h)

(i)

(d)

(e)

(f)

(j)

Sale generally.

- 64. [S. 284.]** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold and proceeds to be paid to person entitled

Any property attached by it.—These words do not imply that if the property attached is situate outside its territorial jurisdiction, a Court has power to sell it (a) See notes under s 28 above, "*Jurisdiction of Court executing a decree*"

Sale of goods not belonging to judgment-debtor.—A obtains a decree against B In execution of the decree A points out to the sheriff's agent goods belonging to C as the property of B C's goods are thereupon attached by the sheriff's agent, and sold in execution C is entitled to claim from A the market value of his goods as on the date of attachment. The sheriff is not liable in such a case (b)

Omission to attach does not invalidate sale.—An omission to attach is only an irregularity and does not render the sale a nullity (c) See notes under r 93, "Omission to attach property before sale".

- 65. [S. 286.]** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made

"Save as otherwise prescribed."—See r. 76 below. The Bombay High Court has held that the Court may for good reasons direct that the bidders at an auction sale shall be restricted to a particular class of persons (d)

Acceptance of bid.—There is nothing in the Code to require a bid to be accepted by a Judge before a contract of sale can be held to be complete. The officer conducting the sale is the person to declare the highest bidder to be the purchaser (e), and the sale is complete when he accepts the bid and the deposit under r 84 has been paid. But the Patna High Court has held that if the sale has been conducted by the nazir the bid sheet must be sent to the Court for acceptance and that there is no completed sale until the Court accepts the bid (f) The Calcutta High Court has followed this decision (g) But the Rangoon High Court has dissented holding that the sale is complete when the officer conducting the sale accepts the bid (h)

(a) *Amlila v. Manikganj Loan Office* (1929) 57 Cal 67, 126, 1 C 43 (29) A.C. 818

(b) " "

(c) " "

(d) " "

(e) *Maung Ohn Tin v. P. R. M. P. S. R. M. Chettyar Firm* (1929) 7 Rang 425, 120 1 C 142 (29) A.E. 311, *Mahomed Jacob v. P. L. J. M. Firm* (1932) 9 Rang 648, 135 1 C 651, (32) A.L. 17

(f) *Jawahar v. Mahabhar* (1923) 2 Pat 542, 76 1 C 113 (23) A.P. 525

(g) *Surendramohan v. Manmathanath* (1931) 53 Cal 724, 134 1 C, 417, (31) A.C. 243

(h) 9 Rang. 604, *supra*

O. 21, r. 63 that the transfer was in fraud of the general body of creditors (a) If the claim is allowed the attaching creditor may sue on behalf of himself and all other creditors for a declaration that the transfer was void as it was in fraud of creditors, but he cannot sue exclusively on his own behalf (i) In execution of a decree obtained by A against B, B's property is attached C claims the property as having been purchased by him from B prior to the attachment but the claim is dismissed C then sues A and B under this rule to establish his right to the property A is entitled to plead in defence that the transfer by B to C was made with intent to defraud B's creditors On the other hand if C's claim is allowed and the attachment is raised then A as attaching creditor may bring a suit under this rule on behalf of himself and all other creditors of B to prove that the transfer was fraudulent and to establish his right to attach But such a suit by A on behalf of himself only is not competent (

Damages for wrongful attachment—Where goods attached as belonging to the judgment debtor are claimed by a third party and his claim is disallowed he may sue under this rule not only for a declaration of his title to the goods but also for the value of the goods as where they have depreciated owing to a fall in the market between the date of attachment and the date of sale He is not bound to allege and prove that the decree holder resisted his application for the removal of attachment maliciously and without probable cause (u)

Attachment by Revenue Court—When an attachment has been made by the Court of an Assistant Collector under the Agra Tenancy Act 1926 the party aggrieved has a right of suit under this rule even though the order has been confirmed on appeal by the Collector under s 247 of that Act (v)

Insolvency of judgment debtor—The Madras High Court holds that if the judgment debtor is adjudged insolvent leave of the Insolvency Court under sec 28 (1) of the Provincial Insolvency Act 1920 is not necessary for the commencement of a suit by the attaching creditor under this rule for a declaration that the property belonged to the judgment debtor at the date of the attachment (w) The Rangoon High Court however differs from this view and holds that in such a case a suit under r 63 is not maintainable without leave of the Court under s 28 (2) of the Provincial Insolvency Act 1920 (x)

Costs—The costs incurred in the summary proceeding under r 58 may be dealt with in the suit filed under this rule (y)

Court fee—The Court fee payable upon the plaint in a suit by a person whose claim to property attached in execution has been dismissed is Rs 10 under the Court Fees Act Sch II art 17 whether the claim is dismissed for default or after investigation (z)

Revision—See notes to r 59 above Limits of inquiry under rules 59 to 61

(s)

Cal 436 17 I A 17

(v) *Bikram Singh v D P Singh* (193) 54 All 767 141 IC 606 (S) A 4 50

(w) *Subramanyam v Varsani* (1929) 56 Mad LJ 489 119 IC 46 (S) A 31 33

(x) *Volamnad Adin v E M Chettyar* (1931) 9 Rang 7 13 IC 38 (30) A R 317

(y) *V E R M Purn v Mani Po Purne* (1925) 6 Rang 408 112 IC 250 (S) A R 449

(z) *Plut K m v Gha shyam Varsani* (1904) 35 Cal 1 [PC] *Sat dra Nath v Sat dra* (1901) 26 CW 1 106 105 64 IC 713 (S) A C 166

(t)

Act 1909
(u) *Amar Nath v Harshad Das* (1830) 17

Sale generally.

- 64. [S. 284.]** Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same

Power to order property attached to be sold and proceeds to be paid to person entitled

Any property attached by it.—These words do not imply that if the property attached is situate outside its territorial jurisdiction, a Court has power to sell it (a) See notes under s 28 above *Jurisdiction of Court executing a decree*

Sale of goods not belonging to judgment debtor—A obtains a decree against B In execution of the decree A points out to the sheriff's agent goods belonging to C as the property of B C's goods are thereupon attached by the sheriff's agent, and sold in execution C is entitled to claim from A the market value of his goods as on the date of attachment The sheriff is not liable in such a case (b)

Omission to attach does not invalidate sale—An omission to attach is only an irregularity and does not render the sale a nullity (c) See notes under r 99, "Omission to attach property before sale"

- 65. [S. 286.]** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this

Sales by whom conducted and how made

behalf, and shall be made by public auction in manner prescribed

"Save as otherwise prescribed"—See r 76 below The Bombay High Court has held that the Court may for good reasons direct that the bidders at an auction sale shall be restricted to a particular class of persons (d)

Acceptance of bid—There is nothing in the Code to require a bid to be accepted by a Judge before a contract of sale can be held to be complete The officer conducting the sale is the person to declare the highest bidder to be the purchaser (e), and the sale is complete when he accepts the bid and the deposit under r 84 has been paid But the Patna High Court has held that if the sale has been conducted by the nazir the bid sheet must be sent to the Court for acceptance and that there is no completed sale until the Court accepts the bid (f) The Calcutta High Court has followed this decision (g) But the Rangoon High Court has dissented holding that the sale is complete when the officer conducting the sale accepts the bid (h)

(a) *Amlal v. Manikganj Loan Office* (1929) 5 Cal 67 15 IC 43 (29) A.C. 818

(b) " "

(c) " "

(d) " "

(e) " "

(f) *12 ILR 100 IC 100 (27) A.C. 143*

(e) *Maung Ohn Tun v. P. R. M. P. S. P. M. Chettyar Firm* (1929) 45 Rang 45 120 IC 142 (29) A.C. 311 *Mahomed Karob v. I. L. I. M. Firm* (1923) 19 Rang 608 135 IC 651 (32) A.C. 17

(f) *Jainabadee v. Matukidhars* (1923) 2 Pat 547 76 IC 113, (23) A.C. 525.

(g) *Surendramohan v. Manmathanath* (1931) 59 Cal. 22 134 IC 44 (31) A.C. 503

(h) 9 Rang. 607 *supra*

D. 21, r. 66

66. [S. 287.] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court

Proclamation of sale by
public auction

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold,
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,
- (c) any incumbrance to which the property is liable,
- (d) the amount for the recovery of which the sale is ordered,
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub rule (2) to be specified in the proclamation

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto

Alterations in the rule

- 1 The provision in sub r (1) for notice to be given to the decree holder and the judgment debtor is new
- 2 Sub r (3) is also new

Incumbrances to which the property is liable—Where a decree holder who held a simple money decree stated in his application [sub r (3)] that the property to be sold was subject to a mortgage in his favour but no mention was made of the

mortgage in the proclamation, the omission not being due to any fraud on his part, O. it was held that he was not estopped from enforcing his mortgage against the auction purchaser (1). But he would be so estopped if he omitted to mention his mortgage in the application (2). See notes to r. 62 of this order.

Value of the property.—Clause (e) of the rule provides that the proclamation shall specify as fairly and accurately as possible ' every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property ' There can hardly be any doubt that the value of the property to be put up for sale is a material fact within the meaning of cl (e) As said by the Judicial Committee in *Saadatmand Khan v Phul Kuar* (k) ' Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things ' which the Court considers material for a purchaser to know ' and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible ' If the value is understated in the proclamation, and the understatement is such as is calculated to mislead bidders and to prevent them from offering adequate prices, and the sale results in a price altogether inadequate the sale must be set aside on the ground of material irregularity in publishing or conducting the sale within the meaning of r 90 below (l) This pronouncement of the Privy Council has been construed as meaning that when a valuation has been stated in the sale proclamation it is a material fact within cl (e) but it does not mean that the Court should make a valuation (m) and it gives no guidance as to whether it is the duty of the Court to make a valuation and enter it in the sale proclamation On this point there were many decisions of the Calcutta High Court which were not easy to reconcile (n) All these have been reviewed in *Ban Behari v Bhukan Lal* (o) where the Calcutta High Court has laid down the following rules (i) that it is the duty of the Court (apart from exceptional circumstances) to make a valuation, the result of which is to be included in the sale proclamation, (ii) that such duty (save in exceptional circumstances) is not discharged by merely stating the values respectively put upon the property by the parties The Court should make its own valuation and arrive at a single figure (iii) that if by reason of exceptional circumstances the course indicated in (i) and (ii) is found to be impracticable, such circumstances should be clearly set out in the order The Madras High Court has, however, held that the Court is under no obligation to fix in the proclamation of sale its own valuation of the property to be sold (p)

Specifying property to be sold — See notes to r 90 below, "Material irregularity in publishing or conducting sale," no 1A

Specifying revenue—See notes to r 90 below, "Material irregularity in publishing or conducting sale," nos 1A and 2

Specifying Incumbrances—See notes to r 90 below, "Material irregularity in pulling or conducting sale," no 1A.

(i) *Debedranath* v. *Padhalissen* (1931) 59 Cal. 5 = 132 I C 68 = (31) A C 5.0 *B. jay*
(j) *Vingh* v. *Ashutosh* (19.3) 24 I W N 6 = 83 I C 430 (-4) A C 5 = 1 *Pushpita* v. *Jank of Bihar* (193) 35 C W N 90 = 136 I C 46 = (3) A C 141 *Tasanta* v. *Sylhet Loan* (o (193) 39 C W N 34 = 139 I C 2 = 5 (3) A C 5 = 6 *Lachman* v. *Anga* (1912) 15 C W N 13 6 I C 1 = 0 *Saurindra* v. *Hurruk* (Land (190)) 1 = C W N 54 = *Kashi* v. *Jamuna* (191) 31 Cal 9 = 0
(k) *Tha* *Surranipatnam* v. *Arhuta* (19 0) 42 Mad 353 94 I C 8 (20) A M 7 = 0
(m) *Tha* *Surranipatnam* v. *Arhuta* (19 0) 42 Mad 353 94 I C 8 (20) A M 7 = 0

O. 21, r. 66

Specifying the amount.—The amount shewn in the sale proclamation as that for which the sale is ordered may be in excess of that shewn in the execution application, for if the decree directs payment of interest an account is taken up to the date of sale (g)

Specifying every other thing material—If a third party has preferred a claim to the property and has filed a suit the Court is justified in giving notice in the proclamation that the property is under litigation (r)

Notice to the decree holder—No notice is necessary in the case of sales in execution of decrees for rent under s 163 of the Bengal Tenancy Act (s)

Proclamation of sale to be settled by Court—The power to settle the proclamation of sale cannot be delegated to a commissioner. The proclamation must be settled by the Court (t). If it is settled by a commissioner the sale would be invalid.

Duty of Court in respect of Court Sales.—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a bidder who asked for an explanation and who was thus misled into buying property which was subject to mortgages amounting to more than its value, the Judicial Committee in setting aside the sale observed. In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this' (u)

Non compliance with provisions of this rule—See notes to r 90 below.
* Material irregularity in publishing or conducting sale nos 1A and 2

Where judgment debtor lies by.—See notes to r 90 below, 'Waiver and estoppel'

Appeal.—An order under this rule, not being included in the list of appealable orders given in O 43, is not appealable as an order. The question then arises whether an order under this rule is an order in execution proceedings within the meaning of s 47. Now an order in execution proceedings may be a final order, that is it may conclusively determine the rights of parties or it may be interlocutory. In the former case the order operates as a decree and is appealable as such [s 2 (2)], but not in the latter case [see notes to s 47, Interlocutory orders in execution proceedings]. The question therefore in each case is whether a particular order made under this rule conclusively determines the rights of the parties or not.

A Full Bench of the High Court of Madras in *Siragani v Subrahmanya (v)* which was a case under the corresponding s 287 of the Code of 1882, held that the proceeding of a Court under that section in relation to the proclamation of sale is an order within s 244 (now s 47) so as to be appealable as a decree. In the course of the Order of Reference the learned Judges said. We are disposed to think that the preliminary objection is well founded and that under s 287, Civil Procedure Code the proceedings are in themselves administrative and not judicial, but that if and when a sale does take place, if ever, and it has to be judicially confirmed, objection may be taken to the confirmation of the sale on any of the grounds mentioned in s 311, Civil Procedure [now O 21, r 90] some of which may relate to the contents of the proclamation. This view receives strong corroboration from the provision enacted by s 288, Civil Procedure Code, that no Judge or other public officer shall be answerable for

(2) *Basinda v Basinda* (1932) 35 C. W. N. 100 (C 212, 201 A C 555)

(r)

(t) *Subrahmanya v Acharya* (1936) 49 Mad 333 84 I C 8 (28) A M 755
(u) *Mahomet Kala Mefta v Harpreet* (1906) 36 Cal 373 334 50 I A 37 37 11 C 102
(v) (1904) 27 Mad 230. *Chidambaram v Thiruvannam* (1923) 46 Mad 783 780 71 I C 155 (-4) A M 1

any error, misstatement or omission in any proclamation under s. 287, Civil Procedure Code, unless the same has been committed or made dishonestly, a provision which, in view of Act XVIII of 1850 would have been quite superfluous if proceedings under s. 287 Civil Procedure Code, were 'judicial' and not 'administrative'. In delivering their opinion the Full Bench said: "We concur in the reasons given in the Order of Preference, and we may add that the view that the proceedings in themselves under s. 287, are of an administrative and not a judicial character is further supported by the fact that special provision is made in s. 287 [now O. 21, r. 6 (3)] to summon witnesses and make enquiry into the matters referred to in the section, a provision which would be superfluous if the proceedings were judicial. It has accordingly been held by that Court that an order under this rule determining the value of the property to be sold, the place where the sale is to take place, the lots in which it is to be sold, and the amount for the recovery of which the property is to be sold is not a judicial but an administrative order, and that it does not come within s. 244 (now s. 47) and is not appealable (w). It may here be stated that s. 288 of the Code of 1882 has not been reproduced in the present Code. In a case under this Code (x) the High Court of Madras observed that the Full Bench decision was good law even under the present Code, notwithstanding the omission of s. 288, though in another case (y) Schwabe, C. J., expressed a doubt on that point. As to a decision regarding the order in which the properties are to be put up for sale, the Madras High Court has held that such a decision is an order within s. 47, and that it is appealable if it affects the rights of co-defendants, *inter se*, for example, in a case of execution of a decree on a mortgage where the interests of the owners of the items of the mortgaged properties will be seriously affected by the order in which the properties are sold (z). In a recent case the same High Court held that the Court is under no obligation whatever under this rule to fix and state in the proclamation of sale its own valuation of the property to be sold (a).

The Bombay High Court follows the Madras Full Bench Case (b).

The High Court of Calcutta has held that an order under this rule may be either final or interlocutory. If it is final it falls within s. 47 and is appealable as a decree, but it is not appealable if it is interlocutory. It has accordingly been held that an order determining the value of the property to be sold is merely interlocutory and is not appealable (c). An order in the following term "let sale proclamation be issued, in the meantime I shall hear the objection of the judgment debtor," is also interlocutory (d). But an order adjudicating upon a dispute as to the boundaries of the property sold and determining that certain accreted land should be included in the property to be sold is final and is appealable as a decree (e). It may be observed that it is not safe to follow such decisions under the Code of 1882 as they proceeded on points in which the definition of a decree differed from that in the present Code.

The High Court of Allahabad has also held that an order under this rule determining the value of the property to be sold does not fall within s. 47 and is not appealable. The reason given is that in such a case "the Court judicially decides nothing" (f).

(w) *C. J. v. C. J.*

(x)

(y)

(z)

(a)

(b)

(c)

(d)

(e)

(f)

O. 21, r. 66 Specifying the amount.—The amount shewn in the sale proclamation as that for which the sale is ordered may be in excess of that shewn in the execution application, for if the decree directs payment of interest an account is taken up to the date of sale (q)

Specifying every other thing material.—If a third party has preferred a claim to the property and has filed a suit the Court is justified in giving notice in the proclamation that the property is under litigation (r)

Notice to the decree holder.—No notice is necessary in the case of sales in execution of decrees for rent under s 163 of the Bengal Tenancy Act (s)

Proclamation of sale to be settled by Court.—The power to settle the proclamation of sale cannot be delegated to a commissioner. The proclamation must be settled by the Court (t). If it is settled by a commissioner the sale would be invalid

Duty of Court in respect of Court Sales.—In a case in which the terms of the proclamation were not clearly explained by the officer of the Court conducting the sale to a bidder who asked for an explanation and who was thus misled into buying property which was subject to mortgages amounting to more than its value, the Judicial Committee in setting aside the sale observed: "In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this" (u)

Non compliance with provisions of this rule.—See notes to r 90 below, "Material irregularity in publishing or conducting sale," nos 1A and 2

Where judgment debtor lies by.—See notes to r 90 below, "Waiver and estoppel"

Appeal.—An order under this rule, not being included in the list of appealable orders given in O 43, is not appealable as an order. The question then arises whether an order under this rule is an order in execution proceedings within the meaning of s 47. Now an order in execution proceedings may be a final order, that is, it may conclusively determine the rights of parties or it may be interlocutory. In the former case the order operates as a decree and is appealable as such [s 2 (2)], but not in the latter case [see notes to s 47, 'Interlocutory orders in execution proceedings'] The question therefore in each case is whether a particular order made under this rule conclusively determines the rights of the parties or not

A Full Bench of the High Court of Madras in *Sitagani v Subrahmanya* (v), which was a case under the corresponding s 237 of the Code of 1882, held that the proceeding of a Court under that section in relation to the proclamation of sale is an order within s 244 (now s 47) so as to be appealable as a decree. In the course of the Order of Reference the learned Judges said: "We are disposed to think that the preliminary objection is well founded and that under s 237, Civil Procedure Code, the proceedings are in themselves administrative and not judicial, but that if and when a sale does take place, if ever, and it has to be judicially confirmed, objection may be taken to the confirmation of the sale on any of the grounds mentioned in s 311, Civil Procedure [now O 21, r 90], some of which may relate to the contents of the proclamation. This view receives strong corroboration from the provision enacted by s 233, Civil Procedure Code, that no Judge or other public officer shall be answerable for

(q) *Dasgula v Baikunta* (1932) 35 C W N 404 133 I C 714 (32) A C 555

(r) "1900"

(u) *Subrahmanya v Achuta* (1906) 49 Mad 333 94 I C 8 (29) A M 733

(v) *Mahomed Kala Meia v Harpers & Co* (1900) 23 Cal 323 331 30 I A 32 37 I C 1, 2

(v) (1904) 27 Mad 59 *Chidambaram v Theilana* (1923) 46 Mad 764 760 74 I C 153, (24) A M 1

any error, misstatement or omission in any proclamation under s 287, Civil Procedure Code, unless the same has been committed or made dishonestly, a provision which, in view of Act XVIII of 1850, would have been quite superfluous if proceedings under s 287, Civil Procedure Code, were 'judicial' and not 'administrative.' In delivering their opinion the Full Bench said "We concur in the reasons given in the Order of Reference, and we may add that the view that the proceedings in themselves, under s 287, are of an administrative and not a judicial character is further supported by the fact that special provision is made in s 287 [now O 21, r 66 (4)], to summon witnesses and make enquiry into the matters referred to in the section, a provision which would be superfluous if the proceedings were judicial. It has accordingly been held by that Court that an order under this rule determining the value of the property to be sold, the place where the sale is to take place, the lots in which it is to be sold, and the amount for the recovery of which the property is to be sold, is not a judicial but an administrative order, and that it does not come within s 244 (now s 47) and is not appealable (w). It may here be stated that s 288 of the Code of 1882 has not been reproduced in the present Code. In a case under this Code (x) the High Court of Madras observed that the Full Bench decision was good law even under the present Code, notwithstanding the omission of s 288, though in another case (y) Schwabe, C. J., expressed a doubt on that point. As to a decision regarding the order in which the properties are to be put up for sale, the Madras High Court has held that such a decision is an order within s 47, and that it is appealable if it affects the rights of co-defendants, *inter se*, for example, in a case of execution of a decree on a mortgage where the interests of the owners of the items of the mortgaged properties will be seriously affected by the order in which the properties are sold (z). In a recent case the same High Court held that the Court is under no obligation whatever under this rule to fix and state in the proclamation of sale its own valuation of the property to be sold (a).

The Bombay High Court follows the Madras Full Bench Case (b).

The High Court of Calcutta has held that an order under this rule may be either final or interlocutory.

appealable if it
the value of th

An order in the following term "let sale proclamation be issued, in the meantime I shall hear the objection of the judgment debtor," is also interlocutory (d). But an order adjudicating upon a dispute as to the boundaries of the property sold and determining that certain accreted land should be included in the property to be sold is final and is appealable as a decree (e). It may be observed that it is not safe to follow such decisions under the Code of 1882 as they proceeded on points in which the definition of a decree differed from that in the present Code.

The High Court of Allahabad has also held that an order under this rule determining the value of the property to be sold does not fall within s 47 and is not appealable. The reason given is that in such a case "the Court judicially decides nothing" (f).

(w) *Suayami v. Subrahmaniam* (1904) 27 Mad

(a)

(b)

(c)

(d)

(e)

(f)

(x)

(y)

(z)

O. 21,
rr. 66, 67

In two earlier cases the High Court of Patna held that an order under this rule determining the value of the property to be sold was merely interlocutory and was not therefore appealable (g). In a recent Patna case a Bench of three Judges held that an order of the Court determining any of the particulars to be stated in the sale proclamation under this rule is not a final order and is not appealable. It was accordingly held in that case that an order refusing to notify a lease in the sale proclamation was not final and was not appealable (h).

Letters Patent appeal.—An order of a single Judge of the High Court sitting on the Original Side refusing to alter the upset price fixed in a proclamation of sale or to direct the sale of the property in lots, or to postpone the date of sale, is not a judgment within the meaning of cl. 15 of the Letters Patent, but merely an interlocutory order and no appeal lies from it under that clause (i).

Death of judgment debtor pending execution.—If the judgment debtor has died before issue of notice to him under this rule, his legal representatives must be brought on the record. If the legal representatives are not brought on the record the sale would be void (j).

Insolvency of the judgment debtor pending execution.—If an insolvency petition by or against the judgment debtor under the Provincial Insolvency Act has been admitted, the Court of execution having notice of the fact is bound to stay the sale (k). If notice is given to the Court of execution and an application is made by the Official Receiver the Court will order the delivery of the attached property to the Official Receiver. See Provincial Insolvency Act s. 52, Presidency towns Insolvency Act s. 41 and Mulla's Law of Insolvency in British India at p. 425.

Non appearance of legal representative and res judicata.—The failure of the legal representative of a deceased judgment debtor to attend pursuant to a notice under sub r. (2) [App. E form no. 28] at the hearing of an application to settle the terms of a sale proclamation does not estop him on the principle of res judicata from contending thereafter that the property attached belongs to him personally and that it does not form part of the estate of the deceased judgment debtor. The notice under sub r. (2) is merely to settle the terms of the proclamation, it is not for determining questions of title to the property (l).

Form of proclamation of sale.—For form of proclamation of sale see Appendix E form no. 29.

Form of notice under sub rule (2).—For form of notice under sub r. (2) see Appendix E, form no. 28.

67. [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub rule (2).

Mode of making proclamation

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(g) *Deoki Andan v. Rajesh Dhakeshwar Prasad*

(h)

(i)

(j) *Chai di Rasool v. Jani* (1977) 49 All 830
10 I C 39 (8) A A 4
(k) *Mahabub v. Fati* (1981) 30 Bom L R
455 103 I C 15 (8) A 31
Mahendrakar v. Deenacha (1933)
60 Cal 696 145 I C 387 (33) A 456
(l) *Chai di Rasool v. Jani* (1977) 49 All 830
10 I C 39 (8) A A 4

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given

Sub rule (1)—If the property to be sold consists of several villages which are all close together it is not necessary to make proclamation in every village (n)

Sub rule (3) property divided into lots for separate sale—This sub rule is new It incorporates the decision in the undermentioned case (n)

Non compliance with the rule—Omission to carry out the provisions of this rule does not render the sale *ipso facto* void But such omission amounts to a material irregularity within the meaning of r 90 below, and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (o) See the proviso to r 90 below

Sub r (2).—Note that under this sub rule the Court may direct publication of the proclamation, it is not incumbent on the Court to do so (p) If the proclamation is published in a local newspaper there is no rule enjoining that any particular period should elapse after the date of publication (q)

68. [s. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent

Time of sale
in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale

Non compliance with the rule—If a sale is held before the expiration of the period prescribed by this rule it is not void but the case is one of material irregularity within the meaning of r 90 and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (r)

69. [s. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment

Adjournment or stoppage of sale
Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court

(m) " "
(n) "
(o) Cal 4
(p) *Gopi Chand v Benars Das* (1919) 1 Lah

I J 197 531 C 94
(q) *Calata n v Syed Mahammad* (193) 35 C W N 24 1401 C 3 (3) A C 6
(r) *Tasadduk v Anad* (1894) 1 Cal 66 201 A 1 6 *Kokil v Ede S ngh* (1904) 31 Cal 351

O. 21,
rr. 66, 67

In two earlier cases the High Court of Patna held that an order under this rule determining the value of the property to be sold was merely interlocutory and was not therefore appealable (g). In a recent Patna case a Bench of three Judges held that an order of the Court determining any of the particulars to be stated in the sale proclamation under this rule is not a final order and is not appealable. It was accordingly held in that case that an order refusing to notify a lease in the sale proclamation was not final and was not appealable (h).

Letters Patent appeal—An order of a single Judge of the High Court sitting on the Original Side refusing to alter the upset price fixed in a proclamation of sale or to direct the sale of the property in lots, or to postpone the date of sale, is not a judgment within the meaning of cl. 15 of the Letters Patent but merely an interlocutory order and no appeal lies from it under that clause (i).

Death of judgment debtor pending execution—If the judgment-debtor has died before issue of notice to him under this rule, his legal representatives must be brought on the record. If the legal representatives are not brought on the record the sale would be void (j).

Insolvency of the judgment debtor pending execution—If an insolvency petition by or against the judgment debtor under the Provincial Insolvency Act has been admitted the Court of execution having notice of the fact is bound to stay the sale (k). If notice is given to the Court of execution and an application is made by the Official Receiver the Court will order the delivery of the attached property to the Official Receiver. See Provincial Insolvency Act s. 52. Presidency towns Insolvency Act s. 41 and Mulla's Law of Insolvency in British India, at p. 47.

Non appearance of legal representative and res judicata—The failure of the legal representative of a deceased judgment debtor to attend pursuant to a notice under sub-r. (2) [App. E, form no. 28] at the hearing of an application to settle the terms of a sale proclamation does not estop him on the principle of res judicata from contending thereafter that the property attached belongs to him personally and that it does not form part of the estate of the deceased judgment-debtor. The notice under sub-r. (2) is merely to settle the terms of the proclamation, it is not for determining questions of title to the property (l).

Form of proclamation of sale—For form of proclamation of sale see Appendix E form no. 29.

Form of notice under sub rule (2)—For form of notice under sub-r. (2) see Appendix E form no. 28.

67. [S. 289] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(g) *Deok Nandan v. Fajal Dinkeshwar Prasad* (1917) Pat. 1 J 13 331 C 616.

(i)

(k)

(h)

(j)

(l)

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given

Sub rule (1) —If the property to be sold consists of several villages which are all close together it is not necessary to make proclamation in every village (m)

Sub rule (3) property divided into lots for separate sale —This sub rule is new It incorporates the decision in the un-mentioned case (n)

Non compliance with the rule —Omission to carry out the provisions of this rule does not render the sale *ipso facto* void But such omission amounts to a material irregularity within the meaning of r 90 below and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (o) See the proviso to r 90 below

Sub r (2) —Note that under this sub-rule the Court may direct publication of the proclamation it is not incumbent on the Court to do so (p) If the proclamation is published in a local newspaper there is no rule enjoining that any particular period should elapse after the date of publication (q)

68. [s. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale

Non compliance with the rule —If a sale is held before the expiration of the period prescribed by this rule it is not void but the case is one of material irregularity within the meaning of r 90 and the sale will be set aside if the Court is satisfied that substantial injury has resulted from the irregularity (r)

69. [s. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reason for such adjournment

Provided that, where the sale is made in, or within the precincts of, the Court house, no such adjournment shall be made without the leave of the Court

(m)

(n)

(o)

(p) *Gop Chand v Be ara Das* (1919) 1 Lah

(q) 1 J 197 531 C 94

(r)

O. 21,
rr. 69-71

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

Omission to fix the "day" of adjourned sale—Where a sale is adjourned, but no day is specified to which it is adjourned, the sale is void (s)

Omission to fix the "hour" of adjourned sale—Such an omission amounts to a material irregularity within the meaning of r 90 below (r)

Omission to issue fresh proclamation—Such an omission amounts to a material irregularity within the meaning of r 90 below (u), see notes to r 90, "Material irregularity in publishing or conducting sale," No 7 But it has been held that the property may be kept under hammer for several days without an adjournment, and if so a fresh proclamation is not necessary (v)

Sale held on a date other than the one to which it is adjourned—Where a sale is adjourned to a certain date, but it is held on a different date, the case is one of material irregularity in conducting the sale (w)

Sub rule (3) Sale in execution of a mortgage decree—A mortgagor judgment debtor is entitled to stop the sale of the mortgaged property in execution of a mortgage decree by payment of the debt before the sale actually takes place even after a final decree for sale has been passed (x)

Rateable distribution—Moneys paid into Court under sub r (3) to stop a sale are assets available for rateable distribution within the meaning of s 73 (y)

70. [Of S. 287, last para.] Nothing in rules 66 to 69, shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector

Saving of certain sales

Execution of decree by Collector—See ss 68 to 72, and Sch III below

71. [S. 293.] Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate

Defaulting purchaser
answerable for loss on
re sale

- | | |
|-----|---|
| (s) | 490. Syed Kashif v. Ganoo Balak (197) |
| (t) | 2 Luck. 490 100 IC 787 (28) A O 99 |
| (u) | Murlidhar v. Natab Sohil Mahomed (1907) 6 Pat 43* 104 IC 215 (27) A P 312 |
| (v) | Hari Sadhan v. Shri Gopal (1907) 33 Cal 130 60 IC 46 (21) A G 507 |
| (x) | Bhayan v. Sorhi (1904) 31 Cal 553 |
| (y) | Lal v. Mithu Lal (1908) 28 All 24 |
| | Purshottamdas v. Surajbharthi (1887) 6 Bom 588 540 a decree under s 293 of the Code of 1882 |

(w)

of the Collector, as the case may be, by the officer or other person holding the sale and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money

Application of the rule.—This rule extends to all sales, whether of movable or of immovable property, and also to re sales made under the Code, whether made in consequence of default of payment of deposit under r 84 or of purchase money under rr 85 and 86 (z) But the re sale should only cover the property sold at the prior sale, and any substantial difference of description at the sale and re sale in any of the matters required by r 66 will deprive the decree holder of the right to recover the deficiency of price under this rule Thus where the defaulting purchaser had been induced to bid for the property as unincumbered by reason of the fact that the incumbrances were not mentioned in the proclamation of sale and the re sale was on a proclamation in which the incumbrances were mentioned, it was held that he was not liable for the deficiency on re sale under this rule (a) The same was held where the property was described as that of A at the first sale and as that of B at the second (b) But if the first proclamation was of the judgment debtor's right title and interest, and the second proclamation stated that that interest was a third only, the defaulting purchaser cannot escape liability for he had no right to assume that the judgment debtor was the sole owner (c) The property sold was the same, and it has been said that "the reasonable construction to place on rule 71 is that the re sale should be within a reasonable time after the first sale and the property re sold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transaction in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default (d) Rule 84 requires that the property should be forthwith resold but the defaulting purchaser will be liable for the deficiency if the property is resold as expeditiously as the circumstances permit (e) The deficiency may be recovered though the certificate referred to in this rule has not been issued (f)

It is to be noted that on the happening of any of the events that render a re sale necessary, the decree holder is *not bound to have the same property re sold* He may proceed against any other property of the judgment debtor, leaving the latter to his remedy against the defaulting purchaser (g)

Who may apply under this rule.—The only person who can apply under this rule is the decree holder who brought the property to sale or the judgment debtor. No other person is entitled to apply (h)

By reason of purchaser's default.—These words cover a default not only in payment of the balance of the price, but in making the deposit of 25 per cent as provided by r 84 below (i)

(z) *Pamdhan v Fajrani* (1831) 7 Cal 337, *Jacherbai v Haribhai* (1831) 5 Bom 575

(a) *Bajynath v Moheep* (1880) 16 Cal 535

(b) *Gangadas v Bai Suraj* (1912) 36 Bom 329, 14 I C 777

(c) *Venkatraman v Mahabateswar* (1931) 33 Bom L.R. 750, 134 I C 692, (31) A B 367

(d) *Venkatachellamayya v Lakshana* (1918) 41 Mad 474 480, 43 I C 635 affirmed on appeal to I C. sub-nomine *Neejakania*

gurga v Venkatachallam (1925) 48 Mad L.J. 335, 86 I C 373 (25) A P C 61

(e) "

(f) "

(g) "

(h) *Sree Mahant Prayag v Raja of Kalahasti* (1906) 49 Mad 570, 97 I C 86, (26) A M 872

(i) *Sua Ram v Janki Ram* (1927) 44 All 266, 271, 65 I C 813, (27) A A 200

At a Court sale *A* bids Rs. 5,000, *B* bids Rs. 6,000 and *C* bids Rs. 7,000. *C* dies before his bid is accepted by the Court. Can *B* be said in the circumstances to be the highest bidder? No. *C*'s bid was revoked by his death before acceptance by the Court. *B*'s bid lapsed on the making of the higher bid by *C*, and *A*'s bid lapsed on the making of the higher bid by *B*. The property should therefore be put up afresh for sale (1).

Certificate.—The certificate as to the deficiency can be executed as a decree and can therefore also be attached as a decree (1)

Interest on deficiency.—A defaulting purchaser is liable for interest on the deficiency from the date on which an order is made against him under this rule, and not from the date of sale (f).

Rateable distribution.—Where a decree holder who has brought the property to sale applies under this rule and attaches the amount of the deposit lying in Court, other decree holders who have applied before the amount was deposited in Court are entitled to a rateable distribution of such amount. The amount in deposit in Court represents the assets realised by the Court within the meaning of sec 73 above (m)

Collector's sale—Court's order necessary.—When the execution of a decree is transferred to the Collector, and the sale is held by the Collector, jurisdiction to order recovery of the deficiency is with the Court. Application for the recovery of the deficiency on re sale must be made to the Court (n).

Where defaulting purchaser merely an agent.—The mere fact that the defaulting purchaser acted as the agent of another is no ground for exempting him from liability under this rule unless he informed the officer conducting the sale that he was merely an agent. The fact that the judgment debtor knew that he was merely an agent does not disentitle the judgment debtor to an order under this rule (c).

Appeal.—An order under this rule allowing or disallowing an application for the recovery of the loss by a re-sale falls within s. 47 and is appealable as a decree (p) See notes to s. 102. "Execution"

72. [S. 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Decree holder not to bid for or buy property without permission

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

| | | |
|-----|--|--|
| (j) | | (o) 38 (1924) 48 Mad L J 134 78 IC 296 (21) A M 476, supra |
| (k) | | (p) " " " " |
| (l) | | " " " " |
| (m) | | " " " " |
| (n) | 1st Edition N. Mahabeshwar (1941) 32 Bom LR 750 134 IC 692 (31) A B | |

21, r. 72 Setting off decretal amount against purchase money—The Bombay High Court has said that if one of the terms on which permission to bid is granted to the decree holder is that there should be no right of set-off then in such a case no set-off should be allowed (x)

Collector's sale—Court has power to allow a set off—If the execution of the decree is transferred to the Collector and the sale is held by the Collector, the Collector is empowered under the rules framed by the High Court to grant leave to the decree holder to bid, but the Collector has no power to allow a set off. The decree holder must apply under this rule to the Court for leave to set off (y)

Leave to bid—Leave to bid should not be refused except upon good ground (z). A decree holder who has obtained leave to bid at a judicial sale is in the same position as any other purchaser, he is not bound more than any other person to disclose circumstances within his knowledge, and bearing on the sale (a). Similarly a mortgagee purchaser who has obtained leave to bid is in the same position as an independent purchaser (b), that is to say, he does not stand in the position of a trustee for the mortgagor, and he is only bound to give credit to the mortgagor for the actual amount of his bid and not for what may be the actual value of the property (c). The decree holder who is allowed to purchase the property on condition that he would purchase it in full satisfaction of the decree is not entitled to recover from the judgment-debtor any money which he has to pay by way of poundage (d). It may here be noted that if the decree holder himself is the purchaser, and the decree is subsequently reversed, the sale to him will be set aside (e), but the sale cannot be set aside against a *bona fide* purchaser who is not a party to the suit (f). See notes to sec 65, 1 effect of reversal of decree upon sale.

Where a decree holder applies for leave to bid at the sale and no order is passed on his application, but is allowed to bid throughout the course of the sale, the Court must be deemed to have permitted him to bid (g).

"Amount due on the decree"—When more than one decree holder has applied for execution, the amount due on the decree to the decree holder purchaser is the amount to which he would be entitled on a rateable distribution under sec 73 (A). This is now made clear by the addition of the words "subject to the provisions of sec 73" in sub r (2). The decree holder purchaser must share the proceeds of the sale rateably with the competing decree holders (i). If the full amount has been paid to him the Court ordering rateable distribution may make an order for refund of the proportionate amount to be enforced by summary process in execution (j). But if rateable distribution is being made by a different Court and a Court of higher grade and the Court has already allowed the decree holder to set off for the whole amount that is a proceeding saved by sec 61 (2). The Court making rateable distribution can only call for the balance of the purchase money after the set off (k). The Madras High Court has held that if the sale proceeds are less than the amount of the decree against which a set-off has been allowed, other decree holders have no right of rateable distribution, as the whole amount must be deemed to have been received and realized so instantly the sale is made (l).

(x) *Hazorimal v. Nandev* (1908) 32 Bom 39

(y) *Martand v. Daya* (1900) 44 Bom 346 35

IC 5-7 -

(z)

(a)

(b) *Gunga Pershad v. Jaiachur* (1892) 19 Cal 4

(c) *Thurman v. Ram Tirand* (1909) 27 All L J

243 118 IC 378 (1909) A A 226

(d) *Set Umedmal v. Srinath Day* (1900) 27 Cal

(f) *Zainulabdin v. Aghar Ali* (1888) 10 All 166

15 IA 12

(g) *Mirshah v. Nawab Sarjad* (1927) 6 Pat

43 104 IC 215 (1927) A P 312

(i)

(j)

(k)

(l)

O. 21,
rr. 74-76

- (b) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the like or fodder stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

- (2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed whatever price may be offered for the produce

Place of sale of movable property.—Except in the case of agricultural produce for which provision has been made by this rule a sale of movables in execution of a decree should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise. A mere contention that a higher price is likely to be bid in some other place is not a good and sufficient reason (x)

75. [New] (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing, before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it

76. [S 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker

* May —A sale through a broker is permissive and not obligatory (y)

77. [S. 297.] (1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

Where movable property is sold by public auction—This does not apply to negotiable instruments or shares sold through a broker under r 76 above (z)

Payment of price.—The officer holding the sale has a discretion to allow the price to be paid at a reasonable time after the sale (a)

In default of payment—The provisions of r 71 apply to a re sale under this rule (b)

Sub rule (3)—This sub rule is new. It gives a right of pre-emption to the co-owner. See as to immovable property, r 83 below

78. [S. 298.] No irregularity in publishing or conducting the sale of movable property shall vitiate the sale, but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery

Irregularity not to vitiate sale but any person injured may sue
Scope of the rule.—This rule provides for the case of irregularity in publishing or conducting the sale of movable property. Rule 90 deals with irregularity in publishing or conducting the sale of immovable property

Irregularity in publishing or conducting the sale.—If the sale proclamation warrants a title which fails the injured party may apply to set aside the sale, for this is not a case of irregularity (c)

At the hand of any other person.—Where movable property not belonging to the judgment-debtor is sold at the instance of the decree holder, the real owner may sue the decree holder for the value of the property (d)

Money-decree.—A money decree is not movable property within the meaning of this rule (e). See O 21, r 53

(z) *Wala v Hira* (1885) 9 Bom 518

(a) *Shah Fareed v Sheo Charan* (1872) 4 N W P H C R 37

(b) *Ramdhani v Rajrani* (1881) 7 Cal 337

(c) *Framji v Hormazji* (1878) 2 Bom 259

(d) *Mohanund v Akul* (1868) 9 W R 118

(e) *Maug Lun Eye v Maung Po Nyun* (1923) 1 Rang 360 76 I C 679, (24) A R 21

O. 21,
rr. 79, 80

79. [Ss. 299, 300, 301.] (1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser

Delivery of movable
property delta and shares

(2) Where the property sold is movable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser

(3) Where the property sold is a debt not secured by a negotiable instrument or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser

Sale of shares — A purchaser of shares of a limited Company at a sale in execution of a decree is not entitled as of right to have his name entered in the register of the Company as a shareholder. He is subject to the same rules as those which apply to a private purchaser (f)

Forms — See App F forms nos 3^a 33 and 34

80. [S. 302] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party

(2) Such execution or endorsement may be in the following form, namely —

A B by *C D*, Judge of the Court of (or as the case may be), in a suit by *E F* against *A B*

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

Execution of deed of transfer of shares—Where a deed of transfer of shares is executed by a Judge under this rule the company has no option as to registering the shareholder who purchased the shares in execution and if the purchaser cannot obtain the original share certificates from the judgment debtor, the company is bound to grant him new share certificates (g)

81. [S. 303.] In the case of any movable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly

Vesting order in case of other property

Sale of immovable property

82. [S. 304.] Sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes

What Courts may order sales

83. [S. 305.] (1) Where an order for the sale of immovable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment debtor, the Court may, on his application postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount

Postponement of sale to enable judgment debtor to raise amount of decree

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court

O. 21, r. 83 Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property

Alterations in the rule.—The words, 'save in so far as a decree holder is entitled to set off such money under the provisions of rule 72' in sub r (2) have been added to make it clear that where a decree holder is entitled to a set off under r 72, he should not be required to pay in the monies. A similar saving has been introduced into r 84 sub r 2, and r 85

Postpone the sale for such period as it thinks proper.—The postponement of sale under this rule is discretionary with the Court (h) But the postponement should be for a reasonable period (i)

The amount of the decree can be raised.—No sale should be postponed and no certificate should be granted under sub r (2) unless the whole amount due on the decree can be raised by mortgage lease or sale (j)

Notwithstanding anything contained in section 64.—On compliance with the conditions of this rule, a private alienation, notwithstanding s 64 becomes absolute, not only against the claim of the decree holder, but against all claims enforceable under the attachment (k)

Confirmation of sale by Court.—Where permission to raise the amount of decree by private sale has been granted to the judgment-debtor by two Courts in each of which a decree has been passed against him, it is enough if the sale is confirmed by one Court it is superfluous to apply to the other Court for confirmation of the same sale (l)

Guardian and Wards Act 8 of 1890, s 29.—A private alienation of property, though confirmed by the executing Court under this rule, is not valid if such alienation is made by a guardian and the sale is not confirmed by the Court by which the guardian was appointed (m)

Decree for the enforcement of a mortgage.—This rule does not apply to a sale of property directed to be sold in execution of a decree for the enforcement of a mortgage. The reason is that in the case of a mortgage decree the right of sale does not depend upon the attachment in execution but is confirmed by the decree itself (n)

Rateable distribution.—Money paid into Court under the proviso to sub-r (2) is liable to rateable distribution under s 73, as it is paid under a pending execution application (o)

(h) *Bishenmun v Land Mortgage Bank* (1884)
12 I A 7 10 11 Cal 244 248 N E R
R M Chetty v M Sbraya (1925) 3
Bom. 13- 136 89 I C 300 (25) A R
271

(i)

(j)

(k)

(l) *Andanapa v Bhemrao* (1905) 19 Bom 539

(m)

(n)

(o) *Thira Ram v Lakshmar* (1918) 41 Ma 1
616, 47 I C 578 *Juralaladas v Suraj-*
Chautha (1882) 6 Bom 598

Revision.—No appeal lies from an order refusing to postpone a sale under this rule. But the party aggrieved may apply to the High Court under s. 115 for a revision of the order and the High Court may in a proper case set aside the order (p)

84. [S. 306.] (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

Deposit by purchaser and re-sale on default

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule

“Declared to be the purchaser.”—An execution sale is not complete until the bid has been accepted and the deposit under this rule is paid (q)

Material irregularity—It has been held by the High Courts of Calcutta and Madras that failure to deposit the 25 per cent immediately as required by this rule is no more than a “material irregularity” within the meaning of r. 90, which would render the sale voidable if substantial injury has resulted by reason of such irregularity (r). It was at one time held by the High Court of Allahabad that such failure rendered the sale altogether void (s) but these decisions have now been overruled by a Full Bench the view taken by the Full Bench being the same as that of the Calcutta and Madras High Courts (t). The word forthwith has been construed by the Madras High Court as meaning as expeditiously as circumstances permit (u)

Sub rule (2)—This sub rule is new. When leave to bid and set off is granted the deposit will as a rule be dispensed with and the set off will take effect as soon as the decree holder is declared to be the purchaser (w). See notes to r. 72. Also see notes to r. 83, ‘Alterations in the rule’

Ratable distribution.—See notes to s. 73, “Before the receipt of the assets”

Calcutta High Court original side—rule not applicable.—This rule is not applicable to mortgage decrees on the original side of the Calcutta High Court. The conditions as to sale and deposit are there regulated by rules framed under s. 122 (v)

85. [S. 307.] The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property.

Time for payment in full of purchase money

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which he may be entitled under rule 72

| | | | | | | | |
|-----|---|---|---|---|--|-----|--|
| (p) | A | R | R | M | Chellu v. Subraja (1925) 3 Rang 15 137 89 I C 300 (25) A R 271 | (q) | Intiram v. Narain (1883) 5 All 316 Amir Begam v. Bank of Upper India Ltd (1908) 50 All 773 |
| (q) | | | | | | (r) | Sita Ram v. Janki Ram (1909) 44 All 268 |
| | | | | | | (u) | |
| | | | | | | (w) | |
| (r) | | | | | | (v) | |

O. 21,
rr. 85-87

On the fifteenth day from the sale.—The purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule. If the purchase money is not received by the Court in time, it will not avail him that he had posted the money in time, for the Post Office is not the agent of the Court (w).

Material irregularity.—The time for payment cannot be extended without the consent of the decree-holder and the judgment-debtor. If it be extended without their consent, the case is one of material irregularity within the meaning of r 90 below (x).

Where the Court or office is closed on the fifteenth day.—In such a case the payment may be made on the next day on which the Court or Office is open. See General Clauses Act 10 of 1897, s. 10.

Proviso.—The proviso is new. See notes to r. 83 above, "Alterations in the rule".

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

Alteration in the rule.—The words "may, if the Court thinks fit," have been substituted for the word "shall." See notes below.

Forfeiture of deposit to Government.—The old section provided that the deposit "shall be forfeited to Government." This provision led to hardship in certain cases (y). To obviate the hardship, the words "may, if the Court thinks fit," have been substituted for the word "shall." It is no longer obligatory upon the Court to forfeit the deposit.

Calcutta High Court—Original side—rule not applicable.—This rule does not apply to sales under a mortgage decree on the original side of the Calcutta High Court for provision has been made for the conduct of such sales by rules framed under s. 122 (z).

87. [S. 309.] Every re-sale of immovable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Fresh notification.—A fresh notification is only necessary where the re-sale is in default of payment of the purchase money within the time allowed by r 85. No fresh notification is necessary for a re-sale in default of payment of the 25 per cent deposit required by r 84 (a).

(w) *Ramchandra v. Belya* (1898) 22 Bom. 415.
(x) *Subramaniam v. Vylunda* (1924) 43 Mad. L. J. 477, 69 I. C. 1001 (23) A. M. 48.
Kalpada v. Hananta (1932) 59 Cal. 117, 138 I. C. 177, (32) A. C. 126.

(y) See *Sambasi a v. Vidyadatasani* (1902) 25 Mad. 535.
(z) *Goural Das v. Zachariah* (1930) 57 Cal. 106, 125 I. C. 534, (30) A. C. 324.
(a) *Vallabhan v. Pangunni* (1889) 12 Mad. 454.

88. [S. 310.] Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

111 of co-sharer to have preference

O. rr. 8

See as to movable property, r 77, sub r (3) above

Co sharer.—A *defeasible* title to a share is not sufficient to support a claim for pre-emption under this rule (b). The Allahabad High Court has held under the rules framed under s 70 of the Code that where a sale is confirmed by the Collector in favour of one bidder, in default of appearance of the other bidder of the same sum claiming a preferential right as a co-sharer, he is not entitled to maintain a separate suit to set aside the sale by virtue of a right of pre-emption (c).

89. [S. 310A.] (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—

Application to set aside sale on deposit

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale

Alterations in the rule —

- 1 The words, "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," have been substituted for the words, "any person whose immovable property has been sold under this Chapter." See notes below. Who may apply under this rule.

(b) *Kamta Prasad v Mohan* (1910) 37 All 45
3 I C 782, *Abdul Ghafoor v Ghulam*
(1913) 35 All 296 18 I C 959

(c) *Badri Singh v Tulsi Ram* (1923) 45 All
203 79 I C 82 (23) A A 186

O. 21, r. 89

- 2 The words, "unless he withdraws his application," and the words, "or prosecute," in sub r. (2) are new See notes below under the head "Sub rule (2)"

Scope of the rule.—This rule provides the only means by which a judgment debtor can get rid of a sale which has been duly carried out (d) After the interest of a third party, i.e., the purchaser, intervenes, the decree cannot be adjusted. See notes under O 21, r 2, "Adjustment not certified if third party's interest intervenes".

Immovable property.—This rule applies only to sales of immovable property A simple mortgage bond is movable, and not immovable property The provisions of this rule do not therefore apply to a sale of such a bond in execution of a decree (e)

This rule applies to sales under money and mortgage decrees.—This rule obviously applies to sales in execution of decrees for the payment of money The transfer into this Code (see O 34) of the sections of the Transfer of Property Act relating to decrees in suits on mortgage shows that the provisions of the present rule apply also to sales under mortgage decrees Hence a mortgagor whose immovable property has been sold in execution of a decree for the sale of the mortgaged property passed under O 34, r 5, may apply under this rule to set aside the sale (f) As to the old section it was doubtful whether its provisions applied to mortgage decrees, the High Court of Calcutta holding that they did not (g), while the other Courts holding that they did (h) The Calcutta decisions are no longer law The rule applies also to sales under a mortgage decree on the original side of the Calcutta High Court (i) But the rule though well adapted to Mofussil practice is not in its terms applicable to the practice of the Original side of the High Court where no amount is specified in the proclamation as that for the recovery of which the sale is ordered and therefore it must be applied not strictly but as fairly as possible to cases on that side (j)

Whether the rule applies to other sales.—This rule has been held to apply when the sale is under a decree passed in terms of an award made on an order of reference in a partition suit (k) The High Court of Madras has held that this rule does not apply to a sale by a receiver of partnership property for realising the partnership assets (l) The rule does not apply to a sale of a tenure under the Bengal Tenancy Act so arrears of rent see s 174 of that Act

Who may apply under this rule.—Under the old section, the application to set aside a sale could only be made by "any person whose immovable property has been sold under this Chapter," that is, the Chapter relating to execution Those words, it was held, included—

- (1) the judgment debtor,
- (2) any person, though not a party to the suit or decree (m), whose interests were affected by the sale

A person whose interests were not affected by the sale could not, it was held, apply under that section (n)

| | | |
|-----|--|--|
| (d) | | overruling <i>Surendra v. Garu</i> (1915) 24 C W N 536 59 I C 432 |
| (e) | | (j) <i>Kaljanee v. Hari</i> (1929) 56 Cal 477, 120 I C 718 (-9) A C 574 |
| (f) | | (k) <i>Nwoke Nath v. Amulya</i> (1912) 27 C W N 466 -7 I C 774 (23) A C 582 |
| (g) | 703 | (l) <i>Trijaram v. Ramchandra</i> (1921) 41 Mad L J 405 65 I C 916 (21) A M 484 |
| (h) | <i>Raja Ram v. Chuni Lal</i> (1907) 19 All 205, <i>Krishnaji v. Maladeo</i> (1901) 25 Bom 104 <i>Shankarji v. Zangamurti</i> (1902) 25 Mad 241 | (m) <i>Sichand v. Falaran</i> (1911) 38 Cal 1 6 I C 810 |
| (i) | <i>Furqan Dast v. Niswanar Lal</i> (1921) 48 Cal 69, 60 I C 406 (21) A C 169, | (n) <i>Ranachandra v. Fakhmabai</i> (1890) 23 Bom 450 <i>Abdul v. Matyar</i> (1903) 20 Cal 425 426 |

Under the present rule, the application to set aside a sale of immovable property held in execution of a decree may be made by—

- (1) any person owning the property, or
- (2) any person holding an interest in such property by virtue of a title acquired before the sale

“Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale”—Under the old section the application to set aside a sale on deposit could be made by ‘any person whose immovable property has been sold’. Under the present rule the application may be made by ‘any person either owning such property or holding an interest therein by virtue of a title acquired before such sale’. There is no doubt that a judgment debtor, whose immovable property has been sold may apply under this rule as a ‘person owning such property’. But what if the judgment debtor has transferred his interest in the property? Now a judgment debtor may transfer his interest in the property before the Court sale or he may do so after the Court sale. Is he entitled after a transfer in either case to apply under this rule? Is the transferee from the judgment debtor entitled to apply under this rule? The cases give the following answers to these questions

First, as regards transfers before Court sale—Under the old section there was a conflict of decisions whether, if the judgment debtor had transferred his interest in the property before the Court sale, the transferee could apply under that section to have the same set aside. In *Srinivasa v Ayyathoras* (o) for instance, it was held that the transferee could apply, while the contrary was held in *Ramchandra v Rakhmabas* (p). Under the present rule it is clear that a transferee acquiring title before the Court sale is competent to apply to have the sale set aside. Further it was held under the old section that a judgment debtor who had effected a private sale of his property subsequently to the attachment and prior to the Court sale was entitled to apply under that section to set aside the sale (q). This ruling is still good law (r).

Next as regards transfers after Court sale—A obtains a decree against J. In execution of the decree certain immovable property belonging to J is sold to C for Rs 166. After the sale to C but before its confirmation under r 92 J sells the property to P for Rs 500. It is clear that if J could apply under this rule to have the sale set aside on payment of the amount mentioned in the rule, the pecuniary benefit to him would be great, for while the property was sold at the Court sale for Rs 166, it fetched Rs 500 at the private sale. Is J, the judgment debtor, entitled to apply under this rule to have the sale set aside? Is P, the purchaser at the private sale, entitled to apply under this rule? It was at one time held by the Allahabad High Court (s) that neither the judgment debtor nor the subsequent purchaser was entitled to apply under this rule, the reason for the decision being that the present rule gives the judgment debtor a last chance of saving the property for himself and that it was no part of the intention of the Legislature that the property should be saved for persons to whom it might be privately sold after the Court sale had taken place. The Madras High Court held in its earlier decisions that the judgment debtor is not entitled to apply (t), but that the subsequent purchaser is entitled to apply (u). The ground of these decisions was that the judgment debtor having parted with his interest in the property before the application under this

(o) (19-3) 45 All 495 74 I C 778 (23) A A
392
(p) (t) *Subbarayada v Lakshminarasamma* (1913)
(q) (u)

(s)

O. 21, r. 89

- 2 The words, "unless he withdraws his application," and the words, "prosecute," in sub r. (2) are new. See notes below under the heading "Sub rule (2) "

Scope of the rule.—This rule provides the only means by which a judgment debtor can get rid of a sale which has been duly carried out (d). After the interest of a third party, i.e., the purchaser, intervenes, the decree cannot be adjusted. See note under O 21, r 2, "Adjustment not certified if third party's interest intervenes"

Immovable property.—This rule applies only to sales of immovable property. A simple mortgage bond is movable, and not immovable property. The provisions of this rule do not therefore apply to a sale of such a bond in execution of a decree (e)

This rule applies to sales under money and mortgage decrees.—This rule obviously applies to sales in execution of decrees for the payment of money. The transfer into this Code (see O 34) of the sections of the Transfer of Property Act relating to decrees in suits on mortgage shows that the provisions of the present rule apply also to sales under mortgage decrees. Hence a mortgagor whose immovable property has been sold in execution of a decree for the sale of the mortgaged property passed under O 34, r 5, may apply under this rule to set aside the sale (f). As to the old section it was doubtful whether its provisions applied to mortgage decrees, the High Court of Calcutta holding that they did not (g), while the other Courts holding that they did (h). The Calcutta decisions are no longer law. The rule applies also to sales under a mortgage decree on the original side of the Calcutta High Court (i). But the rule though well adapted to Mofussil practice is not in its terms applicable to the practice of the Original side of the High Court where no amount is specified in the proclamation as that for the recovery of which the sale is ordered and therefore it must be applied not strictly but as fairly as possible to cases on that side (j)

Whether the rule applies to other sales.—This rule has been held to apply when the sale is under a decree passed in terms of an award made on an order of reference in a partition suit (k). The High Court of Madras has held that this rule does not apply to a sale by a receiver of partnership property for realising the partnership assets (l). The rule does not apply to a sale of a tenure under the Bengal Tenancy Act for arrears of rent. See s 174 of that Act.

Who may apply under this rule.—Under the old section, the application to set aside a sale could only be made by "any person whose immovable property has been sold under this Chapter," that is, the Chapter relating to execution. Those words, it was held, included—

- (1) the judgment debtor;
- (2) any person, though not a party to the suit or decree (m), whose interests were affected by the sale.

A person whose interests were not affected by the sale could not, it was held, apply under that section (n).

| | |
|---|---|
| (d) <i>Ac</i> | overruling <i>Surendra v Gora</i> (1915) 24 O W N 536 50 I C 432 |
| (e) <i>La</i> | (f) <i>Kalyanee v Hari</i> (1909) 56 Cal 477, 120 I C 718 (29) A C 574 |
| (f) <i>Fi</i> | (k) <i>Nyode Nath v Amulson</i> (1922) 27 C W N 466, 77 I C 774, (23) A C 582 |
| (g) <i>Ec</i> | (l) <i>Tuljaram v Ramchandra</i> (1921) 41 Mad L J 425 63 I C 916 (21) A M 484 |
| (h) <i>Papa Pann v Chinnai Lal</i> (1897) 19 All 205, <i>Aradhaji v Mohadeo</i> (1901) 25 Bom 104, <i>Mothilaljunadav v Langamurti</i> (1902) 25 Mad 244. | (m) <i>Suchand v Palaram</i> (1911) 49 Cal 1, 6 I C 810 |
| (i) <i>Vajilan Dass v Baram Lal</i> (1921) 43 Cal 69, 60 I C 406, (21) A C 169, | (n) <i>Ramchandra v Rakhmalal</i> (1899) 23 Bom 450, <i>Abdul v Matwar</i> (1903) 30 Cal 425, 424 |

Under the present rule, the application to set aside a sale of immovable property held in execution of a decree may be made by— O. 21

- (1) any person owning the property, or
- (2) any person holding an interest in such property by virtue of a title acquired before the sale

"Any person either owning such property or holding an interest therein by virtue of a title acquired before such sale"—Under the old section the application to set aside a sale on deposit could be made by 'any person whose immovable property has been sold'. Under the present rule the application may be made by "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale". There is no doubt that a judgment debtor, whose immovable property has been sold may apply under this rule as a "person owning such property". But what if the judgment debtor has transferred his interest in the property? Now a judgment debtor may transfer his interest in the property before the Court sale or he may do so after the Court sale. Is he entitled after a transfer in either case to apply under this rule? Is the transferee from the judgment debtor entitled to apply under this rule? The cases give the following answers to these questions.

First, as regards transfers before Court sale—Under the old section there was a conflict of decisions whether, if the judgment debtor had transferred his interest in the property before the Court sale, the transferee could apply under that section to have the same set aside. In *Srinivasa v Ayyathoras* (o), for instance, it was held that the transferee could apply, while the contrary was held in *Ramchandra v Rakhmabai* (p). Under the present rule it is clear that a transferee acquiring title before the Court sale is competent to apply to have the sale set aside. Further it was held under the old section that a judgment debtor who had effected a private sale of his property subsequently to the attachment and prior to the Court sale was entitled to apply under that section to set aside the sale (q). This ruling is still good law (r).

Next as regards transfers after Court sale—A obtains a decree against J. In execution of the decree certain immovable property belonging to J is sold to C for Rs 166. After the sale to C but before its confirmation under r. 92, J sells the property to P for Rs 500. It is clear that if J could apply under this rule to have the sale set aside on payment of the amount mentioned in the rule, the pecuniary benefit to him would be great, for while the property was sold at the Court sale for Rs 166, it fetched Rs 500 at the private sale. Is J, the judgment debtor, entitled to apply under this rule to have the sale set aside? Is P the purchaser at the private sale entitled to apply under this rule? It was at one time held by the Allahabad High Court (s), that neither the judgment debtor nor the subsequent purchaser was entitled to apply under this rule, the reason for the decision being that the present rule gives the judgment debtor a last chance of saving the property for himself and that it was no part of the intention of the Legislature that the property should be saved for persons to whom it might be privately sold after the Court sale had taken place. The Madras High Court held in its earlier decisions that the judgment debtor is not entitled to apply (t), but that the subsequent purchaser is entitled to apply (u). The ground of these decisions was that the judgment debtor having parted with his interest in the property before the application under this

(o) (1898) 21 Mad 416 [mortgagee]
 (p) (1892) 23 Bom 450 [purchasers]
 (q) *Mayanlal v Doshi* (1901) 25 Bom 431
 (r) *Sundaram v Mawaa* (1921) 44 Mad 554 562
 63 I C 937 (21) A M 157 (F 15)
Viranna v Sathiraju (1927) 57 Mad L J
 157 100 I C 87 (27) A M 443
 (s) *Ishar Das v Asaf Ali* (1911) 34 All 196
 doubted in *Ied Lam v Sundar Singh*

(1923) 45 All 475 74 I C 778 (23) A A
 392
 (t) *Subbarayada v Lakshminarasamma* (1913)
 33 Mad 775 21 I C 193
 (u) *Lakshmi v Sankaran* (1915) 24 Mad I J
 305 18 I C 579 *Subbarayada v Lak*
shminarasamma (1913) 38 Mad 775 777,
 21 I C 193 *Anantha v Kunnanchand*
 (1913) 24 Mad L J 203, 18 I C 579

. 21, r. 89 rule and so having no interest in the property at the date of the application, he was not entitled to apply under this rule, unless the sale to the subsequent purchaser was by an unregistered document in which case the judgment debtor would continue to be the owner of the property and could as such owner apply under this rule (v). On the other hand, the High Court of Bombay held that the judgment debtor is entitled to apply under this rule, but that the subsequent purchaser is not so entitled (w). The ground of the Bombay decision is that as the sale to the auction purchaser has not been confirmed the judgment debtor remains the owner of the property, and that he is therefore entitled to apply as a 'person owning the property' within the meaning of this rule. As regards the Allahabad decision, the Bombay Court said that the object of the present rule was not only to preserve the property in the hands of the judgment debtor, but also to save the judgment debtor from monetary loss that might be occasioned to him if the

an interest in the property at the date of the application under this rule, and that it was sufficient if he owned the property or had an interest in it at the date of the Court-sale. The High Court of Patna has followed the Bombay decision (x). In a later case a Full Bench of the Madras High Court overruled its earlier decisions, and agreeing with the Bombay and Patna decisions held that the judgment debtor was entitled to apply, but that the subsequent purchaser was not entitled to apply under this rule (y). The Allahabad High Court also has overruled its earlier decisions and held that the judgment debtor can apply, but not the purchaser (z). The High Court of Calcutta has held that the subsequent purchaser is not entitled to apply under this rule. The reason given is that the interest, if any, which he held in the property was not by virtue of a title acquired by him 'before' the execution sale, and consequently he is excluded by the very terms of the rule (a). Where two applications are made one by the judgment debtor and another by a mortgagee from him after the sale, and each applicant deposits a portion of the aggregate amount required by this rule, the deposits and the applications may be treated as made by the judgment debtor and therefore within this rule (b).

Miscellaneous cases—Under the old section it was held that a Mahomedan co heir was not entitled to apply to set aside the sale (c). This would seem to be the law under the present rule. But it was held that a co sharer was entitled to apply (d). It is doubtful whether a co sharer is a person entitled to apply under this rule. A coparcener in a joint and undivided Hindu family can apply for he has an interest in the whole of the property (e). It has been held under the old section that a durmukardar can apply (f). The purchaser of a portion of a non transferable occupancy is entitled to apply although the landlord is the auction purchaser (g).

A person who has obtained a mortgage of the property before the Court-sale may apply under this rule (h). So also a usufructuary mortgagee in possession (i). But a person who has merely agreed to purchase the property cannot apply under this rule, for a mere agreement for sale of immovable property does not of itself create any interest

(v) *Sethuramasami v. Syed Mir Hussein* (1919) 42 Mad 503 49 I C 806

(w) *Pandurang v. Corind* (1916) 40 Bom 557 37 I C 211

(x) *Dhanwanthi v. Shree Sannar* (1919) 4 Pat 190 210 I C 290

(y)

(b) *Madhura Saran v. Bishambhar* (1907) 49 All 839 102 I C 471 (27) A 4 561

(c) *See Abdul v. Matwar* (1903) 30 Cal 45

(d) *Tuli Ram v. Jazet Ali* (1909) 30 All 192 193 136

(e) *Ramachandra v. Srinivasa* (1903) 51 Mad 246 109 I C 297 (28) A 31 398

(f)

(g)

(h)

(i)

(h)

(i)

in the property (j). For the same reason an attaching creditor cannot apply (k), and a person who is out of possession of the property and is litigating to establish his right thereto, is not entitled to apply under this rule (l). A lessee subject to whose interest the property is sold is entitled to apply under this rule (m).

Unsuccessful application to stop sale.—The mere fact that the applicant had already unsuccessfully applied to stop the sale on payment of the decretal amount and had also put in a claim petition under r 58 above, does not preclude him for applying under this rule (n).

Deposit without application.—An application is necessary before the Court can act under this rule. Mere deposit of the required amount is not enough (c) See notes below. "Limitation"

Deposit of five per cent.—The deposit of 5 per cent must be made even though the purchaser may be the decree holder. The 5 per cent is intended as a compensation

and costs he may have incurred (*q*), but in another case another Judge of the same High Court has held that nothing more than the prescribed five per cent. can be claimed by the purchaser (*r*)

C. 21, r. 89 Court refused to set aside the sale (v) In a Rangoon case the deposit was one day late and a few rupees less than the full amount and the Court said that the small shortage did not vitiate the deposit but that the delay could not be excused (w)

Conditional deposit.—A deposit under this rule must be unconditional (x)

"For payment to the decree holder"—Rateable distribution.—The expression 'decree holder' in sub sec (1) (b) refers only to the decree holder for satisfaction of whose decree the sale has been ordered. It does not include other decree holders who would have a right to claim rateable distribution out of the sale proceeds under sec 73. It is therefore enough if the judgment debtor deposits such amount as is sufficient to satisfy the claim of the decree holder at whose instance the property was sold. It is not necessary that the amount deposited by him should be sufficient to satisfy decrees held against him by other decree holders also (y). Again, when a judgment debtor deposits in Court a sum sufficient to satisfy the claim of the person for satisfaction of whose decree the property was ordered to be sold, the other decree holders are not entitled to a rateable distribution thereof under sec 73 (z). The Patna High Court, however, holds that as money paid into Court is paid upon the terms of the Code, whatever they may be, a deposit under this rule is liable to rateable distribution (21)

Deposit under this rule, a voluntary payment.—A deposit under this rule is a voluntary payment and cannot be treated as a payment under coercion. If A by mistake sells the land of B, B may ignore the sale and resist dispossession by the auction purchaser. But if B chooses to set aside the sale by making a deposit under this rule he cannot claim a refund (a)

Sub rule (2).—Where a judgment debtor applies to set aside a sale under this rule and subsequently applies under r 90 also, he is not entitled to prosecute the application made by him under this rule (b). But the Court should in such a case put the judgment debtor to his election whether he would withdraw the application under r 90, and if he refuses to do so, it should dismiss the application made under this rule (c). An application, though purporting to be made under r 90, may not really be one under that rule, but one under sec 47, the provisions of sub r (2) do not apply to such a case (d)

"Court"—The word Court in this rule means the Civil Court, and not, as in the case of decrees transferred to the Collector for execution, the Collector (e). Hence an application under this rule must be made to the Court and not to the Collector. If the judgment debtor applies to the Collector, he cannot stop limitation running against him. It is the duty, however, of the Collector in such a case to return the application to the applicant and tell him that the application should be made to the Court (f). See notes, 'Limitation' below

Sale of property by separate lots.—Where property is sold in separate lots in execution of a decree, it is not open to the judgment debtor to apply under this rule

17C
772
601
8
All.
10m
17C
10m
190m
A B
024)
495

sale of all the lots (g). But in an Allahabad case (h) where the decree was satisfied by the sale of several lots and the last lot sold was a house for Rs. 1,000, the sale of the house was set aside on the judgment-debtor depositing Rs. 1,000 for the decree holder and Rs. 50 for the auction purchaser. This was however explained in a later case as having proceeded on the supposition that the decree holder had received the proceeds of the other sales (i).

Necessary parties.—The auction purchaser as well as the decree holder are necessary parties to an application under this rule (j) See the proviso to r 92, sub r. (2) The Allahabad High Court has said that the rule imposes a duty on the Court to give them notice but that they are not necessary parties (k)

Limitation.—The application under this rule must be made within 30 days from the date of sale [Limitation Act, 1908, Sch I, art 166] The Court has no power to extend the time under sec 148 (l) The words "date of sale" means the date on which the property is put up for sale and knocked down to the highest bidder, and not the date on which the sale is confirmed by the Court [r 92] (m) At the same time it is to be remembered that if for any reason the final bid remains unaccepted for some days by the sale officer, the period of 30 days does not begin to run until such bid is accepted by him (n)

The words "may apply to have the sale set aside on his depositing in Court," etc., show that not only the application, but also the deposit, should be made within 30 days from the date of sale. It is not enough to make the application within 30 days (o). Nor is it enough to make the deposit within 30 days (p). Both the application and the deposit must be made within 30 days from the date of sale.

The law does not impose any period of limitation for the issue to the parties of notice of the deposit (a)

Appeal.—The law as regards appeal from an *order setting aside or refusing to set aside a sale* passed on an application under the present rule is quite different from what it was under the Code of 1882. Such an order under the Code of 1882 [s 310A] was not appealable *as an order* for it was not included in the list of appealable orders given in sec 588 of that Code [now O 43, r 1]. But the order being one made in a proceedings in execution (r), it was appealable *as a decree*, if the question as to whether the sale should be set aside or not was one between “the parties to the suit or their representatives” within the meaning of sec 244 [now s 47] (s), and in such a case a *second appeal* also lay from the order passed in first appeal. And it was held that if the question was one between the judgment debtor and the decree holder, in other words, between the parties to the suit, it did not cease to be so merely because the auction purchaser (not a party to the suit) was interested in the result (f). But where the question was one between a party to the suit on the one hand and the auction purchaser on the other, there was a conflict of

- (g) *Manu Nath v. Manu Nath* (1933) 55 All 123 143 IC 127 (33) A.A. 155
(f) *Rameshwar v. Manu Nath* (1930) 9 Pat 310, 125 IC 570 (30) A.P. 318
(k) *Dipchand v. Shro Prasad* (1929) 51 All 910 119 IC 103, (29) A.A. 503
(i) *Chaudhry Rameshwar v. Chaudhry Sureshwar* (1917) 2 Pat. L.J. 164, 39 IC 664
(m) *Chaudhry Keeri v. Giani Roy* (1902) 29 Cal 626, 631
(n) *Munshi Lal v. Ram Narain* (1913) 35 All 65, 17 IC 783
(o) *Mahomed Akbar v. Sukhdeo* (1911) 13 Cal

-
- Figure 1 consists of 12 scatter plots arranged in a 5x2 grid. The rows are labeled (p), (2), (3), (4), and (5) on the left. The columns represent different variables: age, sex, education, income, and occupation. Each plot shows the relationship between the variable on the x-axis and the number of visits (p) on the y-axis. The plots show various patterns of data points, with some showing a clear positive or negative correlation and others showing no clear trend.

O. 21,
rr. 89, 90

opinion as to whether an appeal lay from the order (u) In those cases, however, in which it was held that no appeal lay from the order, it was held that the party aggrieved might apply to the High Court for a *revison* of the order (v) Under the present Code, however, an order *setting aside or refusing to set aside a sale* [r 92] passed on an application under this rule [r 89], is appealable as an order, for it is included in the list of appealable orders given in O 43, r 1 [see cl (j)] The result is that under the present Code *only one appeal* lies from such an order (w) [see s 101 sub s (1) (i) and sub s (2)] An auction purchaser also can now appeal from an order under this rule Only one appeal is allowed in his case also (x)

Dismissal of application for default—Where an application under this rule is dismissed for default of appearance and the Court refuses to restore it to the file, *no appeal* lies from the order refusing to restore the application (y)

Revision—The High Courts of Patna (z), and Madras (a) have held that the High Court can interfere in revision if an application under this rule has been dismissed on the ground that it was made by a person who was not entitled to apply, the reason given being that the decision in such a case is the very foundation of jurisdiction and that the action of the lower Court in refusing to deal with the application in such a case, amounts to a refusal to exercise jurisdiction within the meaning of sec 115 On the other hand the Allahabad High Court has held that it could not interfere in revision when the question was whether the applicant was a person entitled to apply (b) But it interfered in revision when the question was whether a sale of a single lot could be set aside (c)

No revision lies from an order dismissing an application under this rule on an erroneous view of the law of limitation (d), but the High Court interfered in revision when the lower Court dismissed an application on the ground that it had no jurisdiction to extend time for the payment of poundage (e)

90. [S. 311.] (1) Where any immovable property has been sold in execution of a decree, the decree holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it

Provided that no such sale be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud

| | |
|---|---|
| (u) <i>K</i> | (z) <i>Dhanwant v Sheo Shankar</i> (1919) 4 Pat LJ 340 51 IC 873 <i>Autod Ali v Abdul</i> (1923) 2 Lat 715 74 IC 102 (29) A P 490 |
| (c) <i>Mazharul v Doshi</i> (1901) 25 Bom 631 <i>Ram Singh v Sal g Ram</i> (1906) 23 All 84 | (a) <i>Sundaram v Mawra</i> (1911) 44 Mad 534 63 IC 937 (21) A M 157 [F B] |
| (iv) <i>Arumaddi v Sundari</i> (1911) 38 Cal 339 10 IC 345 | (b) <i>Yad Ram v Sundar Singh</i> (1923) 45 All 423 74 IC 718 (23) A A 39-12 B] |
| (z) <i>Kachru v Trimback</i> (1920) 44 Bom 472 56 IC 59 See also <i>Gad gappa v Shidappa</i> (1924) 43 Bom 638 88 I C 155 (1) A R 495 | (c) <i>Panna Lal v Bhola Nath</i> (1931) 53 All 152 128 IC 818 (30) A A 843 |
| (y) <i>Ghaifi Eidi v Abdul Samad</i> (1907) 20 All 595 | (d) <i>Musammatal Bidi v Paras Nath</i> (1923) 2 Pat 800 75 IC 430 (24) A P 37 |
| | (e) <i>Abdul Wahid v Tribhawan Das</i> (1931) 53 All 959 133 IC 407 (31) A A 736 |

Alterations in the rule:—

1. The words, "or any person entitled to share in a rateable distribution," have been added to give effect to decisions under the old section. See notes below, "Who may apply under this rule."
2. The words, "any person whose interests are affected by the sale," have been substituted for the words "any person whose immovable property has been sold under this chapter." The expression now substituted is what the Courts held in several cases was the meaning of the expression "any person whose immovable property has been sold." See notes below, "Who may apply under this rule."
3. The words "or fraud" have been added after the word "irregularity." The addition of these words affects the *right of appeal* as will be seen from the notes below under the head, "Fraud in publishing or conducting sale."
4. The words, "unless upon the facts proved the Court is satisfied," have been substituted for the words "unless the applicant proves to the satisfaction of the Court." This alteration has been made with a view to set at rest the doubts raised under the old section as to the *evidence* upon which the Court could act. See notes below, "Unless upon the facts proved the Court is satisfied," etc.

Who may apply under this rule.—The only persons that may apply under this rule are—

- (1) the decree holder,
- (2) any person entitled to share in a rateable distribution of assets under sec 73,
- (3) any person whose interests are affected by the sale—an expression obviously of a wider import than the expression 'a person holding an interest in the property sold' used in r 99 above (f).

The words "any person entitled to share in a rateable distribution of assets" did not occur in the old section, but it was held that the expression "decree holder" included such person (g).

The expression "any person whose interests are affected by the sale," has been substituted for the expression "any person whose immovable property has been sold," which occurred in the old section. The latter expression was construed as meaning "any person whose interests are affected by the sale" in the Full Bench case of *Asmunnissa Begum v Ashruff Ali* (h), and this interpretation has now been substituted for the original expression. Where an application, therefore, is made by a person other than a decree holder or one entitled to share in a rateable distribution of assets, such person must be one whose interests are affected by the sale. It cannot be said of a person claiming by title paramount to the judgment debtor that his interests would be affected by the sale, inasmuch as his title to the property cannot be affected by the sale, whether it were regular or irregular. Hence a person who claims to be a purchaser of immovable property from the judgment debtor prior to the attachment cannot apply under this rule, for the sale being prior to the attachment, his interest cannot be legally affected by the sale (i). It has similarly been held that where joint Hindu family property is sold in execution of a decree against a member of the joint family, another member claiming the whole property on the death of the judgment-debtor by survivorship is not entitled to

(f) *Abdul Aziz v Tafazul Husain* (1914) 19 C W N 326 328, 23 I C 839

(g) *Lalshani v Kuttum* (1887) 10 Mad 5"
Chakrapani v Dhany (1901) 24 Mad 311, *Dejoy Singh v Hukum Chand* (1902)

29 Cal 548 *Ajundha Prasad v Nand Lal* (1893) 15 All 318

(h) (1888) 15 Cal 488 492
 (i) *Asmunnissa Begum v Ashruff Ali* (1898) 15 Cal 488 491 492

O. 21, r. 90 apply under this rule (j) A co sharer cannot apply under this rule, for his share does not pass under the sale (k) But a reversioner entitled to succeed on the death of a Hindu widow has been held to be entitled to apply under this rule (l) A person who claims to be the purchaser of a *tenure* prior to attachment from the judgment-debtor whose interest in the tenure has been sold in execution of a decree for its own arrears of rent, is entitled to apply under this rule, for his interests are affected by the sale (m) Where immovable property has been sold in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner is entitled to apply under this rule (n) unless his right to the property is in dispute and a suit by him for a declaration of his right is still pending at the date of the application (o) If the judgment-debtor transfers the property after it has been attached and the property is then sold in execution the transferee, though subject to sec 64 is a person whose interests are affected and he is entitled to apply (p)

It has been held by the High Court of Calcutta that the expression 'persons whose interests are affected by the sale' is not limited to persons whose *proprietary or possessory* title is affected by the sale and that it includes persons whose *pecuniary interest* is affected by the sale Hence it has been held that a decree holder who has attached the property of the judgment-debtor in execution of his decree has such interest as would entitle him to apply under this rule to set aside a sale of the property held in execution of a decree obtained by another creditor even though he has lost his right to rateable distribution (q) But a plaintiff who has obtained an attachment before judgment is not entitled to apply under this rule (r) In a later decision the Calcutta High Court said that this was too narrow an interpretation of the rule and held that a plaintiff who had obtained, before the sale, an attachment before judgment and then after the sale, a decree, is entitled to apply (r1), the same view is adopted by the High Court of Madras (s)

Auction purchaser—In a case under sec 311 of the Code of 1882, their Lordships of the Privy Council held that an auction purchaser was not entitled to apply under that section as he was not a person whose immovable property has been sold within the meaning of that section (t) There is a conflict of opinion whether an auction purchaser is entitled to apply to have the sale set aside under the present rule He is so entitled if he is a person whose interests are affected by the sale within the meaning of this rule The High Court of Madras has held that he is entitled to apply under this rule The Court said If an auction purchaser's interests are affected by an order setting aside the sale, it is difficult to see why his interests are not also affected by the sale (u) The Madras High Court has held that a judgment debtor may apply although he has been adjudged insolvent (u1) The High Court of Patna has dissented from this view, and held that an auction purchaser is not entitled to apply under this rule In the view taken by that Court the expression 'interests affected by the sale' means interests

(j) *Subbarayudu v Pedda Subbarasu* (1891) 16 Mad 476

(k) *Rusheshwar Kuwar v Hari Singh* (1883) 5 All 42 *Kunjolai v Idarali* (1927) 97 I C

(l) " " " " " "

(m) " " " " " "

(n) *Abdul Gani v Dunne* (1893) 20 Cal 418 *Tummana v Alahabadi* (1890) 19 Mad 187

(o) " " " " " "

(p) " " " " " "

96 *Bhupendra Nath v Jatindra* (1933) 37 C W N 912 146 I C 339 (33) A C 788

(q) *Dhirendra Nath v Kamini* (1924) 51 Cal 495 84 I C 119 (24) A C 86

(r) *Jogendra v Manmatha* (1913) 17 C W N 80 15 I C 683 *Bachar v Sarada* (1915) 42 Cal L J 37 80 I C 699 (25) A C 1103

(r1) *Sachai v Firm of Kukara* (1933) 39 C W N 172

(s) *Venkatesha v Filla* (1933) 64 Mad L J 603 143 I C 432 (33) A M 455

(t) *Bir Mohun v Rai Uma Nath* (1893) 10 Cal 8 19 I A 154

(u) *Gopalakrishnayya v Sanjaya* (1920) 38 Mad L J 28 20 53 I C 333

(u1) *Swaminatha v Kalpanarama* (1933) 65 Mad L J 339 145 I C 655 (33) A M 694

in the property existing *before the sale*" (c) The Allahabad High Court has declined to follow the Patna decisions, and has held that an auction purchaser is entitled to apply under this rule. The Court said "In the ordinary use of the word ['interests'] in the English language it is a term covering every sort of interest recognized by law, such as, in the case of an auction purchaser, liability to pay the money, liability to complete and take a transfer of the property, and from his own point of view the necessity of finding the necessary funds, and also the necessity of carrying through to fruition the provisional contract into which he has entered. If the expression were 'interests in the property,' it would of course be confined to an interest in the property sold, *antecedent to the sale*. If the word were merely 'interest' without the plural and without the words 'in the property,' it might be possible to hold that the word 'interest' was confined to interest in the thing itself at the time of the sale. But that is not the expression" (c) In a later decision the Patna High Court has resiled from its former decisions, and agreeing with the Allahabad High Court holds that an auction purchaser is entitled to apply (c1) The High Courts of Rangoon and Lahore and the Sind Court have held that an auction purchaser is not entitled to apply under this rule (z)

Defaulting auction purchaser—A defaulting auction purchaser is under a contingent liability and is entitled to apply to set aside a resale after his default (y)

Persons entitled to rateable distribution—It is expressly provided by this rule that a person entitled to share in a rateable distribution of assets under sec. 73 is entitled to apply under this rule. An attaching judgment-creditor who has a right of rateable distribution is entitled to apply (z). But a person who is not entitled to a rateable distribution, as where the application for execution is not made *until after* the receipt of assets by the Court, cannot come in under this rule as a person whose interests are affected by the sale" (a)

Conditions of applicability of the rule—A sale held in execution of a decree can be set aside under this rule only if the following conditions concur—

- 1 There must be a *material irregularity or fraud*
- 2 The material irregularity or fraud must be in *publishing or conducting the sale*
- 3 The applicant must have sustained *substantial injury*
- 4 Such injury must have been caused by *reason of the material irregularity or fraud*

Material irregularity in publishing or conducting sale.—The following are instances of material irregularity in publishing or conducting a sale in execution—

- 1 Service of notice under O 21, r 22, upon a wrong person as legal representative, see notes to O 21, r 22, Notice to wrong person as legal representative"
- 1A Omission to determine the value of the property to be entered in the procla

(v) *Khetro Mohon v Sheikh* (1918) 3 Pat. L. J. 516 46 I. C. 614, *Kartik Chandra v Nagendra Nath* (1923) 74 I. C. 760 (24) A. P. 349

(w) *Raminandan v Jagannath* (1925) 47 All. 479 482 87 I. C. 278 (25) A. A. 459

(w1) "

(z) "

(y) *Hira Lal v Akshay* (1933) 37 C. W. N. 766 146 I. C. 879, (33) A. C. 815

(z) *Narain Pal v Rudra* (1931) 53 All. 759 133 I. C. 426 (32) A. A. 2

(a) *Kathiresan v Ramasami* (1914) 27 Mad. L. J. 30-26 I. C. 93

(b) *Krushna v Viripendra* (1933) 60 Cal. 636 146 I. C. 641 (33) A. C. 62

(c) *Athappa v Ramakrishna* (1898) 21 Mat. 51 *Madarash v Lalaniappa* (1900) 3 Mat. 6-8 *Bairam v Seth Narasingda* (19-3) 45 Mad. L. J. 403 75 I. C. 546 (3) A. P. C. 93 (1 C.) *Donth v Gokul Chand* (1937) 111 Mat. 424 139 I. C. 74 (32) A. A. 34

(d) *Moti Lal v Lhawani* (1902) 6 C. W. N. 836

C. 21, r. 90

that stated in the proclamation (e), or at a place different from that specified in the proclamation (f) the case is not merely one of material irregularity within the meaning of this rule, but that the sale is void altogether. But when the date of sale in the proclamation fell on a Sunday and the sale was held the next day that was an irregularity that did not invalidate the sale as it did not affect the attendance of bidders (g). See r 66 of this Order.

- 2 Misstatement of the value of the property or of Government revenue in the proclamation of sale such as is calculated to mislead intending bidders (h), or to prejudice the judgment-debtor (i). See r 66 of this Order.
- 3 Omission to affix a copy of the sale proclamation as required by r 67 of this Order (j).
- 4 Omission to have a drum beaten as required by r 67 of this Order read with r 54 (k).
- 5 Holding a sale of immovable property before the expiration of 30 days from the date on which the copy of the proclamation has been affixed on the Court house of the Judge ordering the sale (l). See r 68 of this Order.
- 6 Non specification of the hour to which a sale is adjourned (m). See r 69 of this Order.
- 6A Holding a sale on a day other than the one to which it is adjourned (n). See r 69 of this Order.
- 7 Omission to issue a fresh proclamation where a sale is adjourned (o) unless the proclamation has been waived (p). Where a sale proclamation had been issued at the instance of the judgment debtor six times, and a fresh proclamation was subsequently issued notifying that "in the absence of any order of postponement, the sale would be held at the monthly sales commencing on 13th July 1903 at Monghyr" but the monthly sales did not begin until 17th July owing to the absence of the presiding officer from the station, and the sale in question was held on 20th July in the course of the monthly sales, without a fresh proclamation, their Lordships of the Privy Council expressed the opinion that in holding the sale on 20th July the sale was valid (q). See r 69 of this Order.

and that the sale was therefore valid (g). See r 69 of this Order.

- 8 Default in payment of the deposit of 25 per cent as required by r 84 of this Order (r). See notes to r 84.

| | |
|--|--|
| (e) <i>Basharatulla v Uma Churn</i> (1889) 16 Cal 794. See also <i>Babu Ram v Inamullah</i> (1927) 19 All 409 99 I C 906 (27) A A 241. | |
| (f) <i>Jajarama v Prudhagiri</i> (1901) 44 Mad 33. | (h) |
| (g) <i>G</i> | (m) |
| (h) <i>Sc</i> | (n) |
| | (o) |
| (i) <i>Matt Indran v Babu Bimla</i> (1930) 5 Luck 481 124 I C 422, (30) A O 81. | (p) <i>B. pin Behari Mdri v Jalundranath</i> (1910) 37 Cal 897 6 I C 817. |
| (j) <i>Nana Kumar v Galim Chunder</i> (1891) 18 Cal 422. | (q) <i>Rang Lal Singh v Faranesh car</i> (1912) 59 Cal 26, 38 I A 200 121 I C 174. |
| (k) <i>Trimbak v Nana</i> (1886) 10 Bom 504 Gopi. | (r) <i>Ahmad Baksh v Lalla</i> (1898) 28 All 238. <i>Ahmed Singh v Sarwata</i> (1889) 16 Cal 33. |

O. 21, r. 90

Omission to attach property before sale—The question whether an irregularity in attaching the property, as where the attachment is not properly notified, affects the sale or is merely an irregularity in "conducting the sale" within the meaning of this rule, was left open by the Judicial Committee in the undermentioned case (2). In *Mahadeo v Bhola Nath* (a) a full Bench of the High Court of Allahabad held that a regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and when there has been no such attachment the sale is not merely voidable but void. In a later case (b), however, the same High Court held that the omission to attach immoveable property prior to sale amounted to a material irregularity in "conducting the sale" within the meaning of this rule. An attachment, it was said, is a step towards the sale of the judgment debtor's property. As to *Mahadeo's* case the Court said that it could no longer be treated as good law since the decision of the Privy Council in *Tassaddul v Ahmed* (c) where it was held, with reference to a proclamation of sale issued in violation of the provisions of O 21, r 68, that it was nothing more than a material irregularity and did not *ipso facto* vitiate the sale. On the other hand, in a case decided under the Code of 1859, the High Court of Calcutta expressed the opinion that an attachment is not an essential preliminary in sales in execution of decrees: it is merely a measure for the protection of the decree holder and the purchaser of the property, and the absence of attachment is not therefore, an objection which the judgment debtor is competent to raise (d). This view was adopted by the same High Court in later cases where it was held that after a sale had been confirmed, the sale was not to be considered a nullity merely by reason of the absence of attachment (e). The same High Court has held that where an objection that the property proclaimed for sale has not been attached is taken before the sale, it is the duty of the Court not to proceed with the sale and to direct an attachment (f). In the more recent case of *Panchanan v Kunja* (g), decided in 1917, the High Court of Calcutta held that the Court had no jurisdiction to sell property in execution which had not been duly attached and that omission to attach rendered the sale void *ipso facto*. This decision it is submitted is not good law and it has been dissented from in a Calcutta case decided in 1930 (h). In a Bombay case where the property was sold without previous attachment, the sale was set aside, the case being treated as one under s 47 (i). The High Court of Rangoon has held that though the absence of attachment is an irregularity, it does not render the sale absolutely void but merely voidable and, further, that the objection as to the absence of attachment does not come within this rule, but within s 47 the substantial question involved being one of notice to the judgment debtor (j). The High Court of Patna has taken the same view as was taken in the earlier Calcutta decisions and refused to follow the decision in *Panchanan's* case. In the Patna case the application to set aside the rule was made before the sale was confirmed while in the Calcutta cases the application was made after the sale was confirmed. As to this the Patna Court said that it did not make any difference, because if the sale was in fact a nullity by reason of the absence of attachment, its subsequent confirmation could not make it valid (k). The High Court of Madras has held that a sale without an attachment is an irregularity within this rule (l).

| | |
|--|-----------------------|
| (a) <i>Macnaghten v Mahabir Pershad</i> (1893) 9 Cal 656 660 10 I A 25 | (g) (1917) 42 I C 250 |
| (a) (1883) 5 All 86 | (h) " " " |
| (b) <i>Shreedhyan v Bholanath</i> (1870) 21 All 311 | (i) " " " |
| (c) (1891) 21 Cal 68 20 I A 170 | |
| (d) <i>Sharada Moyee v Woona Mojee</i> (1867) 8 W R 9 10 | |
| (e) <i>Kishory Mohun v Mahomed</i> (1891) 18 Cal 185 | (j) " " " |
| <i>Tancoo v Shub Chandra</i> (1894) 21 Cal 629 | (k) " " " |
| <i>Sasaram v Meherbun</i> (1911) 13 Cal I J 243 91 C 918 | (l) " " " |
| (f) <i>Sasaram v Meherbun</i> (1911) 13 Cal L J 243 219 250 91 C 918 | |

Fraud in publishing or conducting sale.—The words or fraud are new. The present rule requires that an application to set aside a sale on the ground of fraud in publishing or conducting the sale should be made *under this rule*. In the absence of these words in the corresponding s 311 of the Code of 1882 it was held that an application to set aside a sale on the ground of fraud could only be made under s 214 [now s 47]. Had it not been for the newly added words or fraud in this rule, such applications would have to be made under s 47 of this Code. The result would then have been, as under the Code of 1882, that a *second appeal* would lie from an order made on such application for an order made under s 47 has the force of a decree (s 2) and every decree is open to second appeal subject of course, to the provisions of ss 100 102(n). The effect of adding the words or fraud into the present rule is to transfer applications setting up fraud in publishing or conducting the sale from s 47 to the present rule. The result is that *no second appeal will now lie* from an order made on such application whether the order be one setting aside the sale or refusing to set aside the sale for the order is no longer one under s 47, but one under r 92, and only one appeal lies from an order made under r 92(n) [see O 43 r 1, cl (j), and s 104, sub-s (2)]. It will thus be seen that the object of The Legislature in requiring applications to set aside a sale on the ground of fraud in publishing or conducting the sale to be made under the present rule, instead of under s 47, is to exclude the right of second appeal from orders made on such applications with a view to bring proceedings on such applications to a speedy termination. But though only one appeal is allowed, an appeal now lies in every case from an order made under this rule and r 92, even at the instance of an auction purchaser though he may not be a party to the suit in which the sale was held. See notes to s 47, 'Execution purchaser,' ill (1), p 178.

It may here be observed that in a large majority of reported cases in which applications were made to set aside a sale on the ground of fraud in publishing or conducting the sale the applicant was the judgment debtor and the fraud alleged was that the decree holder had fraudulently kept him in the dark by omitting to serve him with the writ of attachment (r 54) and that no copy of the proclamation of sale was affixed on the property so as to inform him of the execution proceeding. In all these cases it was also alleged that the fraud first became known to the judgment debtor when the auction purchaser instituted proceedings to recover possession of the property. In some of these cases, again, the auction purchaser was charged with collusion with the decree holder in perpetrating the fraud upon the judgment-debtor (o). The observations of their Lordships of the Privy Council in *Lalla Bunsedhar v. Koonwar Bindesree* (p) have a material bearing on the question now under consideration (q). In that case their Lordships said that where a sale is impeached on the ground of fraud a difference must be made between an innocent purchaser and one tainted by the fraud which has brought about the execution sale. "The question is in the former case, which of two innocent parties shall suffer

v. *Deno Nath* (1893) 2 CWN 631
Bhabon Mohun Pal v. Vunda Lal (1899)
 26 Cal 3 4 *Hira Lal Ghose v. Chundara*
Kanto Ghose (1893) 25 Cal 539 (cases rais-
 ing question of second appeal from order
 on application to set aside sale on ground
 of fraud) *Ipsomun Kumar v. Hali Das*
 (1892) 19 Cal 883 19 IA 166 *Sadho*
v. Jahananda (1904) 26 All 101
Gaya Prasad v. Randhir Singh (1906)
 28 All 631 *Mithara Das v. La Hman*
 (1902) 24 All 239 *Burga Kumbar v. Lal*
want (1901) 23 All 478 (cases raising ques-
 tion of a regular suit to set aside sale on
 ground of fraud)

(p) (1866) 10 M.I. A 454 474

(g) *Parash Nath v Harv Charan* (1911) 39 Cal 62, 66 10 IL 361

O. 21, r. 90 in the latter whether he who has wronged the other party shall be allowed to enjoy the fruits of his wrong-doing. A Court exercising equitable jurisdiction may withhold its sanction in the one case and yet set aside the sale with or without terms in the other.

A charge against a decree holder that he and those who acted in concert with him have acted in such a manner as to prevent the best price from being obtained *does not of itself* amount to a charge of fraud within the meaning of this rule. A obtains a decree against B and obtains leave to bid at the auction sale. A then enters into an agreement with a third person that if that person would not bid at the sale A would sell the property to him if A should become the purchaser. The property is put up for sale and purchased by A. The agreement does not constitute a fraud within the meaning of this rule though it may have discouraged competition at the auction (v). In a recent case Sir Lawrence Jenkins C.J., said: "The word fraud is very loosely used in this class of cases [that is cases under r. 90] any irregularity is taken to be fraud with the consequences that such a finding involves. But a finding of fraud should be reserved for that which is dishonest and morally wrong and it is not sufficient to come to a *roguish* general finding of fraud actual fraud must be established (s). The Patna High Court has recently held that where after the publication of the sale proclamation the decree-holder agrees with the judgment-debtor not to hold the sale if payment was made within a specified time and he then proceeds to sell the property in contravention of the agreement it amounts to fraud in the matter of the conduct of the sale within the meaning of this rule (t)."

In a recent case (u) their Lordships of the Privy Council said: "Charges of fraud and collusion must no doubt be proved by those who make them—proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicious and surmises and conjecture are not permissible substitutes for those facts or those inferences but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so many a clever and dexterous knave would escape."

Substantial injury—Material irregularity or fraud standing by itself is no ground for setting aside a sale. There must be *substantial injury occasioned* by the irregularity or fraud. If the Court fails to find both irregularity and injury occasioned thereby, it is bound to dismiss the application. In other words if there be material irregularity or fraud in publishing or conducting the sale but no substantial loss is occasioned by the irregularity or fraud the applicant is not entitled to have the sale set aside (v). The substantial injury alleged by the applicant must be *proved* it cannot be *assumed* from the mere fact that there was a material irregularity or fraud in publishing or conducting the sale. The mere fact that there was a material irregularity or fraud in publishing or conducting the sale will not justify the Court in assuming that substantial injury has thereby been caused. Hence although an applicant under this rule may prove material irregularity such as non specification of Government revenue in the proclamation of sale (w) or inadequate description of the property sold (x) or the holding of the sale before the expiry of the period prescribed by r. 68 above (y), the sale will not be set aside unless it is *proved* that had it not been for the irregularity the property would have realized a substantially larger price than what it did at the sale. The same

(v) *Mahomed Mirza Baudher v Sarwat Fajaya Paghunatha* (1900) 23 Mad. 27 7 L.A. 17

(w) *Parash Nath v Hara Charan* (1911) 33 Cal. 622, 626 10 I.C. 361

(x) *Shrik Jivula Dux v Paghbar* (1918) 3 Pat. L.J. 645 45 I.C. 560

(y) *Bon Behari v Satish Kanhia* (1924) 39 Cal. L.J. 165 11 73 I.C. 391 (23) A.I.C. 3

(v) *Harbans Lal v Kundan Lal* (1899) 21 All. 149

(w) *Mahomed Ali v Mahab & Pershad* (1823) 9 Cal. 648 10 I.A. 25

(x) *Arunachellam v Arunachellam* (1899) 17 Mad. 19 15 I.A. 171

(y) *Taxanduk v Ahmad* (1894) 21 Cal. 66, 27 I.L. 16

rule applies where the sale is impeached on the ground of fraud in publishing or conducting the sale O. 21,

" Unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud — These words form part of the proviso to the rule. The language of the proviso to this rule differs from the language of the proviso to the corresponding section 311 of the Code of 1882, which was as follows —

" But no sale shall be set aside on the ground of irregularity *unless the applicant proves to the satisfaction of the Court* that he has sustained substantial injury by reason of such irregularity "

The words " unless upon the facts proved the Court is satisfied " have been substituted for the words " unless the applicant proves to the satisfaction of the Court " The object and effect of these alterations will now be explained

If an applicant under this rule proves " *material irregularity* " or " *fraud* " and if he also proves gross inadequacy of price realised at the sale, in other words if he proves " *substantial injury* ",—is this sufficient to entitle him to succeed under this rule ? The answer is that it is not—he must also prove that the inadequacy of the price has been caused " *by reason of* " the material irregularity or fraud. Now there are two possible modes in which this may be proved, namely —

- (a) by *direct* evidence, that is, by evidence connecting the material irregularity or fraud with the inadequacy of price as cause and effect or
- (b) by *circumstantial* evidence, that is, by evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price was the result of the irregularity or fraud complained of

In *Tassadul v Ahmad* (z) where a sale was sought to be set aside under the corresponding s 311 of the Code of 1882 on the ground that it was held before the expiration of 30 days from the date of the proclamation (r 68), their Lordships of the Privy Council, after referring to that section, said —

" In the application of that section [that is, s 311] it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence, and it would be extremely improbable that injury could have happened from the non compliance with the strict letter of s. 290 [now r 68]. Their Lordships cannot accept the judgment of the Judicial Commissioner that loss is to be inferred from the mere fact that a sale was held without full compliance with the provisions of s 290 [now r 68]. The section [that is s 311] clearly contemplates *direct evidence* on the subject "

Relying on the above passage, the High Court of Allahabad held that to succeed under that section the applicant must prove that the inadequacy in the sale price was the result of a material irregularity, and that the co existence of an irregularity and an inadequacy however gross in the sale price was not sufficient in the absence of *direct evidence* to establish a casual connection between the one and the other. In other words, the applicant must connect the irregularity with the inadequacy of price as cause and effect *by means of direct evidence* (a). On the other hand, it was held by the High Courts of Madras (b) and Calcutta (c) that the fact that the inadequacy of price fetched at the sale was the result of the irregularity complained of might be established *either* by direct

(z) (1894) 21 Cal 56, 20 IA 176

(a) *Jagan Nath v Makund* (1896) 18 All 37,
Shirin v Agha Ali Khan (1896) 18 All
141

(b) " " " " " "

(c) " " " " " "
22 Cal 626

O. 21, r. 90 evidence, or might be inferred when such inference was reasonable having regard to the nature of the irregularity and the extent of the inadequacy. As regards the words "direct evidence" the High Court of Calcutta said that their Lordships meant by that expression that there must be evidence showing that substantial injury was the necessary result of the irregularity complained of (d).

The distinction between the Allahabad decisions on the one hand and the Madras and Calcutta decisions on the other may be explained by an illustration. In execution of a decree obtained by A against B, B's one fourth share in certain property is sold for Rs 200. B seeks to set aside the sale alleging that the property was sold at an adjourned sale that no hour was fixed for the sale as required by r 69 that consequently there were only three bidders at the sale, and that owing to that circumstance the property fetched the grossly inadequate price of Rs 200. It is proved that the hour to which the sale was adjourned was not fixed, in other words, material irregularity is proved. Substantial injury is also proved by evidence of the sale of a share smaller than one fourth of the same property for Rs 4,000. The fact that there were only three bidders is also proved. In such a case the High Courts of Madras and Calcutta would under the old section set aside the sale on the ground that the paucity of bidders could reasonably be ascribed to the non specification of the hour, and the low price could reasonably be inferred from the fact of the paucity of bidders (e). The High Court of Allahabad, however, would not set aside the sale on such an inference. That Court would require direct evidence to show that the paucity of bidders was due to the non specification of the hour and that the inadequacy of price was due to paucity of bidders.

The words "unless upon the facts proved the Court is satisfied" have been substituted in the proviso to give effect to the Madras and Calcutta decisions. What is necessary under the proviso is that the Court should be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of, and if the facts proved to do so satisfy the Court, that is sufficient. It is no longer necessary to connect the irregularity or fraud with the inadequacy of price as cause and effect by means of direct evidence. The result is that a sale will be set aside under the present rule if there be either direct evidence connecting the irregularity with the inadequacy of price or evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy was the result of the irregularity complained of and the Allahabad High Court now follows this rule (f). If there be no such evidence the sale must be confirmed (g). If the property has been sold in lots and the irregularities have led to an inadequate price being realized for some lots the sale as to all the lots must be set aside (h).

The mere fact that the property realised at the auction sale only one half of the value entered in the proclamation of sale was held to be no ground for setting aside the sale under this rule (i).

Necessary parties—The decree holder is a necessary party to an application under this rule (j). Under the Code of 1882 there was a conflict of opinion whether an auction purchaser was a necessary party to an application under the corresponding s 312 (k). Under the present Code the proviso to rule 92 would seem to imply that the auction

(j) *Babu Ram v Inamullah* (1927) 49 All 402

(k)

(g)

only imposes a duty on the Court to give him notice (l) Where property is bought at a Court sale by A in the name of B, A the beneficial owner, is not a necessary party to an application under this rule. Hence if an order is made setting aside the sale in a proceeding to which B was a party it will bind A, though A was not joined as a party to the proceeding (m)

Bona fide purchaser for value without notice—If the conditions of this rule are satisfied, the sale will be set aside though the purchaser may be a *bona fide* purchaser for value without notice of the irregularity or fraud in publishing or conducting the sale (n)

Waiver and estoppel—If the judgment-debtor knowing of an irregularity or fraud lies by and allows the sale to proceed without objection, he will be estopped from impeaching the sale on the ground of irregularity or fraud though substantial injury has been caused. In *Arunachellam v. Arunachellam* (o) their Lordships of the Privy Council said: 'It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knows well, but of which the execution creditor or decree holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated.' In *Girdhari Singh v. Hurdeo Narain* (p), the notification of sale had stated the Government revenue to be Rs. 3,146 instead of Rs. 8,146 the sale being fixed for the 5th of August 1872. The judgment-debtor applied for a postponement of sale and stated that he wished to raise money to pay off the decree holder, and in his petition he added: 'Under such circumstances it is prayed that a postponement of one month be granted, the attachment and the notification of sale being maintained.' Upon that petition the sale was postponed for one month without the issue of a second notification. The decretal amount not having been paid the property was put up for sale. The judgment debtor applied to set aside the sale on the ground that the Government revenue was not correctly stated and that the property therefore fetched a very low price. Upon these facts their Lordships of the Privy Council held that though the misstatement of the Government revenue amounted to a material irregularity in publishing the sale, the judgment-debtor was not entitled to have the sale set aside, as the petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. But it is different where an application for a postponement of sale does not contain any such admission and, moreover, it is refused. In such a case there is no estoppel (q). The objection as to irregularity in publishing or conducting the sale cannot be taken for the first time in the Court of appeal (r), but it may be so taken if no fresh evidence is necessary (s).

(l)

(m)

(n)

(o)

(l) 9 A R 311 *Hardians Lal v. Pam Nath* (1929) 27 All L J 619 228 J L 449.
(m) A A 704 *Mahomed v. Sakharam* (1930) 54 Bom 314 125 I C 908 (30).
A B 290 *Siraskandaray v. Narasimha* (1933) 56 Mad 356 144 I C 414 (33).
A M 225 *The New Birbhum Coal Co. v. Surendra Nath* (1933) 37 C W N 1054 (34) A C 205.

(p) (1876) 31 A 230 *Chattan Lal v. Mahomed Ibrahim* (1933) 55 All 519, 143 I C 673 (33) A A 546.

(q) *Thakor v. Leelanand* (1881) 7 Cal 613, *Jaman v. Kunhayan* (1894) 17 Mad 204.

(r) *Olpherts v. Mahabir Pershad* (1843) 10 I A 23 30 9 Cal 656 661 *Mahadeo v. Dhoba* (1913) 2 Lat 916, 918 41 C 834, (23) A I 253.

(s) See *Mahomed Meerza v. Sarwan* (1900) 27 I A 17 at p 25 *Tekau Kruana v. Mofa Chand* (1913) 40 I A 140, 145 40 Cal 633, 19 I C 296.

21, r. 90 Where no application is made under this rule.—If no application is made to set aside a sale under the present rule, an order must be made confirming the sale, see r 92 below

Evidence to be taken—If the application raises questions of fact the Court should give the parties proper opportunity to adduce evidence (f)

Questions outside the scope of this rule.—The question whether the decree in execution whereof the property was sold was obtained without service of summons on the judgment debtor (u), or whether the decree was obtained by fraud (v); or whether the Court had jurisdiction to sell the property (u), or whether the sale was brought about by the fraud of the decree holder the auction purchaser and others (x) is outside the scope of this rule See note below "application to set aside sale on other grounds"

Objections not raised in the application.—The Court should not under this rule consider objections not expressly taken in the application (y)

Compromise of proceedings under this rule—It has been held by the Patna High Court that a proceeding to set aside a sale under this rule is not a proceeding in execution within the meaning of O 23, r 4, but that it is a proceeding in the suit itself. A compromise therefore of proceedings under this rule may be recorded under O 23, r 3 (z). But this decision is of doubtful authority.

Whether O 9 applies to applications under this rule—The provisions of O 9 do not apply to proceedings in execution and therefore do not apply to an application under this rule (a). See notes to O 9 r 9, and O 9, r 13 "Whether this rule applies to proceedings in execution See also notes below, Appeal"

Suit to set aside sale on ground of material irregularity—Where an application made by a judgment-debtor under this rule to set aside a sale on the ground of material irregularity in publishing or conducting the sale is disallowed and the sale is confirmed under r 92 (1) he is precluded by virtue of the provisions of r 92 (3) from bringing a suit to set aside the sale on the same grounds (b). But this rule does not apply in the case of revenue sales in Madras (c).

Limitation—An application under this rule must be made within 30 days from the date of sale [Limitation Act 1908, Sch I, art 166]. But where the irregularity affecting the sale has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor he is entitled to apply under this rule whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him (d).

The point of distinction as regards limitation between the old law and the new law is this, that while under the Code of 1882 the application to set aside a sale on the ground of fraud in publishing or conducting a sale had to be made under s 244 (now s 47) and the period of limitation for the application was 3 years from the date of sale (e), such

(f)

(v)

(c) *Khagendra v Pran Nath* (1902) 29 Cal 395

29 I A 99

(u) *Srinivasa v Agha Ali* (1896) 18 All 141 145(z) *Bhagwan Das v Suraj Prasad* (1904) 47

All 217 811 C 1031 (25) A A 146

(y) *Harbans v Kundan* (1899) 21 All 140*Gopichand v Benarsi Das* (1919) 1 Lah

L J 197 53 I C 94

(x) *Choudhary v Choudhary* (1901) 6 Pat L

J 23 63 I C 608 (21) A P 107

(a) *Bharat Chandra v Jasim Sarkar* (1917)1 C W N 69 41 C 586 *Basara-**tullah v Rens d'lin* (1926) 53 Cal 679

96 I C 705 (26) A C 773

(b)

(c) *Jagannatha v Kathaperumal* (1907) 15

78 105 I C 89 (27) A M 1035

(d)

(e) *Limitation Act 1908 sch I art 181 Aemal**Chand v Deno Nath* (1898) 2 C W N 601*Hari Lal Ghose v Chandra Kant Ghose*

(1896) 26 Cal 539

O. 21, r. 90 Where no application is made under this rule.—If no application is made to set aside a sale under the present rule, an order must be made confirming the sale, see r 92 below

Evidence to be taken—If the application raises questions of fact the Court should give the parties proper opportunity to adduce evidence (i)

Questions outside the scope of this rule.—The question whether the decree in execution whereof the property was sold was obtained without service of summons on the judgment debtor (u) or whether the decree was obtained by fraud (v), or whether the Court had jurisdiction to sell the property (u) or whether the sale was brought about by the fraud of the decree holder the auction purchaser and others (x) is outside the scope of this rule See note below 'application to set aside sale on other grounds'

Objections not raised in the application.—The Court should not under this rule consider objections not expressly taken in the application (y)

Compromise of proceedings under this rule—It has been held by the Patna High Court that a proceeding to set aside a sale under this rule is not a proceeding in execution within the meaning of O 23 r 4, but that it is a proceeding in the suit itself. A compromise therefore of proceedings under this rule may be recorded under O 23, r 3 (2). But this decision is of doubtful authority.

Whether O 9 applies to applications under this rule—The provisions of O 9 do not apply to proceedings in execution and therefore do not apply to an application under this rule (a). See notes to O 9, r 9 and O 9, r 13, 'Whether this rule applies to proceedings in execution' See also notes below, 'Appeal'

Suit to set aside sale on ground of material irregularity—Where an application made by a judgment debtor under this rule to set aside a sale on the ground of material irregularity in publishing or conducting the sale is disallowed and the sale is confirmed under r 92 (1) he is precluded by virtue of the provisions of r 92 (3) from bringing a suit to set aside the sale on the same grounds (b). But this rule does not apply in the case of revenue sales in Madras (c).

Limitation—An application under this rule must be made within 30 days from the date of sale [Limitation Act 1908, Sch. I, art 166]. But where the irregularity affecting the sale has by the fraud of the decree holder or other parties to the sale been kept concealed from the judgment debtor, he is entitled to apply under this rule, whether the sale has been confirmed or not, and the time for making the application is to be computed from the date when the fraud first became known to him (d).

The point of distinction as regards limitation between the old law and the new law is this that while under the Code of 1852 the application to set aside a sale on the ground of fraud in publishing or conducting a sale had to be made under s 244 (now s 47) and the period of limitation for the application was 3 years from the date of sale (e), such

(i) *Jadmandan v. Wajid Ali* (1937) 11 Pat 54

149 I C 303 (32) A P 306

(ii) *Net Lalit v. Sheikh Karim* (1898) 23 Cal 686

689

(iii) *Ahagendra v. Pran Nath* (1902) 29 Cal 395

29 I A 99

(iv) " "

(v) " "

(vi) " "

(vii) " "

(viii) " "

(ix) " "

(b)

(c) *Jagannatha v. Kathaperuvai* (1907) 15

Mad 76 105 I C 88 (27) A M 1035

(d) " "

(e) " "

(f) " "

(g) " "

application must now be made under the present rule, and the period of limitation is 30 days from the date of sale. See notes below, 'Application to set aside sale on other grounds.'

Applications to set aside sale on other grounds—When the auction purchaser is the decree holder himself and when an application is made to set aside the sale on a ground other than that covered by the present rule and no application has been made under r 89, the case falls within s 47, and hence there is a second appeal (f). Similarly where a judgment debtor applies to have a sale set aside not only on the ground of material irregularity in publishing and conducting the sale, but also on the ground that no notice of the application for attachment and sale was given as required by O 21, r 22, the case falls within s 47, and hence there is a second appeal (g). Neither this rule nor r 92 applies to such cases. It must, however, be noted that where an application really comes under the present rule, the mere mention of s 47 in the application will not make it an application under s 47 for the purposes either of an appeal or of limitation (h). See note above, "Questions outside the scope of this rule."

Joinder of claim under this rule with claim under sec 47—A claim to set aside a sale on the ground of material irregularity under this rule may be combined with a claim for a declaration that the sale is a nullity as the decree was passed after the death of the judgment debtor (i).

Rule not applicable to cases under the Bengal Tenancy Act—In cases under the Bengal Tenancy Act where a tenure is sold for arrears of rent an application for setting aside a sale on the ground of material irregularity or fraud must be made under s 174 of that Act which excludes O 21, r 90. That section allows one appeal and in the case of small tenures the right of appeal is restricted by s 153 of that Act to cases where a question of title is involved. See in this connection the undernoted case (j).

Whether sale can be challenged by way of defence in a suit for possession—See notes to r 92 below under the same head.

Appeal—An appeal lies from an order under this rule and rule 92 setting aside or refusing to set aside a sale [O 43, r 1, cl (j)]. But no second appeal lies from the order of the first appellate Court (l). See s 104, sub sec (2), and notes above, "Fraud in publishing or conducting sale." Nor does an appeal lie under the Letters Patent from the order of the first appellate Court (h). See notes above, "Application to set aside sale on other grounds." The insolvency of the judgment debtor does not incapacitate him from filing or presenting an appeal (i).

It has been held by the High Court of Calcutta that an appeal lies from an order dismissing an application under this rule for default, the reason given being that the effect of such an order is to confirm the sale under r 92 (m). *A fortiori* it is so if the order dismissing the application for restoring the original application on the file also confirms the sale (n). These decisions were doubted in a later case (o) which held that

(f) *Superior Bank Ltd v Budd Singh* (1924) 22 All L J 413, 83 I C 1028, (24) A A 698. See also *Akshita v Govindarajulu* (1924) 47 Mad L J 549, 81 IC 975.

(g) (24) A 31 7 8.

(h)

(i)

(j)

(k)

941 *Satyendra Nath v Charn Chandra* (1927) 45 Cal L J 557, 104 I C 188, (27) A C 657.

(l)

(m)

(n)

(o)

0. 21, 90, 91 an order of dismissal by default is not a confirmation of the sale and does not preclude the party from making a fresh application, while a dismissal on the merits, or when the applicant does not appear and the opposite party does appear is appealable under O 43 r 1(j). The case last cited was dissented from by the same High Court in *Ansarali v Bhim Sankar (p)*, where it was held that an appeal lies from an order dismissing an application under this rule for default, where such dismissal is for the non appearance of the applicant or for non appearance of both the parties and even when no formal order is recorded under r 92 confirming the sale.

Revision—No revision lies from an order dismissing an application under this rule for default (q). See notes above. Appeal.

Appeal to Privy Council—See notes to r 92 under the same head.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest

Application to set aside sale—This rule enables the auction purchaser to proceed by an application to set aside the sale where the judgment debtor had no saleable interest in the property. It does not apply where a sale is sought to be set aside by an auction purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (r). The remedy of the purchaser in such a case is by a regular suit. As to refund of purchase money when a sale is set aside on the ground that the judgment debtor has no saleable interest see r 93 below. In two Madras cases a decree holder brought to sale and purchased property which did not belong to the judgment debtor and notified satisfaction of his decree. On discovering his mistake he filed a fresh execution application, but the Court held that he could not execute again without first setting aside the sale under this rule (s).

No saleable interest—This rule applies only where a judgment debtor has no saleable interest at all. Hence the rule does not apply if the judgment debtor has even a partial interest in the property sold (t) however small that interest may be. In other words a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment debtor had a saleable interest in a very small portion of the property, and had no saleable interest in the major portion of the property (u). For the purposes of this rule a mortgagor has a saleable interest in the mortgaged property even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (v) and although the amount due under the mortgage exceeds the value of the property (w).

The decision that a sale cannot be set aside under this rule if the judgment debtor has any interest in the property does not apply to a sale under a mortgage decree held under the rules of the Calcutta High Court and the conditions of sale framed thereunder. Therefore a purchaser under such a sale is entitled to have it set aside if the property

(p) (19 9) 56 Cal 969 119 I C 374 (9) A C 407

(q)

(r)

(s)

(t)

(u) *Sonaram v Moh ram* (1901) 28 Cal 235

(v) *Protop Chunder v Panof*, (1893) 9 Cal 508

(w) *Sant Lal v Lams*, (1887) 9 AU 16*

id was under attachment at the date of sale and that the attaching creditor was not joined as a party to the suit (x)

Necessary parties—See the proviso to r. 92, sub-r. (2)

Limitation—The application under this rule must be made within 30 days from the date of sale. Limitation Act, 1908, sch. I, art. 166

Appeal—An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O. 43 r. 1, cl. (j)]

Withdrawal of purchase money by auction purchaser from Court—See notes to s. 171, case (bb)

Compensation for loss of part of property bought at a Court sale—A purchaser who is deprived of a part of the property bought at a Court sale is not entitled to compensation as against the judgment debtor for the loss of that part. The principle is that apart from the case provided for by this rule and apart from fraud a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment-debtor in the property. The Court which sells the property does not guarantee the title and the maxim *Caveat emptor* applies. It does not make any difference that the property was sold in execution of a mortgage decree and the mortgagee himself is the purchaser (y). See notes to r. 94 below, "What passes at a Court sale."

92. [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

Alterations in the rule —

- 1 The corresponding s. 312 of the Code of 1882 applied only to applications referred to in r. 90. The present rule applies also to applications referred to in rr. 89 and 91 [Code of 1882, ss. 310A and 313] see sub-r. (1)
- 2 In sub-r. (1), the words, "as regards the parties to the suit," which occurred in s. 312 after the words "confirming the sale," have been omitted
- 3 In sub-rule (3), the words "on the ground of such irregularity," which occurred in the old section after the words "no suit to set aside," have been omitted

(x) *Mohan Lal v. Varibhai* (1923) 33 C. W. N. 17; 114 I. C. 87. (24) A. C. 207.
(y) *Abinash v. Babbar* (1921) 25 C. W. N. 756.

63 I. C. 126, (21) A. C. 115. *Sabapathi v. Theendraraya* (1920) 43 Mad. 309, 54 I. C. 515.

O. 21, r. 90, 91 an order of dismissal by default is not a confirmation of the sale and does not preclude the party from making a fresh application, while a dismissal on the merits, or when the applicant does not appear and the opposite party does appear, is appealable under O 43, r 1 (j). The case last cited was dissented from by the same High Court in *Anwarali v Bhim Sankar* (p) where it was held that an appeal lies from an order dismissing an application under this rule for default, where such dismissal is for the non appearance of the applicant or for non appearance of both the parties and even when no formal order is recorded under r 92 confirming the sale.

Revision—No revision lies from an order dismissing an application under this rule for default (q). See notes above "Appeal."

Appeal to Privy Council—See notes to r 92 under the same head.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest

Application to set aside sale—This rule enables the auction purchaser to proceed by an application to set aside the sale where the judgment debtor had no saleable interest in the property. It does not apply where a sale is sought to be set aside by an auction purchaser on the ground that he had been induced by misrepresentation or concealment to buy the property for more than its real value (r). The remedy of the purchaser in such a case is by a regular suit. As to refund of purchase money when a sale is set aside on the ground that the judgment debtor has no saleable interest, see r 93 below. In two Madras cases a decree holder brought to sale and purchased property which did not belong to the judgment debtor and notified satisfaction of his decree. On discovering his mistake he filed a fresh execution application, but the Court held that he could not execute again without first setting aside the sale under this rule (s).

No saleable interest—This rule applies only where a judgment debtor has no saleable interest at all. Hence the rule does not apply if the judgment-debtor has even a partial interest in the property sold (t), however small that interest may be. In other words a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment debtor had a saleable interest in a very small portion of the property, and had no saleable interest in the major portion of the property (u). For the purposes of this rule, a mortgagor has a saleable interest in the mortgaged property, even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (v) and although the amount due under the mortgage exceeds the value of the property (w).

The decision that a sale cannot be set aside under this rule if the judgment debtor has any interest in the property does not apply to a sale under a mortgage decree held under the rules of the Calcutta High Court and the conditions of sale framed thereunder. Therefore a purchaser under such a sale is entitled to have it set aside if the property

(p) (1909) 56 Cal 609 119 I C 374 (29) A C 407

(q) " " "

(r)

(s)

Jaganmada v Basuwayji (1927) 53 Mad L J 255 104 I C 614 (27) A M 635
(t) *Rani Coomari v Sitabai* (1883) 9 Cal 678
Ram Narain v Dwarkanath (1900) 27 Cal 264

(u) *Somaram v Moharam* (1901) 28 Cal 235

(v) *Probas Chunder v Punoty* (1893) 9 Cal 508

(w) *Sant Lal v Ramji* (1887) 9 All 167

sold was under attachment at the date of sale and that the attaching creditor was not joined as a party to the suit (x)

Necessary parties—See the proviso to r 92 sub r (2)

Limitation—The application under this rule must be made within 30 days from the date of sale Limitation Act, 1908, sch I, art 166

Appeal—An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O 43, r 1, cl (j)]

Withdrawal of purchase money by auction purchaser from Court—See notes to s 151 case (bb)

Compensation for loss of part of property bought at a Court sale—A purchaser who is deprived of a part of the property bought at a Court sale is not entitled to compensation as against the judgment debtor for the loss of that part The principle is that apart from the case provided for by this rule and apart from fraud a purchaser at an auction sale must abide by his bargain What is sold and bought is the right title and interest of the judgment debtor in the property The Court which sells the property does not guarantee the title and the maxim *Caveat emptor* applies It does not make any difference that the property was sold in execution of a mortgage decree and the mortgagee himself is the purchaser (y) See notes to r 94 below 'What passes at a Court sale'

92. [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made

Alterations in the rule—

- 1 The corresponding s 312 of the Code of 1882 applied only to applications referred to in r 90 The present rule applies also to applications referred to in rr 89 and 91 [Code of 1882 ss 310A and 313] see sub r (1)
- 2 In sub r (1) the words 'as regards the parties to the suit,' which occurred in s 312 after the words 'confirming the sale,' have been omitted
- 3 In sub rule (3) the words 'on the ground of such irregularity,' which occurred in the old section after the words 'no suit to set aside,' have been omitted

(x) *Mohun Lal v. Nambala* (1920) 33 C W N 17 118 I C 847 (29) A C 207
(y) *Ab nash v. Bhuvan* (1921) 23 C W N 756

63 I C 196 (21) A C 115 *Sabapatil v. Thandarasaya* (1920) 43 Mad 309 54 I C 515

O. 21,
rr. 90, 91

an order of dismissal by default is not a confirmation of the sale and does not preclude the party from making a fresh application, while a dismissal on the merits, or when the applicant does not appear and the opposite party does appear, is appealable under O 43, r 1 (j). The case last cited was dissented from by the same High Court in *Ansarali v. Bhim Sankar* (p), where it was held that an appeal lies from an order dismissing an application under this rule for default, where such dismissal is for the non appearance of the applicant or for non appearance of both the parties and even when no formal order is recorded under r 92 confirming the sale.

Revision—No revision lies from an order dismissing an application under this rule for default (g). See notes above "Appeal".

Appeal to Privy Council—See notes to r 92 under the same head.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold.

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest

Application to set aside sale—This rule enables the auction purchaser to proceed by an application to set aside the sale where the judgment debtor had no saleable interest in the property. It does not apply where a sale is sought to be set aside by an auction purchaser on the ground that he had been induced by *misrepresentation or concealment* to buy the property for more than its real value (r). The remedy of the purchaser in such a case is by a regular suit. As to refund of purchase money when a sale is set aside on the ground that the judgment debtor has no saleable interest, see r 93 below. In two Madras cases a decree holder brought to sale and purchased property which did not belong to the judgment debtor and notified satisfaction of his decree. On discovering his mistake he filed a fresh execution application but the Court held that he could not execute again without first setting aside the sale under this rule (s).

No saleable interest—This rule applies only where a judgment debtor has no saleable interest at all. Hence the rule does not apply if the judgment debtor has even a partial interest in the property sold (t), however small that interest may be. In other words a purchaser is not entitled to have a sale set aside under this rule on the ground that the judgment debtor had a saleable interest in a very small portion of the property, and had no saleable interest in the major portion of the property (u). For the purposes of this rule, a mortgagor has a saleable interest in the mortgaged property even though a decree has been obtained by the mortgagee for the enforcement of the mortgage (v) and although the amount due under the mortgage exceeds the value of the property (u).

The decision that a sale cannot be set aside under this rule if the judgment debtor has any interest in the property does not apply to a sale under a mortgage decree held under the rules of the Calcutta High Court and the conditions of sale framed thereunder. Therefore a purchaser under such a sale is entitled to have it set aside if the property

(p) (1929) 50 Cal 900 119 I C 574 (29) A C

(q) 407

(r)

(u) *Soniram v. Moh ram* (1901) 28 Cal 40

(v) *Protap Chunder v. Panikhy* (1883) 9 Cal 508

(c) *Sant Lal v. Ranji* (1887) 9 All 167

sold was under attachment at the date of sale and that the attaching creditor was not joined as a party to the suit (x)

Necessary parties—See the provisions to r 92 sub r (2)

Limitation—The application under this rule must be made within 30 days from the date of sale. Limitation Act, 1908, s. 1, art 166

Appeal.—An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and rule 92 [O 43 r 1, cl (j)]

Withdrawal of purchase money by auction purchaser from Court—See notes to s 151, case (bb)

Compensation for loss of part of property bought at a Court sale—A purchaser who is deprived of a part of the property bought at a Court sale is not entitled to compensation as against the judgment debtor for the loss of that part. The principle is that apart from the case provided for by this rule and apart from fraud a purchaser at an auction sale must abide by his bargain. What is sold and bought is the right, title and interest of the judgment debtor in the property. The Court which sells the property does not guarantee the title and the maxim *Caveat emptor* applies. It does not make any difference that the property was sold in execution of a mortgage decree and the mortgagee himself is the purchaser (y). See notes to r 94 below, "What passes at a Court sale"

92. [Ss. 312, 314.] (1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

Sale when to become absolute or be set aside

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

Alterations in the rule.—

- 1 The corresponding s 312 of the Code of 1882 applied only to applications referred to in r 90. The present rule applies also to applications referred to in rr 89 and 91 [Code of 1882, ss 310A and 313] see sub r (1)
- 2 In sub r (1), the words, "as regards the parties to the suit," which occurred in s 312 after the words "confirming the sale," have been omitted
- 3 In sub rule (3), the words "on the ground of such irregularity," which occurred in the old section after the words "no suit to set aside," have been omitted

(x) *Mohun Lal v Vanibala* (1929) 33 C W N 17, 118 I C 89 (29) A C 207
(y) *Abinash v Dauben* (1921) 25 C W N 756,

63 I C 126, (21) A C 115 *Sobapath*
v Thandalaroya (1920) 43 Mad 309, 54 I C 515

21, r. 92 Shall make an order confirming the sale—These words are mandatory and when no application is made under rules 89, 90 or 91 or if such application is made and disallowed the Judge is bound by this rule to confirm the sale (a) and this is so even if the decree has been reversed on appeal after the sale and before confirmation (a) See note 'Effect of reversal of decree upon sale where decree reversed before confirmation of sale' at p 244

Notice—Notice should be given to the decree holder and auction purchaser (b) But it has been held that if the application is under r 89 notice need not be given to the decree holders who have applied for rateable distribution (c) If notice is not given to a party interested the order setting aside the sale is not for that reason a nullity though it may not be binding on him (d)

No suit will lie to set aside an order made under this rule—No suit will lie to set aside an order made under this rule by any person against whom such order is made The only remedy of the party against whom the order is made is to appeal from the order under O 43 r 1 cl (j) Now an order under this rule may be—

(1) either an order confirming the sale, or

(2) an order setting aside the sale

Order confirming the sale—An order confirming the sale may be made—

(i) either where no application is made at all to set aside the sale, or

(ii) where an application is made and disallowed

No suit will lie in either case to set aside an order confirming the sale (e)

Order setting aside the sale—The language of sub rule (3) makes it clear that no suit will lie to set aside an order setting aside a sale made on an application under rule 89 90 or 91 (f) The party against whom the order is made has a remedy by way of appeal under O 43 r 1 cl (j)

The suits barred under sub rule (3) are suits to set aside (1) an order confirming a sale under sub rule (1) and (2) an order setting aside a sale under sub rule (2) Sub rule (3) refers to applications under rr 89 90 and 91 A suit by an auction purchaser for a return of the purchase money on the ground that the judgment-debtor has no saleable interest in the property is not barred by sub rule (3) (g) above see notes to r 93

But a sale by a judgment-debtor which was neither included in the mortgage nor in the decree, but which found its way into the certificate of sale in some unexplained manner, is not barred by sub rule (3), such a case is not one of material irregularity within r 90 nor does it fall under r 89 or r 91 above (g) nor does sub rule (3) bar a suit by the mortgagor judgment-debtor for a declaration that the sale does not extinguish his equity of redemption (h) A person claiming title to a property attached and sold by the Insolvency

- (a) *Vanhalal v Umrao S nph* (1931) 53 I A 30 35 C W N 331 130 I C 686 (31) A IC 33 *Ganda Mal v Tar D n* (1932) 13 All 761 142 I C 6-6 (33) A L 99
(a) *Somnathu v Muthu Arukha* (1933) 56 Mad 808 143 I C 854 (33) A M 598
(b) *Ramshwar v Manojal* (1930) 9 Pat 310 125 I C 570 (30) A L 318 D pchand v Nho Prasad (1929) 51 All 910 119 I C 103 (29) A A 593
(c) *Ramnath v Grandhi* (1931) 55 Mad 61 132 I C 141 (31) A M 46
(d) *Dwarkanath v Arukha* (1933) 5 C W N 81 144 I C 814 (33) A C 464
(e) *Elum Singh v Sarada* (1939) 16 Cal 33 40 *Damodar v Nayak* (1901) 26 Bom 40

- Gajrajmati Taram v Khar Huss n* (1907) 29 All 106, 31 I A 3 *Jalmarayan v Appayya* (19 11 44 Mad 351 62 I C 703 (21) A M 121 (Material irregularity)
Agha Hussain v Ghulam Ali (19-5) 23 All L J 946 (26) A A 35 89 I C 1018 (Amendment of decree after sale) *Ma Saw v Maung Kyaw* (1924) 5 Rangoon 105 I C 706, (24) A R 18
(f) See *Shib S nph v Muzat S nph* (1906) 18 All 437 *Sham Jethu Lal v Jup Kulkore* (1928) 20 All 379 (no irregularity)
(g) *Lulagi Das v Kears* (1924) 50 All 686, (28) A A 363
(h) *Kal pada v Basanta* (1937) 59 Cal 117 133 I C 177 (31) A C 126

ri

21, r. 92 Shall make an order confirming the sale—These words are mandatory and when no application is made under rules 89, 90 or 91 or if such application is made and disallowed the Judge is bound by this rule to confirm the sale (z), and this is so even if the decree has been reversed on appeal after the sale and before confirmation (a) See note "Effect of reversal of decree upon sale where decree reversed before confirmation of sale," at p 244

Notice—Notice should be given to the decree holder and auction purchaser (b) But it has been held that if the application is under r 89 notice need not issue to the decree holders who have applied for rateable distribution (c) If notice is not given to a party interested the order setting aside the sale is not for that reason a nullity though it may not be binding on him (d)

No suit will lie to set aside an order made under this rule—No suit will lie to set aside an order made under this rule by any person against whom such order is made The only remedy of the party against whom the order is made is to appeal from the order under O 43, r 1, cl (j) Now an order under this rule may be—

- (1) either an order confirming the sale, or
- (2) an order setting aside the sale

Order confirming the sale—An order confirming the sale may be made—

- (i) either where no application is made at all to set aside the sale, or
- (ii) where an application is made and disallowed

No suit will lie in either case to set aside an order confirming the sale (e)

Order setting aside the sale—The language of sub rule (3) makes it clear that no suit will lie to set aside an order setting aside a sale made on an application under rule 89, 90 or 91 (f) The party against whom the order is made has a remedy by way of appeal under O 43, r 1, cl (j)

The suits barred under sub rule (3) are suits to set aside (1) an order confirming a sale under sub rule (1), and (2) an order setting aside a sale under sub rule (2) Sub rule (3) refers to applications under rr 89, 90 and 91 A suit by an auction purchaser for a return of the purchase money on the ground that the judgment-debtor has no saleable interest in the property sold is barred under sub rule (3), for the case is within r 91 above see notes to r 93, "Suit for a return of purchase money where no saleable interest" But a sale by a judgment debtor to recover property sold in execution of a mortgage decree which was neither included in the mortgage nor in the decree, but which found its way into the certificate of sale in some unexplained manner, is not barred by sub rule (3) or does it fall under the order of redemption (h)

A person claiming title to a property attached and sold by the Insolvency

- (c) *Nanheal v Umrao Singh* (1931) 58 J A 50 35 C W N 381 130 L 686 (31) A PC 33 *Gandu Mal v Toj Daa* (1932) 13 Lah 761, 142 IC 686 (53) A L 99
- (d) *Sornmuthu v Vuthu Krishna* (1933) 56 Mad 808, 143 IC 851 (33) A M 598
- (e) *Rameshwar v Mangal* (1930) 9 Pat 210 125 IC 570 (30) A P 318, *D. pchand v Shoo Tread* (1933) 51 All 910 119 IC 103, (29) A A 593
- (f) *Ramnath v Grandhi* (1932) 55 Mad 61, 132 IC 141, (31) A M 465
- (g) *D. ramkath v Krishna* (1933) 37 C W N 84 144 IC 814 (33) A C 461
- (h) *Bhims Singh v Sarwan* (1889) 16 Cal 37 40, *Damodar v Vinayak* (1902) 20 Bom 40,

(j)

(g)

(28) A A 363

(h) *Kalpada v Basanta* (1932) 59 Cal 117, 138 IC 177, (32) A C 120

Court as belonging to the insolvent is entitled to bring a suit to establish his title to the property, though his claim has been disallowed by the Insolvency Court. The present rule is no bar to such a suit (i)

Whether an execution sale can be challenged by way of defence in a suit for possession—Where a judgment-debtor does not question the validity of a sale under r 90 above, and a suit is brought by the auction purchaser against him for possession, it is not competent to him to challenge the sale in that suit. The penalty imposed on a negligent judgment-debtor is set out in r 92, and it is that the Court shall make an order confirming the sale and thereupon the sale shall become absolute. This amounts to a judicial determination that none of the objections exists on which the validity of the sale could have been questioned (j). The dismissal, however, of an application made by a judgment-debtor under r 90 does not preclude him, in a suit for possession by the auction purchaser, from pleading by way of defence that the property sold in execution of a mortgage decree passed against him and bought by the purchaser was not included in the mortgage suit or decree, but was fraudulently inserted in the sale certificate (k)

Sale by receiver in a partnership action—A sale by a receiver under the directions of the Court given under a preliminary decree in a suit for dissolution of partnership is not a sale in execution of a decree. The provisions of the Code relating to execution sales do not apply to such a sale (l)

"Court."—The word "Court" means the Civil Court and not the Collector when the decree is transferred to the Collector for execution (m)

Plea of bar of limitation after confirmation—No application can be entertained after confirmation of a sale to set aside a sale on the ground that the application for attachment and sale was barred by limitation (n)

Appeal—An appeal lies from an order under this rule setting aside or refusing to set aside a sale [O 43, r 1, cl (1)]. But no second appeal lies from the order passed on first appeal (o) [see s 104 (2)]

Appeal to the Privy Council—An appeal lies to His Majesty in Council from an order passed under this rule and r 90 (p)

93. [S. 315.] Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid

Return of purchase money in certain cases

Section 315 of the Code of 1832—The corresponding sec 315 of the Code of 1832 ran as follows —

"When a sale of immovable property is set aside under sec 310A [O 21, r 89], 312 [O 21, r 92] or 313 [O 21, r 91]

- | | |
|---|--|
| (i) <i>Harnam v Ganpat</i> (1923) 5 Lah. L.J. 9 73 I C 367 (23) A.L. 224 | (m) <i>Fazal v Mansur</i> (1916) 40 All. 425, 45 I C 773 |
| (j) - | (n) <i>Lakhu Rai v Maharaja Kesho Prasad</i> (1917) 2 Pat. L.J. 157, 38 I.C. 876 |
| (k) | (o) <i>Jivan Singh v Sawan Mal</i> (1919) Punj. Rec no 168 p 446 54 I.C. 941 <i>Jagan Nath v Daud</i> (19-3) 4 Lah. 243, 75 I.C. 103 (23) A.L. 592 |
| (l) <i>Narsain Das v Ram Chander</i> (1926) 48 All 209 90 I.C. 116 (26) A.A. 124 | (p) <i>Krishna Pershad v Motchand</i> (1913) 40 Cal 635 40 I.A. 140 19 I.C. 230. |

has been reversed on appeal after the sale and before confirmation (a) See note "Effect of reversal of decree upon sale where decree reversed before confirmation of sale" at p 244

Notice—Notice should be given to the decree holder and auction purchaser (b) But it has been held that if the application is under r 89 notice need not issue to the decree holders who have applied for rateable distribution (c) If notice is not given to a party interested the order setting aside the sale is not for that reason a nullity though it may not be binding on him (d)

No suit will lie to set aside an order made under this rule—No suit will lie to set aside an order made under this rule by any person against whom such order is made The only remedy of the party against whom the order is made is to appeal from the order under O 43, r 1, cl (i) Now an order under this rule may be—

(1) either an order confirming the sale, or

(2) an order setting aside the sale

Order confirming the sale—An order confirming the sale may be made—

(i) either where no application is made at all to set aside the sale, or

(ii) where an application is made and disallowed

No suit will lie in either case to set aside an order confirming the sale (e)

Order setting aside the sale—The language of sub rule (3) makes it clear that no suit will lie to set aside an order setting aside a sale made on an application under rule 89, 90 or 91 (f) The party against whom the order is made has a remedy by way of appeal under O 43, r 1, cl (i)

The suits barred under sub rule (3) are suits to set aside (1) an order confirming a sale under sub rule (1) and (2) an order setting aside a sale under sub rule (2) Sub rule (3) refers to applications under rr 89, 90 and 91 A suit by an auction purchaser for a return of the purchase money on the ground that the judgment debtor has no saleable interest in the property sold is barred under sub rule (3) for the case is within r 91 above see notes to r 93, Suit for a return of purchase money where no saleable interest" But a sale by a judgment debtor to recover property sold in execution of a mortgage decree which was neither included in the mortgage nor in the decree, but which found its way into the certificate of sale in some unexplained manner, is not barred by sub rule (3), such a case is not one of material irregularity within r 90 nor does it fall under r 89 or r 91 above (g), nor does sub rule (3) bar a suit by the mortgagor judgment debtor for a declaration that the sale does not extinguish his equity of redemption (h) A person claiming title to a property attached and sold by the Insolvency

- (2) *Nankahal v Umroo Saha* (1931) 53 I.A. 60, 32 C.W.N. 381 130 I.C. 686 (31) A.I.C. 33 *Ganda Mal v Tal Das* (1932) 13 Lah 761 142 I.C. 686 (33) A.L. 99
(a) *Sarimathu v Mutau Arachna* (1933) 56 Mad 408 143 I.C. 854 (33) A.M. 598
(b) *Nameshwar v Manool* (1930) V Pat 310 125 I.C. 570 (30) A.L. 318 *Dipchand v Shro Prasad* (1930) 51 All 910 119 I.C. 103 (29) A.A. 891
(c) *Ramnath v Grandai* (1930) 55 Mad 61 132 I.C. 141 (31) A.M. 465
(d) *Dwaramatha v Arachna* (1933) 37 C.W. 81 144 I.C. 814 (33) A.C. 461
(e) *Bhambh Singh v Sarwan* (1933) 16 Cal 33 49 *Dumodar v Vinayak* (1902) 28 Bom 40

(f) 5

(g) 1

(h) 1 A.A. 303

(i) *Kal jati v Basanta* (1932) 59 Cal. 117 138 I.L. 177 (31) A.C. 126

debtor had *no saleable interest at all* if the judgment debtor had *some saleable interest* in the property however small he could not by *suit* any more than by *application* obtain a refund of the purchase money in proportion to the extent to which the judgment debtor had no interest (r). It was further held having regard to the words and the purchaser is for that reason *deprived* of it which occurred in the second paragraph of sec 315 that the cause of action did not arise and the period of limitation for a suit under that section did not commence until the purchaser was *deprived* of the property sold to him (r). It was also held that the purchaser was entitled to proceed by way of suit even after rateable distribution against those among whom the purchase money was distributed (x). It was further held that a suit would lie even *after confirmation* of the sale if the purchaser was after confirmation deprived of the property as the result of a suit by the lawful owner (y).

The second and fourth paragraphs of sec 315 of the Code of 1882 have now been omitted. The words *may be enforced* which occurred in sec 315 are not reproduced in the present rule. The present rule says that if an application is made by the auction purchaser under r 91 to set aside the sale—and such application must be made within 30 days from the date of sale—and the sale is set aside under r 92 the purchaser is entitled to an *order* for a return of the purchase money. The result therefore under the present Code is that if the purchaser does not apply under r 91 to set aside the sale, or if an application is made but it is disallowed, the Court shall make an order confirming the sale under r 92 (1). If an order is made confirming the sale, the purchaser is precluded by r 92 (3) from bringing a suit to set aside the order confirming the sale. And it has been held by all the High Courts (z) except the Oudh Court that under the present Code an auction purchaser is *not* entitled as he was under the Code of 1882 to bring a regular suit for a return of the purchase money in cases where the judgment debtor has no saleable interest in the property unless he can bring himself within the equitable principles which justify a suit for money had and received to his use (a). The result of these decisions is that if in ignorance of the true facts the purchaser fails to make the application to set aside the sale under r 91 within the period of limitation, he can get no relief and the judgment debtor is entitled to take credit for the price of property not belonging to him. This may at first sight seem inequitable but the explanation is that while in a private sale there is, in the absence of a contract to the contrary, an implied covenant for title by the vendor, there is no such covenant either by the decree holder or by the Court in the case of a sale in execution of a decree, the doctrine of *caveat emptor* applies to Court sales. The right now given to the purchaser being a creation of the

- (r) Mad 1009 1011 45 IC 109 *Sabbu v Ponambala* (1918) Mad WN 655 49 IC 359 *Balwant v Bala* (1922) 46 Bom 833 67 IC 360 (22) A B 205 *Rudomoy v Vinayak* (1911) 35 Bom 29 7 IC 955 was a case under the Code of 1882] *Jurano v Jais* (1917) 22 CWN 760 46 IC 783 *Banka v Guru Das* (1923) 28 CWN 20 80 IC 257 (24) A C 172, dissenting from *Prasanna v Ibrahim* (192) 36 Cal LJ 205 *Habib-ud-din v Hafim* (1923) 6 Lah 283 86 IC 6 2 (25) A L 467 dissenting from *Asad Ullah v Karamchand* (19-3) 4 Lal 354 76 IC 600 (24) A L 115 *Maung Naung v Maung Ba Gyi* (1923) 6 Rang 468 112 IC 436, (23) A L 772 *Rukhsah v Manik* (1926) 53 Cal 758 98 IC 64 (26) A C 971, *Mehar Chand v Mulki Ram* (1930) 13 Lah 618 133 IC 47 (30) A L 401 P B *Sahu v Mangal* (1930) A L 948 143 IC 479 (33) A A 63 *A v Manik Mohia* (1926) 53 Cal IC 64 (26) A C 771 See also *Jily v Abdul Azeez* (1877) 3 Cal LA 116.
- (x) *Kushen Lal v Muhammad* (1891) 13 All 383 *Girdhar Das v Sudhencari* (1918) 49 All 411 44 IC 637
- (y) *Mukar Ali v Sarfudd n* (1923) 50 Cal 115 9 IC 606 (23) A C 85
- (z) *Nannu Lal v Bhagwan Das* (1917) 39 114 118-119 37 IC - *Dalpat* (19 1) 43 All 60 A A 3 7 *Mohudeen v Ma* Mad LJ 487 17 IC 437 p. *Tirumalaiah v Subramanian*

21, r. 93

or when it is found that the judgment-debtor had no saleable interest in the property which was purported to be sold, and the purchaser is for that reason deprived of it,

the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid

The repayment of the said purchase money and of the interest (if any) allowed by the Court *may be enforced* against such person under the rules provided by this Code for the execution of a decree for money "

The second and fourth paragraphs of sec 315 have been omitted in the present section Further the words, "shall be entitled to an order for repayment," have been substituted for the words, "shall be entitled to receive back," which occurred in the third paragraph

No saleable interest—An auction purchaser may under r 91 apply to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold If the sale is set aside, he may apply under this rule for an order for repayment of his purchase money But no sale can be set aside under r 91 nor can any repayment be ordered under this rule if it is found that the judgment debtor had some saleable interest in the property (q) The reason is that in the case of a sale under a decree of the Court there is no warranty of title either by the decree holder or by the Court as there is in the case of private sales T all risks and all defects in the is not entitled to any refund, all Rules 91 and 93, however, confer upon him a statutory right to a return of the purchase money in such cases (r)

Suit for return of purchase money where no saleable interest—The Code of 1859 did not contain any express provision for a return of the purchase money to the auction purchaser if it turned out that the judgment debtor had no saleable interest in the property at all Hence it was held that the auction purchaser was not entitled to a return of the purchase money even if the judgment debtor had no saleable interest (s) The right to a return of the purchase money was first given by sec 315 of the Code of 1877. That section was in terms similar to sec 315 of the Code of 1882 Under the Code of 1882 it was held by all the High Courts (t), following a Full Bench ruling of the Allahabad High Court (u) that a purchaser at a sale in execution of a decree could maintain a suit against a decree holder for recovery of the purchase money, if it turned out that the judgment debtor had no saleable interest in the property sold, and that he was not limited to the special procedure in the execution department mentioned in that section This view was based principally upon the words "*may be enforced*" which occurred in the last paragraph of sec 315 It was also held under that section that whether the purchaser proceeded by an application for execution under that section or by a regular suit, he was not entitled to receive back his purchase money unless the judgment

(r)

(s)

(t) *Sorlamani v Krishna* (1869) 4 Ind 1 R 11
Hera Lal v Karim-un-Nisa (1890)
 2 All 780, *Jam Naran v Mahab* (1881)
 2 All 829

(u) *Ashun Lal v Muhammad* (1891) 13 All 383
Sathavari v Goshain (1913) 35 All 419
 19 IC 946, *Muhammad v Jai Narain*
 (1914) 36 All 523 26 IC 55, *Girdhar*
Das v Sudeshwari (1918) 40 All 411,

44 IC 697, *Gurshidara v Guraya* (1898)
 22 Bom 783, *Rustomji v Vinayak* (1911)
 35 Bom 21, 7 IC 935, *Hari v Sheikh*
 (1900) 5 CWN 210, *Nujannand v*
Jugyal (1902) 7 CWN 105, *Ram*
Kumar v Ram Gour (1910) 37 Cal 67
 2 IC 559, *Makar Ali v Sarfuddin*
 (1903) 50 Cal 115 126 70 IL 606 (23)
 AC 85, *Pachayappan v Narayana* (1898)
 11 Mad 269, *Nalakanta v Immamul*
 (1893) 16 Mad 361, *Mohdun v Akho*
med (1912) 23 Mad 1 J 487, 17 IC 437
Trumalalams v Subramanian (1917)
 40 Mad 1009 45 IC 199
 (u) *Munna Singh v Gajathar Sun A* (1883) 5
 All 677

debtor had *no saleable interest at all*, if the judgment debtor had *some saleable interest* in the property, however small, he could not by *suit*, any more than by *application*, obtain a refund of the purchase money in proportion to the extent to which the judgment debtor had no interest (r). It was further held, having regard to the words, 'and the purchaser is for that reason *deprived* of it,' which occurred in the second paragraph of sec 315, that the cause of action did not arise and the period of limitation for a suit under that section did not commence until the purchaser was *deprived* of the property sold to him (r). It was also held that the purchaser was entitled to proceed by way of suit even after rateable distribution against those among whom the purchase money was distributed (r). It was further held that a suit would lie even *after confirmation* of the sale if the purchaser was after confirmation deprived of the property as the result of a suit by the lawful owner (y).

The second and fourth paragraphs of sec 315 of the Code of 1882 have now been omitted. The words "*may be enforced*" which occurred in sec 315 are not reproduced in the present rule. The present rule says that if an application is made by the auction purchaser under r 91 to set aside the sale—and such application must be made within 30 days from the date of sale—and the sale is set aside under r 92, the purchaser is entitled to an order for a return of the purchase money. The result, therefore, under the present Code is that if the purchaser does not apply under r 91 to set aside the sale, or if an application is made but it is disallowed, the Court shall make an order confirming the sale under r 92 (1). If an order is made confirming the sale, the purchaser is precluded by r 92 (3) from bringing a suit to set aside the order confirming the sale. And it has been held by all the High Courts (z) except the Oudh Court that under the present Code an auction purchaser is *not* entitled as he was under the Code of 1882 to bring a regular suit for a return of the purchase money in cases where the judgment debtor has no saleable interest in the property unless he can bring himself within the equitable principles which justify a suit for money had and received to his use (a). The result of these decisions is that if in ignorance of the true facts the purchaser fails to make the application to set aside the sale under r 91 within the period of limitation, he can get no relief and the judgment debtor is entitled to take credit for the price of property not belonging to him. This may at first sight seem inequitable but the explanation is that while in a private sale there is, in the absence of a contract to the contrary, an implied covenant for title by the vendor, there is no such covenant either by the decree holder or by the Court in the case of a sale in execution of a decree, the doctrine of *caveat emptor* applies to Court sales. The right now given to the purchaser being a creation of the

(r) *See* *Mad 1009 1011 45 IC 109* *Sabbu v*

(u)

(x) *Kushun Lal v Muhammad* (1891) 13 All 353 *Girdhar Das v Sudhencary* (1918) 40 All 411 44 IC 697

(y) *Mukar Ali v Sarfuddin* (1923) 50 Cal 115, 10 IC 606 (23) A C 85

Lal v Bhagwan Das (1917) 39 All 37 IC 9 *Iam Sarup v* 3 All 60 58 IC 105 (21) *udern v Mahomed* (1912) 23 17 IC 437 per *Napier J* *ni v Subramanian* (1917) 40

Mad 1009 1011 45 IC 109 Sabbu v
Jonambala (1918) *Mad W N* 653 49 IC
359 *Dalcant v Bala* (1922) 46 Bom 833
67 IC 360, (22) A B 205 *Rustomji v*
Tinajak (1911) 35 Bom 29 7 IC 955
was a case under the Code of 1882,
Juranu v Jathi (1917) 22 C W N 760
46 IC 783 *Banka v Guru Das* (1923)
28 C W N 20 80 IC 257, (21) A C 172
dissenting from *Prasanna v Ibrahim*
(1922) 36 Cal L J 205 *Habib-ud din v*
Hafim (1925) 6 Lah 283 86 IC 622 (25)
A L 467 distinguishing *Aand Ullah v*
Karamchand (1923) 4 Lah 354 76 IC
605 (24) A L 115 *Maung Naung v*
Maung Ba Gyi (1928) 6 Rang 468 112
IC 436 (28) A R 272 *Ruhikesh v*
Manik (1926) 53 Cal 758, 96 IC 61, (26)
A C 971, *Mehar Chand v Mitli Jum*
(1932) 13 Lah 618 138 IC 47, (32)
A L 401 F B *Sahu v Mangal* (193-)
54 All 948 143 IC 429 (33) A A 63
(a) *Pishikesh v Manik Malla* (1926) 53 Cal
758 96 IC 61 (26) A C 771 *See also*
Dorab Ally v Abdul Aziz (1877) 3 Cal
806, 5 IC 116

21, r. 93 statute, the remedy to enforce that right must be confined to that prescribed by the statute. That remedy is to apply under r 91 to set aside the sale, and if the sale is set aside, to apply for a return of the purchase money under r 93. If the Court passes an order refusing to set aside the sale, he may appeal from the order under O 43, r 1 (j), the order being one made under r 92. The judgment of the appellate Court is final, there being only one appeal from such order. He cannot, as stated above, bring a regular suit to set aside the sale and for a refund of the purchase money as he could under the Code of 1882 (b).

As said above the Oudh Chief Court gives a different exposition of the law on this point. According to that Court, although there is no warranty of title in Court sales yet an auction-purchaser who finds that the judgment debtor has no saleable interest has a right of suit against the decree holder because the attachment was made at the decree holder's risk. This right of suit is not a statutory right created by s 315 of the Code of 1882, but was recognized by that section. The amendment of that section by r 93 did not abolish that right. On the contrary the words "shall be entitled to an order of repayment" make it clear that the rule is limited to execution proceedings and to cases where the sale has been set aside and does not affect the substantive right of suit which is not a matter of procedure and therefore outside the scope of the Code. In the Oudh case the fact that the judgment debtor had no saleable interest was not discovered till three years after the sale, i.e., long after an application under r 93 was time barred, and yet the purchaser was allowed a refund of the purchase money (c).

But it is otherwise where the auction purchaser has bought the property in execution of a mortgage decree, and *the decree as well as the sale* is set aside in a separate suit brought by parties interested in the mortgaged property. In such a case, it has been held, that the auction purchaser is entitled to a return of the purchase money, his remedy being by an application under s. 47 above (d).

Where a sale took place and was confirmed by the Court before the present Code came into force, it was held by the High Court of Calcutta that the right of the purchaser must be determined with reference to the provisions of the Code of 1882, and that the purchaser was therefore entitled to maintain a regular suit for a return of the purchase-money if the judgment debtor had no saleable interest in the property (e)

Suit for return of purchase money where sale set aside on ground of material irregularity—Where a sale is set aside on the ground of material irregularity under rr 90 and 92, the auction purchaser may bring a *suit* for a refund of the purchase money. Such right exists independently of the Code. The mere use of the expression 'order' in this rule has not the effect of taking away that right. (f)

Interest—The Court has power by the express terms of this rule to award interest on the purchase money (g)

Limitation—The period of limitation for an application under this rule is 3 years from the accrual of the right under art 181 of the Limitation Act, 1908 (A). The period of limitation for a regular suit in cases governed by the Code of 1882, to recover back the purchase money is 6 years from the accrual of the right under art 120 of that Act (A).

(b) See *Ram Sarup v Dalpat* (1921) 43 All 60 58 I C 105 (21) A A 377, *Habib ul-din v Hatim* (1925) 6 Lah. 283 86 I C 622 (25) A I 467

[representation at sale by Court's Officer that the property was being sold free from mortgages though what was being sold in fact was property subject to mortgages] *Gajadhar v Abdul Majid* (1921) 19 All LJ 530 63 IC 425 (21) A.A. 327 [sale proclamation not mention

(c)

(d) ■■■■

(d) " " "

(f) _____

(g) a b

(h)

[illegible]

"Be entitled to an order."—When an order is made for the execution of a decree, it may be executed in the manner prescribed for the execution of a decree.

94. [S. 316.] Where a sale of immovable property becomes absolute, the Court may grant a certificate specifying the property sold and the name of the person who at the time of the sale declared to be the purchaser. Such certificate shall be valid from the day on which the sale became absolute.

Certificate to purchaser

Old section—This rule corresponds with the first part of s. 316 of the Code of 1882. The second part of that section, relating to the vesting of title, has been replaced by s. 65 of this Code with an important alteration as regards the time when the title vests in the purchaser.

Purchaser's title.—See s. 65 and notes thereto.

The Court shall grant a certificate—The provision of this section is mandatory (j).

Certificate of sale—A sale certificate does not transfer the title. It is only a certificate of the transfer (l).

Certificate to legal representative—Where the purchaser is dead, the certificate may be granted to his legal representative (l). See s. 146 above.

What passes at a Court sale—As regards private sales, there is an implied warranty of a contract to the contrary, an implied covenant for title by the vendor as provided by the Transfer of Property Act 1882, s. 55 sub-s. (2). But as regards sales under a decree of the Court there is no warranty of title either by the decree holder or by the Court. Rule 13 of this Order shows that the decree holder, when applying for execution, has only to specify the judgment debtor's share or interest in the property "to the best of his belief," and "so far as he has been able to ascertain the same." Rule 12 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment debtor's interest therein "as fairly and accurately as possible." Hence what passes to a purchaser at a Court sale is the "right, title and interest" of the judgment debtor, whatever that interest may be. In other words, a purchaser at a Court sale buys the property with all risks and all defects in the judgment debtor's title except where it is found that the judgment debtor had no saleable interest at all (m). In the latter case, the purchaser may apply to have the sale set aside under r. 91 of this Order and he may then apply under r. 93 for a return of the purchase money. If the purchase money has been distributed amongst the creditors of the judgment debtor under s. 73, he may follow the money in their hands (n). But,—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment debtor,—the sale will not be set aside, if the judgment debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase money to the extent to which the judgment debtor had no

(j) *Baikuntli v. Naranda* (1916) 1 Pat. L.J. 446
35 I.C. 861

(k) " " " " " "

" " " " " "

(l) " " " " " "

(m) " " " " " "

deen (1878) 3 Cal. 806 5 I.A. 116. *Shanta Chander v. Nain Sookh* (1901) 3 All. 355; *Sundara v. Venkata* (1894) 17 Mad. 228; *Sobhagchand v. Bhauchand* (1884) 6 Bom. 193; *Mantheena v. Apsa* (1913) 36 Mad. 194 197 12 I.C. 444 (improvements by purchaser).

(n) *Rukhun Lal v. Muhammad* (1901) 13 All. 283

21, r. 93 statute, the remedy to enforce that right must be confined to that prescribed by the statute. That remedy is to apply under r 91 to set aside the sale, and if the sale is set aside, to apply for a return of the purchase money under r 93. If the Court passes an order refusing to set aside the sale, he may appeal from the order under O 43, r 1 (i), the order being one made under r 92. The judgment of the appellate Court is final, there being only one appeal from such order. He cannot, as stated above, bring a regular suit to set aside the sale and for a refund of the purchase money as he could under the Code of 1882 (b).

As said above the Oudh Chief Court gives a different exposition of the law on this point. According to that Court, although there is no warranty of title in Court sales yet an auction-purchaser who finds that the judgment debtor has no saleable interest has a right of suit against the decree holder because the attachment was made at the decree holder's risk. This right of suit is not a statutory right created by s 315 of the Code of 1882, but was recognized by that section. The amendment of that section by r 93 did not abolish that right. On the contrary the words "shall be entitled to an order of repayment" make it clear that the rule is limited to execution proceedings and to cases where the sale has been set aside and does not affect the substantive right of suit which is not a matter of procedure and therefore outside the scope of the Code. In the Oudh case the fact that the judgment debtor had no saleable interest was not discovered till three years after the sale, i.e., long after an application under r 93 was time barred, and yet the purchaser was allowed a refund of the purchase money (c).

But it is otherwise where the auction purchaser has bought the property in execution of a mortgage decree, and the decree as well as the sale is set aside in a separate suit brought by parties interested in the mortgaged property. In such a case, it has been held, that the auction purchaser is entitled to a return of the purchase money, his remedy being by an application under s 47 above (d).

Where a sale took place and was confirmed by the Court before the present Code came into force it was held by the High Court of Calcutta that the right of the purchaser must be determined with reference to the provisions of the Code of 1882 and that the purchaser was therefore entitled to maintain a regular suit for a return of the purchase-money if the judgment debtor had no saleable interest in the property (e).

Suit for return of purchase money where sale set aside on ground of material irregularity.—Where a sale is set aside on the ground of material irregularity under rr 90 and 92 the auction purchaser may bring a suit for a refund of the purchase money. Such right exists independently of the Code. The mere use of the expression 'order' in this rule has not the effect of taking away that right (f).

Interest.—The Court has power by the express terms of this rule to award interest on the purchase money (g).

Limitation.—The period of limitation for an application under this rule is 3 years from the accrual of the right under art 181 of the Limitation Act, 1908 (h). The period of limitation for a regular suit, in cases governed by the Code of 1882 to recover back the purchase money is 6 years from the accrual of the right under art 120 of that Act (i).

(b) See *Ram Sarup v Dalpat* (1921) 43 All 60 55 1 C 105 (21) A A 377, *Habib ul-din v Hattin* (1925) 6 Lsh 283 86 1 C 672 (25) A 1 467

(c)

(d)

(e)

(f)

[representation at sale by Court's Officer that the property was being sold free from mortgage though what was being sold in fact was property subject to mortgage] *Gajadhar v Abdul Majid* (1921) 19 All LJ 530 63 FC 425 (21) A A 327 [sale proclamation not mention

(g)

(h)

(i)

"Be entitled to an order."—When an order is made under this rule, it may be executed in the manner prescribed for the execution of decrees. See s 36 above

94. [S. 316.] Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Certificate to purchaser

Old section—This rule corresponds with the first part of s 316 of the Code of 1882. The second part of that section, relating to the vesting of title, has been reproduced in s 65 of this Code with an important alteration as regards the time when the property vests in the purchaser.

Purchaser's title—See s 65 and notes thereto

The Court shall grant a certificate—The provisions of this rule are mandatory (j)

Certificate of sale—A sale certificate does not transfer the title. It is evidence of the transfer (k)

Certificate to legal representative—Where the purchaser is dead, the certificate may be granted to his legal representative (l). See s 146 above

What passes at a Court sale—As regards private sales, there is in the absence of a contract to the contrary an implied covenant for title by the vendor as provided by the Transfer of Property Act 1882 s 53 sub s (2). But as regards sale under a decree of the Court there is no warranty of title either by the decree holder or by the Court. Rule 13 of this Order shows that the decree holder, when applying for execution, has only to specify the judgment debtor's share or interest in the property "to the best of his belief, and so far as he has been able to ascertain the same". Rule 66 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment debtor's interest therein "as fairly and accurately as possible". Hence what passes to a purchaser at a Court sale is the right title and interest of the judgment debtor, whatever that interest may be. In other words a purchaser at a Court sale buys the property with all risks and all defects in the judgment debtor's title except where it is found that the judgment debtor had no saleable interest at all (m). In the latter case, the purchaser may apply to have the sale set aside under r 91 of this Order and he may then apply under r 93 for a return of the purchase money. If the purchase money has been distributed amongst the creditors of the judgment debtor under s 73, he may follow the money in their hands (n). But,—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment debtor,—the sale will not be set aside, if the judgment debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase money to the extent to which the judgment debtor had no

(j) *Baikundi v Naranda* (1916) 1 Pat L.J. 446
35 I.C. 861

(k) " " " " " "

(l) *Vinayak Narayan* in re (1900) 24 Bom. 120
(m) *Dorab Ali v Executors of Khajah Mahomed*

deen (1878) 3 Cal 806 5 I.A. 116. *Shanto Chander v Anan Sukh* (1901) 23 All 355.
Sundara v Venkata (1894) 17 Mad 228.
Sobhagchand v Bhairchand (1882) 6 Bom 193.
Moutheena v Apsa (1913) 36 Mad 194 197 12 I.C. 444 [Improvements by purchaser].
(n) *Kishun Lal v Muhammad* (1891) 13 All. 283

21, r. 93 statute, the remedy to enforce that right must be confined to that prescribed by the statute. That remedy is to apply under r 91 to set aside the sale, and if the sale is set aside, to apply for a return of the purchase money under r 93. If the Court passes an order refusing to set aside the sale, he may appeal from the order under O 43, r 1 (j), the order being one made under r 92. The judgment of the appellate Court is final there being only one appeal from such order. He cannot, as stated above, bring a regular suit to set aside the sale and for a refund of the purchase money as he could under the Code of 1882 (b).

As said above the Oudh Chief Court gives a different exposition of the law on this point. According to that Court, although there is no warranty of title in Court sales yet an auction-purchaser who finds that the judgment debtor has no saleable interest has a right of suit against the decree holder because the attachment was made at the decree holder's risk. This right of suit is not a statutory right created by s 315 of the Code of 1882, but was recognized by that section. The amendment of that section by r 93 did not abolish that right. On the contrary the words "shall be entitled to an order of repayment" make it clear that the rule is limited to execution proceedings and to cases where the sale has been set aside and does not affect the substantive right of suit which is not a matter of procedure and therefore outside the scope of the Code. In the Oudh case the fact that the judgment debtor had no saleable interest was not discovered till three years after the sale, i.e., long after an application under r 93 was time barred, and yet the purchaser was allowed a refund of the purchase money (c).

But it is otherwise where the auction purchaser has bought the property in execution of a mortgage decree, and *the decree as well as the sale* is set aside in a separate suit brought by parties interested in the mortgaged property. In such a case, it has been held, that the auction purchaser is entitled to a return of the purchase money, his remedy being by an application under s 47 above (d).

Where a sale took place and was confirmed by the Court before the present Code came into force it was held by the High Court of Calcutta that the right of the purchaser must be determined with reference to the provisions of the Code of 1882, and that the purchaser was therefore entitled to maintain a regular suit for a return of the purchase-money if the judgment debtor had no saleable interest in the property (e).

Suit for return of purchase money where sale set aside on ground of material irregularity—Where a sale is set aside on the ground of material irregularity under rr 90 and 92, the auction purchaser may bring a suit for a refund of the purchase money. Such right exists independently of the Code. The mere use of the expression "order" in this rule has not the effect of taking away that right (f).

Interest—The Court has power by the express terms of this rule to award interest on the purchase money (g).

Limitation—The period of limitation for an application under this rule is 3 years from the accrual of the right under art 181 of the Limitation Act, 1908 (h). The period of limitation for a regular suit in cases governed by the Code of 1882, to recover back the purchase money is 6 years from the accrual of the right under art 120 of that Act (i).

(b) See *Ram Sarup v Dalpat* (1921) 43 All 60 58 I C 105 (21) A A 377, *Habib-ud-din v Hatim* (1915) 6 Lah 283 86 I C 622 (25) A I 467.

(c) " "

(d) " "

(e) " "

(f) " "

Representation at sale by Court's Officer

(g) " "

(h) " "

(i) " "

* Be entitled to an order"—When an order is made under this rule it may be executed in the manner prescribed for the execution of decrees. See s 36 above

94. [S. 316.] Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Certificate to purchaser

Old section—This rule corresponds with the first part of s 316 of the Code of 1882. The second part of that section, relating to the vesting of title, has been reproduced in s 65 of this Code with an important alteration as regards the time when the property vests in the purchaser.

Purchaser's title—See s 65 and notes thereto

The Court shall grant a certificate—The provisions of this rule are mandatory (j)

Certificate of sale—A sale certificate does not transfer the title. It is evidence of the transfer (k)

Certificate to legal representative—Where the purchaser is dead, the certificate may be granted to his legal representative (l). See s 146 above

What passes at a Court sale—As regards private sales there is in the absence of a contract to the contrary an implied covenant for title by the vendor as provided by the Transfer of Property Act 1882 s 53 sub s (2). But as regards sale under a decree of the Court there is no warranty of title either by the decree holder or by the Court. Rule 13 of this Order shows that the decree holder, when applying for execution, has only to specify the judgment debtor's share or interest in the property "to the best of his belief, and so far as he has been able to ascertain the same." Rule 66 shows that the proclamation only professes to specify the particulars prescribed by that rule including the property to be sold and the judgment debtor's interest therein "as fairly and accurately as possible." Hence what passes to a purchaser at a Court sale is the right title and interest of the judgment debtor, whatever that interest may be. In other words, a purchaser at a Court sale buys the property with all risks and all defects in the judgment debtor's title except where it is found that the judgment debtor had no saleable interest at all (m). In the latter case, the purchaser may apply to have the sale set aside under r 91 of this Order and he may then apply under r 93 for a return of the purchase money. If the purchase money has been distributed amongst the creditors of the judgment debtor under s 73, he may follow the money in their hands (n). But—and this is an important consequence of the purchaser buying only the right, title and interest of the judgment debtor,—the sale will not be set aside, if the judgment-debtor has even a partial interest in the property, nor will the purchaser be entitled to a refund of the purchase money to the extent to which the judgment-debtor had no

(j) *Bakunda v Narinda* (1916) 1 Pat L.J. 446
35 I.C. 861

(k) *Dawar Ali v Hafiz* (1916) 43 Cal 124 129 30

" " " " " " " "

" " " " " " " "

(l) " " " " " " " "

(m) " " " " " " " "

deen (1878) 3 Cal 808, 5 I.A. 116. *Shanto*
Chander v Nain Sukh (1901) 23 All 355;
Kundara v Venkata (1894) 17 Mad 228;
Kotlaghand v Bhachand (1882) 6 Bom
147, *Motherson v Apna* (1913) 36 Mad
141 127 12 I.C. 444 (improvements by
purchaser).

(n) *Mukun Lal v Muhammad* (1911) 13 All
207

1, r. 94 interest, unless the case be one of fraud (o) On the same principle a purchaser in execution of a money decree is bound by the estoppel which binds the judgment debtor whose interest he has purchased (p) The Madras High Court has held that he is not bound in all cases (q).

It has been stated above that what passes to a purchaser at a Court sale in execution of a money decree is the "right, title and interest" of the judgment debtor in the property sold To determine the nature and extent of the judgment debtor's right title and interest in the property sold, the test is as stated by Lord Watson in the course of the argument in *Pettachi Chettiar v Chinnathambiar* (r), what did the Court intend to sell, and what did the purchaser understand that he bought? These are questions of fact or rather of mixed law and fact, and must be determined according to the evidence in the particular case (s) This test was applied in *Baltant v Hirachand* (t), cited in the next following paragraph, and in *Abdul Aziz v Appayyasami* (u) cited in the notes below

Where a purchaser at a Court sale in execution of a decree against a member of a joint Hindu family buys 4 specific properties A, B, C and D, alleged to belong to him, and subsequently there is a partition decree by which properties A, B, X and Y are allotted to that member, the purchaser is entitled only to such of the properties as are common to the sale certificate and the share of that member under the decree, namely, properties A and B He is not entitled to have the equivalent of properties C and D out of properties X and Y (v)

A is entitled to 10 annas share in a village Out of this share he mortgages 6 annas to B In execution of a simple money decree obtained by C against A, a 4 annas share is attached and sold The presumption is, in the absence of specific indications to the contrary, that the share sold was the share which was not mortgaged (w)

Sale on the original side—In the case of a sale held by the Registrar on the original side of the Calcutta High Court the purchaser has a right of compensation for an error or misdescription of the property in the conditions of sale (x)

Sale in execution of a mortgage decree—Where mortgaged property is sold in execution of a mortgage decree obtained by the mortgagee against the mortgagor, the interest both of the mortgagor and mortgagee, passes to the purchaser (y)

Variance between proclamation of sale and sale certificate—O 21, r 66, requires that where property is ordered to be sold in execution of a decree, the proclamation of sale should "specify as fairly and accurately as possible the property to be sold" By the present rule it is provided that where property is sold, and the sale becomes absolute, the Court shall grant a certificate "specifying the property sold" It sometimes happens that the property as described in the certificate of sale is different from that described in the proclamation of sale In such a case the description of the

(o) *Shanto Chander v Nain Suth* (1901) 23 All 355, *Muhammad v Bacheo* (1905) 27 All 537 *Ram Narain v Dwarakanath* (1900) 27 Cal 264, *Doyal v Amrita* (1902) 29 Cal 370 *Dhondu v Ramji* (1867) 4 B H C, A C 114

(p) *Pravag Raj v Sudhu Prasad* (1908) 35 Cal 877, *Mahomed Mozuffer Hooten v Kulkori Mohan Roy* (1890) 22 Cal 909 910, 22 I A 129 137 See also *Poresh Nath v Anath Nath* (1883) 9 Cal 265, *Nandi Lal v Jogendra* (1923) 28 L W N 403 821 C 294 (24) A C 881, *Contrant Ganesh v Purashottam* (1909) 33 Bom 311, 11 C 106

(q) *Veerappa v Ramasami* (1920) 43 Mad 135, 139 53 I C 579

(r) (1887) 10 Mad 241 248 14 I A 84 See also *Simbi unath v Golap Singh* (1887) 14 Cal 572 579 14 I A 77 *Mahabir Pershad v Moheshwar Nath* (1890) 17 Cal 584, 588-89 17 I A 11

(s) (t) (u) (c)

(w) 20 All 463
(x) *Administrator-General v Aghore* (1902) 20 Cal 420 *Shabala v Jhannendranath* (1930) 57 Cal 783, (30) A C 821
(y) *Mogantai v Shakra* (1898) 22 Bom 915

property in the proclamation of sale is *conclusive* as to what was the subject matter of the sale. As stated by their Lordships of the Privy Council in *Thakur Darmha v Jiban Ram* (2), 'that which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is *conclusively* described in and by the schedule to which the attachment refers,' that is, the schedule of the attached property in the proclamation of sale. Thus where a judgment debtor owned a mahal of which a 10 annas share was mortgaged and the proclamation of sale stated that what was to be sold was a 6 annas share in the mahal included in the mortgage but the purchaser obtained a certificate of sale in which the property described was a 6 annas share in the mahal not included in the mortgage, it was held that the sale certificate should be set aside. The Court has no power to grant a certificate in which the property described is different from that specified in the proclamation of sale (a). Similarly where the proclamation of sale stated that the whole interest of five brothers in a mortgaged property was to be sold, and by a mistake on the part of the officer in charge of the sale, the certificate of sale omitted to mention the names of four of them, it was held that what was sold to the purchaser was the property as described in the proclamation of sale, and not the property as erroneously described in the sale certificate (b). "The real question in such case, under the present Code of Civil Procedure, seems therefore to be what was the sale, i.e., what was bargained and paid for, and that must depend not on *erroneous statements* of what was offered for sale, but on what was *actually* offered for sale and bid for. What [is actually] offered for sale [is] determined by the order of the Court and the proclamation" (c).

Effect of new interpretation of law on sale—I purchased at a Court sale the 'right, title and interest' of B in an impartible zamindari. By the law as then interpreted, the holder of such a zamindari was only entitled to a life interest in the zamindari. [I must therefore be deemed to have purchased only the *life interest* of B.] Subsequently this interpretation of the law was reversed by the Judicial Committee which decided that the holder of an impartible zamindari is entitled to an absolute interest in it and that such interest is alienable. The new interpretation does not entitle A to claim that what he purchased at the sale was the *absolute interest* of B (d).

Amendment of certificate of sale—A purchaser at a Court sale may apply to the Court for amendment of the sale certificate where the description of the property in the certificate differs from that in the proclamation. The Court may allow or refuse the amendment, but no appeal lies from the order in either case. Such an order is not appealable under s 104. Nor is it appealable as a decree under s 47 for the question cannot be regarded as one relating to the 'execution, discharge or satisfaction' of the decree, the decree being fully executed. The only question in such a case is whether the certificate given to the auction purchaser gives a right description of the property sold (e).

Limitation—The provisions of the Limitation Act do not apply to an application for a sale certificate. The reason is that it is the duty of the Court on the sale becoming absolute to issue a sale-certificate and there is no duty imposed on the purchaser to *apply* for such a certificate. The action of the Court in granting the certificate is ministerial and not judicial. The Limitation Act does not apply to applications to the Court to do what it has no discretion to refuse, nor to applications for exercise of functions of a

(c) (1914) 41 Cal 590 41 I A 38 43 21 I C 936
(a) (1914) 41 Cal 590 41 I A 38 21 I C 936
supra Uma Churn v Gobind Chunder
(1878) 1 C L R 460 Janchandra v
Haji Kasim (1833) 16 Mad 207
(b) *Balant v Hirachand* (1903) 27 Bom 334
Christian v Prasad (1925) 4 Pat 760 90
I C 501, (25) A I 615

(c) (1903) 27 Bom 334 341 *supra*
(d) *Abdul Aziz v Appaswami* (1904) 27 Mad
131, 31 I A 1
(e) F " " "

O. 21, rr. 94, 95 ministerial character Hence if the Court fails to issue a sale certificate, and the purchaser has thereupon to apply to the Court for a grant of the certificate, the application may be made *at any time (f)*

Effect of certificate of sale on irregularities.—All irregularities, though material, are cured by the certificate of sale (g)

Certificate of sale and *res judicata*—A sale certificate is just like a deed of sale, and it does not operate as a plea of *res judicata* Where a defendant contends that the act of the Court did not pass title to the property in dispute to the plaintiff, and the plaintiff produces a sale certificate, the defendant is barred not by sec 11 relating to *res judicata* but by sec 47 of the Code (h)

95. [S. 318.] Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same

Delivery of property in occupancy of judgment-debtor

Delivery of possession to purchaser.—The possession contemplated by this rule is *has* or actual possession. See notes to r 35 of this Order For the form of the order for delivery, see App L, form No 39

Separate suit for delivery of possession.—See notes to s 47, "Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand," on p 179 above

Appeal.—See notes to s. 47, "Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand," on p 179 above

Limitation.—The period of limitation for an application for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act, 1908, sch I, art 181] The period of limitation for a suit for delivery of possession is twelve years from the date when the sale becomes absolute (i, art 138]

Procedure under this rule.—The purchaser on the strength of his sale certificate is entitled to get an order from the Court for the delivery of the property to him by any person bound by the decree. If the person in possession is holding the property on his own account and is not bound by the decree, the application must be dismissed (i) The auction purchaser of a prior mortgagee, decree for sale cannot be evicted by the auction purchaser at a decree for sale by a *puisne* mortgagee subject to the right of the prior mortgagee (j)

(f) *Kylasa v Rimasams* (1882) 4 Mad 172.
Uthai v Uthayane (1882) 6 Bom 586

(g) *Balkrishna v Masima* (1883) 5 All 142 157
D J A 182, *Nalgar v Bhaskar* (1886) 10 Bom 444

(h) *Lokshan Chandra v Ramdas* (1929) 33 C

W N 790 118 I C 857 (20) A C 374
(i) *Kiron Sanki v Official Assignee* (1934) 60 Cal 8 143 I C 381, (33) A C 246,

Sobhan v Turai (19-4) 46 All 633 690,
43 I C 624 (24) A.A. 495

(j) *Gangadhar v Lakshman* (1930) 32 Bom. L R. 431, 125 I C 905, (30) A R. 221.

It may be objected that a purchaser at a Court sale is not bound to apply for possession under this rule. He may at his option bring a regular suit for possession, the period of limitation for the suit being 12 years as stated above. The remedy by way of application and that by way of suit are concurrent. (1). Further, the fact that an application has been made under this rule, and it is rejected as being unmaintained (2), or on any other ground (3), is no bar to a regular suit for possession.

96. [S. 319.] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94 the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser.

Delivery of possession to purchaser.—The possession contemplated by this rule is *symbolical possession*. See notes to r 95 above.

Limitation.—See notes to r 95 above.

Resistance to delivery of possession to decree-holder or purchaser.

97. [Ss 328, 334.] (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Rules 97, 98 and 99.—These rules are to be read together.

When rule applies.—The purchaser first makes an application to the Court by way of execution under rule 95 or 96. That application should not mention that any particular person is likely to resist. If the process of execution under these rules is resisted, it is then that an application under this rule should be made (a). The Calcutta High Court dissenting from an assumption made in an Allahabad case (b) that this rule applies when the applicant is resisted when attempting to get possession without the help of the Court.

(1) *Kishore v. Chaudry* (1907) 14 Cal. 441.

(2) *Shree Jeeva v. Nur Mahomed* (1907) 22 All. 451.

(3) *Sora v. Elengalia* (1907) 9 Cal. 602.

(a) *Krishna Saha v. Official Assignee* (1907) 40 Cal. 4, 143 L.C. 107 (22 A.C. 245).

(b) *Saha v. Sora* (1904) 44 All. 672, 673, 674, 33 L.C. 923, (24) A.L.J. 406.

O. 21, r. 94, 95 ministerial character Hence if the Court fails to issue a sale certificate, and the purchaser has thereupon to apply to the Court for a grant of the certificate the application may be made *at any time* (f)

Effect of certificate of sale on irregularities—All irregularities though material are cured by the certificate of sale (g)

Certificate of sale and *res judicata*—A sale certificate is just like a deed of sale, and it does not operate as a plea of *res judicata* Where a defendant contends that the act of the Court did not pass title to the property in dispute to the plaintiff and the plaintiff produces a sale certificate the defendant is barred not by sec 11 relating to *res judicata* but by sec 47 of the Code (h)

95. [S. 318.] Where the immovable property sold is in the occupancy of the judgment debtor or of some person on his behalf or of some person claiming under a title created by the judgment debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same

Delivery of property in occupancy of judgment-debtor

Delivery of possession to purchaser—The possession contemplated by this rule is *has* or actual possession See notes to r 35 of this Order For the form of the order for delivery see App E form No 39

Separate suit for delivery of possession—See notes to s 47, Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand on p 179 above

Appeal—See notes to s 47 Questions between the auction purchaser on the one hand and a party to the suit or his representative on the other hand on p 179 above

Limitation—The period of limitation for an application for delivery of possession is three years from the date when the sale becomes absolute [Limitation Act 1908 sch I art 181] The period of limitation for a suit for delivery of possession is twelve years from the date when the sale becomes absolute (ib, art 138)

Procedure under this rule—The purchaser on the strength of his sale certificate is entitled to get an order from the Court for the delivery of the property to him by any person bound by the decree If the person in possession is holding the property on his own account and is not bound by the decree the application must be dismissed (i) The auction purchaser of a prior mortgagee's decree for sale cannot be evicted by the auction purchaser at a decree for sale by a puisne mortgagee subject to the right of the prior mortgagee (j)

- (f) *Ayala v Ramasami* (1887) 4 Mad 170
Ishai v Ishai Rao (1887) 6 Bom 586
 (g) *H Krishna v Masani* (1893) 5 All 147 157
 21 A 18 *Na jir v Bhaskar* (1896) 10 Bom 444
 (h) *Lakshmi Chand v Ramias* (1909) 33 C

- W N 795 118 I C 857 (1909) A C 34
 (i) *Kron Soshi v Official Assignee* (1932) 67 Cal 8 143 I C 381 (33) A C 46
Sobha v Turri (1941) 46 All 693 690
 83 I C 203 (24) A A 400
 (j) *Ganga Char v Lakshman* (1930) 30 Bom L R 431 120 I C 915 (30) A R 401

It may be observed that a purchaser at a Court sale is not bound to apply for possession under this rule. He may at his option bring a regular suit for possession, the period of limitation for the suit being 12 years as stated above. The remedies by way of application and that by way of suit are concurrent (l). Further, the fact that an application has been made under this rule, and it is rejected as being time barred (l), or on any other ground (m), is no bar to a regular suit for possession.

96. [S. 319.] Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser.

Delivery of property in occupancy of tenant

Delivery of possession to purchaser.—The possession contemplated by this rule is *symbolical* possession. See notes to r 35 above

Limitation—See notes to r 95 above.

Resistance to delivery of possession to decree-holder or purchaser.

97. [Ss. 328, 334.] (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

Resistance or obstruction to possession of immovable property

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Rules 97, 98 and 99—These rules are to be read together

When rule applies—The purchaser first makes an application to the Court by way of execution under rule 95 or 96. That application should not mention that any particular person is likely to resist. If the process of execution under these rules is resisted, it is then that an application under this rule should be made (n). The Calcutta High Court dissented from an assumption made in an Allahabad case (o) that this rule applies when the applicant is resisted when attempting to get possession without the help of the Court

(k) *Kushore v Chunder* (1887) 14 Cal 611
(l) *Shro Narain v Nur Muhammad* (1907) 29 All 463
(m) *Seru v Bhagoban* (1893) 9 Cal 602

(n) *Kiron Soahi v Official Assignee* (1 Cal 8, 143 I C 81, (33) A C 246
(o) *Sobha v Turzi* (1924) 46 All 693, I C. 923, (24) A A 495

O. 21, r. 97, 98 Regular suit—The decree holder may either resort to the summary remedy provided by this rule or he may bring a regular suit. Failure on the part of the decree holder to avail himself of the remedy under this rule does not deprive him of his right to bring a regular suit against the party obstructing execution of the decree (p). But if he applies under this rule and fails, the order against him is conclusive unless he brings a suit to establish his right to possession as provided by r 103 below. Such a suit must be brought within one year from the date of the order (q). See Limitation Act, 1908, sch I, art 11 A

Limitation—The period of limitation for an application complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree is 30 days from the date of the resistance or obstruction (Limitation Act, 1908, sch I, art 167)

Fresh application for delivery of possession—Under the present Code a holder of a decree for possession of immovable property applies for possession under O 21, r 35, while an auction purchaser applies for possession, under O 21, r 95. The present rule deals with *obstruction or resistance* in obtaining possession. An important question that arises in this connection is whether if a decree holder or auction purchaser who is obstructed or resisted in obtaining possession omits to apply under this rule within 30 days from the date of obstruction or resistance, the only other remedy open to him is to proceed by a regular suit or whether he is entitled to a fresh writ of possession. It has been held by the High Courts of Madras (r) and Patna (s), that he is entitled to make a fresh application for delivery of possession and to a fresh warrant for possession. On the other hand it has been held by the High Court of Allahabad (t), that he is not so entitled and that his only remedy is by a regular suit. The Bombay High Court holds that he is entitled to a fresh warrant for delivery of possession but that if the resistance is shewn to be by the same person and in the same character the application will be barred by Art 167 of the Limitation Act (u).

Whether O 9 applies to proceedings under this rule—The provisions of O 9 do not apply to proceedings under this rule. See notes to O 9, r 9, "Whether this rule applies to proceedings in execution."

98. [Ss. 329, 330.] Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

When this rule applies—This rule deals with two cases, namely, where the obstruction is occasioned without just cause (1) by the judgment debtor, or (2) by some

(p) *Balwant v. Babaji* (1891) 8 Bom 602
(r) *Kodha v. Turali* (1911) 49 All 693, 698, 83 IC 923, (24) A A 432
(s) *Mulla v. Appanna* (1890) 13 Mad 501
(t) *Laghunandan v. Iam Churan* (1919) 4 Pat

L J 94 491 C 150
(u) *Kerr v. Abdul Hassan* (1904) 26 All 365
(u) *Mukund v. Tanu* (1933) 35 Bom 1 R 1037
146 L C 11 (33) A B 457 L R 457
Rahim Unayaktrao v. Derrao (1887) 11 Bom 473

other person at his instigation. No order can be made under this rule if the obstruction is caused by a person other than the judgment-debtor, unless the Court is satisfied that the person was acting at the instigation of the judgment debtor (r)

Purchaser from a judgment-debtor pending attachment.—The High Court of Madras has held that proceedings can be instituted under this rule against a purchaser from a judgment-debtor pending attachment, though such a purchaser is not expressly mentioned in the rule. The reasons given are (1) that this rule is to be read with r 95 which expressly provides for the institution of proceedings against such a purchaser under that rule, and (2) that such a purchaser is a "representative" of the judgment-debtor within the meaning of s. 146, so that proceedings which can be instituted against a judgment-debtor can also be instituted against him (w).

Presidency Small Cause Court.—This rule applies to proceedings under Chapter 7 of the Presidency Small Cause Courts Act, 1882, relating to recovery of possession of immovable property, by virtue of s. 48 of that Act (x)

Appeal.—See notes to s. 47, "Questions between the auction purchaser on the one hand, etc." See also notes to r 101 below under the head "Appeal." Section 107 excludes an appeal from an order under this rule (y)

99. [Cf. Ss. 331, 335.] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

Resistance or obstruction
by bona fide claimant

When this rule applies.—The present rule deals with two cases of claimants in good faith, namely, (1) persons claiming on their own account, and (2) persons claiming on account of some person other than the judgment debtor.

Person other than judgment debtor claiming to be in possession on his own account.—If the resistance is by a person claiming *bona fide* to be in possession on his own account the question is not within the purview of s. 47 and this rule applies (z). The word "possession" as used in this rule is not limited to actual physical possession. It includes also *constructive* possession, such as possession through tenants or servants. Hence a landlord who is in possession of a property through his tenant is a "person in possession of the property on his own account" within the meaning of this rule (a)

Where in a suit brought by a plaintiff against two defendants, a decree is passed by consent against one of them only, the other defendant is not a judgment debtor. He is a "person other than the judgment debtor" within the meaning of this rule (b)

Subtenants.—A lets his house to B. B sublets the house to C. A files a suit against B for possession and obtains a decree against B. C is not joined as a party to the suit. C obstructs A in obtaining possession of the property. Can C be

(r) " " " " " " " " " " " "

(w) " " " " " " " " " " " "

(x) *Daroga v Mahabern* (1923) 45 Mad LJ 66, 73 IC 985, (24) A M 74

(y) " " " " " " " " " " " "

(z) " " " " " " " " " " " "

(a) " " " " " " " " " " " "

(b) *Jathavedun v Kunchu* (1907) 30 Mad 72

O. 21,
r. 99, 100

said to be in possession on "his own account" within the meaning of this rule? The High Court of Bombay has held that *C* is not a person claiming to be in possession on his own account as his title is derived from the judgment-debtor (*c*) The Calcutta High Court also holds that *C* is not entitled to resist possession as he is bound by the decree and that there is no occasion for the landlord *A* to make an application under r 97 as he can evict *C* under r 35 (*d*) See note 'Bound by the decree' under r 35 above

The Bombay High Court has also held that *C* is not entitled to claim the benefit of the Bombay Rent Act against *A*, there being no privity of contract between him and *A* (*e*)

Transferee pendente lite—See r 102 below

Appeal—See notes to rr 98 and 101 under the head, "Appeal"

100. [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Rules 100 and 101—These rules are to be read together

When this rule applies.—This rule refers to a person who has been dispossessed by an auction purchaser who has taken possession of the property through the Court. He complains to the Court of such dispossession, and the Court makes a summary investigation, and if it holds that the applicant was in possession of the property on his own account and not on account of the judgment debtor, it directs under r 101 that possession be given back to the applicant. The party against whom the order is made may then institute a suit under r 103 to establish the right which he claims to the present possession of the property (*f*)

Claim may be barred by res judicata.—If the person who is dispossessed has before the sale unsuccessfully objected to the attachment under r 58 his only remedy is by suit and he cannot make an application under this rule (*g*) Similarly when a mortgagee obtained a decree for sale against three brothers who had mortgaged the property to him and impleaded the mother as lessee, the mother could not resist dispossession on the ground that she had inherited a share of another brother for this ground of defence should have been taken in the suit (*A*)

"Any person other than the judgment debtor."—See notes to sec 47, "Representatives," on p 174 A purchaser of a portion of a holding from a judgment debtor is his representative and is not entitled to apply under this rule (*i*). The Patna

- (c) *Jaram v Norem* (1921) 23 Bom L.R. 1316, 65 I.C. 212 (22) A II 419
(d) *Shrikā Jany v Jyotsnāchandra* (1932) 59 Cal 732 137 J.C. 133 (32) A.C. 211, dissenting from *Fera v Gubbay* (1920) 47 Cal 907, 91 I.C. 963
(e) *Jagjiri v Ji vadia* (1922) 48 Bom 526, 61 I.C. 612, (22) A.C. 273

- (f) " "
(g) " "
(h) "
(i) *Bhikā v Ji v Bihari* (1917) 21st L.J. 476, 42 I.C. 626.

High Court has held that a purchaser from a judgment-debtor of a non transferable holding is also a representative and is not entitled to apply (j). But the Calcutta High Court has come to the opposite conclusion and says that so far as the decree holder is concerned he is a trespasser and is entitled to apply under this rule (k). Indeed Rankin, C.J., deprecates the use of the word 'representative' in this connection and treats the purchaser as entitled to apply as being a person in possession on his own account (l).

"Is dispossessed."—Where mere symbolical possession is delivered to the decree holder or purchaser under r 96, the person in possession cannot be said to be "dispossessed" within the meaning of this rule so as to entitle him to apply under this rule (m). It is only the delivery of actual possession (r 95) that can constitute dispossession within the meaning of this rule. A person who is in possession through his tenant will be said to be 'dispossessed' within the meaning of this rule, if the tenant is ousted from the property by the delivery of actual possession to the decree holder or purchaser (n).

Dispossession under order of Collector.—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred, he should apply to the Collector, and not to the Court, complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (o).

Limitation.—The application under this rule must be made within 30 days from the date of the dispossession. Limitation Act, 1908, sch I, art 165. If the auction-purchaser has sold the property to a sub purchaser, the period of limitation is the same and does not run from the time when the party dispossessed had notice of the sub purchase (p).

Dismissal of application for default.—It was held by the Patna High Court in the undermentioned case (q) that where an application made under this rule by a person not bound by the decree is dismissed for default, the order may be set aside under O 9 r 9 and the application may then be reheard. But this decision was disapproved by a Special Bench of the same Court in a later case (r). See notes to O 9, r 9, "Whether this rule applies to proceedings in execution."

101. [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

"Was in possession on his own account."—The Bombay High Court has held that the rule does not apply to a member of a joint Hindu family as he is not in possession on his own account (s). On the other hand it has been held that the rule is comprehensive enough to include a claim by a member of a joint Hindu family and that the effect of the order is to restore him to joint possession (t).

- (j) *Panchraton v Ram Sahay* (1918) 3 Pat L J 5, 9 43 I C 969
 (k) *Purna Chandra v Manobini Devi* (1927) 53 Cal 913 99 I C 718 (27) A C 156
 (l) *Bhim Nask v Chakradhar* (1930) 34 C W N 577 127 I C 552 (30) A C 348
 (m) *Ibrahim v Ramjodu* (1903) 30 Cal 710
 (n) *Brajabala v Gurudas* (1906) 33 Cal 487
 (o) *Ravho v Hanmati* (1913) 37 Bom 488, 19 I C 903

- (p) *Indubhusan v Haricharan* (1931) 58 Cal 55 123 I C 471 (21) A C 906
 (q) " "
 (r) " "
 (s) " "
 (t) " "

O. 21,
rr. 99, 100

said to be in possession on "his own account" within the meaning of this rule? *The High Court of Bombay* has held that *C* is not a person claiming to be in possession on his own account as his title is derived from the judgment debtor (*c*) *The Calcutta High Court* also holds that *C* is not entitled to resist possession as he is bound by the decree and that there is no occasion for the landlord *A* to make an application under r 97 as he can evict *C* under r 35 (*d*) See note 'Bound by the decree' under r 35 above

The Bombay High Court has also held that *C* is not entitled to claim the benefit of the Bombay Rent Act against *A*, there being no privity of contract between him and *A* (*e*)

Transferee pendente lite — See r 102 below

Appeal — See notes to rr 98 and 101 under the head, "Appeal"

100. [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Dispossession by decree-holder or purchaser

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Rules 100 and 101 — These rules are to be read together

When this rule applies — This rule refers to a person who has been dispossessed by an auction purchaser who has taken possession of the property through the Court. He complains to the Court of such dispossession and the Court makes a summary investigation, and if it holds that the applicant was in possession of the property on his own account and not on account of the judgment debtor it directs under r 101 that possession be given back to the applicant. The party against whom the order is made may then institute a suit under r 103 to establish the right which he claims to the present possession of the property (*f*)

Claim may be barred by res judicata — If the person who is dispossessed has before the sale unsuccessfully objected to the attachment under r 58 his only remedy is by suit and he cannot make an application under this rule (*g*) Similarly when a mortgagee obtained a decree for sale against three brothers who had mortgaged the property to him and impleaded the mother as lessee, the mother could not resist dis possession on the ground that she had inherited a share of another brother for this ground of defence should have been taken in the suit (*h*)

"Any person other than the judgment debtor." — See notes to sec 47, "Representatives" on p 174 A purchaser of a portion of a holding from a judgment debtor is his representative and is not entitled to apply under this rule (*i*) *The Patna*

(c) *Joram v Joram* (1921) 23 B.M. L.R. 1316, 83 I.C. 212 (2-3) A.B. 419

(d) *Shrikrishna Jural v Jyotichandra* (1932) 59 Cal. 39 137 I.C. 133 (3) A.C. 211

dismissing from *Pra v Guldady* (1920) 47 Cal. 607, 60 I.C. 953

(e) *Jagjiri v Miesudin* (1922) 46 Bom. 526 61 I.C. 632, (2) A.B. 273

(f) *Ambica v Ram Prasad* (1925) 30 C.W.N. 163 186 90 I.C. 575 (26) A.C. 377

(g) *Ehlalanti v Hara* (1932) 36 C.W.N. 1031 141 I.C. 100 (33) A.C. 233

(h) *Kedarnath v Bhairava* (1933) 60 Cal. 832, (33) A.C. 840

(i) *Bhikha v F. H. Jharia* (1917) 2 Pat. L.J. 478, 42 I.C. 526

High Court has held that a purchaser from a judgment-debtor of a non transferable holding is also a representative and is not entitled to apply (j). But the Calcutta High Court has come to the opposite conclusion and says that so far as the decree-holder is concerned he is a trespasser and is entitled to apply under this rule (l). Indeed Rankin, C J., deprecates the use of the word 'representative' in this connection and treats the purchaser as entitled to apply as being a person in possession on his own account (l).

"Is dispossessed."—Where mere symbolical possession is delivered to the decree-holder or purchaser under r 96, the person in possession cannot be said to be dispossessed within the meaning of this rule so as to entitle him to apply under this rule (m). It is only the delivery of actual possession (r 95) that can constitute dispossession within the meaning of this rule. A person who is in possession through his tenant will be said to be "dispossessed" within the meaning of this rule, if the tenant is ousted from the property by the delivery of actual possession to the decree holder or purchaser (n).

Dispossession under order of Collector.—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred, he should apply to the Collector, and not to the Court, complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (o).

Limitation.—The application under this rule must be made within 30 days from the date of the dispossession. Limitation Act, 1908, sch I, art 165. If the auction-purchaser has sold the property to a sub-purchaser, the period of limitation is the same and does not run from the time when the party dispossessed had notice of the sub-purchase (p).

Dismissal of application for default.—It was held by the Patna High Court in the undermentioned case (q) that where an application made under this rule by a person not bound by the decree is dismissed for default, the order may be set aside under O 9, r 9, and the application may then be reheard. But this decision was disapproved by a Special Bench of the same Court in a later case (r). See notes to O 9, r 9, "Whether this rule applies to proceedings in execution."

101. [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession

"Was in possession on his own account."—The Bombay High Court has held that the rule does not apply to a member of a joint Hindu family as he is not in possession on his own account (s). On the other hand it has been held that the rule is comprehensive enough to include a claim by a member of a joint Hindu family and that the effect of the order is to restore him to joint possession (t).

(j) *Panchraton v Ram Sahay* (1918) 3 Pat 117, 118, 119, 120, 121.

(k)

(l)

(m)

(n) *Brajabala v Gurudas* (1906) 33 Cal. 487.

(o) *Rajko v Hanmati* (1913) 37 Bom 488, 191 Cal 903.

(p) *Indubhusan v Harcharan* (1931) 58 Cal 55, 132 F C 631, (31) A C 385.

(q)

(r)

(s)

(t)

O. 21,
rr. 99, 100

said to be in possession on "his own account" within the meaning of this rule? The High Court of Bombay has held that *C* is not a person claiming to be in possession on his own account as his title is derived from the judgment debtor (*c*) The Calcutta High Court also holds that *C* is not entitled to resist possession as he is bound by the decree and that there is no occasion for the landlord *A* to make an application under r 97 as he can evict *C* under r 35 (*d*) See note 'Bound by the decree' under r 35 above

The Bombay High Court has also held that *C* is not entitled to claim the benefit of the Bombay Rent Act against *A* there being no privity of contract between him and *A* (*e*)

Transferee pendente lite—See r 102 below

Appeal—See notes to rr 98 and 101 under the head, Appeal

100. [S. 332.] (1) Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same

Rules 100 and 101—These rules are to be read together

When this rule applies—This rule refers to a person who has been dispossessed by an auction purchaser who has taken possession of the property through the Court. He complains to the Court of such dispossession and the Court makes a summary investigation, and if it holds that the applicant was in possession of the property on his own account and not on account of the judgment debtor it directs under r 101 that possession be given back to the applicant. The party against whom the order is made may then institute a suit under r 103 to establish the right which he claims to the present possession of the property (*f*)

Claim may be barred by res judicata—If the person who is dispossessed has before the sale unsuccessfully objected to the attachment under r 58 his only remedy is by suit and he cannot make an application under this rule (*g*) Similarly when a mortgagee obtained a decree for sale against three brothers who had mortgaged the property to him and impleaded the mother as lessee the mother could not resist dispossession on the ground that she had inherited a share of another brother for this ground of defence should have been taken in the suit (*h*)

'Any person other than the judgment debtor'—See notes to sec 47, Representatives on p 174 A purchaser of a portion of a holding from a judgment debtor is his representative and is not entitled to apply under this rule (*i*) The Patna

- (c) *Jairam v. Nouro* (1921) 23 Bom L.R. 1316 65 I C 212 (20) A B 419
(d) *Shri K. Yashu v. Jyoti Achandra* (1932) 59 Cal 759 137 I C 139 (32) A C 241
dissenting from *Ezra v. Gubbay* (1920) 47 Cal 907 60 I C 969
(e) *Jagji v. M. Yadav* (1946) 46 Bom L.R. 61
I C 602 (2) A B 273

- (f) *Ambica v. Ram Prasad* (1925) 30 C W N 163 166 90 I C 573 (26) A C 377
(g) *Bholanath v. Hara* (1937) 36 C W N 1034 141 I C 100 (33) A C 233
(h) *Kedarnath v. Ksh. Rada* (1933) 60 Cal 832, (33) A C 680
(i) *Bh. Khas v. J. J. Bhari* (1917) 2 Pat L. J 478 42 I C 526

High Court has held that a purchaser from a judgment debtor of a non transferable holding is also a representative and is not entitled to apply (j). But the Calcutta High Court has come to the opposite conclusion and says that so far as the decree holder is concerned he is a trespasser and is entitled to apply under this rule (l). Indeed Rankin, C J., deprecates the use of the word 'representative' in this connection and treats the purchaser as entitled to apply as being a person in possession on his own account (l).

"Is dispossessed"—Where mere symbolical possession is delivered to the decree holder or purchaser under r 96, the person in possession cannot be said to be dispossessed within the meaning of this rule so as to entitle him to apply under this rule (m). It is only the delivery of actual possession (r 95) that can constitute dispossession within the meaning of this rule. A person who is in possession through his tenant will be said to be 'dispossessed' within the meaning of this rule, if the tenant is ousted from the property by the delivery of actual possession to the decree holder or purchaser (n).

Dispossession under order of Collector.—When a person has been dispossessed under an order made by the Collector to whom execution proceedings are transferred he should apply to the Collector, and not to the Court, complaining of such dispossession. This rule has no application when execution has been transferred to the Collector (o).

Limitation.—The application under this rule must be made within 30 days from the date of the dispossession. Limitation Act, 1908, sch I, art 165. If the auction-purchaser has sold the property to a sub purchaser, the period of limitation is the same and does not run from the time when the party dispossessed had notice of the sub-purchase (p).

Dismissal of application for default.—It was held by the Patna High Court in the undermentioned case (q) that where an application made under this rule by a person not bound by the decree is dismissed for default, the order may be set aside under O 9 r 9 and the application may then be reheard. But this decision was disapproved by a Special Bench of the same Court in a later case (r). See notes to O 9, r 9, 'Whether this rule applies to proceedings in execution'.

101. [Ss. 332, 335.] Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession

"Was in possession on his own account."—The Bombay High Court has held that the rule does not apply to a member of a joint Hindu family as he is not in possession on his own account (s). On the other hand it has been held that the rule is comprehensive enough to include a claim by a member of a joint Hindu family and that the effect of the order is to restore him to joint possession (t).

(j) *Panchraton v Ram Sahay* (1918) 3 Pat 111

(k)

(l)

(m)

(n) *Brajabala v Gurudas* (1906) 33 Cal 487

(o) *Rajha v Hanmati* (1913) 37 Bom 488 191 C 903

(p) "The rule applies to a sub-purchaser who has bought the property from the auction-purchaser."

(q)

(r)

(s)

(t)

O. 21, rr. 101-103 Ex parte order for delivery of possession—Where an order even though ex parte is made under rule 101, the remedy of the other party is by way of suit under rule 103 and not by proceedings under O 9 r 13. O 9 r 13 does not apply to execution proceedings in any event not to proceedings under rules 100 and 101 of the present Order (u). See notes to O 9 r 13. Whether this rule applies to execution proceedings.

Appeal—The Chief Court of the Punjab has held that no appeal lies from an order made under this rule (t). On the other hand it has been held by the High Court of Madras that where an application under r 100 is contested between persons who were parties to the suit or representatives of parties the case falls within sec 47 and an appeal lies from the order (u). The Madras decision assumes that questions as to possession under r 100 are questions relating to the execution discharge and satisfaction of the decree within the meaning of sec 47. Upon this point there is a conflict of decision. The matter is discussed fully in the notes to sec 47. Questions between the auction purchaser on the one hand and etc. It is submitted that r 103 excludes an appeal from the order.

102. [S. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

R is not applicable to transfer *in pendente lite*

If an order is made under r 99 or r 101 it is conclusive against the party against whom it is made unless he brings a suit to establish his right as provided by r 103 below. This rule provides that nothing in rr 99 and 101 applies to resistance by a transferee *pendente lite* from the judgment debtor. If an order is made in execution proceedings in such a case r 103 does not apply. The Oudh Court has held that where a transferee *pendente lite* pays off a prior usufructuary mortgage and enters into possession of the property and resists the decree holder in obtaining possession he must be treated in relation to his position as a purchaser from the possessory mortgagee and that the case falls within r 99 above and is not affected by the rule of *pendente lite* (z).

103. [S. 332, fourth para.; S. 335, second para.] Any party not being a judgment debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any), the order shall be conclusive.

Orders conclusive subject to regular suit

Suit to establish right to present possession—The suit must be brought within one year from the date of the order, Limitation Act 1908 sch I art 11 A and time spent in prosecuting an application for revision of the order will not be excluded under

(u) *Hari Charan v Manmatha* (1914) 41 Cal 1 19
I C 683

(t) "

(w) "

63 I C 730 (21) A M 612 *Meyyappa v Chudambaram* (1920) 39 Mad L J 603
61 I C 349 *Pezantra v Maya* (19 0)
43 Mad 696 58 I C 501

(x) *Muhammad Fatima v Raza Ali* (1927) 2
Lu k 269 92 I C 219 (26) A O 610

see 14 of the Limitation Act (y) If no suit is brought within the aforesaid period, the order will be conclusive (z)

This rule does not apply *unless an order has been made under r 98, r 99 or r 101* Therefore where an application is made under r 97 or r 100, but the Court declines to pass any order upon the application thinking it best that the applicant should be referred to a separate suit, the present rule does not apply, and any suit which the applicant may subsequently institute for possession is not a suit under this rule, and it is not therefore governed by art 11A of the Limitation Act (a) Not only is it necessary that an actual order should have been made but the order must have been one *made after investigation* as contemplated by r 97, sub r (2) and r 100, sub r (2) An order dismissing an application for default of prosecution is not an order made after investigation The present rule, therefore, does not apply to such an order (b)

Scope of suit under this rule.—It must not be supposed that a suit under this rule is concerned only with actual possession at the date of the order The suit is to establish the right which the plaintiff claims to the present possession of the property, and this right may be established without showing that the plaintiff was in actual possession at the date of the order against him (c)

Suit by auction purchaser for possession under a different right.—An auction purchaser against whom an order is made under r 99 or r 101 may bring a suit under this rule to establish the right which he claims to the present possession of the property Where a suit is brought by him under this rule, the suit is one for possession *under his auction purchase*, and the *cause of action* in the suit is the adverse decision under r 99 or r 100 A suit under the present rule is quite irrespective of *any other cause of action* which such person *apart from his character as auction purchaser* may have against the opposite party It is, therefore, competent to the auction purchaser to abandon all his right in the auction sale including the right to bring a suit under this rule *as auction purchaser* and to bring a suit against the opposite party for possession *upon a different title altogether* To such a suit the provisions of the present rule do not apply, and the suit need not be brought within one year from the date of the order as required by art 11A of the Limitation Act (d)

Order dismissing application under rule 101.—A makes an application under r 100 The application is dismissed under r 101 A is a "party against whom an order is made under r 101," within the meaning of the present rule, though there is no express provision for dismissal of an application under r 101 (e)

Order dismissing an application under r 95.—An order dismissing an application under r 95 cannot be treated as an order under r 99 so as to attract the application of the present rule (f)

ORDER XXII

Death, Marriage and Insolvency of Parties.

1. [S. 361.] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

No abatement by party's death if right to sue survives

(y)

(z)

(a)

(b)

(c) *UNIL v Locker* (1911) 44 Mad 227, 60 I C

(d)

(e)

(f)

109 (21) A M 317

O. 22, r. 1 Application of order to appeals—The provisions of this order apply to appeals See sec 107, sub s (2) and r 11 below

Application of order to execution proceedings—The provisions of this order apply to execution proceedings except rr 3, 4 and 8 See r 12 below

' Right to sue —The right to sue means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death (g)

In what cases the right to sue survives and in what cases it does not.—To answer this question, we may turn to the provisions of—

I the Indian Contract Act 9 of 1872 sec 37, and

II the Indian Succession Act 39 of 1925 sec 306

I *Contract Act sec 37*—Section 37 of the Contract Act runs as follows ' Promises bind the representatives of the promisors in case of the death of such promisors before performance, *unless a contrary intention appears from the contract* The words in italics refer to contracts involving the exercise of special skill or involving special personal confidence for these are not binding on the representatives of the promisors A promises to paint a picture for B by a certain day, at a certain price A dies before the day The contract cannot be enforced either by A's representatives against B or by B against A's representatives The reason is that the right to sue does not survive to or against the representatives of A

II *Indian Succession Act 39 of 1925 sec 306*—Section 306 of the Succession Act is as follows All demands whatsoever and all rights to prosecute or defend any action or special proceedings existing *in favor of or against* a person at the time of his decease survive *to and against* his executors or administrators, except causes of action for defamation assault as defined in the Indian Penal Code or other personal injuries not causing the death of the party, and except also cases where after the death of the party the relief sought could not be enjoyed or granting it would be nugatory

The effect of this section is that the right to sue does not survive in the following cases —

(i) Suits for defamation assault or other personal injuries not causing the death of the party [When death is caused by a personal injury, the legal representative of the deceased may sue the wrong doer for damages, see Act 13 of 1855]

(ii) Cases where after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory

Illustrations

1 A sues B to recover possession of his minor daughter illegally detained by B B dies before decree The cause of action does not survive against B's representative and the suit abates *Sharifa v Munekhan* (1901) 20 Bom 574

2 A applies to be appointed guardian of the person of X The application is opposed by B who claims that he has been appointed guardian by the will of X's father B dies B's representative is not entitled to continue the proceedings A claim based on a personal trust does not survive to the claimant's representative *Gangabai v Akashbhai* (1899) 23 Bom 719 It is different, however where the claim is not based on a personal trust In such a case the legal representative of the deceased is entitled to continue the proceeding and to contend that the applicant is not a proper person to be appointed guardian *Palamandi v Adailalam* (1924) 17 Mad 459, 84 I C 613, (24) A M 484

3 A sues B to establish his right to the office of Mahant. A dies before decree. The suit abates for the right claimed is a personal right to an office. *Sham Chand v Bhayaram* (189) 22 Cal 92, *Gular v Sardar Ali* (1911) 12 Lah 1, 125 I C 84, (70) A L 503.

4 The right of an unmarried Hindu daughter to claim the property left by her father to the exclusion of her married sister is not a personal right. If a suit is brought to establish such a right and the plaintiff dies pending the suit, the suit does not abate. *Jadubansi v Mahpal Singh* (1915) 38 All 111, 32 I C 101, dissenting from *Balak Puri v Durga* (1908) 30 All 49.

5 A suit by an idol is conducted by the shebait as representing the idol and does not abate on the death of the shebait. *Keshab Pasi v Jyoti Prasad* (1932) 36 C W N 810 139 I C 123 (72) A C 783.

6 A sues B for an injunction to restrain him from preventing A from enjoying the honour of standing at a particular place in temple. B dies pending the suit. The suit abates. *Josiam v Swami* (1910) 31 Mad 76 5 I C 937.

7 A a Sunni Mahomedan sues B for pre-emption. A dies pending the suit. It is not settled whether the right to sue is extinguished, or whether it survives to his heirs or legal representatives. *Muhammad v Aiamat un Nissa* (1897) 20 All 88, *Sayyad Jiaul v Sitaram* (1912) 36 Bom 144, 12 I C 720.

8 An action to recover damages for breach of contract of marriage abates on the death of the plaintiff. *Balubhai v Nanalal* (1920) 44 Bom 416, 55 I C 624.

9 A sues B for damages for malicious prosecution. A dies pending the suit. Does the right to sue survive? The Calcutta High Court has held that it does and that A's legal representative is entitled to continue the suit (h). On the other hand it has been held by the High Courts of Bombay (i), Patna (j), Madras (k), and Allahabad (l) that the right to sue does not survive and that the suit abates on A's death.

10 The right to sue for damages for breach of contract, the right to sue on a promissory note, the right to sue for a debt, the right to sue on a mortgage, the right to sue for wrong done to property, are all instances of rights that are not extinguished on the death of the plaintiff or defendant. In all these cases the suit does not abate on the death of the plaintiff or defendant. An agreement referring matters in dispute to arbitration is not in this country revoked by the death of any of the parties thereto before the award is made. Hence the question whether the legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a purely personal nature or is one which survives to the legal representative (m).

Partial abatement—A suit may abate as to one of the reliefs claimed and not as to another. Plaintiff sued under sec 92 for the removal of a trustee, and for the settlement of a scheme. On the death of the trustee the suit as for his removal abates, but not so far as it prayed for the settlement of a scheme (n). See notes to sec 92, Death of defendant trustee pending suit, on page 313 above.

| | | |
|-----|---|--|
| (h) | " | v <i>Raja of Ramnad</i> (1926) 49 Mad 208 91 I C 366, (26) A M 243 |
| (i) | " | (l) <i>Maktab Singh v Hub Lal</i> (1926) 48 All 630 98 I C 580 (28) A.A. 610 |
| (j) | " | (m) <i>Perumalla v Perumalla</i> (1904) 27 Mad 112 |
| (k) | " | <i>Dulla v Khedu</i> (1911) 33 All 645 11 I C 935 |
| | " | (n) <i>Arumuga v Namaswamy</i> (1925) 48 Mad 688 91 I C 109 (26) A M. 162 |

O. 22, r. 1 Suit under O. 1, r. 8.—If a suit is filed by a plaintiff under O. 1, r. 8, on behalf of himself and numerous other persons in the same interest the right of suit is not personal to the plaintiff for any person interested has the right to intervene at any time under O. 1, r. 8(2). If a person interested who is not a party dies the suit does not abate. If the plaintiff or one of the plaintiffs appointed to conduct the suit dies, any other person interested may apply to carry on the suit. See note 'Abatement of suit' under O. 1, r. 8, at p. 467.

Suit by reversioner.—The right of intervention by a person interested as referred to in the preceding paragraph has been extended to the case of a suit by a presumptive reversioner to set aside an adoption by a Hindu widow. The Privy Council have held that such a suit is a representative suit for the object of the suit is to remove an apprehended injury to the interest of all reversioners presumptive and contingent. A contingent reversioner can apply at any time to be made a party. So on the death of the plaintiff the suit does not abate but may be carried on by the next reversioner (o). But the heir of the presumptive reversioner would not be entitled to continue the suit if the property would not be ancestral in his hands (p).

Application for probate.—The right of intervention by a person interested also applies to the case of an executor applying for probate of a will. The executor acts in a representative capacity on behalf of the whole class of persons, including himself, interested in having the will established. Therefore the Madras High Court have held that on the death of the executor, any person interested may carry on the proceedings with this difference that the prayer will be for letters of administration with the will annexed (q). The same view was taken in a Calcutta case (r). But in two earlier Calcutta cases (s) the right of the executor was treated as a personal right and the rule as to abatement was applied (s).

Death of either party pending appeal.—Where a decree has been passed for the plaintiff in a suit in which the right to sue would not have survived had the

defendant died, and the defendant appeals and dies pending the appeal the appeal does not abate for his legal representative may carry on the appeal to get rid of the decree which would otherwise have to be paid out of the estate of the deceased (t). Again if damages have been awarded against a defendant and the plaintiff dies pending the appeal, the plaintiff's legal representative may

carry on the appeal. But if after damages are awarded the defendant dies pending the appeal, the appeal abates for the plaintiff's claim in the appeal is to enforce the original right to sue (u). It follows that if the plaintiff's suit is dismissed and the plaintiff has appealed from the decree and either party dies pending the appeal, the appeal will abate (u).

| | |
|-----|--|
| (o) | Cyl 799 3 I C 995 <i>Haribaran v Manmatt unath</i> (1918) 45 Cal 562 511 C 76 |
| (p) | <i>Abdullah v West Zamb</i> (1937) 13 Lah 116 134 I C 71 (31) A L 233 |
| (q) | <i>Bama v Panna</i> (1933) 56 Mad 346 141 I C 87 (33) A L 114 |
| (r) | <i>Chandramani v B. per</i> (1931) 35 Cal 1074 136 I C 543 (32) A L 206 |
| (s) | <i>Sarat Chandra v Dhanu Mohan</i> (1909) 36 |
| (t) | <i>Gopal v Ramechandra</i> (1909) 26 Bom 507 <i>Jatunon v Sundararaja</i> (1903) 28 Mad 493 |
| (u) | <i>Muhammad v Khushalo</i> (1887) 9 All 131 |
| (r) | <i>Bhims Sen v Mohammad Ali</i> (1930) 11 Lah 1320 I C 9 (21) A L 807 |
| (w) | <i>Gopal v Ramechandra</i> (1909) 26 Bom 507 at p. 501 lines 33-35 <i>Kyashani v Bhacani</i> (1904) 27 Mad 545 |

Illustrations

1. *A* sues *B* for damages for defamation and obtains a decree for Rs. 5,000. *B* appeals from the decree. *A* dies pending the appeal. The appeal does not abate and *B* may continue the appeal against *A*'s representatives. If *B* dies pending the appeal *B*'s representative may continue the appeal against *A*. In each case the appeal is to get rid of the decree.

1A. *A* sues *B* for damages for personal injury and obtains a decree for Rs. 2,000. *B* appeals from the decree on the ground that he is not liable. *A* files cross objections claiming enhanced damages. Pending the appeal *B* dies. *B*'s legal representative may carry on the appeal to get rid of the decree. But *A*'s cross objections claiming more damages on the original right of suit abates. *Bhim Sain v. Mohammad Ali* (1910) 11 Lah. 1120 I.C. 9 (2) A.L. 807.

2. *A* sues *B* for damages for defamation, but the suit is dismissed. *A* appeals from the decree. Pending the appeal *A* dies. *A*'s representative is not entitled to prosecute the appeal. The reason is that the decree in the original suit being against *A* what is sought to be enforced in appeal is *A*'s right to sue. But the right to sue in a suit for defamation does not survive to the legal representative, hence the appeal abates. Similarly if *B* dies pending the appeal *A* is not entitled to continue the appeal against *B*'s representative not even if *A*'s suit was dismissed *with costs* (x).

2. [S. 362.] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants

Procedure where one of several plaintiffs or defendants dies and right to sue survives

Where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Executors and trustees—Where a suit is brought by executors or trustees the right to sue on the death of any one of them survives to the surviving plaintiffs alone. Where a suit is brought against executors or trustees the right to sue survives against the surviving defendants alone. If one of four uralans or trustees representing a Malabar Devasom sues to redeem a kanom, the suit may continue in spite of the death of one of the other three uralans who are pro forma defendants for the devasom is sufficiently represented by the surviving uralans (y).

Joint Hindu family—See notes to r. 3 below. Joint Hindu family and legal representative

3. [Ss. 363, 365, 366.] (1) Where one of two or more

Procedure in case of death of one of several plaintiffs or of sole plaintiff

plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the

(x) *Josiam v. Swami* (1910) 34 Mad. 76 5 I.C. 937. *Sulata v. Iella* (1941) Rang. 91 80 I.C. 744 (24) A.R. 217.

(y) *Selkara v. Narayanan* (1930) 53 Mad. 90 128 I.C. 451 (30) A.M. 881.

O. 22, r. 3 Court, on an application made in that behalf, shall cause the legal representatives of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Alterations in the rule.—

- 1 The words "so far as the deceased plaintiff is concerned" in sub rule (2) are new. See notes below, "The suit shall abate so far as the deceased plaintiff is concerned"
- 2 The words "the suit shall abate" in sub rule (2) have been substituted for the words "the Court may pass an order that the suit shall abate" which occurred in sec 366 of the Code of 1882. The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable. The High Courts of Bombay (a) and Madras (a) held that such an order was a decree and was therefore appealable. The Allahabad High Court (b) held that the order was not appealable. No such question can arise under the present rule, for it is no longer necessary to make an order that the suit shall abate. The suit abates *ipso facto* if no application is made under sub rule (1) within the time limited by law. It has been so held by the High Court of Lahore (c), and a Full Bench of the High Court of Allahabad (d).

Limitation—The application under this rule must be made within 90 days from the date of the death of the deceased plaintiff or appellant, Limitation Act, 1908, Sch I, art 176

"The suit shall abate"—See notes above, "Alterations in the rule," No 2

The suit shall abate "so far as the deceased plaintiff is concerned"—Where one of two or more plaintiffs dies and the right to sue survives to the surviving plaintiffs or plaintiff alone, the surviving plaintiff or plaintiffs may proceed with the suit. This is the case dealt with in r 2 above. The present rule provides inter alia that where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiffs alone, the legal representative of the deceased plaintiff ought to be made a party to the suit. For this purpose an application should be made to the Court, and it must be made within 90 days from the date of the death of the deceased plaintiff. Sub rule (2) provides that where no such application is made

a nature that it can proceed in the absence of the legal representative of the deceased

(a) *Bhikaji v Purnhotam* (1886) 10 Bom 229
 (a) *Subbaya v Saminadayar* (1890) 18 Mad 496
 (b) *Hamida Bibi v Ali Hussain* (1895) 17 All 172
 (c) *See Ram Gopal v Haru Kishan* (1925) 7 Lah. L J 517, 519 881 C 478 (25) A L 598
Qaim v Aurs (1928) 7 Lah 73 94 I C

422, (26) A L 234
 (d) *Churpa v Baneshwar* (1926) 48 All 334
 93 I C 313 (26) A A 217, overruling
Gujrati v Sital Mider (1922) 44 All 459,
 66 I C 554 (22) A A 209, *Lachmi v*
Muhammed (1920) 42 All 540, 59 I C
 903

plaintiff, it will abate so far only as the deceased plaintiff is concerned. A suit by the partners of a firm to recover a partnership debt is a suit of this nature so that if one of the partners dies pending the suit and his legal representative is not brought on the record, the suit will abate *only so far as the deceased partner is concerned* (e). But if it is of such a character that it cannot proceed in the absence of the legal representative, it will abate as a whole. A suit by some of the partners of a firm against the other partners for dissolution and for accounts is a suit of this character, so that if one of the plaintiffs (or defendants) dies and his legal representative is not brought on the record, the suit will abate *as a whole* (f). See notes above, "Alterations in the rule," No 1.

This rule applies to appeals.—The provisions of this rule apply not only to the case of a deceased plaintiff but to the case of a deceased appellant (see sec 107 and r 11 below). Therefore where one of two or more appellants dies and the right to appeal does not survive to the surviving appellant alone, the legal representative of the deceased appellant ought to be brought on the record. If this is not done, the appeal will abate *so far as the deceased appellant is concerned*. But the appeal will abate *as a whole*, if the case is of such a nature that the appeal cannot proceed in the absence of the legal representative of the deceased appellant.

There is one class of cases in which the appeal cannot abate as a whole, but abates only so far as the deceased appellant is concerned, and these are cases which come within O 41, r 4, corresponding with sec 544 of the Code of 1882. O 41, r 4, provides that where there are two or more plaintiffs or defendants in a suit, and the decree appealed from proceeds on any ground *common* to all the plaintiffs or to all the defendants, *any one* of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of *all* the plaintiffs or *all* the defendants, as the case may be. Where several plaintiffs or defendants jointly appeal from a decree in a case to which O 41, r 4, applies, and one of the appellants dies pending the appeal, but his legal representative is not brought on the record within the period of limitation, the appeal abates so far only as the deceased appellant is concerned and not as a whole. *A* and *B* sue *C*, *D* and *E* for possession of certain property, alleging that it had been unlawfully dispossessed by the defendants. The defence is that the land belongs to *C*, *D* and *E*. The Court finds that the property belongs to the plaintiffs, and a decree is passed in favour of the plaintiffs. *C*, *D* and *E* appeal from the decree. *E* dies pending the appeal, but his legal representative is not brought on the record within the period of limitation. *A* and *B* (respondents) contend that the appeal has abated as a whole and it could not therefore be proceeded with. Does the appeal abate as a whole? No: it abates only so far as the deceased appellant is concerned, and the appeal should therefore be proceeded with. The reason is that the ground of appeal being *common* to all the appellants, viz., that they were the lawful owners of the land, any one of them might have appealed from the whole decree under O 41, r 4, and so the death of one of the appellants cannot affect the right of the other appellants to proceed with the appeal. The same principle applies to suits for partition, redemption and for a declaration of title to the property in suit (g). The High Court of Calcutta holds that O 41, r 4, does not apply on the grounds that a decree cannot be varied or reversed in favour of a person who is dead, and that the appeal having abated the rights

(e) *Saryu v Ram Sarap* (1921) 19 All L J 266, 60 I C 755 (21) A A 34.

(f) *Rajuchander v Ramgati* (1904) 31 Cal 487, 31 I A 71.

(g) *Chandrasang v Khimabhai* (1898) 22 Bom 718 (suit for possession), *Ilam Swak v Lambar* (1903) 25 All 27 (suit for partition), *Chintaman v Gangabai* (1903) 27 Bom 284 (suit for partition), *Somasun-*

daram v Pathlinga (1917) 40 Mad 846, 888 41 I C 546 (suit for possession), *Med Singh v Kabir-un-nissa* (1914) Punj Rec no 88 323 26 I C 486 (suit for declaration of title), *Piyare Lal v Churamani* (1918) Punj Rec no 84 p 279 46 I C 50 (suit for possession), *Maung Nyauing v Maung Shwe* (1924) 2 Rang 486 84 I C 170, (24) A R 376 (suit for redemption).

O. 22, r. 3 between the deceased appellant and the respondents must be deemed to have been determined by the decree of the lower Court (h) In one Calcutta case *A, B and C* sued *D, E and F* for ejectment, but the suit was dismissed *A, B and C* appealed from the decree, *A* died pending the appeal, but no steps were taken to bring his legal representative on the record within the period of limitation. It was held that the appeal abated as a whole. It was also held that if at the hearing of the appeal *B and C* instead of asking for ejectment asked only for joint possession with *D, E and F* the Appellate Court could grant leave to them to amend the plaint by asking for joint possession though on terms that they should pay all costs incurred up to that date (i) See notes to r. 4 below, "Suit or appeal shall abate as against the deceased defendant or respondent"

But O. 41, r. 4, will not enable a pro forma defendant who has not appealed to come forward and carry on an appeal that has abated. Thus *A, B and C* who are jointly interested file a suit which is dismissed. *A* alone files an appeal and joins *B and C* as pro forma respondents. *A* dies his legal representatives are not joined and the appeal abates. Neither *B nor C* can carry on the appeal saying that it has not abated as they should be treated as if they were appellants (j)

Suit for pre-emption—A decree in a suit for pre-emption passed against the defendants respondents in ignorance of the death of one of them and without bringing his legal representative on the record is a nullity as the right to sue in such a case does not survive against the surviving defendants alone (k) On the other hand when three plaintiffs appeal from a decree dismissing their suit for pre-emption and one of them dies pending the appeal and his legal representatives are not impleaded the appeal abates as regards the deceased alone, for each pre-emptor has an independent right to pre-empt (l) Where the plaintiffs obtain a joint decree for pre-emption against the vendor and the purchaser, without any adjudication under O. 20, r. 14 (2) of their respective rights they each have the right to pre-empt the whole property. If one of the plaintiffs respondents dies pending an appeal from the decree and the appeal is allowed without his representatives being joined the appeal abates as to that plaintiff only and the representative is entitled to possession if the pre-emption money is paid over to the purchaser defendant with the consent of the surviving plaintiffs respondents. A stranger purchaser cannot be required to submit to a partial pre-emption nor is he entitled to demand it (m)

'Legal representative' of deceased plaintiff—The expression 'legal representative' is defined in sec. 2 (11). On the death of a Hindu widow pending a suit to recover property belonging to her deceased husband, the reversionary heirs of the husband are her legal representatives within the meaning of this rule (n) On the death of a Hindu female to recover her father's property from strangers the next heirs of the father are her legal representatives within the meaning of this rule (o)

It has been held by the High Court of Madras that where a suit is brought by a minor Hindu for partition, and the minor dies pending the suit his legal representatives are not entitled to continue the suit, the reason given being that the rule that the mere institution of a suit for partition effects a severance of the joint estate is not applicable

| | | |
|-----|--|---|
| (h) | | 47 All 750 85 I C 66 (25) A A 108 and <i>Imbika Prasad v. Jaiwant Singh</i> (19-3) |
| (i) | | 45 All 286 71 I C 321 (21) A A 211 |
| (j) | | (m) <i>Wajid Ali Khan v. Purn Singh</i> (19-9) |
| (k) | | 56 I A 80 51 All 267 114 I C 601 |
| (l) | | () A 1 C 58 |
| (n) | | (o) |
| | <i>Mahabir Singh v. Abbas Nanotan</i> (10-7) | |
| | 49 All 750 102 I C 43 (27) A A 543 | |
| | and <i>Wajid Ali v. Purn Singh</i> (19-5) | |

to a suit by a minor, as it is for the Court to determine in such a suit whether a decree for partition will be beneficial to the minor (p)

The real owner is not the representative of a benamidar and if he chooses to allow a benamidar to sue in his own name, he cannot after his death come in under this rule (q)

A suit brought by the head of a mutt on behalf of the mutt may be continued on his removal by his successor in office. The successor is not a legal representative, but a person on whom the interest in the trust property "devolves" within the meaning of r 10 below. Hence r 10, and not the present rule, applies to such a case (r)

Two or more legal representatives.—We next proceed to consider the question whether, if there are two or more legal representatives, they should all be made parties. A Mahomedan plaintiff dies pending a suit brought by him, leaving three sons, A, B and C. A alone applies to be brought on the record in place of the deceased, and he is brought on the record as plaintiff. No application is made to bring B and C on the record within the period of limitation. Does the suit abate? It does according to the Allahabad High Court (s). According to that Court, the expression "legal representative" must, when there are two or more legal representatives, be read in the plural. It has accordingly been held by that Court that all the legal representatives must be brought on the record as plaintiffs and if any one of them refuses to be joined as a plaintiff, he should be joined as a defendant. The High Courts of Bombay, Madras, Calcutta and Lahore agree with the Allahabad High Court in holding that the expression "legal representative" must be read in the plural, but hold that if some of the representatives are unwilling to join in the application or if one or more of the legal representatives are unknown, a bona fide application by those who are willing to join in making the application is a sufficient compliance with this rule. If there is a bona fide dispute as to the representative character of those who have not been joined, the Calcutta High Court has held that the Court may proceed with the suit striking out such prayers as are not maintainable in the absence of the persons omitted (t). The same principles apply to appeals. See notes to r 4 below under the same head (u)

Wrong person as legal representative.—See notes to r 4 below under the same head

Joint Hindu family and legal representative.—The High Court of Patna has held that this rule is to be applied even if the plaintiffs are members of a joint Hindu family, and that r 4 is to be applied even if the defendants are members of a joint family. According to that Court, the legal representatives of a deceased coparcener within the meaning of sec 2 (11) are the surviving coparceners, and the latter must be brought on the record in their representative character though they may be already on the record in their own capacity (v). On the other hand, it has been held by the Calcutta High Court that the case of members of a joint Hindu family is governed by r 2 above, that is, the right to sue survives to or against the surviving coparceners alone, and if they are already on the record, it is not necessary to bring them on the record in their representative capacity also (w). In a later decision, when one of two co widows who jointly represented the estate of their deceased husband, died, the Patna High Court

(p) *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(q) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(r) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(s) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(t) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(u) *Mayarajan v Abdul* (1933) 37 C W N 134, 145 I C 170, (33) A C 498

(v) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(w) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(x) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(y) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(z) *See* *Chelima v Subbammal* (1918) 41 Mad 442, 43 I C 860

(aa) *Choudhry Shamsund v Rajnarain* (1906) 11 C W N 186, *Shridhar v Madappa* (1930) 31 Bom L R 698, 127 I C 334, (30) A B 367

22, r. 3 jurisdiction vested in it by law under this rule, and the High Court may interfere in revision under sec 115 (q)

Appeal—The decisions on the question of appeal are not uniform. In some cases to be presently considered the alteration introduced in the present rule namely, the substitution of the words "the suit *shall abate*" for the words "the Court may pass an order that the suit shall abate," which occurred in the corresponding sec 36b of the Code of 1882, has not been noticed, see notes above, "Alterations in the rule", No 2. We proceed to consider the decisions of each High Court separately.

Madras—The Madras High Court has held that where on the death of a plaintiff two rival claimants apply to the Court to be brought upon the record as the legal representative of the deceased plaintiff, and the Court decides in favour of one of them and against the other, the party against whom the decision is given is not entitled to appeal, the reason given being that there is no abatement of the suit in such a case as the suit can be proceeded with by the other claimant (r). A Full Bench of the Madras High Court has also held that even if a sole plaintiff dies and only one person claims to be his legal representative, an order refusing his application to be brought on the record is not one from which an appeal lies (s). But the Court declined to express an opinion as to what the consequence would be if the petitioner appeals against the actual order for abatement or dismissal. Presumably section 146 would enable him to do so as a person claiming under the deceased plaintiff.

Allahabad—It has been held by the High Court of Allahabad that no appeal lies from an adjudication that a suit (t) or an appeal (u) has abated whether the abatement is due to the fact that no application was made to bring the legal representative of the deceased plaintiff on the record (v), or the abatement follows on the dismissal of the application made by a person to be brought upon the record as the legal representative of the deceased plaintiff (w) the reason given being that such an adjudication does not amount to a decree. In a recent case where A had obtained an ex parte decree against B and B had applied to set aside the decree, and thereafter B died, and on B's death his son applied to continue the application and the application was granted notwithstanding opposition on A's part, it was held that the case did not fall either under r 3 or r 4 of this order and that no appeal lay from the order (z). See sec 146 above.

Lahore—In a case where a person applied to be brought on the record as the legal representative of a deceased plaintiff, and the Court refused the application on the ground that he was not the legal representative, and also made a separate order recording that the suit had abated inasmuch as no application by any legal representative had been made, it was held by the High Court of Lahore that the order dismissing the application was not appealable under the Code as it was really a matter collateral to the suit. As to the order recording the abatement the Court said it would amount to a decree and be appealable as such if the applicant was already a party to the suit in another character (y). In another case (z) where an appeal was declared to have abated as a whole, it was held, following a Full Bench ruling of the same High Court (a) that

(q) *Janardhan v Ramchandra* (1909) 26 Bom 317

(r)

(s) *Venkatakrishna v Krishna* (1906) 49 Mad 450 90 I C 483 (20) A M 590 overruling *Ayva Mital's v Veerayee* (1900) 43 Mad 812 58 I C 493

(t) *Hanula Buba v Ali Husain* (1895) 17 All 172 *Walayat v Ramul* (1914) 12 All

L J 1113 25 I C 643

(u) *Muhammad v Manohar* (1902) 20 All

L J 214 65 I C 838 (27) A A 113

(v) See (1914) 12 All L J 1113 25 I C 643

supra

(w) See (1890) 17 All 170 *supra*

(z) *Moti Lal v Ishambhar* (1925) 47 All 741

88 I C 90 (25) A A 431

(y) *Ram Sarup v Moti Ram* (1920) 1 Lah

493 57 I C 137

(z) *Udum v Hira* (1920) 1 Lah 582 60 I C

111

(a) *Anjanjan v Afzal* (1916) Punj Rec

no 128 p 393 38 I C 7

whether the final decision was called an abatement or a dismissal, it came within the definition of "decree" and was appealable as such, the applicants having been parties to the suit

Oudh—The Oudh Court has held that a decision that a suit has abated coupled with a refusal to bring the legal representative on the record on the ground that the cause of action did not survive, operates as a decree and is appealable (b).

4. [S. 368.] (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Procedure in case of death of one of several defendants or of sole defendant

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant

Alterations in the rule —

- 1 The words used in sec 368 of the Code of 1882 were "any person whom he alleges to be the legal representative of the deceased defendant" The words used in the present rule are "the legal representative of the deceased defendant" See notes below "Effect of decree against legal representative of deceased defendant"
- 2 Sub rule (2) is new.
- 3 The words "as against the deceased defendant" in sub rule (3) are new See notes below, 'The suit shall abate as against the deceased defendant'

Suit.—The word "suit" in this rule includes an appeal, and the word "defendant" a respondent. see r 11 below

Limitation.—The application under this rule must be made within 90 days from "the date of the death of the deceased defendant or respondent" Limitation Act, 1908, sch I, art 177 The alteration in the language of art 177 as it stood in the Limitation Act, 1877, art 175 C, clearly shows that the word "respondent" in the present article is not confined to a respondent only in first appeal as was held by the High Court of Madras under the old article (c), but that it includes a respondent also in second appeal as was held by the High Courts of Calcutta and Allahabad (d) See also r 11 below.

(b) *Rampal Singh v Abdul Hamid* (1928) 3 Luck 628, 110 IC 826, (28) A O 362
1 B
(c) *Surya Pillai v Aiyakannu Pillai* (1906) 29

Mad 529
(d) *Upendra Kumar v Sham Lal* (1907) 34 Cal 1020 *Madhuban Das v Sarain Das* (1907) 23 All 535

22, r. 4 Where no application made within the period of limitation—The application to bring the legal representative of the deceased defendant on the record should, as stated above, be made within 90 days from the date of the death of the deceased defendant. If no such application is made within the aforesaid period, the suit abates as against the deceased defendant [sub rule (3)], though the plaintiff was ignorant of the death of the deceased (e). After abatement, the only course open to the plaintiff is to make an application under r 9 sub r (2), to have the abatement set aside. Such an application should be made within 60 days from the date of the abatement [Limitation Act, 1908, sch I, art 171] but the Court may entertain the application even after 60 days if sufficient cause is shown (f) [see r 9, sub r 3, and Limitation Act, 1908, s 5]. As to the inherent power of the Court to bring the legal representative of a deceased defendant on the record after abatement see notes below. It may be stated that where a defendant dies pending a suit, it is open to its legal representative to apply to be brought on the record notwithstanding the plaintiff's omission to implead him (g).

"The suit shall abate"—See notes to r 3, "Alterations in the rule" No 2

The suit or appeal shall abate as against the deceased defendant or respondent—Where one of two or more defendants dies, and the right to sue survives against the surviving defendant or defendants alone the suit should be proceeded with as against the surviving defendant or defendants. This case has been dealt with in r 2 above. The present rule provides *inter alia* that where one of two or more defendants dies, and the right to sue does not survive against the surviving defendant or defendants alone, the legal representative of the deceased defendant ought to be made a party to the suit. For this purpose an application should be made to the Court, and such application must be made within 90 days from the date of the death of the deceased defendant. Sub rule (3) provides that where no such application is made the suit shall abate as against the deceased defendant. The words "as against the deceased defendant" are new. In the absence of these words in the corresponding section 368 of the Code of 1882, it was contended in a large number of cases that where no application was made to bring the legal representative of a deceased defendant or respondent on the record within the period of limitation, the suit or appeal, abated not only as against the deceased defendant or respondent, but as a whole. But this contention was overruled, and it was held that a distinction ought to be made between cases in which a suit or appeal could proceed in the absence of the legal representatives and those in which it could not. In the former case it was held that the suit or appeal abated only as against the deceased defendant or respondent in the latter case, that it abated as a whole. Sub r (3) of the present rule makes it clear that where no application is made to bring the legal representative on the record within the time limited by law, the suit or appeal abates primarily as against the deceased defendant or respondent only, and that it does not abate necessarily as a whole. This sub rule gives legislative recognition to the rulings under the Code of 1882. The result is that as under the Code of 1882, so under the present Code, if a case is of such a nature that the suit or appeal can proceed without bringing on the record the legal representative of the deceased defendant or respondent the suit or appeal abates as against the deceased

(e) *Sayed Mir Asad v Hardeo* (1911) *Punj Rec* no 60 p 235, 12 I C 871, *Hadu v Lala* (1915) *Punj Rec* no 41 p 197, 21 I C 951, *Jama v Sarjit* (1919) *Punj Rec* no 67 p 166, 52 I C 510. Ignorance of death may however, be a good ground for setting aside the abatement. *Daga*

Singh v Bta Singh (1916) *Punj Rec* no 118, p 363, 33 I C 7.
(f) *Secretary of State v Jawahir Lall* (1914) 30 All 25, 25 I C 48.
(g) *Ajnasurami v Singaravelu* (1923) 45 Mad L J 233, 75 I C 848, (23) A M 679.

defendant or respondent only (h) A suit on a joint and several promissory note against the promisers, is a suit of this nature. But if the suit or appeal cannot proceed in the absence of the legal representative, the suit or appeal will abate as a whole (i) A suit by a partner against his co-partners for dissolution of partnership and for accounts is a suit of this nature [see ill (2) under the head "II. Cases in which suit or appeal held to abate as a whole"]

The test often adopted in such cases is whether in the event of the appeal being allowed as against the remaining respondents there would or would not be two contradictory decrees in the same litigation with respect to the same subject matter. It is clear that a Court should not be called upon to make two inconsistent decrees about the same property and in order to avoid conflicting decrees the Court has no alternative but to dismiss the appeal as a whole. If on the other hand the success of the appeal would not lead to such a result there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it (j)

The High Court of Calcutta has held that where the plaintiffs are joint owners, and a decree is passed for them for possession and the defendant appeals from the decree making the plaintiffs respondents, and one of the plaintiffs respondents dies pending the appeal the appeal abates as a whole, the reason given being that the Court should not be called upon to make two contradictory decrees in the same litigation, which would

(h) *Chandarnag v Khimabhai* (1899) 22 Bom

Supra (1900) 23 All 200 (suit against mortgagee and surety) *Benga v Gnanapra-kara* (1906) 30 Mad 67 (suit on a mortgage appeal) *Abdul Aziz v Basdeo Singh* (1912) 34 All 604 17 I C 80 (suit for rent) *Zainah Bibi v Rohila* (1917) Punj Rec no 23 p 90 39 I C 277 (appeal) *Shan kerbhai v Motilal* (1925) 49 Bom 118, 85 I C 197 (25) A B 22 (appeal—suit

supra 8 Bom 122 (1901) *Bagira v Hardoon* (1928) 50 All 559 (28) A A 172 F R (appeal) 12

of land] *Khuda Baksh v Mothra*

J. Mani Lal, et al. vs. D. D. (23) A R 238 (appeal—suit for partition) *Hayat Ali v Purn Singh* (1924) 47 All 109, 85 I C 66 (25) A A 108 (appeal—suit

against co-tenants) *Bhagwan Singh v Jamal* (1921) 3 Lah L J 252 (appeal—suit for redemption against several joint mortgagees) *Anant Chand v Ram Chand* (1922) 4 Lah L J 189, 77 I C 186 (22) A L 201 (appeal—suit for redemption by second mortgagee against prior mortgage and mortgagor) *Shabbir v Abbas* (1925) 23 All L J 935 90 I C 324 (26) A A 152 (appeal—suit for pre-emption) *Kesho v Muhammad* (1930) 9 Pat 693 128 I C 119 (31) A P 17 (appeal—suit for a declaration of ownership against proprietors of a village), *Mst. Umrao v Ram Kuan* (1932) 13 Lah 70 137 I C 820 (33) A L 281 (appeal—suit for declaration of joint ownership) *Ram Ditta v Shaman* (1913) 14 Lah 234 139 I C 693, (32) A L 624 distinguishing 10 Lah 7, *supra*

(j) *Sant Singh v Gulab Singh* (1929) 10 Lah 7, 13, (28) A L 672 See also *Hayat Ali Khan v Purn Singh* (1923) 56 I A 80, 84 51 All 267, 114 I C 601, (29) A I C 58

22, r. 4 be the result if the appeals were allowed as against the surviving joint owners, and the decree of the lower Court left undisturbed as against the deceased joint owner (l)

A and B sue C, D and E for declaration of title and for possession and a decree is passed for them C, D and E appeal from the decree Pending the appeal C dies No steps are taken to bring his legal representative on the record within the period of limitation According to the Calcutta decision the appeal abates as a whole The reason given is that if the defendants succeed in the appeal then there would be two decrees, one against the surviving plaintiffs respondents and another decree of the lower Court in favour of the deceased plaintiff to the effect that the property in suit belongs to the plaintiffs of which he was a proprietor Further, as to O 41, r. 4, the Calcutta High Court has said that the rule is limited to the case of appellants and does not apply to the case of respondents (l) On the other hand, the High Court of Bombay has held that the appeal abates only as against deceased, and it should be heard on the merits against the other joint owners After the appeal is heard on the merits, the Court may pass such decree as the case may require (m) It has been held by the High Court of Allahabad that where a joint decree is passed in a suit for redemption of a mortgage brought by two or more plaintiffs, and the defendants appeal from the decree, and one of the plaintiffs respondents dies pending the appeal but his legal representatives are not impleaded within the period of limitation the appeal abates only so far as the deceased respondent is concerned, but not as a whole (n) See notes to r. 3 above, This rule applies to appeals

Where there is no possibility of contradictory decrees, the appeal abates only so far as concerns the deceased defendant or respondent, but not as a whole A Hindu widow sells immovable property belonging to her husband to A, B and C It is stated in the sale deed that the property is sold to A, B and C in equal shares After the sale the next reversioner sues the widow and A, B and C for a declaration that the sale is not valid beyond the life time of the widow, but the suit is dismissed The reversioner appeals from the decree During the pendency of the appeal A dies, but his legal representative is not brought on the record within the period of limitation The appeal abates as against A alone but not as a whole The reason is that the interest of A in the property is separate from those of the surviving respondents B and C, the shares having

the abatement of the appeal *qua* A (o)

I Cases in which the appeal abates as against a defendant or respondent for repayment of a mortgage debt of the mortgaged property, and as against C for a decree for the payment of the mortgage debt C dies pending the suit No application is made by B to make the legal representative of C a party to the suit within 6 months [now 90 days] from the date of C's death. The suit abates as against C only, and not as a whole *Mehdi Hussain v. Supra Begam* (1902) 25 All 206 [In this case it is clear that B could have abandoned his claim against C, and sued A alone on the mortgage]

(k) *Dharanj v. Chawlethwar* (1907) 11 C.W.N.

85 I.C. 187 (25) A.B. 1907 *Chandran v. Achimobhai* (1894) 22 Bom 118 *Full v. Adesing* (1902) 28 Bom 203 *See also Chintaman v. Gangabai* (1903) Bom 284 *Jam Senai v. Lamber* (1903) 25 All 21 *Son asun laram v. Iach l nag* (1917) 40 Mad 845 868 41 I.C. 546 *Yung Eyang Maung v. Shwe* (1914) 21 Ang 46 84 I.C. 10 (24) A.B. 36

(n) *Narain Das v. Shro Din* (1916) 48 All 251 91 I.C. 859, (6) A.A. 34

(o) *Sant Singh v. Gulab Singh* (1919) 10 Lah 7 (-8) A.L. 57-

(m) *Shankar Das v. Mohd* (1925) 49 Bom 118

(2) *A* lets certain lands to *B* and *C*. *A* then sues *B* and *C* for arrears of rent, but the suit is dismissed. *A* files an appeal, the respondents being *B* and *C*. *C* dies pending the appeal. No application is made by *A* to substitute *C*'s legal representative in *C*'s place within 6 months [now 90 days] from the date of *C*'s death. The appeal does not abate as a whole, but against *C* only. *Joy Gobind v Monmotha* (1906) 33 Cal 680, *Abdul Aziz v Basdeo Singh* (1912) 34 All 604, 17 IC 89, *Pai Kashi Nath v Kailas Singh* (1925) 4 Pat 53, 89 IC 236, (25) A P 480. [In this case it is clear that *A* could have sued *B* alone without joining *C* as a party defendant. see Contract Act, 1872, s 43.]

(3) *A* and *B* obtain a joint decree for redemption against *C* who appeals. *A* dies pending the appeal and his legal representatives are not brought on the record. The appeal abates against *A* alone. *Narain Das v Sheo Din* (1920) 48 All 251, 91 IC 859, (26) A A 234. [In this case either *A* or *B* could have sued to redeem.]

(4) *A* mortgages land to *B*. *A* dies and *B* sues the heirs of *A* for a decree for sale. The suit is dismissed and *B* appeals. Pending the appeal one of the respondents heirs dies, and his legal representatives are not brought on the record. The appeal abates as against the deceased respondent only. *Mst Haleyatunnissa v Mst Chalakhi* (1931) 10 Pat 341, 132 IC 100, (31) A P 164. The Court can deal with the appeal so far as regards the interests of the parties before it and if necessary make a decree for sale for a proportionate amount. See note under O 31, r 1 'Consequences of non joinder, at p 981.

II. Cases in which suit or appeal held to abate as a whole.—(1) *A*, *B* and *C* are joint owners of certain property. The property is sold for arrears of Government revenue and purchased by *D*. *A*, *B* and *C* sued *D* to set aside the sale on the ground of fraud and irregularities and a decree is passed in their favour. *D* files an appeal from the decree against *A*, *B* and *C*. *C* dies pending the appeal but *D* makes no application to bring *C*'s legal representative on the record within the period of limitation. The appeal abates not only as against *C* but as a whole. In this case it is clear that *A*, *B* and *C* being joint owners the suit would have been bad if *C* were not joined as a party to the suit. Again if the appellate Court heard the appeal in the absence of *C*'s legal representative and came to the conclusion that the decree of the lower Court should be reversed, the decree could then be reversed only as to *A* and *B*, but not as to *C*, for *C*'s representative is not on the record. But this would be a *reductio ad absurdum* for the whole appeal could not be reversed as to the unascertained shares of some joint holders [that is, *A* and *B*] and confirmed as to the unascertained share of other joint holders [that is in this case *C*]. The case therefore is one in which the appeal could not proceed in the absence of *C*'s legal representative. The appeal therefore must abate as a whole. *Dharanjit v Chandeshwar* (1907) 11 CWN 504, *Kali Dayal v Nagendra Nath* (1919) 24 CWN 44, 54 IC 822, *Bejoy Gopal v Umesh Chandra* (1901) 6 CWN 196, *Manindra v Bhagubatti* (1926) 30 CWN 45, 90 IC 990, (26) AC 335, *Madnapore Zamindary Co v Amulya Nath* (1928) 53 Cal 752, 95 IC 649, (26) AC 893, *Hadu v Lala* (1915) Punj Rec no 41, p 197, 21 IC 951, *Jamna v Sarjit* (1919) Punj Rec no 67, p 166, 52 IC 510, *Wali Mohammad v Mahlu* (1924) 5 Lah 429, 86 IC 592, (25) AL 124, *Muhammad v Abdulla* (28) AL 869. According to the Bombay rulings the appeal abates as against *C* only, and it should be heard on the merits against *A* and *B*. The Court may after hearing the appeal on the merits pass such a decree as the case may require. *Shankerbhai v Motilal* (1925) 49 Bom 118, 85 IC 197, (25) AB 122, *Chandarsang v Khimabhai* (1897) 22 Bom 718.

(2) *A* sues his partners *B*, *C*, *D* and *F* for dissolution and for accounts of the partnership. A decree is passed in the suit by which it is ordered that a sum of Rs 9,000 should be contributed by *A*, *B* and *C*, and that out of that sum Rs 1,740 should be paid

22, r. 4 to D and the rest to F. A appeal from the decree making B, C, D and F party respondents. B and C also appeal from the decree making A, D and F party respondents. Pending the appeal D dies. No application is made by the appellants in either appeal to bring on the record the legal representative of D within the period of limitation. The appeal abates as a whole for as the sum is a partnership account, it is not one in which the appeals could proceed in the absence of the legal representative of D. *Fry Chauder v. Chaudhary Doss* (1904) 31 Cal. 477 31 I.A. 71. *Moti Lal v. Purni Narain* (1917) 39 All. 501 47 I.C. 1006. *Jarindas v. Sorabji* (1901) 16 B.M. 27.

(3) A obtains a decree against B, C and D for some profits. A appeals on the ground that the sum awarded is not sufficient. B dies pending the appeal and his legal representative is not joined. The appeal abates as a whole for although in a sum arising wronged as it is not necessary to implead all wrongdoers where the plaintiff has made his choice and obtained a decree he cannot proceed further against some only so as to lead to an account error. *Kamala Prasad v. Kulkarni* (1908) 30 Cal. 660 106 I.C. 300 (25) A.C. 150. *Eame Kaur v. Purn Chandra* (1937) 11 Pat. 533 140 I.C. 300 (37) A.P. 327.

Suit for pre-emption.—See notes to r. 3 above under the same head.

Appellate Court and abatement.—Where a defendant appeals from a decree and the plaintiff-respondent dies pending the appeal within the legal representative being joined within the period of limitation, it is the appeal which abates and not the sum (p).

Inherent power to add legal representative as a party after abatement.—Notwithstanding the abatement of a suit the Court has the power in a proper case to bring on the record the representative of a deceased defendant under s. 101 and O 1 r. 10. A case B and C for partition of joint family property. A preliminary decree is passed and a commissioner is appointed to make a partition according to the rights declared in the decree. B then dies but no application is made to bring on his legal representative on the record within the period of limitation. Though the suit abates as regards B the Court may add B's representative as a defendant (q). But no such order can be made if no preliminary decree has been passed (r).

Effect of decree against legal representative of deceased defendant.—The words used in s. 36b were "any person whom he assigns to be the legal representative of the deceased defendant." The words used in the present rule are "the legal representative of the deceased defendant." It was accordingly held under the Code of 1859 that where a person alleged by the plaintiff to be the legal representative of the deceased defendant was brought on the record without any objection by him and a decree was passed in the sum the estate of the deceased was bound by the decree in the absence of fraud or collusion (s). But in view of the altered wording of the present rule it is not sufficient for the plaintiff to allege that a particular person is the legal representative of a deceased defendant and for each person to be brought on the record as representing the estate of the deceased. Thus if the sole defendant dies pending a sum against him for the recovery of money leaving sons and daughters but in ignorance of the existence of these heirs his brother is brought on the record as his representative and a decree is passed against the estate of the deceased, the decree is not binding on the estate and on the persons rightfully entitled to that estate (t).

(q) *Chauder v. Musammud Karam* (1919) 41 All. 253, 50 I.C. 222.

(r) *Lachman Lal v. Karna* (1911) 35 F.M. 523, 11 I.C. 503. *Chandrasekhar v. Kulkarni* (1912) 22 F.M. 71. 1912.

(s) *Mahabir v. Laxmi Kaur* (1925) 1 E.L.L. 153.

1919, 4 I.C. 177 (23) A.R. 25.

(t) *Kaur v. Mahabir* (1907) 76 Ind. 230.

(u) *Pathy v. Jaganath* (1926) 50 F.M. 402, 100 I.C. 122. (27) A.P. 63. *Murthy v. Murthy* (1937) 63 Ind. L.J. 319 179 I.C. 465, (33) A.L.J. 43.

Two or more legal representatives.—If there are several legal representatives it seems to suffice if at least one of them is impleaded whether in the suit (u) or in the appeal (t). The Lahore High Court in one case (w) held that r 4 is sufficiently complied with if all the legal representatives known after diligent inquiry are joined. But in another case (x) where only two out of three heirs of a deceased respondent were brought on the record the same Court held that the appeal abated as the whole estate was not represented. See notes to r 3 above under the same head.

Indian Succession Act and legal representative.—In the case of a person subject to the Indian Succession Act, his legal representatives within the meaning of s 2(11) of the Code are his executors or administrators, and not his heirs (y).

Joint Hindu family and legal representative.—See notes to r 3 above under the same head.

Legal representative already on record in another character.—See note under the same head to r 3 above.

Death of insolvent respondent.—An appeal preferred by the creditors of an insolvent against an order of adjudication abates on his death, as the right to sue does not survive within the meaning of this rule (z). So also does an appeal against an order refusing an adjudication (a).

Wrong person as legal representative.—An application to bring on the record as legal representative of a deceased defendant a person who is not in fact such representative will be of no avail to save the running of limitation in the case of a subsequent application to implead the person who really is the legal representative (b). As already stated, if the wrong person is impleaded as legal representative, the decree will not bind the true heir (c).

What pleas may be taken by a legal representative.—See sub r (2) and notes under the same head to r 3 above.

Rehearing of suit or appeal.—A plaintiff whose suit is heard and dismissed is not entitled to a rehearing of the suit on the ground that one of the defendants had died previous to the hearing of the suit and that the suit was heard without bringing the legal representative of the deceased defendant on the record. The right to have the suit reheard is the right of the legal representative [which he would not care to exercise as the suit was dismissed] and not the right of the unsuccessful plaintiff. The same rule applies to appeals (d).

Pro forma defendant.—Omission to bring on record the legal representative of the defendant against whom no relief is claimed does not cause the suit to abate (e).

Cross appeals.—If the plaintiff and the defendant both appeal from a decree and the defendant dies the fact that the plaintiff has joined the legal representatives

(u) *Jeharabai v. Dismillabai* (1924) 26 Bom L.R. 375, 80 IC 758 (24) A.B. 420, *D.P. Narain v. Lachman* (1925) 47 All 466, 87 IC 799 (25) A.A. 479, *Kadir v. Muthukrishna* (1902) 26 Mad 230, *Muhammed Zafaryah v. Abdul* (1928)

(a) IC 281 (28) A.L. 119

(b) " " " " " "

(c) " " " " " "

(d) *Indar Singh v. Jamselji* (1926) 50 Bom 802, 100 IC 185 (27) A.B. 63

(e) *Vellayam v. Jothi* (1915) 28 Mad L.J. 138, 28 IC 83

(f) *Dr. Indar Singh v. Kanshi Ram* (1917) 44 IA 218, 225 Cal. 94, 110, 42 IC 43

(g) (1917) Panj. Rec. no. 104 p. 323 at p. 407, *Alla Baksh v. Madho Ram* (1901)

23 All 22, 24, *Abdulla v. Muhammad* (1920) 2 Lah. L.J. 601, *Ram Lakhaya v. Kartar Singh* (1925) 7 Lah. L.J. 466, 92

IC 261 (25) A.L. 651

(v) " " " " " "

(w) *Begam Jan v. Jamal Bibi* (1927) 7 Lah. 438, 98 IC 612 (27) A.L. 6

(x) *Muhammed Hasan v. Inayat* (1927) 100 IC 418 (27) A.L. 94, *Chuni Lal v. Amin Chand* (1933) 14 Lah. 543, 142

(y) " " " " " "

(z) " " " " " "

(a) " " " " " "

O. 22, r. 4 of the defendant in his appeal will not prevent the defendant's appeal from abating if the legal representatives are not joined in that appeal (j)

Death of defendant after preliminary and before final decree.—It has been held in several cases that this rule applies where a defendant dies after the preliminary and before the final decree and that his legal representatives must be brought on the record, otherwise the suit abates so far as concerns the deceased defendant (g). But it is difficult to reconcile these cases with the decision of Privy Council in *Luchin Varain v Bal Mukund* (h). The Allahabad High Court and the Oudh Court have held that this rule does not apply when a defendant dies after the passing of a preliminary decree (i), and the Allahabad High Court has amended r. 12 so as to supersede a decision to the contrary (j). There is, however, an observation of Rankin, C.J., in the undernoted case (k) which implies that a partition suit may abate after the preliminary decree. The Rangoon High Court has also held that O. 22, r. 4, does not apply on the death of a defendant after a preliminary decree has been passed (l). See notes to r. 3 above, Death of plaintiff after preliminary and before final decree.

Decree for or against a dead person.—A decree against a person who was dead at the date of the institution of the suit is a nullity (l). Similarly a decree passed against a defendant who died *pending the suit* without bringing his legal representative on the record is a nullity and it cannot be executed against the legal representative (m). A decree passed against a respondent in ignorance of the fact of his death is also nullity (n). If one of several defendants is discovered to have been dead at the institution of the suit, there is no question of abatement, nor should the suit be dismissed as against him. The Court should remove the name of the deceased from the record and proceed under O. 1, r. 10 (o). A decree in a suit for rent against several joint tenants of whom some are dead at the institution of the suit is a nullity as against those who are dead, but is valid as a money decree as against those who are living for under s. 43 of the Contract Act, the liability of a joint promisee is joint and several (p). But by reason of a statute of 1833 (3 and 4 William 4, c. 41, s. 23) a decree passed by the Privy Council against the respondents in ignorance of the death of one of them is not a nullity, though the legal representative of the deceased was not brought on the record, the decree being an order of the Sovereign (q).

O. 41 r. 20, and abatement.—O. 41 r. 20 does not override the provisions of O. 22 of the Code and after the appeal has abated the Court cannot direct the representative to be made a party (r).

(f) *Sarala v Lazmi* (1831) 60 Mad. L.J. 92. 190 F.C. 721 (1853) 777

(g)

(h)

(i)

(j)

(k)

(l)

(l) *Mohun v Tindal* (1859) 12 W.R. 45. 1859 31 Mad. 86. *Veerappa Rampran*

(m)

(n)

(o)

(p)

(q)

(r)

Sub rule (2) : Defence appropriate to his character as legal representative.—See notes to r. 3 above, "What pleas may be taken by a legal representative"

O. 1, r. 8, abatement.—See notes to O. 1, r. 8, under the same head.

Execution proceedings.—This rule does not apply the penalty of abatement to execution proceedings. See note under the same heading under r. 12. If the judgment debtor dies during the pendency of execution proceedings the decree holder is under s. 50 entitled to continue the execution proceedings against the legal representative of the judgment debtor (s). He may do this at any time even after the period of 12 years fixed by s. 48, provided the execution is still pending (t).

Appeal.—It has been held by the High Court of Lahore that an adjudication that an appeal has abated as a whole amounts to a decree and is appealable as such (u). See notes to r. 3 above, "Appeal"

5. [S. 367.] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Determination of question as a legal representative

Alterations in the rule :—

- 1 The words "where a question arises as to whether any person is or is not the legal representative," have been substituted for the words "if any dispute arises as to who is the legal representative". The object is to make it clear that this rule applies not only where two or more persons claim to be the legal representative of a deceased party but where there is only one claimant and his representative character is denied. This is in accordance with the interpretation put upon the words of the old section in the undermentioned cases (v).
- 2 Under the old section where a question arose as to whether any person was or was not the legal representative of a deceased party the Court had the power either to stay the suit until the question was determined in another suit, or to determine the question itself. Under the present rule the Court is bound to determine the question itself (w).
- 3 It is provided by rr. 3 and 4 of this Order that once the Court determines who the legal representative is, and the legal representative is brought on the record under those rules, "the Court shall proceed with the suit". No objection therefore as to the representative character of such person can be entertained after he is brought on the record, though the hearing of the suit has not commenced. Under the old section the objection could be taken "at or before the first hearing of the suit". But the words "at or before the first hearing" have been omitted in the present rule, the object being that the objections as to whether any person is or is not the legal representative of a deceased party should be taken before such person is made

(r) *Purusottam v. Jaybai* (1910) 31 Bm 142, 4 I C 833

(t) *Venkatlakshamma v. Seshagiri* (1931) 60 Mwl L.J. 628, 131 I C 610 (31) A M 304

(u) *Ums v. Hira* (1920) 1 Fah 582, 60 I C 111.

(v) *Othi v. Bejethi* (1931) 17 Mwl Wm 411; *Subban v. Sundarapur* (1917) 18 Mwl 496; *Hirunt Singh v. Ramji* (1914) 30 All 348

(w) *Raoji v. Anant* (1918) 42 Bm 519, 314, 46 I C 750

22,
5, 6

a party under rules 3 and 4 above (x) But if a person alleging himself to be a legal representative is brought on the record as such *without notice to the other side* the other side is entitled to raise the objection at the hearing (y)

Legal representative—See s 2 cl. (II) and notes to r 3 above *Legal representative of deceased plaintiff.*

'Shall be determined—If the Court of first instance fails to determine the question as to who is the legal representative it is necessary for the appellate Court to determine it (z)

Objection as to representative character when to be taken—If the defendants have not objected in the suit that a deceased co-defendant is not properly represented they will not be entitled to raise this objection in the appeal and contend that the suit has abated (a) See notes above *Alteration in the rule No 3*

Effect of order under this rule—The Allahabad High Court at one time seemed to decide that this rule provides a summary procedure for appointing a person to be the legal representative of the deceased plaintiff *for the purpose of prosecuting the suit* and that an order appointing a legal representative does not operate as a final determination of the representative character of the person appointed in other words it does not operate as *res judicata* (b) But in a later case the same High Court disapproved of this decision and held that an order under this rule does operate as *res judicata* (c)

Power of Court to correct its order—The Court has power to correct an *ex parte* order made under this rule (d)

Appeal—No appeal lies from an order under this rule (e) But a party aggrieved

6. [New] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party

No abatement by reason of death after hearing

between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place

No abatement by reason of death after hearing—This rule is new It

(a)

(b)

(c)

(d)

(g) *Balabhai v Ganesh* (1903) 27 Bom 16

(h) *Surendro v Doorga Soodery* (189) 19 Cal

In a mortgage suit the "judgment" referred to in this rule is the judgment supporting the final decree and not the judgment supporting the preliminary decree, and the "hearing" referred to in the rule is the hearing of issues upon which judgment is to be delivered determining the plaintiff's right to a final decree. Therefore this rule does not apply where a party to a mortgage suit dies before the application for a final decree is made and heard (1). See notes to r 3 above, "Death of plaintiff after preliminary and before final decree," and notes to r 4 above, "Death of defendant after preliminary and before final decree."

7. [S. 369.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

Suit not abated by marriage of female party

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

Liability for wife's debts.—See Pollock and Mulla's Indian Contract Act, s 187, and notes thereto

8. [S. 370.] (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Procedure where assignee fails to continue suit or give security

(1) *Junglu Lal v. Ladta Ram* (1919) 41 at L J 240 50 I C 523 *Ammol v. Hari* (1930)

O. 22, r. 8 Insolvency of plaintiff—This rule lays down the procedure to be followed when a *plaintiff* becomes insolvent. The suit should not be dismissed for default of appearance for O 9, r 8 cannot apply where there is known to be no person in the position of the plaintiff who has any right or duty to appear (j)

The procedure laid down in this rule applies to appeals see r 11 below. Thus if a decree is passed in a suit by *A* against *B* and *B* appeals from the decree and pending the appeal *B* becomes insolvent and the Official Assignee does not give security for costs the Court must under this rule dismiss the suit. If the plaintiff respondent has filed cross objections they could not be heard, the dismissal of the suit being in effect an abatement of the appeal (l)

Insolvency of defendant—As to the case of the insolvency of a *defendant* in a presidency town it is now provided by sec 18 of the Presidency towns Insolvency Act, 1909, that where a defendant to a suit has been adjudged an insolvent the Court may, at any time after the making of the order of adjudication stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. The same section also enacts that any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just. As to cases governed by the Provincial Insolvency Act, 1920 see sec 29. See also notes to r 10 below,

Insolvency of the defendant joinder of Official Assignee

"Insolvency"—This rule does not apply to a case where the adjudication has been annulled. In such a case, the dismissal for the non appearance of the plaintiff or the Official Assignee on the date fixed for the hearing is under O 9, r 9 (l)

Limitation—There is no limitation provided for the Official Assignee to appear and apply for substitution. Again, where the plaintiff's name is struck off and the Official Assignee is substituted for the insolvent plaintiff, and the adjudication is thereafter annulled there is no limitation for the plaintiff to appear and apply for the restoration of his name on the record (m)

Insolvency of pauper applicant—In the case of a pauper who has applied for leave to sue as a pauper, the present rule can be applied only after leave to sue is granted but not before (n)

Costs payable by plaintiff prior to his insolvency—The general principle is "that a person who comes in by representation, whether it be an assignee in bankruptcy or as an executor or administrator of an original plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid." It has accordingly been held that where a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay (o). The security required of the Official Assignee is for costs incurred prior to the insolvency (p)

Costs of successful defendant—Where a suit is continued by the assignee in bankruptcy, and the defendant obtains judgment with costs, the defendant is entitled to be paid all his costs in full, and not merely the costs as from the date of insolvency with liberty to prove for the costs previously incurred (q)

(f) *Kusen Gopal v Suklat* (1906) 53 Cal 844

(h)

(l)

(m)

(n)

(o) *Cook v Hathway* (1869) L. R. 8 I. Q. Cas 612

(p) *Gilson Hussain v Jinnally Abdulla* (1906)

28 Bom. L. R. 1074 97 I. C. 797 (26)

A. B. 533

(q)

Practice.—As to the form of the order under this rule, see the undermentioned case (r)

Execution proceedings.—This rule does not apply to proceedings in execution See r 12 below

Cause of action arising after insolvency.—*A*, an undischarged insolvent, sues *B* for brokerage earned by him subsequent to his adjudication *B* applies for security for costs. If the Official Assignee has not intervened, no order should be made for security for costs (s) It may be observed that under the Presidency towns Insolvency Act, 1909, property acquired by an insolvent after adjudication does not vest in the Official Assignee until he intervenes and claims it on behalf of the creditors. In cases governed by the Provincial Insolvency Act, 1920, such property vests immediately on the making of order of adjudication.

9. [Ss. 371, 372A.] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

Effect of abatement or dismissal.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2)

Sub rule (1) No fresh suit on the same cause of action.—This rule prohibits a fresh suit on the same cause of action As to the meaning of "Cause of action," see notes to s 20 above Cause of action'

A, a member of a joint Hindu family, sues *B*, for redemption of a mortgage of ancestral property executed by *A* to *B* *A* then dies *A*'s heirs are not brought on the record, and the suit abates Subsequently *A*'s son and grandsons institute another suit against *B* for redemption of the same mortgage There is no indication that *A*'s suit was brought by him in a representative capacity, that is, as representing the joint family The second suit is not barred (t)

There is no question of the survival of the right to sue when a reversioner dies Therefore when a suit by a reversioner has abated, a fresh suit on the same cause of action by the next reversioner is not barred for the right to sue has not devolved upon him from the last reversioner (u)

Sub rule (2) Who may apply under this rule.—The following persons may apply under sub r (2), namely, (1) *the plaintiff*, where a suit has abated under

(r) *Lekhnaj v Shamlat* (1892) 16 Bom 404

(s) *Murray v East Jengal Mahajin Flot Ha Co Ltd* (1919) 46 Cal 156 48 J C 622

(t) *Isachandra v Shripatrao* (1916) 40 Bom 248 33 I C 771

(u) *Lachhman v Binsu* (1931) 12 Lah 275, 131 I C 98 (31) A L 79

O. 22, r. 8 Insolvency of plaintiff—This rule lays down the procedure to be followed when a *plaintiff* becomes insolvent. The suit should not be dismissed for default of appearance for O 9, r 8, cannot apply where there is known to be no person in the position of the plaintiff who has any right or duty to appear (j)

The procedure laid down in this rule applies to appeals, see r 11 below. Thus if a decree is passed in a suit by A against B and B appeals from the decree and pending the appeal B becomes insolvent and the Official Assignee does not give security for costs the Court must under this rule dismiss the suit. If the plaintiff respondent has filed cross objections they could not be heard, the dismissal of the suit being in effect an abatement of the appeal (l)

Insolvency of defendant—As to the case of the insolvency of a *defendant* in a presidency town it is now provided by sec 18 of the Presidency towns Insolvency Act, 1909, that where a defendant to a suit has been adjudged an insolvent, the Court may, at any time after the making of the order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court. The same section also enacts that any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just. As to cases governed by the Provincial Insolvency Act, 1920, see sec 29. See also notes to r 10 below, "Insolvency of the defendant joinder of Official Assignee"

"Insolvency."—This rule does not apply to a case where the adjudication has been annulled. In such a case, the dismissal for the non appearance of the plaintiff or the Official Assignee on the date fixed for the hearing is under O 9, r 9 (l)

Limitation—There is no limitation provided for the Official Assignee to appear and apply for substitution. Again, where the plaintiff's name is struck off and the Official Assignee is substituted for the insolvent plaintiff, and the adjudication is thereafter annulled, there is no limitation for the plaintiff to appear and apply for the restoration of his name on the record (m)

Insolvency of pauper applicant—In the case of a pauper who has applied for leave to sue as a pauper, the present rule can be applied only after leave to sue is granted, but not before (n)

Costs payable by plaintiff prior to his insolvency—The general principle is "that a person who comes in by representation, whether it be an assignee in bankruptcy or as an executor or administrator of an original plaintiff, where costs are due by the person whom he represents, the suit cannot be carried on except upon the costs of the original suit being paid". It has accordingly been held that where a plaintiff, who has been ordered to pay the costs of a proceeding in the suit, becomes bankrupt, and the suit is revived by his assignee, the Court will stay proceedings until payment of the costs which the plaintiff has been ordered to pay (o). The security required of the Official Assignee is for costs incurred prior to the insolvency (p)

Costs of successful defendant.—Where a suit is continued by the assignee in bankruptcy, and the defendant obtains judgment with costs, the defendant is entitled to be paid all his costs in full, and not merely the costs as from the date of insolvency with liberty to prove for the costs previously incurred (q)

(j) *Kissen Gopal v. Suklal* (1926) 53 Cal 844
93 I C 781, (27) A C 78

(k) *Mut Chand v. Dovenie & Co. Ltd* (1929)
10 Lah 203, 110 I C 910 (28) A L 596

(l)

(m)

(n)

(o) *Cook v. Hathway* (1861) L R 8 Fq Cas 612

(p) *Giam Hussain v. Iqbally Abdulla* (1926)
28 Bom L R 1074, 97 I C 797 (26)
A B 553

(q)

.

Practice.—As to the form of the order under this rule, see the undermentioned case (r)

Execution proceedings—This rule does not apply to proceedings in execution See r 12 below

Cause of action arising after insolvency.—t, an undischarged insolvent, sues B for brokerage earned by him subsequent to his adjudication B applies for security for costs. If the Official Assignee has not intervened, no order should be made for security for costs (s) It may be observed that under the Presidency towns Insolvency Act, 1909, property acquired by an insolvent after adjudication does not vest in the Official Assignee until he intervenes and claims it on behalf of the creditors In cases governed by the Provincial Insolvency Act, 1920, such property vests immediately on the making of order of adjudication

9. [Ss. 371, 372A.] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

Effect of abatement or dismissal.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit

(3) The provisions of section 5 of the Indian Limitation Act, 1877, shall apply to applications under sub-rule (2).

Sub rule (1) No fresh suit on the same cause of action.—This rule prohibits a fresh suit on the same cause of action As to the meaning of "Cause of action," see notes to s 20 above Cause of action

A, a member of a joint Hindu family, sues B, for redemption of a mortgage of ancestral property executed by A to B A then dies A's heirs are not brought on the record, and the suit abates. Subsequently A's son and grandsons institute another suit against B for redemption of the same mortgage There is no indication that A's suit was brought by him in a representative capacity, that is, as representing the joint family The second suit is not barred (t)

There is no question of the survival of the right to sue when a reversioner dies Therefore when a suit by a reversioner has abated, a fresh suit on the same cause of action by the next reversioner is not barred for the right to sue has not devolved upon him from the last reversioner (u)

Sub rule (2) Who may apply under this rule.—The following persons may apply under sub r (2), namely, (1) *the plaintiff*, where a suit has abated under

(r) *Lekhray v. Shamlal* (1822) 15 Bom 404

(s) *Murray v. East of Bengal Mahayan Flotilla Co Ltd* (1919) 46 Cal 156 48 I C 622

(t) *Kimchandra v. Shripatrao* (1916) 40 Bom 248 33 I C 331

(u) *Lachman v. Bansi* (1931) 12 Lah. 275, 131 I C 98 (31) A L 79

D. 22, r. 9 r 4 (3) (v), (2) *the legal representative of a deceased plaintiff*, where a suit has abated under r 3 (2), (3) *the assignee of an insolvent plaintiff*, where a suit is dismissed under r 8 (2)

Limitation.—An application under this rule for an order to set aside an abatement must be made within 60 days from the date of the abatement [Limitation Act, 1908 sch I art 77] Similarly an application for an order to set aside the dismissal of a suit must be made within 60 days from the date of the order of dismissal [*Ib*, Art 172] If no application is made within 60 days, the Court has the power under s 5 of the Limitation Act to admit the application after the expiry of that period if the applicant satisfies the Court that he had sufficient cause for not making the application within 60 days See sub r (3) In an Oudh case a decree was passed against a defendant in ignorance of his death, but on application of his legal representatives, the decree was treated as a nullity, delay was excused, the representatives impleaded, and the appeal heard *de novo* (w)

Sub rule (2). "Sufficient cause."—An application to bring upon the record the legal representative of a deceased *plaintiff* must be made within 90 days from the date of the death of the deceased [Limitation Act, 1908 sch I, art 176] An application to bring upon the record the legal representative of a deceased *defendant* must also be made within 90 days from the date of the death of the deceased [*Ib*, Art 177] If no application is made within the prescribed period, the suit abates in the case of a deceased plaintiff under r 3 (2), and in the case of a deceased defendant under r 4 (3) But the plaintiff or the person claiming to be the legal representative of a deceased plaintiff as the case may be, may apply under r 9 (2) for an order to set aside the abatement The application to set aside the abatement must be made within 60 days from the date of the abatement If no application is made within 60 days, the Court may under s 5 of the Limitation Act admit the application if the applicant satisfies the Court that he had sufficient cause for not making the application within 60 days see sub r (3)

An abatement ought not to be set aside as a matter of course or lightly The reason is that when a suit abates, the setting aside of the abatement deprives the party in whose favour the abatement operates of a valuable right Under sub r (2), the applicant has to satisfy the Court that he was prevented by some sufficient cause from making the application to bring the legal representative of the deceased upon the record within 90 days from the date of the death of the deceased Under sub r (3), the applicant has to satisfy the Court that he had sufficient cause for not making the application to set aside the abatement within 60 days from the date of abatement (x) The two sub rules are distinct In dealing with an application under sub r (2), the Court has to decide whether there was sufficient cause for not bringing the legal representative of the deceased upon the record within 90 days from the date of the death of the deceased independently of sub rule (3) (y)

Ignorance of the death of the deceased (z), or of the whereabouts of the legal representatives of the deceased (a), may be a sufficient cause for excusing the delay

(v)

no 118 p 369 38 IC 7, *Zainab Bibi v*(w) *Ahluja v. Ahluja* (19-1) - Luck 59- 101
1 C 841 (27) A O 2-1(x) *Sarat Chandra v. Mathar Stone & Lime Co*
(1922) 49 Cal. 62, 67 I C 917 (22) A C 3-5(y) *Lochani v. Muhammad* (19-0) 42 All 540
59 I C 903(z) *Days Singh v. B. ta Singh* (1916) Punj Rec

(a)

deceased was under the impression that the co-defendants were prosecuting the appeal and challenging the validity of the entire decree, it was held that it was a sufficient cause for excusing the delay in making the application to bring him on the record in place of the deceased (b)

Sub rule (3)—See notes above, "Sub rule (2) Sufficient Cause."

Substitution without setting aside abatement—The Patna High Court has

Minor and abatement—When an application on behalf of a minor to be brought on the record in place of his deceased father who was the plaintiff in the suit

Remand—When the High Court in second appeal declares the first appeal to have abated it has no power to set aside the abatement but should remand the case to the lower Appellate Court for disposal under this rule (f)

Cause of action in revived suit—Where an abatement is set aside under this rule, the suit is revived. No fresh cause of action can be imported into the revived suit for the proceedings in the revived suit are a continuation of the proceedings in the original suit (g)

Appeal—An appeal lies under abatement or dismissal of a suit, or an order setting aside an abatement the abatement is passed without is appealable or at least open to revision (h). An order refusing to set aside an abatement of a suit, if not appealed against is final and affords a new starting point for limitation under art. 182 (2) of the Limitation Act (i)

Letters Patent appeal—The High Court of Allahabad has held that an appeal with cl. 15 of the Letters Patent Act is appealable to the High Court judge of the first instance proceeds

would be strange if there was permission to appeal, as undoubtedly there was from the lower Appellate Court to the High Court that there should not also be the right of appeal, not merely in a suit but when the question arose in a Court of appeal (j)

(a) *Chunni Lal v. Anila Chand* (1933) 14 Lah 543 1421 C 649 (33) A L 356

(b)

(c)

(d)

(e)

(f) *Amarsingh v. Desai* (1925) 27 Bom L R 91 85 I C 31 (25) A B 230

(g)

(h)

(i)

(j)

O. 22,
r. 9, 10

The High Court of Calcutta has held that an order *setting aside* the abatement of a suit is a "judgment" within the meaning of cl 15 of the Letters Patent, and is appealable as such, the reason given being that when a suit has abated, the setting aside of the abatement deprives the party in whose favour the abatement operates of a valuable right (k)

10. [S. 372.] (1) In other cases of an assignment creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved

Procedure in case of
assignment before final
order in suit

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1)

Alterations in the rule—(1) The words "either in addition to or in substitution for the person from whom it has passed which occurred in sec 372 of the Code of 1882 after the words "interest has come or devolved," have been omitted. It would seem to follow from some of the observations of their Lordships of the Privy Council in the undermentioned case (l) that the effect of the omission of those words is that a transferee *pendente lite* cannot under this Code be added as a party, but that he may be substituted for his transferor. It is not clear whether their Lordships intended to go that length. If they did, a difficulty would arise in every case where a mortgagee *pendente lite* applied to be joined as a party.

(2) Sub rule (2) is new. See notes below under the heading 'Sub rule (2)'

Other cases of assignment, creation or devolution of interest—It will be observed that the preceding rules deal with certain specified cases of assignment creation and devolution of interest. Rule 8 deals with the case of assignment on the insolvency of a plaintiff, rule 7 with the case of creation of an interest in a husband on marriage, and rules 2, 3 and 4 with the case of devolution of interest on the death of a party to a suit. The present rule provides for cases of assignment, creation and devolution of interest *other than* those mentioned above (m). See notes below 'Devolution of interest.'

Assignment of interest—This includes a sale, or a mortgage (n), or a lease (o) of the property in suit, also an assignment of a mortgage (p).

Devolution of interest. representative suits—Rules 2, 3 and 4 relate to cases of devolution of interest on the death of a plaintiff or a defendant. These rules, however, do not apply where a suit is brought by or against a person in his representative character e.g., by or against the head of a mutt or the manager of a temple as such. In such a case the present rule applies so that if the head of the mutt or manager of the temple dies, his successor may be substituted in his place. But the rule is not confined to

(l) *Sarat Chandra v. Mather Stone & Lime Co* (1907) 43 Cal 62, 67 IC 917 (27) AC 33.

(f) *Manindra v. Pamlal* (1902) 49 IA 220 276 11at 591 588 63 IC 973 (22) A FC 204.

(m) *Elwan Das v. Nikanta* (1904) 9 CW 171 173 *Ali Baba Iur v. Isfahall* (1907) 43 All 310 100 IC 288 (21) A A 25 *Isfahall v. Isfahall* (1907) 45 Mad

872 63 IC 942 (23) A M 237 overruled on another point by *Ier n al v. Perumal* (1908) 51 Mad 701 112 IC 116 (29) A M 914.

(n) *Tegnanara v. amurthi v. Balakrishna* (1934) 56 Mad 463 143 IC 578 (33) A M 411.

(o) *Pan J un ar Lal v. Raja Mukund Soli* (1916) 11at 133 536 38 IC 237.

(p) *Macleod v. Kusan* (1906) 30 Bom 250 25 58.

devolution of interest by death. It also applies if the head of the mutt or manager of the temple resigns his office or is removed from office (g). In such a case also the successor to the head of the mutt (r) or to the manager of the temple (s) may be substituted as a party under this rule. But if the successor does not apply to be substituted as a party the original plaintiff may continue the suit, and his successor will be bound by the result of the litigation (t). Where during the pendency of a suit brought by the manager of an encumbered estate the estate was released from management and restored to the owners it was held that the owners could apply under this rule to be made plaintiffs in place of the manager (u).

Interest—The word interest in this rule means interest in the property, the subject matter of the suit (1).

Illustrations

1. A sues B for recovery of possession of certain property. Pending the suit, A sells his interest in the property to C. C may apply under this rule to have his name substituted as plaintiff in A's place.

2. A sues the firm of B C to recover Rs. 5,000. Pending the suit the firm of B C transfers all its assets and liabilities to the firm of X Y. Thereupon A applies to the Court under this rule to have the firm of X Y joined as a party defendant. The firm of X Y should not be joined as a party for the assignment cannot be said in any sense to be an assignment of the defendant's interest in the subject matter of the suit. *Harish Chandra v Chandpore Co., Ltd* (1903) 30 Cal. 961. [Here the subject matter of the suit is the amount claimed by A, namely, Rs. 5,000.]

Insolvency of defendant Joinder of Official Assignee—This section applies to the devolution of interest by reason of an order of adjudication (w). See Mulla's Law of Insolvency in British India p. 486 *et seq*.

(a) A sues B for recovery of possession of certain immovable property. The defence is that B is the full owner of the property. Pending the suit, B is adjudged insolvent and his estate vests in the Official Assignee. The Official Assignee is entitled to be substituted as a party defendant under this rule. The reason is that the order of adjudication operates as a statutory transfer of the interest of the insolvent in the subject matter of the suit to the Official Assignee. see *Punitharelu v Bhashyam* (1902) 25 Mad. 406, *Subbayar Bros v I. K. Munuswami Aiyar & Sons* (1927) 50 Mad. 161, 98 I.C. 516 (26) A.M. 1133.

(b) If the Official Assignee refuses to defend a suit relating to the insolvent's property the insolvent is not entitled to defend the suit independently of the Official Assignee. *Tribhovanadas v Abdulally* (1914) 39 Bom. 568, 28 I.C. 506. see also *Surendra Nath v Thripura* (1927) 32 C.W.N. 304, 109 I.C. 282, (28) A.C. 215. As to the old law on the subject see the undermentioned case (x).

(c) A mortgages his property to B. B sues A for a sale of the mortgaged property. Pending the suit A is adjudged insolvent. The Official Assignee or Receiver is a necessary party to the suit. *Kala Chand v Jaggannath* (1927) 54 I.A. 190, 54 Cal. 595, 101 I.C. 442 (27) A.P.C. 108.

(d) A sues B to recover a debt or damages for breach of contract. Pending the suit B is adjudged insolvent and his property vests in the Official Assignee. Here there is a mere money claim against the insolvent and no vesting in the Official Assignee of

- | | | | |
|-----|-----|-----|---|
| (g) | " " | (u) | <i>Saivendra v S. Romani</i> (1901) 98 Cal. 171 |
| (r) | " " | | <i>Macleod v Kisan</i> (1906) 30 Bom. 250 |
| (s) | " " | (v) | <i>Harish Chandra v Chandpore Co. Ltd</i> |
| | " " | | (1903) 30 Cal. 961 |
| (t) | " " | (w) | <i>Punitharelu v Bhashyam</i> (1902) 25 Mad. |
| | " " | | 406, 413 |
| | " " | (x) | <i>Hunt v re</i> (1864) 11 Bom. H.C. 251 |

O. 22, r. 10 any "order" with reference to the suit
Office
suit

259, *Punthalelu v Bhashyam* (1902) 25 Mad 406, 421, *Subbaya Bros v J K Munnuswami Aiyar and Sons* (1927) 50 Mad 161, 98 I C 516 ('26) A M 1133 See notes above, "Interest"

Annulment of order of adjudication—Where a suit is brought by the Official Assignee, and the order of adjudication is annulled pending the suit, the insolvent is entitled to be substituted as plaintiff under this rule (y)

"During the pendency of a suit"—These words mean "before a final decree or order has been passed or made in the suit" [see the marginal note to the rule] Hence the provisions of this rule apply if the assignment, creation or devolution of interest takes place before a final decree or order is passed or made in the suit. There is no power to make an order after the final decree has been passed (z). In the case of an appeal, the provisions of this rule apply if the assignment, etc., takes place before a final decree or order is passed or made in the appeal [see r 11 below]. Though a suit may be compromised and the terms of the compromise filed in Court, the suit will be deemed to be pending until a decree is passed in terms of the compromise. Until the decree is passed, a transferee *pendente lite* is entitled to apply under this rule to be joined as a party (a). If he is joined as a party he is entitled to object to a decree being passed in terms of the compromise arrived at between his transferor and the opposite party (b). But if he is not joined as a party he is bound by the decree passed on the compromise (c).

Illustrations

1 A decree is passed in a suit respecting a will that a scheme should be settled. Before the scheme is settled and a final order is made, the interest of one of the parties to the suit passes by devolution to A B. A B may be brought on the record under this rule *Gocool Chunder v Administrator General* (1880) 5 Cal 726

2 The devolution of the interest of a party to a suit after an order has been made directing the Commissioner to take accounts, but before the passing of the final decree is within this rule *Keshub Roy v Krishno Mitter* (1903) 30 Cal 609

3 The assignment of the interest of a mortgagee in a suit for sale of the mortgaged property after a preliminary decree for sale, but before the passing of the final decree is within this rule *Chunni Lal v Abdul Ali Khan* (1901) 23 All 331

4 In a suit by A against B to recover certain immovable property a decree is passed for A. B appeals from the decree. Pending the appeal, A sells the property to C. C may be made a party to the appeal under this rule *Rajaram Bhagwat v Jibat* (1885) 9 Bom 151, *Pandit Gocul Chand v Kuar Sarat* (1896) 18 All 285

5 A sues B to recover Rs 5,000 and a decree is passed for him. B appeals from the decree. Pending the appeal, A assigns the decree to C. C may be made a party to the appeal under this rule *Durga Prasad, in the matter of* (1900) 22 All 231

6 A sues B for redemption of a mortgage. A preliminary decree for redemption is passed, and a time is fixed within which the mortgage money is to be paid by A into Court. The money is not paid by A within the time fixed by the Court nor is any application made by B under O 34, r 8 (4) for a decree for sale. A then sells the mortgaged property to C. This amounts to an assignment pending the suit so as to

(y) *Haji Sojan v C Macleod* (1908) 32 Bom 821, 334

(z) *Mrs M A Cunningham Sircar v Fred Stephens* (1930) 57 Cal 1143 130 I C 907 (31) A C 51

(a) *Lakshon v Dikinja Moni* (1903) 27 C W N

755 80 I C 538 (24) A C 183

(b) *Verraghara v Subba* (1920) 43 Mad 37, 53 I C 428

(c) *Dasappa v Bhimangonda* (1923) 52 Bom 258 108 I C 17 (28) A B 65

entitle *C* to be brought on the record as a party under this rule *Muhammad v Jarao* (1915) 37 All 226, 27 IC 771

7 *A* sues *B* for possession of certain land and mesne profits Pending the suit *B* lets the lands to *C* and delivers possession to him A decree is then passed for *A* for possession and mesne profits After the decree *C* at *B*'s request delivers possession of the land to *A* *A* then applies in execution proceedings to join *C* as a party to the suit so as to compel *C* to account for profits which he had received from the land *C* should not be joined as a party, for it cannot be said that *B*'s liability for mesne profits has 'devolved' upon *C* within the meaning of this rule *Manindra v Ram Lal* (1922) 49 I A 220 1 Pat 581, 68 IC 973 (22) A PC 304

8 A mortgagee who brings to sale and purchases the share of a party during the pendency of a suit for partition may be made a party under this rule *Jadunath v Murari* (1931) 35 C W N 296, 134 IC 307, (31) A C 594

Application under this rule when to be made—This rule only governs an application to continue a suit An application by a transferee of the interest of a party made after the termination of a suit is not within this rule (d) But where an appeal is preferred from the decree, an application under this rule can be made to the appellate Court even though the devolution of interest occurred when the case was pending in the trial Court (e)

Illustration

A sues *B* to establish his right to certain property Pending the suit *B* mortgages the property to *C* A decree is then passed in favour of *A* *B* does not appeal from the decree *C*, being desirous of appealing from the decree applies to be made a party to the suit The suit having terminated *C* should not be joined as a party to the suit He may however appeal from the decree under sec 146 as a person claiming under *B* within the meaning of that section *Sitaramaswami v Lalshmi* (1918) 41 Mad 510 48 IC 840

Court's power to grant leave is discretionary—An applicant under this rule is not entitled to leave to be joined as a party as a matter of right The Court has a discretion in the matter, and it may refuse leave on the ground of laches or delay (f) The Court refused leave after a lapse of 53 years to resurrect a suit in which the preliminary decree for partition had been made and several devolutions had occurred (g) Again the Court refused leave to allow a party who had been declared bankrupt in England to remain on the record either himself or by his trustee (h)

Sub rule 2—*A* obtains a decree against *B* *B* appeals from the decree Pending the appeal *C*, who holds a decree against *A*, attaches the decree obtained by *A* against *B* *C* may be made a party under this rule See O 21, r 53

No new suit—It is clear from the terms of this rule that when a party is brought on the record under this rule, there is as regards him no new suit at all He is brought on the record as a party to a suit that has already been instituted and that suit is continued by or against him His substitution as a party does not initiate, as regards him a new proceeding (i) See notes below, Limitation'

- | | |
|--|--|
| <p>(d) <i>Sitaramaswami v Lakshmi</i> (1918) 41 Mad 510 48 IC 840 <i>Collector of Muaffarnagar v Hussain Begum</i> (1896) 18 All 86 <i>Srinivas v Pratapa</i> (19 5) 49 Mad LJ 704, 91 IC 820 (-6) A M 244 [application after decree by mortgagee to be joined as a party to secure amount in Court in part payment]</p> <p>(e) <i>Rasani v Raja Jyoti</i> (1922) 27 C W N 710 75 IC 255 (24) A C 90</p> | <p>(f) <i>Lalshmi v Subramanyam</i> (1923) 27 C W N 755 60 IC 538 (24) A C 188</p> <p>(g) <i>Eloishee v Kunjabharae</i> (1933) 60 Cal 940 147 I C 779 (33) A C 696.</p> <p>(h) <i>Prince Victor v Bhonarabendra</i> (1930) 34 C W N 53 125 IC 851 (30) A C 398</p> <p>(i) <i>Chuni Lal v Abdul Ali</i> (1901) 23 All 331 335</p> |
|--|--|

O. 22, r. 10, 11 Trial Court can bring assignee on record pending appeal—The Court of first instance has jurisdiction to bring on record the assignee of a party to the suit, though there may be an appeal pending in the appellate Court from an interlocutory order made by the Court of first instance (j)

Execution proceedings.—The words “during the pendency of the suit” and the marginal note seem to exclude the application of the rule to execution proceedings. On the other hand it has been suggested though not decided that as this rule is not referred to in r 12 it becomes applicable to execution proceedings on the principle of exclusion (l). In a later case (l) the Calcutta High Court said that the question of the applicability of the rule to execution proceedings has not yet been authoritatively decided. But in the undernoted case (m) it was assumed that r 10 applied to execution proceedings. The decree was against the managing committee of a school in their representative capacity and was enforceable against the assets of the school. Three members of the managing committee went out of office after the decree and the Court said that was a devolution of interest within O 22, r 10.

Transfer of decree.—This rule does not apply to transfers of decrees. O 21, r 16, applies to such transfers (n).

Doctrine of lis pendens.—In this connection may be noted the provisions of sec. 52 of the Transfer of Property Act, 1882, which runs as follows: “During the pendency of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

Limitation.—The right to apply under this rule accrues from day to day, and is not therefore barred by lapse of time. An application therefore to be added or substituted as a party under this rule may be made at any time (o).

Appeal.—Under the Code of 1832 an appeal was allowed from an order *giving leave*

appealable though on the facts the order should not have been passed under this rule (r).

Letters Patent Appeal.—An order *refusing leave* to be joined as a party is a “judgment” within the meaning of cl. 15 of the Letters Patent, and is appealable as such (s).

11. [S. 582, 1st para.] In the application of this Order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.

- Application of Order to appeals
- (j) *Ehnoial v. Darasha* (1913) 25 Bom. L.R. 242
- (k) “
- (l) “
- (m) “
- (n) “
- (o) A.P. 160
Kelurnath v. Harra Chand (1882) 8 Cal. 420
Keshub Roy v. Kristo Mitter (1903) 30

- Cal. 609, *Papari v. Fija Jyoti* (1923) 27 C.W.N. 710, 75 I.C. 235 (24) A.C. 90
- (p) *Jamna Bibi v. Sheikh Jan* (1902) 24 All. 532
- (q) *Mudnapore Zemindary Co., Ltd. v. Nareah* (19-7) 54 Cal. 718, 104 I.C. 842 (-7) A.C. 844
- (r) “
- (s) “

Neither suit nor appeal—An application under sec 21A of the Punjab Alienation Act is neither a suit nor an appeal and cannot abate as O 22 does not apply (i)

12. [New] Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order

Application of Order to proceedings*

Execution proceedings—Rules 3 and 4 relate to the death of a party pending a suit or appeal. Rule 8 relates to the insolvency of a plaintiff pending a suit, and the insolvency of an appellant pending an appeal. The present rule provides that nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree. It sets at rest the conflict on the question whether the provisions relating to the abatement of suits and appeals apply to proceedings in execution. The Madras High Court has held that this rule does not apply to the procedure for bringing on record the legal representative of a deceased party in an execution proceeding, but merely enacts that the penalty of abatement shall not attach to execution proceedings (u). The rule is therefore for the benefit of the decree holder, for his heirs need not take steps for substitution under rule 3 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding, or he may file a fresh execution application (t). See note 'Transfer pending execution' under O 21, r 16, at p 720.

Illustrations

(1) A sues B and obtains a decree against him. A then applies for execution of his decree against B. B dies during the pendency of the execution proceedings. The application cannot abate under rule 4. A may apply at any time while the proceeding is pending under sec 50 and O 22, r 12 to continue the execution proceeding. *Purushottam v Rajbai* (1910) 34 Bom 142 4 I C 839, *Venkatalakshamma v Seshgiri* (1931) 60 Mad L J 628 131 I C 610 (31) A M 303.

(2) A sues B and obtains a decree against him. A applies for execution of his decree against B but dies during the pendency of the execution proceeding. Rule 3 provides that the application does not abate but it does not prevent A's legal representative from being made a party. No order for substitution is necessary. The legal representative may apply and be brought on the record to carry on the proceeding. *Venkatachalam v Ramaswami* (1932) 55 Mad 352, 135 I C 561, (32) A M 73 F B, *Akhoy v Surendra* (1926) 30 C W N 735, 96 I C 378, (26) A C 957, *Annachariya v Narayan* (1933) 57 Bom 616 145 I C 773 (33) A B 358. According to the Allahabad and Oudh Courts the legal representative may apply to continue the proceedings, but his application must be under rule 16 of O 21 and in the tabular form of r 11. *Baynath v Ram Bharios* (1927) 49 All 509 104 I C 116 (27) A A 165, *Mirza Mahommed v Sujud Mirza* (1928) 3 Luck 126, 105 I C 611, (28) A O 30.

Appeal in execution proceedings—Can it abate?—There is a conflict of decision as to whether rule 12 applies to appeals in execution proceedings. The Patna and Lahore High Courts have held that rule 12 has the effect of excluding appeals in execution proceedings from rules 3, 4 and 8 and that there can be no abatement of such an appeal (w). On the other hand the Madras High Court has held that an appeal against an order in execution is not a proceeding in execution of a decree and that such an appeal

(i) *Secretary of State v Amar Singh* (1930) 11 Lah 706 126 I C 441 (30) A L 75

(u) *Venkatachalam v Ramaswami* (1932) 55 Mad 352 135 I C 561 (32) A M 73 F B overruling *Palanappa v Veilamma* (1929) 50 Mad 1 99 I C 6 (29) A M 184

(t) *Akhoy v Surendra* (1926) 30 C W N 735 96 I C 378 (26) A C 957. *Saiden*

dranath v Surendranath (1930) 57 Cal 1137 199 I C 57 (30) A C 614. *Venkatalakshamma v Seshgiri* (1931) 60 Mad L J 628 131 I C 610 (31) A M 303

(w) *Halim Syed Mahomed v Fateh Bahadur* (1911) 9 Pat 37 122 I C 148 (22) A L 565 F B (Das J, dissenting). *Murkhan v Sharfa* (1933) 5 Lah L J 163 41 I C 57, (23) A L 569

O. 22, r. 12 can abate as rule 12 does not apply (x) The Allahabad High Court has also held that rules 3, 4 and 8 do apply to execution appeals and that a receiver appointed in the insolvency of an appellant judgment debtor can be called upon to furnish security under rule 8 and that if he fails to furnish such security the appeal may be dismissed (y)

Mesne profits.—*A* obtains a decree against *B* for possession and mesne profits *B* dies pending the inquiry into mesne profits Under the Code of 1882 an inquiry as to mesne profits was a proceeding in execution, and hence there could be no abatement of the proceeding under that Code (z) Otherwise the suit as against *B* with regard to the ascertainment of mesne profits will abate (a) Under the present Code an inquiry as to mesne profits is an inquiry *pending* the suit; hence r 4 applies and *B*'s legal representative should be brought on the record See notes to O. 20, r. 12, "Inquiry as to mesne profits no longer a proceeding in execution."

Death of party after preliminary and before final decree.—See note to r 3 above, and notes to r 4

ORDER XXIII.

Withdrawal and Adjustment of Suits.

O. 23, r. 1 1. [S. 73.] (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

Withdrawal of suit or abandonment of part of claim

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(x) *Raja of Kalahasti v Jagannadha* (1932) 55 Mad 1006, 139 I C 409, (32) A M 574

(y) *Changa Mal v Chaubey* (1934) 55 All. 509, 144 I C 391, (33) A A 398

(z) *Kodarmath v Anant Prasad* (1923) 52 I A 188, 4 Pat 507, 89 I C 482, (25) A. FC 117

(a) *Jankinath v Niroddaran* (1930) 57 Cal 148, 124 L C 817, (30) A C 422

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others

This rule applies to appeals.—This rule applies to appeals; see s 107 Hence an appellate Court may allow an appeal to be withdrawn (b), and the High Court may allow a second appeal to be withdrawn (c) See O 41, r 22 (4) and notes thereto

Sub rule (1) Withdrawal "of" Suit.

Distinction between sub-rule (1) and sub rule (2)—Sub rule (1) is new It does not create any new right It merely affirms the right of a plaintiff to withdraw a suit in whole or in part against all or any of the defendants, and is added here to make the rule a complete enunciation of the law relating to the withdrawal of and from suits. Sub r (1) contemplates a withdrawal of the suit, sub r (2) a withdrawal from the suit If a party desires to withdraw from the suit with liberty to institute a fresh suit he must apply to the Court under sub r (2) to permit him so to withdraw If he does not desire to have the liberty, then he can withdraw the suit of his own motion under sub r (1) and no order of the Court is necessary (d) But he cannot withdraw a suit reserving to himself a right to bring a fresh suit (e)

Withdrawal "of" suit by plaintiff.—Where a suit is one for partition, and pending the suit the parties come to a compromise, the plaintiff is not at liberty to withdraw the suit under sub rule (1), and the defendants are entitled to a decree in terms of the compromise under O 23, r 3 (f) If after a preliminary decree for taking accounts the plaintiff wishes to withdraw the suit and the defendant wishes to continue, the proper course is to transpose the plaintiff as defendant, and the defendant as plaintiff (g).

Withdrawal of suit by plaintiff appellant.—The plaintiff brought a suit for partition against several defendants and came to a compromise with some of the defendants making a concession in their favour and a decree was passed in the suit based in part on the compromise and as to the rest in invitum The plaintiff appealed and while the appeal was pending withdrew the suit But the Court held that it was not open to the plaintiff who had made a concession afterwards to annul it by withdrawing from the suit of his own free will and without permission of the Court If the plaintiff withdraws in such a case, the proper course is for the appellate Court to dismiss the appeal, and the decree of the first Court will then stand as a subsisting decree (h) But when a plaintiff appellant was allowed to withdraw his suit and appeal and so deprive the defendant of a judgment in his favour, the High Court though not approving of the order refused to interfere in revision (i)

Withdrawal "of" suit by plaintiff respondent.—There is no provision of law allowing plaintiff respondent in an appeal to withdraw as of right his suit as against the appellant It is discretionary with the appellate Court to allow such a withdrawal, and the appellate Court will not allow such a withdrawal if the result will be to prejudice the appellant and other respondents who have not appealed A sues B and C The claim against B is to establish his right to a channel and against C to prevent interference by him in the use of the channel A decree is passed against both the defendants C does

(b) *Pam Irtshad v Lhurosa* (1885) J W I 34 *Kalyan Singh v Rahmu* (1901) 23 All 130

(c) *Pandu v Derya* (1883) 7 Bom 287

(d)

(e)

(f)

(f) *Tularam v Ramchandra* (1922) 49 Bom 600 59 I C 984 (25) A B 425

(g) *Debi Chand v Jorbbu Lal* (1906) 24 All L J 634 96 I C 67 (26) A A 582

(h) *Suyabhamabai v Ganesh* (1905) 23 Bom 13 *Kamini Kumar v Rajendra* (1906) 4 Cal L J 219 90 I C 432, (26) A C 233

(i) *Sahrbjan Bibi v Gopal* (1930) 34 C W N 127 I C 71 (30) A C 424

O. 23, r. 1 not agreed from the decree. Hence in the
in the
draw the

that he may be allowed to withdraw the suit as against *B*. *B* opposes the application on the ground that if the decree against *C* were allowed to stand, he would be considerably prejudiced. Held, upon the above facts that *A*, the plaintiff respondent, should not be allowed to withdraw the suit as against *B*, the defendant appellant, and the proper course is to hear the appeal on the merits (1).

Withdrawal by decree holder "of" application for execution—Though a decree holder who has applied for execution of his decree may not be entitled, by virtue of the provisions of O 23, r 4, to "withdraw" his application under sub r (1) of this rule, he is entitled, if he does not wish to proceed to apply to the Court that the application be *dismissed* (1)

Withdrawal "of" application for withdrawal of suit.—Where an application for withdrawal of a suit has not been finally disposed of, it is open to the Court, in a proper case, to allow the plaintiff to withdraw the application for withdrawal of the suit and to proceed with the trial (1)

Sub rules (2) and (3) Withdrawal "from" Suit.

Scope of sub rule (2)—Sub r (2) allows the Court in the cases specified therein to grant the plaintiff permission to withdraw from a suit with liberty to institute a fresh suit, in which case the bar against the fresh suit which is otherwise imposed on a plaintiff who abandons his first suit is removed (*m*)

"Formal defect"—Sub r (2) provides that where the Court is satisfied that a suit must fail by reason of "some formal defect, or that there are "other sufficient grounds" for allowing the plaintiff to institute a fresh suit for the same subject matter as the Court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit with liberty to institute a fresh suit in respect of the subject matter of such suit. A misjoinder of parties or of causes of action is a formal defect within the meaning of this rule (n). Similarly an erroneous valuation of the subject matter of a suit is a formal defect, and leave may be granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (o). But leave should not be granted where the suit is deliberately undervalued to save Court fees and to bring it in a Court of a lower grade (p). Leave to withdraw may also be granted where a material document is not properly stamped (q), or registered (r), for these are in the nature of formal defects. Where a plaintiff institutes two suits for rent, and then applies for leave to withdraw the suits with liberty to file a fresh suit consolidating the two claims to avoid the danger of the second suit being held barred under the provisions of O 2, r 2, the case is one of a formal defect, and leave may be granted under sub r (2) (s). The institution of a suit in a Court which has no jurisdiction to entertain the suit is a formal defect, or at least a defect analogous to a formal defect so as to bring the case under sub r (2) (b). In such

- | | |
|--|---|
| (j) <i>Dharmaraja v Pethu Raja</i> (1923) 46 Mad 811 741 C 4 (24) A M 79 | 279 <i>Afsal Shah v Lachmi Narain</i> (1918) 40 All 7 11 431 C 86 |
| (k) | (o) (1869) 13 MIA 160 170 3 Beng L R F C 49 49 <i>supra</i> <i>Kannuram v Jagannath</i> (1918) 41 Mad 701 707, 46 I C 260 |
| (l) | (p) (1918) 41 Mad 701 707 708 46 I C 260 <i>supra</i> |
| (m) <i>Fateh Singh v Jagannath Bokkash Singh</i> (1925) 52 I A 100 100-106 47 All 154 162 163 91 I C 280 (25) A 1 C 55 | (q) (1869) 13 M I A 160 170 3 Beng L R 1 C 48 49 <i>supra</i> |
| (n) <i>It was v Collector of Fyzabad</i> (1849) 13 MIA 160 170 3 Beng L R C 1 44 44 (i) <i>inshi v Khairat</i> (1894) 16 All 116 | (r) <i>Misses Delee v Eildeo</i> (1873) 5 N W T 116 |
| | (s) <i>Siddh Co v Alimsa</i> (1921) 2 Rang 66 811 C 46 (-4) R 210 |

a case, however, the Court should not act under this rule, but return the plaint under O 7, r 10 to the plaintiff to be presented to the proper Court (i). But O 7 r 10, does not apply to Chartered High Courts. In the case, therefore, of a Chartered High Court, the Court may it seems, act under this rule.

"Other sufficient grounds"—Sec 97 of the Code of 1859 ran as follows—

'If the plaintiff at any time before final judgment satisfy the Court that there are sufficient grounds for permitting him to withdraw from the suit, with liberty to bring a fresh suit for the same matter it shall be competent to the Court to grant such permission on such terms as to costs or otherwise as it may deem proper' "

It is to be noted that sec 97 of the Code of 1859 did not contain the words "some formal defect" which occur in the present Code. In *Watson v Collector of Rajshahye* (u) the plaintiff sued the defendant to set aside an auction sale of a putnee Taluk for arrears of rent. A preliminary issue was framed whether the plaintiff was in a position to sue. A commission was issued for the examination of witnesses, but it was returned unexecuted as the witnesses had not been presented for examination. Upon this the Court finding no excuse for the plaintiff's neglect dismissed the suit for want of evidence, but with a reservation that the order made was not to be a bar to the plaintiff from proceeding as if the action had not been brought. The plaintiff then brought a fresh suit in respect of the same cause of action. The High Court of Bengal held that the second suit was barred as *res judicata* under s 2 of the Code of 1859. This decision was affirmed on appeal by the Privy Council. In the course of the judgment their Lordships of the Privy Council, referring apparently to sec 97 of the Code of 1859, said as follows—

"There is a proceeding in those Courts (Courts of India) called a non suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit, but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit, to cases in which a material document has been rejected because it has not borne the proper stamp and to cases in which there has been an erroneous valuation of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue liberty has been given to him to bring a second suit except in the particular instance that is now before them.

The passage cited above indicates their Lordships' view of the meaning of the words "sufficient grounds" in sec 97 of the Code of 1859. This decision was followed by the High Court of Bengal in *Madan Ram v Izrail* (v), where it was held that a plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit after issues have been joined and he has failed to produce the evidence to support his claim. *Madan Ram*'s case was also a case under the Code of 1859. The words 'by reason of some formal defect' appeared for the first time in sec 373 of the Code of 1877. The decision in *Watson*'s case was also followed by the High Court of Calcutta in *Khanda Co, Ltd v Doorga Charan* (w) a case under the present Code. The question in that case was whether a plaintiff can be permitted to withdraw from the suit with liberty to bring a fresh suit after he has adduced all his evidence and finds that the evidence is insufficient to establish his case. It was contended for the plaintiff that the words 'other sufficient grounds' were wide enough to entitle the Court to allow the plaintiff to withdraw from the suit under any circumstances that might be deemed sufficient by the Court but this contention was overruled,

(i) *Kannurams v Jagathambal* (1915) 41 Mad

01 708 46 I C 62

(u) (1861) 13 M L J 160 170 3 B N

L R P C 49

(v) (1874) 21 W R 21 (Civ I ul)

(w) (1902) 11 Cal I J 45 46 51 C 187

- O. 23, r. 1 and it was held that the Court had no power to allow a plaintiff to withdraw from the suit after evidence had been adduced, and the evidence was found to be insufficient to support his case. In the course of his judgment Mookerji, J., after referring to clauses (a) and (b) of sub rule (2) said "The intention plainly is that a ground indicated in clause (b) must be of the same nature as the ground specified in clause (a)". This decision has been followed by the same High Court in subsequent cases (x). The High Courts of Patna (y), and Lahore (z) have followed the Calcutta decisions. The Oudh Court also holds that other sufficient grounds must be *ejusdem generis* with a formal defect (a). The High Court of Bombay held in some cases that the Court should not allow a suit to be withdrawn after the parties were ready for trial "if such withdrawal might operate to the prejudice of the defendant" (b). But this view was dissented from in a later case in which the Court followed the Calcutta decisions (c). In a recent case the same High Court held that it is wrong to grant leave to withdraw a suit with liberty to file a fresh suit after the evidence is concluded though the hearing may be adjourned for final arguments (d). In Allahabad (e) leave to withdraw has been granted where the plaintiff fails to give formal proof of a document which is essential for his success. In Madras there is a conflict of opinion whether the words "other sufficient grounds" mean grounds analogous to a "formal defect" as held in Calcutta or include grounds which may not be analogous to a "formal defect". In one case (f) the High Court held that the words "other sufficient grounds" must be *ejusdem generis* with the words "some formal defect," and that the Court had no power under this rule to give leave to the plaintiff after a substantial portion of his evidence had been heard. In a later case (g), however, Sadashiva Ayyar, J., said that the words "other sufficient grounds" were not *ejusdem generis* with the words "some formal defect."

of Judges are in favour of the view that the mere inability of the plaintiff to prove his case is not a "sufficient ground" within the meaning of this rule for giving him leave to withdraw with liberty to institute a fresh suit.

The Calcutta High Court has held that the plaintiff should not be allowed to withdraw his suit with liberty to bring a fresh suit after the suit has been heard and decided on the merits (h). Where a plaintiff sought to recover a sum of money upon certain allegations which were found untrue by the first Court, and the first Court dismissed the suit, and on appeal the District Judge came to the same conclusion, but granted leave to the plaintiff to withdraw from the suit with liberty to institute a fresh suit, the High Court held that the order should not have been made and set it aside (i).

'On such terms as it thinks fit'—Where leave is granted to a plaintiff to withdraw from a suit with liberty to institute a fresh suit the defendant is

| | |
|--|---|
| (x) <i>Unbulia v. Lani Hemangrai</i> (1910) 11 Cal | Bom 3 384 335 58 I C 1004 (21) |
| | A B 267 |
| (y) | (r) |
| | (d) |
| | (e) |
| (z) | (f) <i>Siva v. Copanna</i> (1914) 27 Mad L J 480 |
| (a) <i>Ishar Das v. Lal S. Singh</i> (1905) 7 Lah. I. J 90 901 C 632 (20) A L 497 | 8 I C 57 |
| (b) <i>Tulas Chobay v. Shree Dayal</i> (1928) 3 Luck. 413 107 I C 88 (28) A O 48 | (g) <i>Kannusiram v. Jayathambal</i> (1918) 41 Mad 701 707 46 I C 263 |
| (c) <i>M. K. Pat v. Nath</i> (1919) 33 Bom 202 | (h) |
| (d) 4 I C 252, <i>Bai Kash bai v. Shildapa</i> (1913) 37 Bom 64 21 I C 23 (leave granted after the hearing was finished) | (i) |
| See also <i>Nataraj v. Shanulal</i> (1911) 45 | |

ordinarily entitled to the costs of the suit (j) The High Court of Madras has held that where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs on or before a specified date and he fails to do so he is precluded from bringing a second suit and if such suit is brought, it should be dismissed (k) That Court also held that if leave is granted to bring a fresh suit on payment of the defendant's costs (without specifying any date), the plaintiff is precluded from bringing a second suit unless the costs are paid before the institution of the second suit The payment of costs after the close of the trial in the second suit is not a compliance with the condition (l) But the same Court has held, that when it is absolutely impossible for the plaintiff to pay the costs on or before the date fixed by the Court as where the exact amount of costs cannot be ascertained in time, the Court has power to extend the time (m)

The High Court of Calcutta has not taken the same strict view of the condition as to the payment of costs as the Madras High Court Thus in *Abdul Aziz v Ebrahim* (n), where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs it was held that though the payment of costs was a condition precedent to the institution of a second suit non payment of costs before the institution of the second suit did not render the fresh suit bad *ab initio*, and further, that payment of costs before the trial of the fresh suit cured the irregularity In *Shital v Gaya* (o) Sir Lawrence Jenkins while agreeing with the result of the ruling in *Abdul Aziz v Ebrahim* based his decision on somewhat different grounds In that case also permission was granted to the plaintiff to institute a fresh suit on payment of the defendant's costs The plaintiff did not pay the costs and brought a second suit The suit was dismissed by the Munsif for non payment of costs The plaintiff appealed to the Subordinate Judge Pending the appeal the plaintiff paid the defendant's costs The Subordinate Judge thereupon sent back the case to the Munsif for trial on the merits It was held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment the original suit could not be deemed to be withdrawn until those costs were paid and it must therefore be deemed to be a pending suit which became disposed of as soon as payment was made In the course of the judgment the learned Judge said 'When a plaintiff has obtained leave to withdraw upon payment of costs it is his duty to pay the costs at once for until they were paid there is no withdrawal with the permission of the Court In that view, when the case came before the Munsif he was not entitled to dismiss it All he could do was to regard sec 10 (of the Code) as a bar to his proceeding with the trial of the suit In so far as he dismissed it he exercised a power that was not vested in him and I think the Subordinate Judge was right when on payment of the costs he set aside the decree of the Munsif and sent back the case in order that the Munsif should proceed with the trial for on the payment of those costs there was the withdrawal complete under O 23 It appears to me important in cases of this kind to have regard to the precise terms of the section and I think it will be well that the Court when giving permission to withdraw with liberty to bring a fresh suit should

High Court of Patna has followed the Calcutta decisions (p) The High Courts of Madras Allahabad and Bombay have dissented from the view taken by the Calcutta High Court in *Shital v Gaya* and held that the withdrawal operates not when the costs are paid but

(j) *Kh mehand v Sobhaychand* (19 3) 47 Bom. 559 - 1 C 3 4 (3) A B 06
(k) *F sher v Nagappa* (1910) 33 Mad 252 6 I C 253
(l) *Seshayya v Subayya* (19 4) 47 Mad L J 646 8-1 C 499 (24) A M 877
(m) *Pera v Karapanna* (1906) 29 Mad 370

(n) (1904) 31 Cal 965

(o) (1914) 19 Cal L J 5 9 531 31 (1)

(p) *Kuldev v Kulkarni* (1918) 31 Cal L J 67 41 1 C 9 Q 1 *Muhammad v Isak* (19 19) 51 Cal L J 10 10 1 C 91, 51 Cal L J 409

O. 23, r. 1 from the date of the Court's order granting permission to withdraw for otherwise the suit might be pending for an indefinite time (g)

Where a plaintiff who had brought a suit for redemption against the mortgagee was allowed to withdraw the suit with liberty to bring a fresh suit *within two years* and he brought the fresh suit after two years the High Court of Bombay held that he was entitled to do so. The reason given was that a mortgagor has a right to sue for redemption at any time within the period of limitation unless his equity of redemption has in the meantime been extinguished (r)

Notice.—Though this rule does not specifically require that notice of an application under it must be given to the opposite party still it is an elementary rule of universal application that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard. Hence if an order is made under this rule granting leave to the plaintiff to withdraw from a suit with liberty to bring a fresh suit without giving notice to the opposite party the order will be set aside under s. 115 of the Code on the ground of material irregularity (s)

Permission need not be express.—The permission mentioned in this section need not be given in express terms. It is sufficient if it can be implied from the order read with the application on which the order was made (t)

Form of order.—Where leave is granted to the plaintiff to withdraw from the suit with liberty to bring a fresh suit the order must not be one *dismissing* the suit with liberty to bring a fresh suit but one *granting permission* to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (u). Where leave is refused the Court should simply dismiss the application. It should not make an order disposing of the suit on the assumption that the plaintiff would withdraw the suit under sub rule (1) if the application was refused (v)

Permission extends to one fresh suit only.—The permission granted in the original suit to bring a fresh suit in respect of the same subject matter extends only to the filing of one fresh suit and not more. Hence where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs and the plaintiff brings a fresh suit without paying the costs and the suit is dismissed the dismissal is a bar to the institution of a third suit in respect of the same subject matter (w). The third suit will be dismissed even if the second suit was dismissed with leave to file a fresh suit for the leave so granted will not affect the condition imposed by the first suit which was broken when the second suit was filed (x)

Dismissal of suit coupled with liberty to bring a fresh suit.—There is no power in the Courts of India to *dismiss* a suit *with liberty* to the plaintiff to bring a fresh suit for the same matter (y)

Liberty to consolidate withdrawn suit with a pending suit.—A Court it seems has no power under this rule to grant permission to a plaintiff to consolidate

- (g) *Seshajya v. Sahay* (19 4) 47 Mad 1 J 646 80 I C 499 (4) A M 877 *Iachpal v. Sheo Katan* (19 9) 118 I C 584 (9) A 69 *Sahramappa v. Mallappa* (1931) 55 Bom 96 135 I C 558 (31) A II 257
- (r) *Panhand v. Ramnatha* (19 0) Bom 1 11 939 58 I C 45
- (s) *Laxendra v. Alai* (1917) 44 Cal 454 39 I C 99
- (t) " "

- (u) *Dozett v. Wise* (1841) 1 W R 3 *Ba-car Das v. Muhammad* (1847) 9 All 690
- (v) *Mahab v. P. rathodmas* (1908) 3 Bom 313
- (w) " "
- (x) "
- (y) "

the claim in the suit which is withdrawn with a claim in another suit pending at the time. But if such an order is made, it cannot be said to be one made without jurisdiction, and it is not a nullity (z). But there is nothing to prevent the Court from granting leave to a plaintiff to withdraw from two suits with liberty to bring a fresh suit consolidating the claims in the two suits (a).

Withdrawing with permission: Additional relief in fresh suit.—The effect of withdrawing a suit with the permission of the Court, is to leave the parties in the same position as that in which they stood before the suit was brought. Therefore the plaintiff may include in the fresh suit a *relief* which he might have included in the first suit, but which he had omitted to include in it (b).

Withdrawing with permission after suit has abated against some of the defendants.—Where a suit has abated against a defendant, and it is then withdrawn with liberty to bring a fresh suit, such permission does not entitle the plaintiff to join the legal representatives of such defendant as party defendants in the fresh suit (c).

Withdrawing without permission. Bar of fresh suit.—Where a plaintiff withdraws from a suit without the permission of the Court, he is precluded from instituting a fresh suit in respect of the same subject matter [sub rule (3)], and against the same defendant. The rule is mandatory, and when a suit by an idol was withdrawn a second suit by a shebait or manager of the idol was held to be barred (d). See notes below 'Same defendant,' and 'Same subject matter.'

Same defendant.—Though the rule does not expressly say so, the fresh suit that is barred must be a suit against the same defendant. A second suit will not be barred if it is brought against a different person. A obtains a decree against B and in execution of the decree attaches certain property alleged to belong to B. C intervenes under O 21 r 58 alleging that the property belongs to him. C's application is rejected, and he brings a regular suit against A alone to establish his title to the property. C then withdraws from the suit without obtaining permission of the Court to bring a second suit for the same subject matter. After the suit has been withdrawn, the attachment falls through. A then re-attaches the same property in execution of the same decree, and the property is sold and purchased by D. C does not appear to contest the second execution proceeding after the withdrawal of his suit. He then institutes a suit against D to recover possession of the property, alleging that the property is his sole and exclusive property. The suit is not barred under this rule, as B the judgment debtor, was not a party to the first suit (e).

Same subject matter.—As already stated if a suit is withdrawn without the permission of the Court, the plaintiff is precluded from bringing a fresh suit in respect of the same subject matter. The expression used in the corresponding s 373 of the Code of 1882 was 'matter'. A Calcutta case under the Code of 1882 said that matter did not mean property, but that it had reference to the *right* in property which the plaintiff seeks to enforce. In that case, A had instituted a suit to establish his right to sell certain property in satisfaction of a decree against B, but he withdrew the suit without obtaining leave to bring a fresh suit. Subsequently he instituted another suit to establish his right to sell the same property in satisfaction of another decree against B. It was held that the second suit was not barred. The Court said: 'Now, though the property in respect of which the present suit is brought is the same as that in respect of which the former suit was brought, still that would not be sufficient to make the present

(z) *Lakshmanan v. Muthaya* (1921) 40 Mad L J 126 6 I C 833. *Tularam v. Topala* (1917) 37 Mad L J 431 40 I C 611.
(a) *Sahib d. Co v. Adamma* (1924) 2 Rang 66 81 I C 465 (4) A R 241.
(b) *Behari Lal v. Nirmali Baran* (1935) 17 All

53
(c) *Seethamma v. Suryanarayana* (1915) 33 Mad 643 2 I C 260.
(d) *Pangacharya v. Guru Reddi* (28) A A 649.
(e) *Mukhoda v. Pam Churn* (184) 8 Cal 871.

O. 23, r. 1 suit one for 'the same matter' as that for which the former suit was brought, within the meaning of s 373, for the cause of action in the two suits was different (f) In a Madras case under the present Code, where the next reversionary heir of a deceased Hindu instituted a suit against the widow of the deceased and an alienee from her of her husband's property for a declaration that the alienation was not binding on the estate, and on the death of the widow withdrew the suit without obtaining leave to bring a fresh suit, it was held that the subsequent suit which he brought against the alienee, for possession of the same property, was not barred Wallis, C.J., in delivering the judgment of the Court, said "The terms 'subject matter' and 'the same matter' which occurred in the corresponding s 373 of the old Code have not been defined, and must, we think, be construed strictly in a penal provision of this character Without attempting an exhaustive definition of all that may be included in the term 'subject matter,' we are of opinion that where, as in the present case, the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject matter as the first suit" (g) The contrary, however, was held by the Chief Court of the Punjab in a case in which the facts were almost similar to the Madras case (h) In a Bombay case (i) A sued to eject B but finding that the notice to quit was defective withdrew the suit without obtaining the leave of the Court Subsequently A gave a formal notice to quit, and brought a fresh suit for ejectment It was held that the suit was not barred under this rule, as the previous suit was not for the same subject matter as the second suit Scott, C.J., said, We are of opinion that 'subject matter' means, to use the words of Order I, Rule 1, 'the series of acts or transactions alleged to exist giving rise to the relief claimed' Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree It was incomplete because there was no notice to quit The second series of acts or transactions is complete because the notice to quit has been given, and, therefore, the two suits are not in respect of the same subject matter" But the withdrawal of a prior suit for a declaration of title to certain war bonds is a bar to a subsequent suit for consequential relief in respect of the same bonds [that is, for recovery of possession] (j)

A suit for partition, however, stands on a different footing the cause of action in such a suit being a recurring cause of action Hence the withdrawal of a suit for partition of joint property, though without permission of the Court, is no bar to a second suit for partition of the same property against the same defendants (k)

Withdrawing without leave of Court but with consent of defendant—
In a case decided under s 97 of the Code of 1859 it was observed by Norman, J., that where a plaintiff withdraws his suit without the permission of the Court, but with the consent of the defendant, he is not precluded from instituting a fresh suit in respect of the same subject matter (l) The observations of Norman, J., on this point have been doubted in a recent case (m) The doubt seems to be well founded

(f) *Kanai v. Ram Nath* (1894) 21 Cal 265
268 *Gopal Chandra v. Purna Chandra*
(1893) 4 C W N 110 See also *Kanai*
I am v. Rao Balrao (1919) Punj Rec
no 136 at pp 30, 31 335 531 C 478

(j)

(g) *Sinja Peldi v. Subba Peldi* (1916) 39 Mad
98 998 351 C 185 overruling *Achutta*
v. Achutan (1898) 21 Mad 30

(k)

(h) *Jit Singh v. Hari Singh* (1916) Punj Rec
no 97 1 94 371 C 129

(i) *Jagobai Jo v. Watson & Co. Bourke's Rep*
Part VII p 160

(l) *Palkhivala v. Mahadho* (1918) 47 Bom 155
185 431 C 75 followed in *Chencharam*

(m) *Gopichandra v. Purna Chandra* (1893) 4
C W N 110

Withdrawing from suit pending arbitration—When the matters in dispute in a suit are referred to arbitration by an order of the Court made under Schedule II, para 3, the Court has no power under this rule to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit. The provisions of this rule do not apply to such a case, for when once a matter is referred to arbitration, the Court is precluded from dealing with it in the same suit save in the manner and to the extent provided in Schedule II. A *sues B* for possession of certain property. The matters in difference between the parties are referred to arbitration by an order of the Court. The Court has no power, either before or after the award is made, to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit (n). But where a reference to arbitration has been made without the intervention of the Court (that is, not by an order of the Court), and one of the parties to the reference applies to the Court under Schedule II, para 20, to file the award, the provisions of this rule apply, and it is open to the applicant to withdraw the application, though numbered and registered as a suit under that para 20, under sub r (1) of this rule (o).

Power of appellate Court to give leave to plaintiff to withdraw from suit—It has been held by the High Courts of Allahabad (p), Madras (q), and Bombay (r), that where a plaintiff's suit is dismissed, and he appeals from the decree, the appellate Court has power to allow the plaintiff appellant to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject matter. see s 107 (2). The contrary view seems to be implied in a Calcutta decision (s). But an appellate Court has no power to grant such leave before the appeal is admitted (t).

Erroneous order granting leave to withdraw and jurisdiction—An order for withdrawal of a suit with leave to institute a fresh suit made in circumstances not within the scope of this rule that is made in a case where there is no "formal defect" or "other sufficient ground" within the meaning of this rule, cannot be treated as an order made without jurisdiction [though it may be challenged in revision on the ground of material irregularity—see notes below, 'Revision'], such order is consequently not null and void (u). The order not being a nullity, a fresh suit instituted upon leave so granted is maintainable, it is not barred as *res judicata*. Further, the Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had power to make the order and had properly made it (r).

Appeal—An order under this rule granting leave to a plaintiff to withdraw from a suit or to abandon a part of his claim with liberty to institute a fresh suit is not appealable. Such an order is not one of the appealable orders mentioned in O 43, r 1, nor is it a "decree" within the meaning of s 2 (2) (w).

Letters Patent appeal—An order of a single Judge of a High Court granting leave to withdraw from a suit with liberty to institute a fresh suit is a "judgment" within

- | | |
|-----|--|
| (n) | <i>Prasanna v Panchanan</i> |
| (o) | |
| (p) | <i>Afzal v Akbari</i> (1915) 37 All 326 28 I C 857, <i>Ganga Ram v Akbari</i> (1885) 8 All 80 |
| (q) | <i>Kamappa v Papayya</i> (1917) 40 Mad 209 37 I C 414 (F B) |
| (r) | <i>Chhanubhai v Dabhabhai</i> (1920) 44 Bom 593 57 I C 530, <i>Shekha Hassan v Mahmood</i> (1911) 45 Bom 206 59 I C 210 (21) A B 278 |
| (s) | <i>Kali Jagananna v Janchanan</i> (1916) 44 Cal 367 33 I C 670 |
| (t) | <i>Elmath v Janooji</i> (1911) 35 Bom 261 10 I C 813 |
| (u) | <i>Hriday Nath v Ram Chandra</i> (1921) 45 Cal 134 58 I C 806, (1) A C 34 (F B) |
| (v) | <i>Genda Mal v Purkhu Lal</i> (1895) 17 All 97, <i>Jayodindro v Sarup Sundari</i> (1894) 19 Cal 322, <i>Abdul Hussain v Kari</i> (1900) 27 Cal 362 |

O. 23, r. 1 the meaning of cl 15 of the Letters Patent, and appealable as such (x) Similarly an order of a single Judge of a High Court dismissing an application for the revision of an order giving leave to withdraw a suit with liberty to bring a fresh suit is a "judgment" within the meaning of that clause and is appealable as such (y)

Revision—Though an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit is not appealable, it is open to revision if it falls within s 115 of the Code. An order is open to revision under that section, if the Court which made it had *no jurisdiction* to make it as in the undermentioned case (z), or if the Court acted *illegally or with material irregularity* in making the order (a).

An order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit in circumstances not within the scope of the present rule, that is, in a case in which there is no "formal defect" or "other sufficient ground for making it, as where the order is made on the ground of the plaintiff's inability to prove his case, cannot be treated as an order made without jurisdiction [see notes, 'Erroneous order granting leave to withdraw and jurisdiction'] The High Court, therefore, has no power to interfere with such an order on the ground that it was made without jurisdiction (b). But it has been held in a series of cases that the High Court will interfere with such an order on the ground of material irregularity and will set it aside in revision (c). Similarly the High Court will interfere and set aside in revision on the ground of material irregularity an order granting leave to a plaintiff to withdraw from a suit with liberty to bring a fresh suit, if the order was made *ex parte* (d), or if leave was granted without assigning any reasons (e), or if leave was granted on the ground that there was a "formal defect" or "other sufficient ground," but no inquiry was made as to whether there was in fact a formal defect or other sufficient ground (f). In a Patna case, the High Court held that where the defendant himself alleges a 'formal defect' the Court has jurisdiction to pass any order it pleases under this rule (g). But this seems to be an extreme view. In a Madras case, where the plaintiff deliberately undervalued his suit and paid insufficient court fees and brought the suit in a District Munsif's Court, and then applied for leave to withdraw from the suit with liberty to bring a fresh suit, and leave was granted, the Court was held to have acted with material irregularity and the order was set aside in revision (h). In a Calcutta case, the first Court dismissed the plaintiff's suit on a finding that the plaintiff's allegations were untrue. On appeal the District Judge came to the same conclusion, but granted leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit. The High Court held that the order was not "properly" made and set it aside (i).

In Allahabad, it has been held that the High Court will interfere in revision if the lower Court has not applied its mind to the circumstances of the case and the provisions

(x) 27 Mad L J 480 26 IC 57
(y) (d) *Pandey v Mot* (1917) 44 Cal 454 39 IC 969
(e) *Muchmal v Kani* (1888) 11 Mad 323
1st mat Llah v Dharan Singh (1929) 20
All J 90 64 IC 948 (-) A 185
b xini v Asl tosh (1923) 39 Cal I J
(z) 371 84 IC 31 (-) 24) A C 751 *Harinath*
v *Baban* (19 7) 49 All 459 103 IC 232
(a) 27) A A 637 *Kamla Singh v Bhagwan*
Das (1978) 50 All 199 106 IC 431, (28)
A A 98
(b) *Naith v Pam v Mosammat Shro Cor* (1918)
(c) 41st LJ 460 46 IC 170 *Mahenra*
Pam v Singh Lal (1918) 3 Pat LJ 651,
48 IC 197
(d) *Bhushan v Brijra* (1918) 3 Pat L J 630
41 IC 406
(e) *Karn s amil v Jagathambai* (1919) 41 Mad
701 46 IC 285
(f) *Folan v Gresh Chandra* (1919) 46 Cal 169
45 IC 41 [in no case appeal]

of this rule, in other words, if it has not exercised a judicial discretion (j) But if the lower Court has exercised a judicial discretion, the High Court will not interfere in revision merely because the High Court itself might have taken a different view of the matter (l)

Effect of reversal of order granting leave to withdraw—Where a fresh suit is filed before the reversal in revision of an order granting leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the procedure is to declare the fresh suit null and void and to direct the lower Court to proceed with the original suit from the stage which it had reached when the order granting leave was made by that Court (l)

Sub rule (4): Co plaintiffs

Co plaintiffs—By sub r (4) it is enacted that nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others. This sub rule limits the jurisdiction of the Court to grant permission to withdraw a suit to cases where all the plaintiffs join in the application. Where the Court in contravention of this sub-rule allows two out of four plaintiffs without the consent of the other two to withdraw from a suit with liberty to bring a fresh suit, it acts without jurisdiction, and a second suit in respect of the same subject matter is barred. But if the suit that was withdrawn was a suit for partition, the second suit, it has been held, will not be barred, for a cause of action in a suit for partition is a recurring one and a joint owner has a right to come to Court at any time provided he proves that he has a subsisting joint title and possession in the properties within the period of limitation (m).

It is not clear whether sub rule (4) governs sub rule (1), but irrespective of this question a Court can refuse to allow one of several plaintiffs to withdraw without the consent of the co plaintiffs if such a course would be prejudicial to their interests (m1)

Representative suit—If the suit is a representative suit the person conducting it cannot withdraw so as to terminate the litigation. In a case in which the Collector acting as Court of Wards and guardian of an estate withdrew a suit to set aside an adoption a reversioner was allowed to carry on the suit (m2). See in this connection note, Abatement of suit under O 1, r 8

Rule does not apply

Bengal Rent Act—The provisions of this rule do not apply to suits instituted under the Bengal Rent Act 10 of 1859 which is a complete Code in itself (n)

Probate proceedings—This rule does not apply to probate proceedings, the provision in s. 55 of the Probate and Administration Act 5 of 1881 [now Indian Succession Act 39 of 1925, s. 268] being qualified by the words "so far as the circumstances of the case will admit" (o)

Execution proceeding—See r 4 below

2. [S. 374] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted

Limitation law not affected by first suit

- (j) *Radha v. Tula* (1912) 10 All. L. J. 393 17 I C 647 *Ganga v. Mussamat Aishni* (1925) 47 All. 319 87 I C 175 (5) A A 466
(k) *Jhunku Lal v. Buhshar Das* (1918) 40 All. 612 46 I C 71 *Ishar Das v. Daya Ram* (1932) 13 Lah. 537 136 I C 1 (33) A L 360 *Syed Sadq v. Asaf* (1931) 34 C W N 58 127 I C 549 (31) A C 68 *Lalan Lal v. Muhammad* (1921) 19 All. L. J. 47 60 I C 899 (21) A A 65 (the facts of the case are not reported) *Jaimala v. Collector of Saharanpur* (1933) 55 All. 825 (34) A A 4

- (l) *Nathuni Ram v. Shro. Koor* (1918) 3 Pat. L. J. 460 46 I C 179
(m) *Mussamat Ram Dei v. Mussamat Bahulani* (1922) 11 Pat. 2-4 (2) A L 489
(m1) *Pamarrami v. Benjan* (1933) 65 Mad. L. J. 693 (33) A M 824
(m2) *Jaimala v. Collector of Saharanpur* (1933) 55 All. 825 (34) A A 4
(n) *Gulam Mahomed v. Shibendra* (1909) 35 Cal. 990
(o) *Banwari Lal v. Kshen* (1920) 2 Lah. L. J. 242 67 I C 1002

O. 23,
rr. 2, 3

Limitation—The fresh suit must be instituted within the period of limitation. It will not be after the period of limitation even though the suit that was permitted to be withdrawn was within the period of limitation (p). But if the first suit was brought in a Court that had *no jurisdiction* to entertain it, that Court would have no power under rule 1 above to give leave to withdraw with liberty to bring a fresh suit. If it does give leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order is one made without jurisdiction. Hence if a second suit is instituted, though upon leave so granted, the case will be governed not by the provisions of this rule, but by those of sec. 14 of the Limitation Act, 1908, and the time during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit (q).

3. [S. 375.] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Compromise of suit

Alterations in the rule.—This rule differs from the corresponding sec. 375 of the Code of 1882 in three respects, namely —

- 1 The words "where it is proved to the satisfaction of the Court that" have been added into the rule to set at rest the conflict of opinion noted below in the commentary under the head "Where a compromise set up by one party is denied by the other."
- 2 The words "the Court shall order such agreement . . . to be recorded" have been substituted for the words "such agreement . . . shall be recorded." The object is to bring out the word "order" prominently, as an appeal is now given from an order made under this rule recording or refusing to record an agreement. See O 43, r 1, cl. (m), and notes below "Appeal."
- 3 The words, "and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction," which occurred in the old section after the words "so far as it relates to the suit" have been omitted. See notes to sec 96, "Sub s (3) consent decree not appealable."

Scope of the rule.—The agreement, compromise or satisfaction contemplated by this rule may (1) relate to the whole suit, or (2) it may relate only to a part thereof or (3) it may also comprise matters that do not relate to the suit. When the agreement relates to the whole suit, the Court must, on being invited by the parties, record the agreement, and pass a decree in accordance with the agreement, and the suit stops there. Where the agreement relates to a part only of the suit, the Court must, on the application of the parties, pass a decree in accordance with the agreement and the suit may be proceeded with as to the rest. But the Court is not obliged to pass a decree as soon as the compromise is recorded. In the case of a compromise of part of a suit which did not include a party whose interest could not be separated, the Court was held to be justified in postponing passing a decree until the termination of the suit (r). Where the agreement, besides relating to the suit or a part thereof comprises matters that do not relate to the suit, the decree must comprise only such terms of the agreement as relate to the suit, but not

(p) *Varajlal v Shomeshwar* (1905) 29 Bom 219
(q) *Pamdeo v Gonesh Narain* (1908) 30 Cal 924

(r) *Kumar Abhinavand v Maharaja Thraji Rameshwar* (1930) 9 Lat 314 125 I C 5 1 (30) A 1 395

the rest. As to the case where a decree comprises matters not relating to the suit see below notes. Where the decree comprises matters that do not relate to the suit

Procedure to be followed under this rule—It is important to note that a consent decree under this rule can be passed only after an order is made directing the compromise to be recorded. This is not a mere matter of form as the aggrieved party has a right of appeal against such order under O 43 r 1 cl (m) (s). See notes below, Appeal.

Where a compromise set up by one party is denied by the other—If a party to a suit alleges that the suit has been adjusted by a lawful agreement and applies to the Court to record the agreement and to pass a decree in accordance therewith but the opposite party to the suit denies the agreement or wishes to recede from it the question arises whether the Court has power in the one case to decide if the agreement was effected and to pass a decree accordingly and in the other case to pass a decree in spite of the opposite parties' reluctance. Under the old section both branches of this question were answered in the affirmative by the High Courts of Bombay, Madras and Calcutta (t) but in the negative by the High Court of Allahabad (u). According to the Allahabad decisions the Court had no power under the old section to record an agreement and to pass a decree in accordance therewith unless both the parties consented before the Court to have the agreement recorded. Thus even where there was an agreement to adjust the suit the Court could act under that section only if both the parties were in agreement at the moment of moving the Court and if they were not then in accord the agreement could only be enforced by a fresh suit for specific performance. The conflict arose from the words "if a suit be adjusted wholly or in part by any lawful agreement or compromise with which sec 373 commenced". The present rule gives effect to the Bombay, Madras and Calcutta decisions. The words "where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part" clearly show that the Court has power under this rule where an agreement or compromise is denied to decide whether as a fact the alleged agreement or compromise was made and if it is satisfied that it was made to record it (v). The Privy Council have said that an agreement to compromise a suit must be established by general principles which govern the formation of contracts though there are special rules governing its enforcement which arise out of its intrinsic nature (w).

Submission and award—It was held in two Bombay cases under the Code of 1882 that when the matters in difference in a pending suit are referred to arbitration without the intervention of the Court and an award is made the submission and the award might be treated as an adjustment of the suit by an agreement within the meaning of sec 373 of that Code and might be recorded as an adjustment under that section (x). In the later of the two cases (y) Starling J. said that it was open to the plaintiff to proceed under sec 520 [now sec II para 90] but that it was not obligatory upon him to do so as there was no express provision in the Code of 1882 that no other course than that prescribed by sec 525 should be followed.

that
law f

(s) *Laban Sardar v. Hhendra Nath* (1916) 43

(t)

mathan (1903) 3 Mad 101 *Brojodu lakh v. Iamanath* (1893) 4 Cal 908

(u) *Bandhu v. Shah Muhammad* (1883) 14 All

(v) *Sat v. Lal Bahadur* (1916) 33 All 5 80-81

(w) 31 I C 96

(x)

Adamji (1909) 33 Bom 69 1 I C 60 which is in its turn disented from in *Ponnamma v. Marampudi* (1933) 56 Mad 85 199 I C 355 (3) A.J. 715

(y) (1909) 96 Bom 76 80 *supra*

O. 23,
rr. 2, 3

Limitation—The fresh suit must be instituted within the period of limitation. It will not be after the period of limitation even though the suit that was permitted to be withdrawn was within the period of limitation (p). But if the first suit was brought in a Court that had no jurisdiction to entertain it, that Court would have no power under rule 1 above to give leave to withdraw with liberty to bring a fresh suit. If it does give leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, the order is one made without jurisdiction. Hence if a second suit is instituted, though upon leave so granted, the case will be governed not by the provisions of this rule, but by those of sec 14 of the Limitation Act, 1908, and the time during which the first suit was prosecuted will be excluded in computing the period of limitation for the second suit (q).

3. [S. 375.] Where it is proved to the satisfaction of

Compromise of suit

the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

Alterations in the rule.—This rule differs from the corresponding sec 375 of the Code of 1882 in three respects, namely—

- 1 The words "where it is proved to the satisfaction of the Court that" have been added into the rule to set at rest the conflict of opinion noted below in the commentary under the head "Where a compromise set up by one party is denied by the other."
- 2 The words "the Court shall order such agreement" to be recorded have been substituted for the words "such agreement shall be recorded." The object is to bring out the word "order" prominently, as an appeal is now given from an order made under this rule recording or refusing to record an agreement. See O 43, r 1, cl. (m), and notes below "Appeal."
- 3 The words "and such decree shall be final so far as it relates to so much of the subject matter of the suit as is dealt with by the agreement, compromise or satisfaction," which occurred in the old section after the words "so far as it relates to the suit" have been omitted. See notes to sec 96, "Sub s (3) consent decree not appealable."

Scope of the rule.—The agreement, compromise or satisfaction contemplated by this rule may (1) relate to the whole suit, or (2) it may relate only to a part thereof or (3) it may also comprise matters that do not relate to the suit. When the agreement relates to the whole suit, the Court must, on being invited by the parties, record the agreement,

relating to the suit or a part thereof comprises matters that do not relate to the suit, the decree must comprise only such terms of the agreement as relate to the suit, but not

(p) *Parajlal v Shomeshwar* (1905) 29 Bom

219

(q) *Pamdeo v Ganeshnarain* (1903) 35 Cal 94

(r) *Kumar Abhayanant v Bhanrajadhari*

Rameshwar (1930) 9 Pat 514 120 I C

521 (30) A 1 395

the rest. As to the case where a decree comprises matters not relating to the suit, see below notes "Where the decree comprises matters that do not relate to the suit."

Procedure to be followed under this rule.—It is important to note that a consent decree under this rule can be passed only after an order is made directing the compromise to be recorded. This is not a mere matter of form, as the aggrieved party has a right of appeal against such order under O 42, r. 1, cl (m) (s). See notes below, "Appeal"

Where a compromise set up by one party is denied by the other.—If a party to a suit alleges that the suit has been adjusted by a lawful agreement, and applies to the Court to record the agreement and to pass a decree in accordance therewith but the opposite party to the suit denies the agreement, or wishes to recede from it, the question arises whether the Court has power in the one case to decide if the agreement was effected and to pass a decree accordingly, and in the other case to pass a decree in spite of the opposite parties' reluctance. Under the old section both branches of this question were answered in the affirmative by the High Courts of Bombay, Madras and Calcutta (t), but in the negative by the High Court of Allahabad (u). According to the Allahabad decisions, the Court had no power under the old section to record an agreement and to pass a decree in accordance therewith, unless both the parties consented before the Court to have the agreement recorded. Thus even where there was an agreement to adjust the suit, the Court could act under that section only if both the parties were in agreement at the moment of moving the Court, and if they were not then in accord, the agreement could only be enforced by a fresh suit for specific performance. The conflict arose from the words "if a suit be adjusted wholly or in part by any lawful agreement or compromise" with which sec 373 commenced. The present rule gives effect to the Bombay, Madras and Calcutta decisions. The words "where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part" clearly show that the Court has power under this rule, where an agreement or compromise is denied, to decide whether, as a fact, the alleged agreement or compromise was made, and if it is satisfied that it was made, to record it (v). The Privy Council have said that an agreement to compromise a suit must be established by general principles which govern the formation of contracts, though there are special rules governing its enforcement which arise out of its intrinsic nature (w).

Submission and award.—It was held in two Bombay cases under the Code of 1882 that when the matters in difference in a pending suit are referred to arbitration without the intervention of the Court, and an award is made, the submission and the award might be treated as an "adjustment of the suit by an agreement" within the meaning of sec 373 of that Code, and might be recorded as an adjustment under that section (x). In the later of the two cases (y), Starling, J., said that it was open to the plaintiff to proceed under sec 525 [now sch II, para 20], but that it was not obligatory upon him to do so as there was no express provision in the Code of 1882 that no other course than that prescribed by sec 525 should be followed.

The present Code, however, does contain such a provision, for it is enacted by sec 89 that "save in so far as is otherwise provided by the Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit

(s) *Lalan Bardar v. Bhupendra Nath* (1916) 43 Cal 85, 33 I C 700. *Saburi v. Suri* (1927) 6 Pat 103, 105 I C 71 (27) A P 354.

(t) *Goculdas Manufacturing Co. v. Scott* (1892) 16 Bom 504, 22 Smta v. Premji (1896) 20 Bom 504. *Tyranani v. Varadachari* (1-96) 19 Mad 419. *Brudharan v. Pura Mathan* (1900) 23 Mad 101. *Brojodurtab v. Jamanath* (1-97) 4 Cal 904.

(u) *Bandhu v. Shah Muhammad* (1-92) 14 All 300.

(v) *Sital v. Lal Bahadur* (1916) 38 All 75, 80-81.

31 I C 962

(w)

(x)

(y)

O. 23, r. 3 or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule." In a Bombay case decided under this Code, it was held by Davar, J., that where in a *pending suit* the parties go to arbitration without the intervention of the Court and an award is made, the provisions of para. 20 of Schedule II do not apply to the award, but that the submission and the award may be recorded as an "adjustment" under this rule. As to sec. 89, it was said, that the words "any other law for the time being in force" were wide enough to include the provisions of O. 23, r. 3 (2). Four years later Sir Norman Macleod, another judge of the same High Court, held in *Shaiakhaw v. Tyab Haji Ayub (a)*, that the words "any other law for the time being in force" in sec. 89 do not include the present rule, and that having regard to the provisions of that section a submission and an award could not be recorded as an adjustment under this rule, and that the correct procedure was to apply to the Court to file the award under paragraphs 20 and 21 of Sch. II. The above decisions were reviewed by Sir Norman Macleod in *Manilal v. Goculdas (b)*. The learned Judge came to the conclusion that his decision in *Shaiakhaw's* case was erroneous, and said "They [that is, the parties] may make the agreement an order of Court, and then paras. 1 to 16 of Schedule II, apply. If they do not make the agreement an order of Court, they cannot ask for the agreement to be filed under para. 17, they cannot ask for the award if made to be filed under paras. 20 and 21. If an award is made and both parties accept the award, they can apply for a consent decree in terms thereof and there is no need to apply for an order recording the terms of the adjustment. If the plaintiff disputes the award for any reason and proceeds with the suit, the defendant may plead the award and have the case set down for hearing on the issue whether the award is binding as an adjustment. If the defendant disputes the award, the plaintiff may have the case set down for trial on the issue whether the adjustment could be recorded. Either party may file a suit to enforce the award, and apply for a stay of the original suit." The ground of the ruling in *Manilal's* case is that a submission and an award properly made in accordance with the submission amounts to an "adjustment" within the meaning of this rule, and as such it may be enforced under the general law of contract. The result, according to that ruling, is that where parties to a suit refer their disputes to arbitration without the intervention of the Court, and an award is made, an application to pass a decree in terms of the award is an application to record a compromise within the meaning of this rule. Further, if an objection is taken to the award on the ground of misconduct on the part of the arbitrator, the Court, acting under this rule, has jurisdiction under this rule to enquire into the charge of misconduct. If the Court does make the inquiry, and refuses to record the submission and award, the order is not open to revision under sec. 115 above (c). The High Court of Calcutta has dissented from the decision in *Manilal's* case, and held that the words "any other law for the time being in force" in sec. 89 do not include the present rule, further, that where in a *pending suit* the parties go to arbitration without an order of the Court, the award cannot be enforced under this rule or Schedule II or under the Arbitration Act, also that if a submission to arbitration of matters in difference in a *pending suit* is to take place, there is no provision for it other than the provisions in Schedule II (d). The result, according to the Calcutta decisions, is that if an award is made under a reference without an order of the Court in a *pending suit*, the Court should not take any notice of the award, and the suit may be proceeded with on the application of either party (e). The High Court of Lahore has held that an award made without the intervention of the Court in a *pending suit* cannot be recorded as an adjustment under this

(a) *Harakhmal v. Jannabai* (1913) 37 Bom 639 10 I C 786

(a) (1916) 40 Bom 336, 37 I C 140

(b) (1921) 45 Bom 245 264 59 I C 53 (-1)
A II 310 overruling (1916) 40 Bom 336 37 I C 140 *supra*

(c) *Thakur Dass v. Lalulhas* (1923) 25 Bom

I R 45-75 I C 102 (23) A B 401

(d) *Amarchand v. Banwarilal* (19-2) 49 Cal 604 69 I C 804 (22) A C 404

(e) *Dekari Tea Co., Ltd v. The India General Steam Navigation Co. Ltd* (1900) 25 C W N 127 61 I C 919 *Guismon v. Tarnet* (19-7) 55 Cal 534 104 I C 360 (27) A C 887

O. 23, r. 3 to have the suit dismissed on plaintiff's failure to take the oath. The Court should not dismiss the suit, but should record the refusal and the reasons thereof under s. 12 of the Oaths Act 10 of 1873, and proceed with the trial (v)

"Lawful agreement or compromise."—Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the compromise arrived at between them, the Court has no power to refuse to pass the decree, on the ground that it considers the compromise to be too favourable to one of the parties (w). The Privy Council have said that the Court has a duty not a discretion to record a lawful compromise subject possibly to an inherent power of refusal when substantial injustice would be worked (x). An agreement may be lawful although it is voidable for fraud or undue influence (y). The rule does not refer to such agreements but if the agreement or compromise is unlawful, as where it is opposed to public policy, the Court should refuse to pass a decree in accordance with the compromise even if the parties consent (z). With reference to public and charitable trusts the Court not only has the power, but is under a duty to scrutinize the compromise and will refuse to make a decree in terms of the compromise if it sacrifices the interests of the trust (a). If a decree is passed under this rule on a compromise which is not lawful, the Court should not enforce the decree in execution proceedings. Thus a sale of an office attached to a temple is against public policy. Hence if in a suit against the holder of such an office a compromise is arrived at whereby the holder of the office consents to the office being sold in satisfaction of the debt due to the plaintiff, and a decree is passed on the compromise, the Court should notwithstanding the consent decree refuse to sell the office in execution (b). It is clear that if the matter had rested in contract only, the Court could not have enforced the sale in a suit brought for that purpose. The mere fact that the contract is embodied in a decree does not alter the incidents of the contract. By private agreement, converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone (c). Therefore a decree passed on a compromise with a minor (d), or with a guardian *ad litem* of a minor after the minor has attained majority (e) is a nullity. A compromise of a suit by a disqualified proprietor is invalid unless it has been sanctioned by the Court of Wards under s. 3 of the Bengal Court of Wards Act 1879 and so is a decree passed on such a compromise (f). The principle is that where a decree is based on an agreement of compromise, the Court must be taken to adopt the agreement *with all its incidents* (g). "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the Judge" (h). On this principle in a case where A sued B on a mortgage, and C, who was a second mortgagee, was joined as a party defendant, and A and B entered into a compromise whereby A agreed to pay B more than he was entitled to, the Court refused to pass a decree in terms of the agreement on the ground that the compromise was detrimental to the interests of C, and that it was not therefore 'lawful'.

(v) *Etakkott v Etalol* (1908) 31 Mad 1 See also *Parbhu v Jamil* (1922) 44 All 117 64 I C 616 (27) A A 160 (minor)

(w) *Sourendranath v Tarubala* (1930) 57 I A 133, 57 Cal 1311, 123 I C 545 (30) A PC 158, *Bayarao v Sakharani* (1911) 33 Bom L R 463, 132 I C 434 (31) A B 235, *Sabitra v Sani* (1933) 12 Pat 359, 145 I C 1 (33) A P 306, *Motiram v Jeeu* (1898) 22 Bom 238

(z) *Sourendranath v Tarubala* (1930) 57 I A 133, 57 Cal 1311, 123 I C 545 (30) A PC 158

(y)

(a)

(a) *Narayanamsami v President H R E Board*

(1930) 53 Mad 398, 124 I C 602 (30) A M 629

(b) *Lakshmanaswami v Pangamma* (1903) 23 Mad 31

(c) *Great S W Central Ry Co v Charlebois* (1899) A C 114

(d) *Ganganath v Ramashwagar* (1927) 6 Pat 388, 102 I C 449 (27) A P 271

(e) *Sanyasi v Jeyannanda* (1928) 51 Mad 763 (28) A M 204

(f) *Sarajwala v Obaidulla* (1937) 58 Cal 1297, 135 I C 441 (34) A C 137

(g) *Nagappa v Venkat Rao* (1901) 24 Mad 265, 270

(h) *Wentworth v Bullen* (1879) 9 B & C 810, 850, *Trevelly v Gilmora* (1866) L R 1 P C 570. See also *Conolan v Leyland* (1894) 27 C D 637, 639

the latter class of cases it may be stated that as a general rule "all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject matter of the suit or not, become related to the suit, and can be embodied in the decree." Thus where *A* sued *B* on a promissory note, and a compromise was arrived at between the parties whereby *B* agreed to pay the amount of the note by instalments, and the amount was also made a charge on certain immovable property of *B*, it was held that there was nothing in the present rule to preclude the Court from making the amount a charge on *B*'s property, even though the relief claimed was for a money decree only. The charge, though not claimed as a relief, related to the suit (r). It formed the consideration for the time allowed for payment of the sum decreed by instalments, and thus constituted an integral and necessary part of the adjustment of the claim in the suit (w). It has similarly been held that where *A* and *B* are joint tenants of certain land, and *A*, having paid up the entire rent, sues *B* for contribution, and a compromise is arrived at whereby *B* in consideration of *A* abandoning his claim gives up his share of the land to *A*, the term as to *B* giving up his share is a term which relates to the suit (x). Where in execution of a decree obtained by *A* against *B*, *A* attaches certain property, and *C* claiming the property as his own brings a suit against *A* for a declaration of his title to the property, and a compromise is arrived at between the parties whereby *A* admits *C*'s ownership of the property, and *C* agrees to execute a mortgage of the same property in favour of *A* for the amount of the decree obtained by *A* against *B*, the term as to the execution of the mortgage is a term which relates to the suit (y). But where *A* sued *B* to restrain *B* from building a projected house in such a way as to interfere with *A*'s enjoyment of light and air, and a compromise was arrived at between the parties whereby *B* undertook not to build his house higher than it originally was and also agreed not to let water into the passage between the houses, it was held that the arrangement as to the passage did not relate to the suit, and that the operative part of the decree should be confined to the undertaking as to the house (z). But the parties can get over the difficulty by amending the pleadings with the leave of the Court so as to comprise in the pleadings and the decree matters that did not relate to the original suit but are comprised in the compromise (a). In a Patna case where the plaintiff claimed Rs 7,000 with interest at the rate of 9½ per cent per annum, and a consent decree was passed whereby the defendant agreed to pay Rs. 2,500 with interest at the rate of 9 per cent per annum if the amount was paid on a specified date, but at 24 per cent per annum if it was not paid on or before that date, the Court refused execution of the decree with interest at 24 per cent on the ground that that part of the compromise which provided for the payment of interest at the rate of 24 per cent per annum was outside the scope of the suit, and allowed execution with interest at 9 per cent only (b). This decision cannot be supported either on principle or on authority so far as the ground on which it is based is concerned. See notes below, "Execution of decree based on a compromise."

Parties—If persons other than parties to the suit are parties to the compromise, it cannot be recorded unless those persons are brought on the record as parties to the

- (c) *Joti v Izari* (1907) 30 Mad 478. *Rama swami v Subbaraya* (19-5) 49 Mad L J 490 494 88 I C 648 (25) A M 1101. *Natesa Chetti v Vengau* (1910) 33 Mad 100 51 I C 701. *Pikuranagiri v Maradugula* (1907) 17 Mad L J 200. *Saba pathy v Janmahalinga* (1915) 38 Mad 959 23 I C 541. *Ayyappa v Koorur* (1914) 27 Mad L J 173 25 I C 58. *Ratanawami v Ratanammal* (1914) 27 Mad L J 388 24 I C 135. *Charu v Samdhu* (1918) 3 Pat L J 255 264 46 I C 354. *Bajirao v Akheram* (1931) 33 Bom L.R. 463 132 I C 434 (31) A B 295. *Bhom Bhaurav v Mandal* (1931) 33 Bom L.R.

- 1457 135 I C 479 (30) A B 47.
(w) *Gobinda Chandra v Dwarka Nath* (1909) 35 Cal 837. *Purna v Nil Madhub* (1901) 5 C W N 485.
(x) *Jachin v Cheninesta* (1919) 24 C W N 328 54 I C 538.
(y) *Saudamini v Behary Lal* (1920) 25 C W N 64 61 I C 535. *Bharat v Vinayak* (1921) 25 C W N 806 66 I C 273 (22) A C 358.
(z) *Ruttonary v Poorbal* (1883) 7 Bom 304.
(a) *Mohibullah v Imami* (1887) 9 All 229.
(b) *Gauri Dutt v Dohan* (1917) 2 Pat L.J. 673, 43 I C 459.

O. 23, r. 3 ³suit This is because the Court has to be satisfied before recording a compromise under this rule that there is a lawful compromise, and this is not possible in the absence of those that are not parties to the suit (c) In a case where the first defendant transferred his interest in the subject matter of the suit to the second defendant, who effected a compromise with the plaintiff, the Privy Council held that the fact that the first defendant remained on the record did not give him sufficient interest to entitle him to raise any objection to the compromise or to appeal from the decree (d)

Compromise pending arbitration—The Calcutta High Court has held that where the matters in dispute in a suit are referred to arbitration *under an order of reference made by the Court*, and pending the reference the parties adjust the suit by an agreement in writing signed by them and the arbitrators, the agreement does not amount to an award. Nor can it be recorded as an adjustment under this rule unless the arbitration has been superseded by an order of the Court, the mere fact that the time for making the award has expired does not amount to a supersession of the arbitration, there must be an order of supersession under para 8 of Schedule II (e) In a Madras case, where the lower Court had under somewhat similar circumstances, recorded the adjustment under the present rule, it was held that as the time for making the award had expired when the adjustment was recorded, the Court must be deemed to have exercised its power to supersede the arbitration under para 8 of Schedule II (f)

Execution of decree based on a compromise—This rule requires that where the Court is invited to pass a decree in terms of an agreement or compromise, the agreement or compromise should be *lawful*, and, further, that the *operative* part of the decree should be confined to the *actual subject matter of the suit*. But what if a decree is passed on an agreement that is not lawful, or that the *operative* part of the decree comprises matters that do not relate to the suit. Is the Court bound to execute the decree literally according to its terms? The decisions on the subject may be summarized as follows—

First, where a consent decree is based on an agreement or compromise that is not lawful—As to this, it has been held that “so far as the decree embodies unlawful terms of a compromise, it is inoperative, and will not be enforced” (g) The subject has already been dealt with above in the notes, “Unlawful agreement or compromise”

Next, where a consent decree embraces matters that do not relate to the suit—Where a decree passed on a compromise includes terms that relate to the suit, all the terms may be enforced in execution of the decree. But where it contains terms that do not relate to the suit, there is a conflict of opinion whether those terms can be enforced in execution. According to the Allahabad and Madras decisions, such terms can be enforced in execution of the decree (h) It is not open to the party against whom the decree is sought to be executed to object to the decree on the ground that it contains matters foreign to the suit. Such an objection, it has been said by the Madras High Court, must be taken by way of appeal from the decree [and now by way of appeal under O 43, r 2 (m), from the order recording the compromise], and it cannot be taken in execution of the decree (i) On the other hand, the High Court of Calcutta has said that such terms cannot be enforced in execution of the decrees, but they may be enforced as a *contract*

(c) *Dooly Chand v. Mohan Lal* (1914) 51 Cal 432 83 IC 606 (24) A.C. 722

(d) *Shanker Bharati v. Narasimha* (1927) 54 I.A. 111 51 Bom 442 101 IC 20 (27) A.P.C. 57

(e) *Dooly Chand v. Mohan Lal* (1924) 51 Cal 432 83 IC 606 (24) A.C. 722

(f) *Alagu v. Mayalappa* (1923) 45 Mad L.J. 76, 78 74 IC 609 (23) A.S.P. 676

(g) *Lakshmanaswami v. Rangamma* (1903) 26 Mad 31, 33

(A) *Mohibullah v. Imami* (1887) 9 All 279, *Manager of Sri Mennakshi Devasthanam v. Abdul Karim* (1907) 30 Mad 421, *Saba pati v. Annahalinga* (1915) 34 Mad 959 31 IC 581 See also *Gouri Dutt v. Dahan* (1917) 1 Pat L.J. 673 43 IC 459; *Saku Shyam v. Shyam Lal* (1933) 55 All 775 146 IC 145, (33) A.A. 619

(i) *Manager of Sri Mennakshi Devasthanam v. Abdul Karim* (1907) 30 Mad 421 *Ratnaswami v. Rathammal* (1914) 27 Mad L.J. 358 24 IC 13

by a separate suit (j) Such a suit, however, according to the Allahabad High Court, O. 2, would be barred under s 47, the question, in the view taken by that Court, being one relating to execution (l) In *Hemanta Kumari v Midnapur Zamindari Co* (l), where a decree comprised lands outside the suit, the Judicial Committee observed "A perfectly proper and effectual method of carrying out the terms of [the present rule] would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree, but in either case, although the operative part of the decree would be properly confined to the actual subject matter of the then existing litigation the decree taken as a whole would include the agreement This in fact is what the decree did in the present case. *It may be that as a decree it was incapable of being executed outside the lands of the district*, but that does not prevent it being received in evidence of its contents." With reference to this judgment of the Privy Council the Bombay High Court have said 'a perfectly proper and effectual method of carrying out the terms of r 3, O 23, would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or to introduce the agreement in a schedule to the decree, but the operative part of the decree should be confined to the subject matter of the suit The operative part of the decree so confined to the subject matter of the suit can be enforced as between the parties to the suit under s. 47 of the Civil Procedure Code Any agreement as to matters, extraneous to the suit can be enforced in a separate suit' (m)

Registration—The Privy Council in *Hemanta Kumari's* case held that the exemption of a decree from registration applied to consent decrees passed on compromise even though the decree included in its non operative part a recital of an agreement affecting immovable properties outside the suit But the law has been altered by the amendment made in s 17 (2) (vi) of the Registration Act by s 10 of Act 21 of 1929 The effect of this amendment is that consent decrees and orders compromising immovable property other than that which is the subject matter of the suit are no longer exempted from registration See Mulla's Registration Act, 2nd Edn, note Amendment of cl. (vi) 'at p 84

Appeal—An order under this rule recording or refusing to record a compromise is appealable under O 43, r 1 (m) The Court may, under this rule, either record a compromise or it may refuse to do so. If an order is made recording the compromise, the Court must pass a decree in accordance with the compromise If an order is made refusing to record the compromise, the suit will be proceeded with But in either case, as stated above an appeal will lie from the order Where an order is made recording the agreement, an appeal may be preferred on any of the following grounds —

- 1 That there was no compromise at all, or no such compromise as the Court ordered to be recorded (n)
- 2 That the compromise is *not lawful* (o)
- 3 That the compromise recorded by the Court comprises matters that do not relate to the suit (p)

(j) *Jasimuddin v Bhuvan* (1907) 34 Cal 456 463 *Purna Chandra v Nid Madhub* (1901) 5 C W N 485

(k) *Mahibullah v Imami* (1897) 9 All 209

(l) (1919) 46 IA 240 246 47 Cal 445 493 53 IC 534 In app from 19 C W N 347 53 IC 879

(m) *Fuzan v Pamchandra* (1932) 34 Bom LR 849 851 139 IC 830 (32) A B 466

(n) *Goraldas v James Scott* (1892) 16 Bom 20, 212, *Talamand v Patoh Din* (1914) Punj Rec no 83 p 27 45 IC 230 [where

no consent was given at all by some of the parties to the suit]

(o) *Goraldas v James Scott* (1892) 16 Bom 20, 212 *Shridharan v Puramathan* (1900) 23 Mad 101

(p) *Fenkalappa v Thimma* (1895) 18 Mad 410, *Pragas v Gurdhardas* (1902) 26 Bom 70, 79 *Manager of Sri Menakshi Deras tanam v Abdul Karim* (1907) 30 Mad 421 423 *Mahomed Rashid v Rahmat Ullah* (1914) Punj Rec no 96 p 355 24 IC 630

O. 23,
rr. 3, 4

A compromise entered into by a pleader without the authority of his client is no compromise at all (q), and as such it comes under group (1) above

It has been held by the High Courts of Lahore (r), and Madras (s) that the fact that a decree has been passed in accordance with the compromise does not preclude an appeal from the order recording the compromise. On the other hand, it has been held by the High Court of Calcutta that an appeal from the order is incompetent if the appeal is filed after the passing of the decree (t). See notes to s 96, "Sub sec (3)" above "consent decrees not appealable," and notes above under the head "Scope of the rule"

The Bombay High Court holds that after the decree the appeal from the order is competent only if there had been a contest in the Court below as to the terms of the compromise (u)

O 43, r 1 (m), does not apply to an order setting aside an award under a reference made through the intervention of the Court. Such a case falls within Schedule II of the Code (v)

Registration—As to registration of decrees based on a compromise, see Mulla's Registration Act, 2nd Ed., p 85, *et seq*

Execution proceedings—See r 4 below

Proceedings in execution
of decrees not affected

4. [S. 375A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order

Proceedings in execution—One effect of this rule is that the provisions of r 3 shall not apply to execution proceedings. The reason is that O 21, r 2 and s 47 taken together provide a complete procedure for recording compromises arrived at in execution proceedings (w). This rule also prevents the provisions of r 1 from applying to proceedings in execution. Hence where an application for execution of a decree has been made, the Court has no power to allow the applicant to withdraw the application under r 1 (2) above with permission to make a fresh application (x). For the same reason the applicant cannot withdraw his application under r 1 (1) above though he may apply for its dismissal if he does not wish to proceed further with it (y). The High Court of Bombay has held that a compromise of a suit for partnership accounts after the passing of the preliminary decree and during the pendency of an enquiry before the Commissioner for taking accounts is not a compromise of a proceeding in execution. Such a compromise may therefore be recorded under r 3 above (z). In Rangoon it has been held that an agreement between the mortgagor and the mortgagee after the preliminary decree for sale and before the final decree whereby the mortgagee agrees to allow an extension of time to the mortgagor for payment of the decretal amount is within O 21, r 2, and not within r 3 above (a). The High Court of Patna has held that an application to set aside a sale under O 21, r 90, is not a proceeding in execution and that a compromise arrived at between the parties that on the judgment debtor paying a certain sum into Court by a particular date the Court sale should be set aside may, therefore, be recorded under r 3 above (b). But the correctness of this decision is doubtful

(q) *Thenal v Sakkamal* (1917) 41 Mad 233
41 IC 499

(r) *Mahomed Rashid v Rahmat Ullah* (1914)
PunJ Rec no 98 p 355 24 IC 630
Megh Raj v Tulsi Ram (1924) 6 Lah LJ
187 80 IC 696 (24) A L 466

(s) *Salvanarayana Moorthi v Butchavva* (1905)
49 Mad LJ 249 87 LC 124 (25) A M
606

(t) *Bengal Coal Co v Aprar Collieries* (1921)
9 CW n 8 87 IC 248 (26) A C 412

(u) *Onkar v Ganna* (1933) 57 Bom 208, 144
IC 448 (37) A B 205

(v) *Munshi v Gol ar* (1914) 29 CW n 795

(w) 95 IC 773 (95) A C 974

(x) "

(y) "

(z) "

(a) *Ahmed v A L A R Chattrar Firm* (1928)
6 Rang 285 110 IC 873 (28) A R 194

(b) (1911) 6 Pat LJ 253 6 IC 608 (21)
A L 107 *supra*

ORDER XXIV.

Payment into Court.

1. [S. 760, R. S. C., O. 22, r. 1.] The defendant in any O. 22

Deposit by defendant of
amount in satisfaction of
claim

suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

Payment into Court with denial of liability.—There is no provision in this rule enabling a defendant to pay money into Court *with a denial of liability*, in other words, *without prejudice to his contentions*, as there is in the corresponding English rule, see R. S. C., O. 22, rr 1 and 6

Mere willingness to pay.—A mere averment of willingness to pay made in the written statement is not equivalent to payment into Court, and it does not stop interest from running (c)

"Suit to recover a debt or damages."—This order applies only to a suit to recover a "debt or damages," and not to any other suits. Where a suit is instituted against a defendant to recover a debt or damages, he may pay into Court such amount as he considers a satisfaction in full of the plaintiff's claim. By such payment into Court, the defendant may be benefited (1) in respect of interest, for which see r. 3 and (2) in respect of costs, for which see r. 4 and illustrations thereto

Suit for injunction.—A suit for an injunction to restrain a defendant from building so as to interfere with the plaintiff's light and air, but *not including any claim for damages* is not a suit for 'debt or damages' within the meaning of this rule. No doubt, the Court has in such a suit a discretion under s. 19 of the Specific Relief Act I of 1877 to award damages in lieu of injunction, but this circumstance does not make the suit one for "damages" within the meaning of this rule (d). But it has been held by the High Court of Bombay, in view of the long established practice of that Court, that where a defendant in a suit for an injunction pure and simple pays into Court a sum which he considers a satisfaction in full of the plaintiff's claim, though it be with defence denying liability, and the Court allows damages only to the plaintiff and that too to the extent of the amount deposited by the defendant, the principle underlying r. 4 below ought to regulate the discretion of the Court (which it has under s. 35) in directing the payment of costs (e)

Suit for accounts.—This rule does not apply to suits for accounts (f)

Suit to recover debt or damages together with other relief.—This rule applies to suits to recover debt or damages though there may be other reliefs claimed in the suit, e.g., injunction (g)

"At any stage of the suit."—This means *before decree* as indicated by the words "in full of the claim" and the subsequent rules. See notes to r. 3 below, "Execution proceedings."

Payment into Court and insolvency of defendant.—In England it has been held that when money is paid into Court *admitting liability*, the plaintiff, in the event of the defendant's bankruptcy, is a secured creditor in respect of it, and when liability

(c) *Haji Abdul Rahman v Haji Noor Mahomed* (1902) 16 Bom 141 150

(d) *Luxmon v Moroba* (1897) 21 Bom 502

(e) *Luxmon v Moroba* (1897) 21 Bom 502

(f) *Nichols v Evans* (1883) 22 C D 611

(g) See *Moon v Dickinson* (1890) 63 LT 371

O. 25, r. 1 (2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

Object of the rule.—The object of the rule is to provide for the protection of defendants in certain cases where, in the event of success, they may have difficulty in realizing their costs from the plaintiff (m).

Application of the rule.—Security for the costs of a defendant may be required from a plaintiff in the following two cases —

- I (a) Where the plaintiff resides out of British India, or where there are two or more plaintiffs, all the plaintiffs reside out of British India, and
- (b) where none of the plaintiffs has sufficient immovable property within British India other than the property in suit
- II. (a) Where the plaintiff is a woman ;
- (b) where her suit is for the payment of money ; and
- (c) she does not possess sufficient immovable property within British India

Discretion of Court in requiring security for costs from non-resident plaintiff.—The word "may" implies discretion. In the exercise of this discretion the Court will not order security for costs from a plaintiff residing out of British India in cases in which he cannot be rendered liable for the defendant's costs, e.g., an administration suit by the plaintiff as a creditor or a legatee in which the plaintiff's claim is admitted, or a suit on a mortgage or a promissory note where there is no defence. In such cases no security for costs will be ordered even though the plaintiff resides out of British India, and has not sufficient immovable property within British India, not even though the plaintiff be a woman (n).

Resides.—The "residence" intended in this rule is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. Mere presence in British territory at the time of suit is not "residence" (o). Thus a resident of a Native State staying in Bombay for the sole purpose of taking proceedings to get his wife back cannot be said to "reside" in Bombay, within the meaning of this rule (p). But a stay of four years in Poona by a person who had come from a Native State was held to constitute residence (q). See notes to O. 20 above, "Actually and voluntarily resides"

(m) *Premchand, in the goods of* (1894) 21 Cal 832, at p. 839

(n) *Premchand, in the goods of* (1894) 21 Cal 832, 838

(o) *Mahomed Shuffi v. Ladda* (1879) 3 Bom

227.

(p) *Hanif v. Kulsam* (1922) 46 Bom 569, 64 I C 703 (22) A B 299

(q) *Mahomed v. Aimsia* (1930) 32 Bom L R 411, 125 I C 719, (30) A B 220

Trading corporations—The “residence and domicile” of an incorporated trading company are determined by the situation of its principal place of business. By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other operations are carried on. Dicey & Conflict of Laws, 4th ed., p. 153.

British India—Aden is within British India (r). The Kathiawar States are not within British India (s), nor is the Cantonment of Wadhwan (t), nor the Cantonment of Secunderabad (u), nor the Rajkot Civil Station (r). See notes to s 1, “British India,” p. 4 above.

“Immovable property”—A plaintiff who is entitled under a will to a beneficial interest in a part of the surplus income derived from immovable property cannot be said to possess immovable property within the meaning of this rule (v). Leasehold property is “immovable property” within the meaning of this rule (x).

Poverty of plaintiff—Mere poverty is no ground for requiring a plaintiff to give security for the costs of the suit (y). But this is not so in the case of an appellant (z). See note “In its discretion” under O 41, r 10, at p. 1084. The Court will require security if the plaintiff is not the real litigant and sues on behalf of another who is not a party to the suit (a). In a Bombay case, a suit was brought by a Parsi father and his minor daughter as plaintiffs for damages for the defendant’s breach of his promise to marry the daughter. The father was an undischarged insolvent and it was alleged that the suit was really the father’s suit and that he was seeking to make money out of his daughter’s engagement. The Court upon these grounds ordered the father to furnish security for the costs of the defendant (b). In the last mentioned case the Court relied upon a dictum of Bowen L.J. in *Couell v. Taylor* (c) that, in order to prevent abuse, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security.

Inherent power to order security for costs—The case for security for costs from a puppet plaintiff is clearly outside the scope of this rule. It can only be brought in under the inherent power of the Court. In one case the Calcutta High Court said that it had such power (d). In a later case the same High Court said that the Court had no such power, the reason given being that the inherent power of the Court cannot be invoked in matters for which the Code does actually provide (e). See notes above, “Poverty of plaintiff.”

Where leave has been granted to plaintiff to sue as a pauper—The Court has no power under this rule to require security for costs from a person to whom leave has been granted under O 33 r 8, to sue as a pauper, for to do so would be to render the leave nugatory (f). If an order is made requiring a plaintiff to furnish security for

(r) Aden. Laws Regulation 1891 s 2.

(s) *Hemchand v. Azam Sakarlal* (1906) 33 I A 1 s Bom L R 129.

(t) *Emperor v. Chimanlal* (1912) 14 Bom L R 8 s 6 17 I C 534 discharging from *Trivram v. L B & C I Ry* (1885) 9 Bom 44.

(u) *Hosain Ali v. Abdul Ali* (1894) 21 Cal 177.

(v) *Queen Empress v. Abdul* (1886) 10 Bom 186.

(w) *Iremchand in the goods of* (1894) 1 Cal 63.

(x) *Pussikell v. Jadubram* (1873) 10 Beng L 1 A 11 25.

(y) *Mannick v. Goodhai* (1879) 3 Bom 41. *Khajah Asernoolajou v. Solomon* (1887) 14 Cal 533.

(z) *Birndranath v. Sultan* (1931) 58 Cal 119 127 I C 669 (31) A C 4.

(a) *Ram Coomarr Coomdo v. Chunder Canto*

Moolerjee (1877) 2 Cal 233 4 I A 23 [a case under the Code of 1859 which did not contain any provision for security for costs]. *Khajah Asernoolajou v. Solomon* (1887) 14 Cal 533. *Harinath v. Ram Kumar* (1913) 18 C W N 119, 20 I C 703.

(b) *Bomony v. Vassereanji* (1903) 27 Bom 100.

(c) (1885) 31 Ch D 34 33.

(d) *Harinath v. Ram Kumar* (1913) 18 C W N 119 20 I C 703.

(e) *Bharabendra v. Uday Varain* (1923) 50 Cal 833 864-866 29 I C 298 (4) A C 251.

(f) *Musamat Hafsan v. Abdul Karim* (1908) 12 C W N 163. See also *Vassereanji v. Bhowas v. Ujjul Bhowas* (1871) 17 W N 68 [no security for costs from a pauper appellant].

O. 25, r. 1 the costs of the defendant, and leave is subsequently granted to the plaintiff to continue the suit as a pauper, the order ceases to operate as regards antecedent costs, provided leave is granted before the time limited for giving security has expired (g).

Where the plaintiff is a minor.—The power as to requiring security for costs is a discretionary one, and except in exceptional cases, neither a minor plaintiff nor his or her next friend should be required to give security for costs (h), not even if both the minor and his next friend are residing out of British India and do not own immovable property in British India (i).

Where the plaintiff is a woman.—The necessity for the provisions of sub r (3) arises from the provisions of sec 56, by which it is enacted that no woman can be arrested or detained in the civil prison in execution of a decree for the payment of money (j). But the Court has a discretion in the matter, and in the exercise of its discretion it will not as a general rule require security for costs from a woman plaintiff of the result of such an order will be practically to defeat the suit where it has been instituted *bona fide* (k).

"Suit for the payment of money"—The words "suit for the payment of money" have been substituted for the words "suit for money" which occurred in the old section. Suits which are not exclusively for the payment of money, but which will result in a decree for the payment of money on the relief sought, are "suits for the payment of money" within the meaning of this rule (l). Thus a suit to recover possession of specific movable property (e.g., ornaments), or in the alternative the money value of such property, is a "suit for the payment of money" within the meaning of this rule (m). But a suit for the administration of an estate which consists largely of immovable property is not a "suit for the payment of money". Such a suit is in fact a suit relating to immovable property, though it may ultimately be necessary to sell the estate and distribute the proceeds in money (n).

Cross claim and security for costs—There is no hard and fast rule of practice which prevents the Court from making an order for security for costs against a person residing out of British India who, upon being sued in British India sets up a cross claim, either by counter claim or by cross suit. It is for the Court to consider, in the exercise of its discretion, whether, having regard to the circumstances of the particular case, the cross claim must be treated as made, substantially, by way of defence to the suit against the claimant, or whether it must be regarded as being substantially in the nature of an independent claim made in respect of matters foreign to that suit, and therefore one with regard to which security for costs ought to be ordered to be given (o).

Appeal.—There is no appeal under the Code from an order made under this rule but there is one from an order rejecting an application under r. 2 (2) below for an order to set aside the dismissal of the suit. But an order under this rule made by a Chartered High Court requiring a plaintiff to give security for the costs of a suit is a "judgment" within the meaning of clause 15 of the Letters Patent, and is therefore appealable (p).

(g) *Bai Lazmi v. Harjeean* (1912) 36 Bom 415
121 C 538.

(h) *Bai Porbai v. Derya* (1899) 23 Bom 100.
Mans Bhai v. Ladd Goind (1908) 18 Mad
1 J 155.

(i) *Bhaubanker v. Mulya* (1910) 35 Bom 339,
111 C 321.

(j) *Prmehani, in the goods of* (1894) 21 Cal
832 836.

(k) *Namubai v. Daji Corind* (1911) 35 Bom
421, 81 C 1035. *Sonabai v. Tribhuvandas*
(1908) 32 Bom 602, 606.

(l) *Sonabai v. Tribhuvandas* (1908) 32 Bom

602.

(m) *Degimbhai v. Anshubhai* (1890) 17 Cal
610. See also *Bai Porbai v. Derya* (1899)
23 Bom 100, *Bomonsji v. Austericanji*
(1903) 27 Bom 100.

(n) *Sau Darmat v. Dargah Singh* (1925) 3
Rang 213 901 C 900 (25) A J 321.

(o) *New Fentz Comjajnia v. General Accident
Assurance Corporation* (1911) 2 K B 619.

(p) *Seshagiri v. Narayn Askur* (1907) 20 Mad
502. *Sonabai v. Tribhuvandas* (1908)
32 Bom 602.

Revision.—Where a Court passes an order under this rule requiring a plaintiff to give security for costs in a case to which the rule does not apply, *e.g.*, where an order is erroneously made for security for costs against a woman in a suit which is not "a suit for the payment of money" within the meaning of sub r (3) the case is one of "illegal" exercise of jurisdiction within the meaning of sec 115, and the High Court has power to interfere in revision (q)

Other cases in which security for costs may be required under the Code.—See O 22, r 8 [plaintiff's insolvency], O 37, r 4 [summary suit on negotiable instruments], O 41, r 5 [security on stay of execution], O 41, r 6 [security where execution is granted of a decree appealed from], O 41, r 10 [security from appellant] and O 45, r 7 [security on grant of certificate of leave to appeal to the Privy Council]

2. [S. 381.] (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant

Res Judicata.—A plaintiff whose suit has been dismissed under this rule for failure to furnish security is not precluded from instituting a fresh suit on the same cause of action (r), or from pleading the subject matter of such suit in answer to any other suit instituted against him (s) A sues B for the cancellation of a promissory note alleging that the note was obtained by fraud The suit is dismissed under this rule for failure to furnish security This does not preclude A from instituting a fresh suit for the cancellation of the note nor does it preclude him, if a suit is brought against him by B to recover the amount of the note, from pleading fraud in answer to such suit

Limitation.—An application by a plaintiff for an order to set aside a dismissal for failure to furnish security for costs must be made within 30 days from the date of dismissal [Limitation Act, 1908, sch I, art 163]

Appeal.—An appeal lies from an order under this rule rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit, see O 43, r 1 (n)

(q) *Saw Durnay v Baggah Singh* (1905) 3 Rang 213 90 I C 969 (25) A K 351 (s) *Pungraw v Sudhi Mahomed* (1882) 6 Bom. 642
(r) *Harisam v Lalbai* (1900) 26 Bom 637

COMMISSIONS.

Commissions to examine witnesses.

O. 26, r. 1 1. [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it

Power of Court to issue commissions.—See sec 75 above

Cases in which commissions may be issued—A commission can only be issued in the cases specified in this rule and rules 4 and 5 below, and in no other case. Therefore, a commission should not be issued for the examination of the head of a *mutt* on the ground that it is derogatory to a person in his position to appear personally in Court as a witness. But a commission may be allowed if the head of the *mutt* is summoned by the opposite party and the Court thinks that the application is vexatious (i).

Persons exempted from attending Court.—Amongst those so exempted are women who, according to the custom and manners of the country, ought not to be compelled to appear in public (see s 132) This is a right which no Court has power to refuse (u) Such women ought to be examined on commission, even though they may have appeared in public before (v) and though an allegation of immorality is made against them (w) A woman may have entirely abandoned the protection of the *purda* and yet she may be exempted under sec 132 from giving evidence in Court, if the Court is satisfied having regard to the class and community to which she belongs that she should not be compelled to appear in the witness box (x) A religious preceptor is not one of the persons exempted from attending the Court (y)

May issue—See notes to r 4 below under the head "May issue"

Sickness or infirmity—If sickness or infirmity is alleged, the character and gravity of that sickness or infirmity must be assessed and the risk consequent upon a refusal to issue a commission must be taken into consideration. At the same time the importance of having witnesses present before the Court should not altogether be lost sight of: (2) The application may be granted even if the defence consists of an equitable counterclaim. If it is found that the vendor is unable to attend Court by reason of sickness or infirmity, the Court has discretion to grant or refuse the application. Such discretion cannot be revised under sec. 115 above (a).

Evidence taken on commission under this rule—Where evidence is taken on commission under this rule, the procedure laid down in r 8 below should be strictly observed (b)

| | |
|--|--|
| (t) <i>Ieradrarn v Vataraja</i> (1905) 28 Mad 28 | (x) <i>Solomon v Jyotana</i> (1918) 44 Cal 492 44 I C 157 |
| (u) <i>Rahimunnissa v Shaik Halim</i> (1928) A C 814 | (y) <i>Panchand v Manoharilal</i> (1918) 42 Bom 136 141 142 43 I C 729 |
| (v) <i>Mohesh Chunder v Manick Lal</i> (1899) 28 | (z) |
| (w) | (a) |
| | (b) |

Irrelevant examination—an abuse—The Privy Council have expressed emphatic disapproval of the examination of witnesses on commission being protracted by questions quite irrelevant to the suit. Their Lordships characterised it as an abuse which the High Court should in flagrant cases check by disciplinary action (c)

Arbitration—It is competent to the Court to issue a commission for the examination of witnesses though the matters in difference in the suit have been referred to arbitration under Schedule II of this Code (d)

Appeal—See notes to rule 4 below, * Appeal

Revision—See notes above, * Sickness or infirmity

2. [S. 384.] An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined

Order for commission

3. [S. 385.] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it

Where witness resides within Court's jurisdiction

4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

Persons for whose examination commission may issue

- (a) any person resident beyond the local limits of its jurisdiction
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court, and
- (c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court

Form—For form of commission to examine absent witness see App H, form No 7

(c) *Rajkumar v. Ram Sundar* (1932) 34 Bom L.R. 526 1561 C 102 (32) A 1 C 69 | (d) *Rasbihi v. Rahimabai* (1905) 7 Bom L.R. 560

O. 26, r. 4 May issue.—The Court has a discretion to grant or refuse a commission (e) But the discretion must be exercised judicially (f) If the Court fails to exercise the discretion judicially, such failure is of itself no ground for interfering with the decree in appeal, the appellate Court should not interfere, unless it is shown that if the lower Court has exercised its discretion judicially, the decision would have been different from what it was (g) The issue of a commission under this rule is not the proper procedure if the Court desires a local inspection to be made of the subject matter of the suit (h) This should be done under O 39, r 7

Commission for the examination of witnesses.—"Ordinarily, in the case of a witness not under the control of the party asking for a commission, who resides beyond the limit fixed under O 16, r 19 (b), a commission should issue as a matter of right, unless the Court is satisfied that the party is merely abusing its authority to issue process It is not for the Court to decide whether the party will be benefited thereby or not, that is a matter entirely for the party" (i)

Plaintiff asking for a commission to examine himself.—Suppose a plaintiff, residing in Delhi, institutes a suit in Bombay, and then applies to the Bombay Court for the issue of a commission for his examination in Delhi In such a case the Court will refuse the application unless a very strong case is made out because the Bombay tribunal is that chosen by the plaintiff himself (j)

Defendant asking for a commission to examine himself.—The case, however, is different where the application is made by a defendant and especially a defendant lawfully resident out of the jurisdiction according to the ordinary course of his life and business The Court will not regard the case of a defendant with the same strictness as the case of a plaintiff (k) See preceding paragraph

Appeal.—The High Court of Madras at one time held that an appeal lay under cl 15 of the Letters Patent from an order made by a single Judge of the High Court directing the issue of a commission (l) as well as from an order refusing a commission (m), and this was on the ground that such order amounted to a judgment within the meaning of cl 15 of the Letters Patent But those decisions have since been overruled by a Full Bench of the same High Court (n) In Bombay it has been held that no appeal lies from an order directing the issue of a commission, because such an order is merely an interlocutory order and not a "judgment" within the meaning of the said clause (o) The High Courts of Calcutta (p) and Rangoon (q) have held that no appeal lies from an order refusing a commission

(e) *J. J. v. J. J.* (1864) 1 Hyde 68 *Coch v. Alcock* (1888) 21 Q B D 179

(f) *Hurre Doss v. Meer Moazzum* (1871) 15 W R 447 *Mosry v. Newchani* (1893) 23 Bom 626 *Janchura v. Janchanan* (1924) 39 Cal L J 594 691 603 84 L C 9 (24) A C 911

(g) *Alikunnu v. Rip Lal* (1893) 25 Cal 807, 20 L A 117

(h) *Ammul v. Annada* (1923) 37 C W N 143 144 L C 80 (33) A C 475

(i) *Jayannatha v. Strathambal* (1921) 46 Mal 574 575, 71 L C 530 (23) A N 3-1 *Satamma v. Subraya* (1911) 21 Mad L J 807 121 L J 74 *Amrith Nath v. Dhampur Singh* (1873) 20 W R 253 *Hurre Doss v. Meer Moazzum* (1871) 15 W R 447

(j) *Ross v. Woodford* [1894] 1 Ch 38 42 *New v. Burns* [1894] 64 L J Q B 194 *Keeley v. Wakley* [1893] 9 Times 26-571,

Nawab Sayid v. Herbert (1974) 3 Pat 863 84 L C 993 (20) A P 135

(k) *Id. Sarat v. Rim* (1922) 35 Cal I J 78 69 L C 9 (22) A C 42 *Jeerath v. Somasundaram* (1924) 46 Mad I J 131 78 L C 407 (24) A M 511

(l) *Veerabhadram v. Nataraja* (1900) 28 Mad 28

(m) *Viruthamithu v. Krishnamachariar* (1907) 39 Mad 143

(n) *Tuljaram v. Alagappa* (1912) 35 Mad 1, 8 20 21 81 L C 310

(o) *Vina Mahomed v. Zorabi* (1903) 11 B m L R 241, 1 C 157

(p) *Toremull v. Kunsj Lal* (1920) 31 Cal L J 162 55 L C 768

(q) *Mahomed v. Hossain* (1925) 3 Rang 293, 90 L C 967, (25) A R 10 *Abdul C. Jaffer v. Official Assignee* (1915) 3 Rang 600, 93 L C 211, (26) A R 64

Revision—An order refusing the application of a defendant to be examined on commission is in a proper case open to revision (r). Similarly an order granting the application of the plaintiff to be examined on commission may in a proper case be revised by the High Court (s).

5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request

Commission or Request
to examine witness not
within British India

Or a letter of request—These words are new. See sec 77 above. For form of letter of request see App II, form no 8.

Evidence of a foreign witness—Evidence of a foreign witness taken in foreign territory (e.g. Chandernagore) under a commission issued under this rule and executed in accordance with the provisions of r 17 below is clearly admissible (t).

Revision—The Madras High Court refused to interfere in revision when the Court in the exercise of its discretion declined to issue a commission (u). But when the lower Court erroneously refused to issue a commission for the examination of a foreign witness on the ground that he resided within the limits specified in O 16, r 19 which applies in British India, the same High Court reversed the order in revision (t).

6. [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto

Court to examine witness
pursuant to commission

Examination on commission—A party who has not joined in a commission is entitled to cross examine the witness examined under the commission (w). Evidence taken on commission without full opportunity for complete cross examination should not be admitted (x). But where the Court is satisfied that the cross examination of any witness on commission is being unnecessarily prolonged it will order such cross examination to be concluded within a certain time (y).

7. [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of

Return of commission with
depositions of witnesses

(r) *Sarat v. Pam* (19) 35 Cal. L.J. 78
81 641 C. 9 () A.C. 42 *Isaiah Nathan*

(s)

(t)

(u) *Nizam of Hyderabad In re* (1886) 9 Mad. 256

(r) *Subbiah v. Vellayappa* (1933) 60 Mad. L.J.
334 142 I.C. 201 (33) A.M. 366

(w) *Gregory v. Dooley Chand* (1865) 14 W.R. 0
C. 17

(x) *Bosagomoff v. Nahapet Jute Co* (1901) 5
C.W.N. p. cxxx

(y) *Surya Prasad v. Standard Life Insurance Co*
(1903) 30 Cal. 6-5

O. 26,
rr. 7, 8

such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

Evidence taken on commission shall form part of the record of the suit—See notes to r 8 below, "Reading deposition in evidence."

8. [S. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

When depositions may
be read in evidence

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

"Or is a civil or military officer—public service"—The sewords which occur in cl (a) are new.

Reading depositions in evidence.—Evidence taken on commission cannot be used without the consent of the opposite party, unless the conditions of clause (a) are fulfilled, or the record shows that the discretion under clause (b) has been exercised by the Court (z)

According to the practice prevailing on the Original Side of the High Court of Calcutta, evidence taken on commission is not treated as evidence in the suit until it has been tendered and read as evidence in the suit by the party on whose behalf it has been taken. It follows that evidence taken under a commission at the instance of one party cannot be used by the opposite party until it is tendered and read as evidence by the party on whose behalf it has been taken (a). On the other hand, the practice in the Courts in the mofussil of Calcutta is to treat the deposition of a witness examined on commission as evidence in the case even though it has not been formally tendered and this practice has been said to be not only perfectly consistent, but also in strict accordance with the provisions of rules 7 and 8 (b)

(c)

(a) —A C 116

(b)

Admissibility of documents—Where a document is produced before a Commissioner, and no objection is taken to its admissibility, no such objection can be taken before the Court hearing the suit to which the commission is returned (c) But if the admissibility of the document is objected to before the Commissioner, the party who has objected to the admissibility of the document before the Commissioner on one ground is not precluded from objecting to its admissibility before the Court on any other ground (d)

Commissions for local investigations

9. [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

Commission when to be issued—The words and the same cannot be conveniently conducted by the Judge in person, which occurred in the old section after the words 'net profits,' have been omitted in this rule The effect of the alteration is that the issue of a commission for local investigation is no longer restricted to cases where the Judge is unable conveniently to make the investigation himself As the rule now stands, a Judge may issue a commission in any case where he deems it fit to do so, irrespective of his own convenience (e)

Personal investigation by Judge—A Judge has power to make a local investigation in person in any case in which he sees fit to do so (f) See O 18, r 18

Commission for local investigation—This rule does not authorise a Court to delegate to a Commissioner the trial of any *material issue* which the Court itself is bound to try (g) The local investigation may be for the purposes indicated in the rule, but a commission under this rule should not issue merely for a local inspection (h) The proper procedure for that purpose is under O 39, r 7

Commissioner's report—Where in a suit as to a right of way a commissioner was appointed under this rule to prepare a map of the locality in question, it was held that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence (i)

Interference with Commissioner's report—Interference with the result of a careful local investigation except upon clearly defined and sufficient grounds is to be deprecated (j)

(c) *Chandrasekhar v. Subbarao* (1931) 54 I A 173 53 All 190 12* I C 613 (31) A 14
(d) *136, Bangli v. Mookun* (1893) 16 Mad 350
(e) *Ram Krishna v. Easwari Choud* (1931) 54 I A 173 53 All 190 12* I C 613 (31) A 14
(f) *136, Bangli v. Mookun* (1893) 16 Mad 350
(g) *Ram Krishna v. Easwari Choud* (1931) 54 I A 173 53 All 190 12* I C 613 (31) A 14
(h) *136, Bangli v. Mookun* (1893) 16 Mad 350
(i) *136, Bangli v. Mookun* (1893) 16 Mad 350
(j) *136, Bangli v. Mookun* (1893) 16 Mad 350

(A) *Ammalya v. Annada* (1932) 37 C W. N 143 144 I C 870 (33) A C 475
(i) *Shitara v. Bhimappa* (1899) 24 Bom 43
(j) *Surendra v. Prasanna Coomra* (1870) 13 M I A 60* 6 Buz L R 677 *Mookun v. Bhulinder* (1871) 15 W R 423 *Pani Amrita v. Mookun* (1923) 29 C W N 318 80 I C 755 (24) A C 620

O. 26,
rr. 9, 10

Amount of profits—The report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s. 164 of the Agra Tenancy Act is admissible in evidence having regard to this rule and rules 16, 17 and 18 (k)

Mesne profits—Burden of proof—See notes to O. 20 r. 12. Burden of proof on p. 678 above

Form—For form of commission for local investigation see App. H form no. 9

10. [S. 393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court

Procedure of Commissioner

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation

Report and depositions to be evidence in suit

Commissioner may be examined in person

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit

Alterations in the rule—The words "or as to his report" in sub-rule (2) after the words "mentioned in his report" are new. Sub-rule (3) is also new

Further evidence after Commissioner's report—This rule does not contemplate the tender of further evidence after the Commissioner's report except the examination of the Commissioner himself but it does not forbid it. It is consistent with either course and the point must be decided on general principles according to the facts of each case (f)

Issue of several commissions improper—The practice of issuing several commissions and arriving at a valuation by a process of selection from the reports of each commissioner is improper (n). A second commission should not issue unless the report of the first commissioner is unsatisfactory in which case no attention should be paid to it (n)

(k) *Bakhtawar v. Shro Prasad* (1913) 39 All. 691, 40 I.C. 7. The provisions of O. 26 are applicable to suits under the Agra Tenancy Act of 1901

(f) *Gursh Chander v. Shashi Sukhdevnar Roy* (1900) 7 Cal. 901, 906, 97 I.A. 110

Sabapathy v. Jeymal (1921) 44 Mad. 610, 6 I.C. 790, (21) A.M. 323

(m) *Panangal v. Achuta* (1933) 55 Mad. 656, 138 I.C. 114, (3) A.M. 48

(n) *Kunhi v. Muhammad* (1931) 54 Mad. 239, 130 I.C. 470, (31) A.M. 73

Commissions to examine accounts

11. [S 394] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment

Commission to examine
or adjust accounts

Commission to examine accounts—The words of this rule clearly indicate that no order can be made for the appointment of a commissioner unless the examination or adjustment of accounts is considered necessary (o)

The Commissioner to whom a suit is referred by a Judge on the original side of the High Court of Bombay is entitled to decide questions of law which may arise while taking accounts (p)

Further evidence after Commissioner's report—If a debatable point arises after the Commissioner's report the Court may take further evidence (q)

Form—For form of commission to examine accounts see App H form no 9

12. [S 395] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination

Court to give Com
missioner necessary
instructions

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit

Proceedings and report
to be evidence Court may
direct further inquiry

Commissions to make partitions

13. [S 396, 1st para.] Where a preliminary decree for partition has been passed the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree

Commission to make
partition of immovable
property

(a) *Bharat Chandra v. Kiran Chandra* (19-5)
52 Cal. 55, 90 I C. 944 (25) A. C. 1062
(p) *Laxmibai v. Huzarabai* (1917) 41 I L M
719 55 I C. 618 See also *Watson v.*

Agar Mehrotra (18-4) 11 A. 316
(q) *Joti Prasad v. Hardwar* (1937) 53 All 54
15-1 C. 334 (52) A. A. 128

O. 26,
rr. 9, 10

Amount of profits—The report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collection in a suit for profits under s. 164 of the Agra Tenancy Act is admissible in evidence having regard to this rule and rules 16, 17 and 18 (k)

Mesne profits—Burden of proof—See notes to O 20, r 12 Burden of proof on p 678 above

Form—For form of commission for local investigation, see App H form no 9

10. [S. 393.] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court

Procedure of Commissioner

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation

Report and depositions to be evidence in suit

Commissioner may be examined in person

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit

Alterations in the rule—The words 'or as to his report' in sub rule (2) after the words 'mentioned in his report', are new Sub rule (3) is also new

Further evidence after Commissioner's report—This rule does not contemplate the tender of further evidence after the Commissioner's report, except the examination of the Commissioner himself but it does not forbid it It is consistent with either course and the point must be decided on general principles according to the facts of each case (l)

Issue of several commissions improper—The practice of issuing several commissions and arriving at a valuation by a process of selection from the reports of each commissioner is improper (m) A second commission should not issue unless the report of the first commissioner is unsatisfactory in which case no attention should be paid to it (n)

(k) *Bakhta cō v Shro Prasad* (1917) 39 AU 634 4. IC 20 The provisions of O 26 are applicable to suits under the Agra Tenancy Act 2 of 1901

(l) *Gursh Chander v Shashi Sh Kharewar Roy* (1900) 27 Cal 951 958 27 I A 110

Sobapathy v Ierumal (1971) 44 Mad 640 62 IC 790 (21) A M 3 3

(m) *Panangal v Achula* (1972) 55 Mad 656 128 IC 114 (3.) A M 489

(n) *Kunhi v Muhammad* (1931) 54 Mad 230 139 IC 470 (31) A M 73

Commissions to examine accounts

11. [S. 394] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment

Commission to examine or adjust accounts **Commission to examine accounts**—The words of this rule clearly indicate that no order can be made for the appointment of a commissioner unless the examination or adjustment of accounts is considered necessary (o)

The Commissioner to whom a suit is referred by a Judge on the original side of the High Court of Bombay is entitled to decide questions of law which may arise while taking accounts (p)

Further evidence after Commissioner's report—If a debatable point arises after the Commissioner's report the Court may take further evidence (q)

Form—For form of commission to examine accounts see App H form no 9

12. [S. 395] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination

Court to give Commissioner necessary instructions **(2)** The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit

Proceedings and report to be evidence Court may direct further inquiry

Commissions to make partitions

13. [S. 396, 1st para.] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree

Commission to make partition of immovable property

(a) *Bharat Chandra v Kiran Chandra* (19-5)
52 Cal 766 90 IC 944 (25) A C 106 J
(p) *Laxmibai v Harsadobhai* (1917) 41 Ik m
719 36 I C 618 See also *Watson v*

Aga Mehmedee (18-4) 11 A. 346
(r) *Joti Prasad v Hardwar* (193) 53 All 54
137 I C 334 (32) A. A 198

O. 26,
rr. 13, 14

Alteration in the rule—The singular person has been substituted for the plural persons Under the old section it was held that the issue of the plural persons showed that the Court could not issue a commission to make partitions to a single Commissioner (r) The substitution of the singular person for the plural persons clearly shows that under the present rule the commission may be issued to a single Commissioner

Form—For form of commission to make a partition see App H form no 10

14. [S 396, 2nd and 3rd paras.] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds Such report or reports shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied, but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit

Alteration in the rule—The words shall confirm vary or set aside the same at the end of sub rule (2) and the whole of sub rule (3) have been substituted for the words shall either quash the same and issue a new commission or (where the Commissioners agree in their report) pass a decree in accordance therewith Under the wording of the old section it was held that the Court must either accept the report or reject the report and that it had no power to vary it (s) The word vary has been added into sub rule (2) to enable the Court to modify the report in a proper case

Resistance to Commissioner—Where a commission has been issued to make a partition the circumstance that the plaintiff or his agent resists the Commissioner is not sufficient to justify the dismissal of the suit (t)

(r) *Mul hand v Muhammad Ali* (1907) 99 All 235

(s) *Janki v Gauri* (1906) 93 All 75

(t) *Masum-un-niswah v Latifan* (1910) 32 All 319 51 C 872

General provisions.

15. [S. 397.] Before issuing any commission under this Order the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued

Expenses of Commission
to be paid into Court

16. [S. 398.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

Powers of Commis-
sioners

- (a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him,
- (b) call for and examine documents and other things relevant to the subject of inquiry,
- (c) at any reasonable time enter upon or into any land or building mentioned in the order

17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court

Attendance and examina-
tion of witnesses before
Commissioner

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper

Sub rule (2).—This sub rule is new. It enables the Court within the local limits of whose jurisdiction a witness resides to issue a summons for his examination on the application of the Commissioner. In the absence of any such provision in the old section it was held that where a witness failed to appear before a Commissioner pursuant to a

O. 26,
rr. 17-19

notice issued by him, the only course left open to the Commissioner was to return the commission to the Court from which it was issued, and the latter Court would then send the commission to the Court within the local limits of whose jurisdiction the witness to be examined resided (u)

18. [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

Form.—See App H, form no 7.

*Commissions issued at the instance of Foreign
Tribunals.*

19. (1) If a High Court is satisfied—

- (a) that a foreign court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,
- (b) that the proceeding is of a civil nature, and
- (c) that the witness is residing within the limits of the High Court's appellate jurisdiction,

it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

- (a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the Governor-General in Council, or
- (b) by a letter of request issued by the foreign court and transmitted to the High Court through the Governor-General in Council, or
- (c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding.

to avoid waste of time

Foreign Court situate in a foreign country—The rule does not apply to the Courts referred to in s. 78, clauses (a) and (b)

Evidence may be given—Sub rule (2) indicates the method by which the request contained in sub rule (1) may be established, but does not prevent the High Court from requiring further evidence if it thinks fit

Party—Under O 3, r 1, the word party includes a recognized agent or pleader

20. The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign court, or

(b) upon an application by a law officer of the Local Government acting under instructions from the Local Government

21. A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission

22. The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign court "

ORDER XXVII

Suits by or against the Government or Public Officers in their official capacity

1. [New] In any suit by or against the Secretary of O. State for India in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case

Suits by or against Government.—Suits by or against the Government must be instituted by or against the Secretary of State for India in Council, see s. 79 above.

Notice in suits against Secretary of State or public officer—See s. 80 above,

O. 27,
rr. 2-6

2. [S. 417.] Persons being *ex-officio* or otherwise authorized to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government

Persons authorized to act
for Government

Recognised Agents—In the Punjab all Government pleaders are authorised to act for Government as their recognised agents without any power of attorney. Such pleaders are recognised agents within the meaning of this rule (v)

3. [S. 418.] In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "The Secretary of State for India in Council"

Plaints in suits by or
against Government

4. [S. 419.] The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court

Agent for Government
to receive process

5. [S. 420.] The Court, in fixing the day for the Secretary of State for India in Council to answer to the plaint, shall allow a reasonable time for the necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion

Fixing of day for
appearance on behalf of
Government

6. [S. 421.] The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person

Attendance of person
able to answer questions
relating to suit against
Government

7. [S. 423.] (1) Where the defendant is a public officer and, on receiving the summons considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel

Extension of time to enable public officer to make reference to Government

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8. [Ss. 426, 427.] (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits

Procedure in suits against public officer

(2) Where no application under sub rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree

ORDER XXVIII

Suits by or against Military Men or Airmen

1. [S. 466.] (1) Where any officer, soldier or airman actually serving the Government in a military or air force capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them

(2) The authority shall be in writing and shall be signed by the officer, soldier or airman in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer, soldier or airman is serving in military or air force

O. 28,
rr. 1-3

staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, soldier or airman by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or dépôt to which the officer, soldier or airman belongs.

Changes in the rule—The words “or airman” have been added in the heading of this Order and in this rule after the word “soldier” by the Repealing and Amending Act 1927. The words “or air force” in this rule were inserted after the word “military” by the same Act.

2. [S. 465.] Any person authorized by an officer, soldier or airman to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier or airman could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, soldier or airman.

Person so authorized
may act personally or
appoint pleader

Changes in the rule—See note to r. 1, “Changes in the rule”

3. [S. 467.] Processes served upon any person authorized by an officer, soldier or airman under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Service on person so
authorized or on his pleader
to be good service

Changes in the rule—See note to r. 1, “Changes in the rule”

ORDER XXIX

Suits by or against Corporations

O. 29, r. 1 1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Subscription and verification of pleading

Companies authorized to sue and be sued in the name of an officer or trustee—All reference has been omitted in this and the next following rule to companies authorized to sue and be sued in the name of an officer or of a trustee, as such

O. 28,
rr. 1-3

staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer, soldier or airman by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or dépôt to which the officer, soldier or airman belongs.

Changes in the rule—The words “or airman” have been added in the heading of this Order and in this rule after the word “soldier” by the Repealing and Amending Act 1927. The words “or air force” in this rule were inserted after the word “military” by the same Act.

2. [S. 465.]

Person so authorized
may act personally or
appoint pleader

Any person authorized by an officer, soldier or airman to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier or airman could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, soldier or airman.

Changes in the rule—See note to r. 1, “Changes in the rule”.

3. [S. 467.]

Service on person so
authorized or on his pleader
to be good service

Processes served upon any person authorized by an officer, soldier or airman under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Changes in the rule—See note to r. 1, “Changes in the rule”.

ORDER XXIX

Suits by or against Corporations

O. 29, r. 1

1. [S. 435.]

Subscription and verification
of pleading

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

Companies authorized to sue and be sued in the name of an officer or trustee—All reference has been omitted in this and the next following rule to companies authorised to sue and be sued in the name of an officer or of a trustee as such

companies, if any there be, are very rare. A registered trades Union is under Act 16 of 1926 authorised to sue and be sued in the name of the Union. A suit by persons who are vice presidents of the union is not maintainable (ic)

The rule is permissive—The rule is permissive and not mandatory. A plaintiff in a suit by a company may be signed by the secretary, director or other principal officer able to depose to the facts. But this does not exclude O 6, r 14, and as a company is unable to sign itself the words 'good cause' in the latter rule enable a company to authorise a person to sign a plaintiff on its behalf (x)

Foreign corporation—The procedure prescribed by this rule applies to foreign corporations also. A foreign corporation can claim the benefit of this rule although not registered under the Indian Companies Act or under an Act of Parliament (y). Thus a plaintiff in a suit by the Singer Manufacturing Company, which is a company incorporated in the United States, may be verified by an agent holding a general power of attorney from the company as a "principal officer" of the company within the meaning of this rule (z). The fact that the Agent also acts for another foreign firm is not material (a)

Suit by an unregistered or unincorporated society—A suit by an unregistered or unincorporated society must be brought in the names of all the members of the society (b). Where there are numerous members, the suit may be instituted by one or more of them with the permission of the Court on behalf of all (O 1, r 8)

Suit by or against a registered company—A suit by or against a registered company must be instituted in the name of the company. A suit against two companies described as 'the India General S N & R Co, Ltd, and the Rivers S N Co, Ltd, by their joint Agent A E Rodgers,' is substantially a suit against Rodgers and it is in contravention of the provisions of this rule. The words 'by their joint agent A E Rodgers' should be omitted (c). But if the relief is really sought against the Company, and the error is one of misdescription, a suit nominally against the Agent may be treated as a suit against the Company (d)

"Other principal officer of the corporation"—The manager at Lucknow of the local branch of the Delhi and London Bank was authorised by a power of attorney to manage the affairs of the Bank, and to substitute any person for himself. In pursuance of this power he gave a power of attorney to the accountant of the Bank to manage the affairs of the Bank, but the power omitted words giving authority to sue. It was held that the accountant was, under the circumstances, the principal officer of the Bank and that he could, as such, sign and verify the plaintiff in a suit filed by the bank (e)

Principal officer able to depose to the facts of the case—The Calcutta High Court has held that as regards every pleading on behalf of a company or corporation the fitness to verify of the person purporting to verify it must be proved by affidavit (f). Note the difference in punctuation between this rule and r 3 below.

(y) *Singer Manufacturing Co v Bajinath* (1903) 30 Cal 103

(z) *Singer Manufacturing Co v Jay Mukund* (1912) (Pun) Rec no 8 p 33 101 (141)

(a) *Sieckaria Corporation Ltd v Chemuene Fabrik von Heyden Aktiengesellschaft* (1911) 2 K B 516. See also *Actuaris Kabel Bampakib Herrules v Grand Trunk Pacific Railway* (1912) 1 K B 222

(b) *Panels v Gauri Kumar* (1894) 20 All 187; *Hriday Nath Roy v Akh Chandra Roy* (1929) 49 C L J 357 (29) A C 445

(c)

(f) *International Continental Cameltown Compagnie v Mehta & Co* (1927) 21 C W N 1030 105 I C 564 (27) A C 780; *Greeneth v East Indian Railway Coy* (1895) 22 Cal 264

(g) *Israf Beg v The Board of Foreign Missions of the Presbyterian Church* (1914) 16 All 420

O. 29,
rr. 1-3

or unincorporated society the suit is brought in the names of some only of the members of the society (h) See notes above

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation

- (a) on the secretary, or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business

Service by post—The language of the old section has been enlarged so as to allow of service by post on corporation and by this means the rule is brought into line with the provisions of sec 148 of the Indian Companies Act 7 of 1913

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation, who may be able to answer material questions relating to the suit

Power to require personal attendance of officer of corporation

ORDER XXX

Suits by or against Firms and Persons carrying on business in names other than their own

O 30, r. 1

1. [New R. S. C., O. 48A, r. 1.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

Suing of partners in name of firm

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

0.3

alone but only if he sues in the name of the partnership (i)

firm (l) though all the partners may not have appeared (m)

of subordinate firms is a partnership of the members of those subordinate firms

and be sued in the name of its members (o)

obtained judgment against the firm in the proper form that is a judgment against the

- | | |
|--|--|
| (i) <i>Hari Singh v. Firm Karan Chand</i> (1922) 8 Lah. 1 100 I (721 (27) A L 115 | 552 |
| (j) <i>Wid. Est. v. J. B. v. J. B. v. J. B. v. J. B.</i> | (n) <i>Soodyal v. Joharmull</i> (1923) 50 Cal 549, 55-558 75 I (81 (24) A (74, <i>Kader Bar v. Palt Bahari</i> (1923) 38 Cal 409 140 I (70 (32) A (764 |
| (k) | (o) <i>Amulachand v. Lalulal</i> (1933) 35 Bom. L. R. 563 (33) A R 544, <i>Rampasad v. Arin ras</i> (1935) 27 Bom. L. R. 1122, 90 I (6-5 (33) A R 522 |
| (l) | |
| (m) <i>Lynght Ltd v. Clark & Co</i> [1931] 2 Q. B. | |

O. 29, rr. 1-3 or unincorporated society the suit is brought in the names of some only of the members of the society (A) See notes above

2. [S. 436.] Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

Service on corporation

- (a) on the secretary, or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business

Service by post—The language of the old section has been enlarged so as to allow of service by post on corporation and by this means the rule is brought into line with the provisions of sec 148 of the Indian Companies Act 7 of 1913

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation, who may be able to answer material questions relating to the suit

Power to require personal attendance of officer of corporation

ORDER XXX

Suits by or against Firms and Persons carrying on business in names other than their own

O. 30, r. 1 1. [New R. S. C., O. 48A, r. 1.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

Suing of partners in name of firm

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

Suits by or against firms.—The whole of this Order is new. It is a reproduction of almost verbatim of the principal rules comprised in O 48A of the English rules. The rules as to the attachment of partnership property and the execution of decree against firms will be found in O 21, rr 49 and 50 above.

In applying English decisions under the corresponding rules in England, it must be remembered that there is a distinction between the English and the Indian law as to the liability of partners. According to the English law, the liability is joint, according to the Indian law, it is joint and several. See Indian Contract Act, 1872, ss 42 to 45. Under sec 45 of the Contract Act one of two joint promisees cannot sue alone. This order modifies that section and if the promisees are partners it enables one to sue alone but only if he sues in the name of the partnership (i).

This Order deals with the mode of suing firms. Rule 1 provides that two or more persons claiming or being liable as partners may sue or be sued in the firm name. But as the rule is permissive it does not affect the right of the plaintiff to implead all the members of the firm (j). Rule 3 provides that where a suit is instituted by partners in the name of their firm the plaintiffs shall on demand in writing by the defendant, declare in writing the names and places of residence of the partners. If the plaintiffs fail to comply with the demand, the Court may stay further proceedings. If the demand is complied with, the suit will proceed as if all the partners had been named as plaintiffs in the plaint. As regards *signature and verification* where a suit is brought in a firm name it is provided by r 1, sub r (2) that it will suffice if the pleading or any other document required to be signed or verified is signed or verified by *any one* of the partners. It is not necessary that all the partners should sign or verify it. As regards *appearance* in a suit brought against a firm it is to be noted that a firm cannot appear as a firm and the partners should therefore appear individually in their own names but all subsequent proceedings should continue in the name of the firm (r 6). Where a suit is brought against a firm no partner can put in a personal defence (k). He can only file a written statement *for and in the name of the firm*. The decree also must be in the name of the firm (l) though all the partners may not have appeared (m).

Firm.—As to the definition of a firm it is laid down in sec 4 of the Indian Partnership Act 1932, (Act IX of 1932) that persons who have entered into partnership with one another are called collectively a 'firm'. The Calcutta High Court has held that a partnership firm is not a person but merely a collective name of the individuals who are members of the partnership and as such cannot be a partner in another firm (n). Therefore a partnership consisting of individuals and subordinate firms is a partnership of those individuals and the partners of the subordinate firms. Similarly a partnership of subordinate firms is a partnership of the members of those subordinate firms.

Joint Hindu family firm.—Order not applicable.—The provisions of this Order do not apply to a joint Hindu family firm for the rights and liabilities of such a firm are not exclusively regulated by the Indian Contract Act. Such a firm must sue and be sued in the name of its members (o).

Minor.—In England an infant's contract is voidable and he may be a partner. He is not, however personally liable for the debts of the firm but a creditor who has obtained judgment against the firm in the proper form that is, a judgment against the

(i) *Hari Singh v Firm Karan Chand* (1932) 8 Lah 1 100 I C 21 (1) A I 115

(j) *Mst. Karmi v Luckman* (1931) 9 Lat 1-1-1 C 55 (31) A I 33

(k) *Ell v Watson* (1899) 1 Q B 114

(l) *Harr v Leachamp Brothers* (1893) 2 Q B 534 535

(m) *Lynagh Ltd v Clark & Co* (1931) 2 Q B 1

550

(n) *Seedoval v Joharmull* (1923) 50 Cal 549 55 552 75 I C 81 (24) A C 74.

Kader Bur v Bult Behari (1932) 36 C W N 40 140 I C 50 (32) A C 764

(o) *Amulchand v Labul* (1933) 35 B m L P 36 (33) A B 204, *Kamprasad v Anantias* (19-5) 27 B m L R 1122, 9 I C 65 (25) A B 52.

O. 30, r. 1 defendant firm other than *A B*, an infant partner, may levy execution against the partnership property (*p*) If the action is not brought against the firm in the firm name, but is brought against the partners as nominee, the infant partner ought not to be joined as a party (*q*) In India a minor's contract is void, and a minor cannot be a partner He may, however, be admitted to the benefits of partnership in which case his share in the property of the firm is liable for the obligations of the firm but he is not personally liable see Indian Contract Act, 1872, s 247 The "share" referred to in sec 247 is the right of the minor to participate in the property of the firm after its obligations are satisfied (*r*) When a minor has been admitted to the benefits of partnership, a reference by the firm to arbitration will bind the minor to the extent of his share in the property of the firm (*s*) See O 21, r 50

Suit against "manager and owner" of a firm—In a Bombay case (*t*) the plaintiff filed a suit against "*C K*, manager and owner of the shop of *U C*" It turned out that *C K* had died before the suit was filed, and the plaintiff applied to bring the heirs of *C K* on the record The period of limitation had by that time expired and so the lower Court dismissed the suit as time barred The High Court reversed the decree on the ground that the suit was in substance a suit against the firm

"At the time of the accruing of the cause of action"—These words show that a suit may be brought by or against a firm in the firm name though the firm may have been dissolved before the date of the suit, provided the cause of action arose before dissolution (*u*)

"Carrying on business in British India"—This rule applies to all partnerships carrying on business in British India Therefore a firm which carries on business in British India may be sued in the firm name under this rule, although it be a foreign firm the members of which are resident out of the jurisdiction (*v*) The only question to be considered in order to see whether the case comes within the rule is whether the firm carries on business [in British India] (*w*) If it does, the partners may be sued in the firm name If it does not the partners cannot sue (*x*) or be sued (*y*) in the firm name The expression "carry on business" has no special legal significance It must be interpreted in the ordinary business sense (*z*) A firm in England cannot be said to carry on business in Bombay, merely because it has employed an agent in Bombay to collect orders for the firm, *the agent having no authority to accept or reject the orders* (*a*), it does not make any difference that the name of the firm is affixed to the agent's office (*b*) See notes to sec 20 'Carries on business'

Suit by firm on promissory note passed to a member—A firm may sue on a promissory note passed to one of its members though the note has been passed to him in his name (*c*)

Firm as agriculturist—The definition of "agriculturist" in sec 2 of the Dekkhan Agriculturists Relief Act, 1879 can only apply to a firm sued under the provisions of O 30, r 1, if that firm by itself or by its servants or by tenants earns its livelihood

- | | |
|-----|---|
| (p) | <i>Harijandas v Bhagvan Das</i> (1920) 43 Cal 394 96 I C 230 (22) A C 350 |
| (q) | (v) <i>Wootter City & County Banking Co v Kirt & Pauling & Co</i> [1894] 1 Q B 734 |
| (r) | (w) <i>Ib</i> p 738 |
| (s) | (x) <i>Vankaralesh Oil Mill v Vankaralesh</i> (1920) 30 Bom L R 117 109 I C 99 (-3) A B 191 |
| (t) | (y) <i>Von Helfeld v Frehnitzer</i> [1914] 1 Ch 748 |
| | (z) <i>Grant v Anderson & Co</i> [1892] 1 Q B 108 117 per Lord Esher M R |
| | (a) <i>Grant v Anderson & Co</i> [1892] 1 Q B 108 |
| | (b) <i>Irill v Goodwin & Co</i> (1886) 33 C D 604 |
| (i) | (c) <i>Bajaj v Budh Nath</i> (1920) 55 Cal 531 105 L C 549 (-8) A C 148 |
| (j) | <i>Davis & Sons v Morris</i> (1883) 10 Q B 1483 <i>Pulin v Mahendra</i> (1921) 34 Cal 1 J 405 67 I C 10 (-1) A C 72 |

wholly or principally by agriculture carried on within the limits of a district to which the Act extends. The mere fact that one or all the members of a firm earn their livelihood principally from agricultural income does not make the firm itself an "agriculturist" within the meaning of that Act (d)

Statement of names and addresses—Rule 2 enables a *defendant* to obtain disclosure of the names of the partners in a *plaintiff firm* by a statement in writing by the plaintiff or their pleader. Under r 1 *any party* to the suit *may apply to the Court* for a statement of the names of the partners in the *plaintiff or defendant firm* to be furnished and verified in such manner as the Court may direct (e). "It is perhaps not altogether easy to reconcile the two rules but r 2 is applicable to the case only of plaintiffs, whereas r 1 applies generally (f). Where an affidavit has been filed under r 1 or a declaration made under r 2, the Court has no power to require the deponent or declarant to attend to be cross examined on the affidavit or declaration, nor has the Court any power to direct the separate trial of an issue as to whether a person whose name has been disclosed in the affidavit or declaration was a partner in the firm at the time the cause of action accrued (g). But the statement of names disclosed in the affidavit or declaration will be treated as embodied in the plaint and will be a necessary part of the cause of action, and if the plaintiffs fail in establishing it, the suit will fail (h).

Suit by or against individual partners—See Indian Contract Act, 1872, ss. 43 and 45

2. [New R. S. C. O. 48A, r. 2.] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint.

Provided that all the proceedings shall nevertheless continue in the name of the firm

Disclosure of partners names—See notes to r 1 above. **Statement of names and addresses.** If the plaintiff firm has not made a full disclosure of their

(d) *Dharamdas v. Balkrishna* (19 J) 53 F.R.M.

78 N. L. J. C. 251 (20) A. B. 379

(e) *Pringle & Co v. Shamdas Dhan & Co* (1911)

17 N. J. C. 262 47 J. 4 422

(f) *Abrahams & Co v. Dunlop Pneumatic Tyre*

Co (1905) 1 K. B. 46 50

(g) *Abrahams & Co v. Dunlop Pneumatic Tyre*

Co (1905) 1 K. B. 46

(h) 16 F. 51

but it is not service upon any other member of the firm so as to make such member "a person who has been individually served as a partner," etc., within the meaning of O 21, r 50, sub r (1), cl (c). If the service is effected in the second mode prescribed by the rule, that is upon a manager at the place of partnership business and the manager is not a partner, the service is good service upon the firm, but it is not service upon any member of the firm so as to make such member "a person who has been individually served as a partner," etc., within the meaning of O 21, r 50, sub r (1), cl (c) (n). This distinction is important for the purposes of execution, for, under O 21, r 50, where a decree has been passed against a firm, execution can at once issue without leave of Court against the property of the firm and also against the separate property of any individual partner who was served with the writ. But execution cannot be issued without leave of Court against the separate property of any partner who was not served with the writ and did not appear (o).

Dissolution of partnership before institution of suit—Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable unless he served the writ of summons upon him. A sues the firm of B & Co upon a promissory note passed to him by the firm. When the note was given the firm consisted of three partners, X, Y and Z, but Z had retired from the firm before the institution of the suit, and A knew before he instituted the suit that Z had so retired. Z resides in British India, but he is not individually served as required by the proviso to this rule. Z does not appear. A obtains a decree against the firm. The decree cannot be executed against the personal property of Z. Nor can A apply under O 21, r 50, sub r (2) for leave to execute the decree against the personal property of Z. So also on the death of a partner his personal estate cannot be made liable unless his legal representative is joined (p). This is because the present rule overrides O 21 r 50, and the latter rule only applies where there has been no dissolution to the knowledge of the plaintiff (q). The above ruling would not apply to the case of a partner who had left the firm before the institution of the suit without the knowledge of the plaintiff. If the plaintiff was not aware of the dissolution when he filed his suit, the decree binds all the partners in the firm whether they have been served individually or not (r).

Service on manager, subsequent service on partner.—Where a summons is served upon a manager, and subsequently upon a partner, it is the date of the latter service from which time is to be counted for the appearance of the defendant firm (s).

"Principal place at which the partnership business is carried on"—See notes to r 1 above, "Carrying on business in British India."

"As the Court may direct"—These words do not occur in the corresponding English rule. According to the English rule, the summons may be served upon a partner or upon the manager at the plaintiff's option. Under the present rule, it would seem, that the plaintiff has no such option, and that he should obtain the directions of the Court as to the mode of service. If the method of service prescribed by the Court is followed, then *prima facie* there has been service on the firm (t). The omission to obtain such directions is, however, only an irregularity within the meaning of s 99 and does not vitiate the service (u).

Notice to be given to the person served as to the capacity in which he is served—See r 5 below and notes thereto.

- (n) *In re Ide* (1946) 17 Q.B.D. 755.
 (o) *Darshan v. Bank of Bengal* (1914) 19 C.W.N. 1004; 1012 261 C. 866.
 (p) *Malikaraj v. Ibrahim* (1927) 51 B.M. 946, 103 I.C. 871, (27) A.R. 641.
 (q) *Wigram v. Cox, Sons, Lacey & Co* [1921] 1 Q.B. 792.
 (r) *Gordhandas v. Gantamchand* (1925) 27 B.M.

- L.P. 541 871 C. 1051 (2); A.R. 531.
 (s) *Allen v. Leakey* (1880) 25 Q.B.D. 543.
 (t) *International Cotton and Cloth Co. v. Mifflin* (1927) 54 Cal. 105; 105 I.C. 356 (2) A.C. 354.
 (u) *Kerr, Robinson & Co. v. Lyle Forest Co* (1932) 59 Cal. 496 133 I.C. 637 (32) A.C. 541.

O. 20,
rr. 2, 3

partners, the proper procedure is not to dissolve the suit, but to allow the firm to put in a further declaration making a full disclosure, and thus to remedy the defect (i). The fresh declaration involves the admission of new parties, so that if the period of limitation has expired the declaration would be of no effect and the suit would be dismissed (ii).

Proceedings to continue in name of firm.—See notes to r. 1 above "Suits by or against firms," on p. 129 and r. 6 below. Subsequent proceedings to continue in name of firm.

3. [New. R. S. C., O. 484, r. 3.] Where persons are sued as partners in the name of their firm, the summons shall be served either—

- (a) upon any one or more of the partners, or
- (b) at the principal place at which the partnership business is carried on within British India, upon any person having, at the time of service, the control or management of the partnership business there,

as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable

Service of summons—This rule is to be read with r. 1 above and with O. 21, r. 30. It applies only to suits against partners in the name of their firm. It provides a special mode of service upon firms carrying on business in British India, whether the partners reside within or without British India (j). One mode of service authorized by the rule is service upon anyone or more of the partners, the other is service at the principal place of business of the partnership, within British India, upon the manager of the business. If the summons is not served in either of these ways the service is irregular (k). If it is served in either of these ways, the service is good service upon the firm whether all or any of the partners are within or without British India. The service being good service upon the firm, any decree that may be passed in the suit against the firm may be executed against the property of the firm. When the firm has been dissolved, the only method of service is under clause (a) on partner (l), and if service by registered post has been ordered, the registered letter should be addressed to a partner and not to the firm name at the place where the business used to be carried on (m).

If the service is effected in the first mode prescribed by the rule, that is if the service is upon a partner, it is good service upon the firm as well as upon that partner personally

Leasing Co. v. British Crown

(k) See *Worcester City and County Bank v. Fairbank Pauling & Co.* (1894) 1 Q.B. 784. "49" 70.

Anglo-Siam Co. v. Siam Siam Co. (1922) 49 Cal. 49.
Goodwin & Co. (1866) 20 C.
W. v. Budh Nath (1928) 55 Cal. 551,
L.C. 549 (28) A.C. 148.

but it is not service upon *any other member* of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within the meaning of O 21, r 50, sub r (1), cl (c). If the service is effected in the second mode prescribed by the rule, that is upon a *manager* at the place of partnership business and the manager is not a partner, the service is good service upon the firm, but it is not service upon any member of the firm so as to make such member "a person who has been *individually* served as a partner," etc., within the meaning of O 21, r 50, sub r (1), cl (c) (n). This distinction is important for the purposes of execution, for, under O 21, r 50, where a decree has been passed against a firm, execution can at once issue without leave of Court against the property of the firm and also against the separate property of any individual partner who was served with the writ. But execution cannot be issued without leave of Court against the separate property of any partner who was not served with the writ and did not appear (o).

Dissolution of partnership before institution of suit—Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable unless he served the writ of summons upon him. *A* sues the firm of *B & Co* upon a promissory note passed to him by the firm. When the note was given the firm consisted of three partners, *X*, *Y* and *Z*, but *Z* had retired from the firm before the institution of the suit, and *A* knew before he instituted the suit that *Z* had so retired. *Z* resides in British India, but he is not individually served as required by the proviso to this rule. *Z* does not appear. *A* obtains a decree against the firm. The decree cannot be executed against the personal property of *Z*. Nor can *A* apply under O 21, r 50, sub r (2) for leave to execute the decree against the personal property of *Z*. So also on the death of a partner his personal estate cannot be made liable unless his legal representative is joined (p). This is because the present rule overrides O 21 r 50 and the latter rule only applies where there has been no dissolution to the knowledge of the plaintiff (q). The above ruling would not apply to the case of a partner who had left the firm before the institution of the suit *without* the knowledge of the plaintiff. If the plaintiff was not aware of the dissolution when he filed his suit, the decree binds all the partners in the firm whether they have been served individually or not (r).

Service on manager, subsequent service on partner.—Where a summons is served upon a manager, and subsequently upon a partner, it is the date of the latter service from which time is to be counted for the appearance of the defendant firm (s).

"Principal place at which the partnership business is carried on"—See notes to r 1 above. "Carrying on business in British India."

"As the Court may direct"—These words do not occur in the corresponding English rule. According to the English rule, the summons may be served upon a partner or upon the manager at the plaintiff's option. Under the present rule it would seem, that the plaintiff has no such option, and that he should obtain the directions of the Court as to the mode of service. If the method of service prescribed by the Court is followed, then *prima facie* there has been service on the firm (t). The omission to obtain such directions is, however, only an irregularity within the meaning of s 99 and does not vitiate the service (u).

Notice to be given to the person served as to the capacity in which he is served—See r 5 below and notes thereto.

- (m) *In re Ide* (1886) 17 Q.R.D. 755
 (o) *Dunlop v. Bank of Bengal* (1914) 19 C.W.N. 1004 1012 261 C 866
 (p) *Mathew v. Mathew* (1927) 51 B.M. 9-8
 (q) *Mathew v. Mathew* (1927) 51 B.M. 9-8
 (r) *Bridges v. Co. v. Shamas* (1927) 51 B.M. 2-7
 (s) *Abraham v. Co. v. Dunlop* (1927) 51 B.M. 2-7

- (t) *Allen v. Larkley* (1927) 51 B.M. 2-7
 (u) *International v. Dunlop* (1927) 51 B.M. 2-7
 (v) *Mathew v. Mathew* (1927) 51 B.M. 9-8
 (w) *Mathew v. Mathew* (1927) 51 B.M. 9-8

O. 30,
rr. 2, 3

partners the proper procedure is not to dismiss the suit, but a further declaration making a full disclosure, and thus fresh declaration involves the addition of new parties. If the declaration would be of no effect.

Proceedings to continue in name of firm
against firms, on p 929 and r 6 below, 'Sub-junctum'
of firm

3. [New R. S. C., O. 48A, r. 3.] Where
as partners in the name of
service summons shall be served on

- (a) upon any one or more of the partners
- (b) at the principal place at which the
business is carried on within British India
any person having, at the time of service,
control or management of the partnership
business there,

as the Court may direct, and such service shall be deemed
good service upon the firm so sued whether all or any of the
partners are within or without British India:

Provided that, in the case of a partnership which has
been dissolved to the knowledge of the plaintiff before the
institution of the suit, the summons shall be served upon every
person within British India whom it is sought to make liable

Service of summons—This rule is to be read with r 1 above and with O 21, r 50.
It applies only to suits against partners in the name of their firm. It provides a special
mode of service upon firms carrying on business in British India whether the partners
reside within or without British India (j). One mode of service authorized by the rule
is service upon anyone or more of the partners, the other is service at the principal
place of business of the partnership, within British India, upon the manager of the
business. If the summons is not served in either of these ways the service is irregular (k).
If it is served in either of these ways the service is good service upon the firm whether
all or any of the partners are within or without British India. The service being good
service upon the firm any decree that may be passed in the suit against the firm may be
executed against the property of the firm. When the firm has been dissolved, the only
method of service is under clause (a) on partner (l), and if service by registered post
has been ordered the registered letter should be addressed to a partner and not to the
firm name at the place where the business used to be carried on (m).

If the service is effected in the first mode prescribed by the rule that is if the service
is upon a partner, it is good service upon the firm as well as upon that partner personally.

Pratt v. Crown (1881) 11 Cal 581 (k) See *Worcester City and County Bank v. Co*
Fairbank Lumber Co (1891) 1 Q B 734 789 790
Ann v. Ann (1890) 49 Cal 107
Goodwin v. Co (1890) 55 Cal 551
Edwards v. Co (1890) 55 Cal 551
Edwards v. Co (1890) 55 Cal 551
Edwards v. Co (1890) 55 Cal 551

O. 30,
rr. 4, 5

4. [New.] (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

Joinder of legal representative—A passes a promissory note for Rs 5,000 to a firm consisting of three partners B, C and D. If B dies C and D alone cannot sue to recover the amount of the note. The suit must, under s 45 of the Contract Act, be brought by C and D along with B's legal representative. The effect of the present rule is that where the suit is brought in the firm name, it is not necessary to join B's legal representative as a party plaintiff (v). But the legal representative may apply to be made a party plaintiff. The mere fact that he does not apply will not affect his right to claim the benefit of any decree that may be passed in favour of C and D. If the suit is against the firm, and one of the partners dies before or during the suit, the decree can be enforced against the share of the deceased in the partnership property. But if the legal representatives are not joined, it cannot be enforced against the personal estate of the deceased partner (v).

5. [New. R. S. C., O. 48A, r. 4.] Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

Notice in what capacity served—Where a suit is brought against a firm in the firm name, the summons will be issued against the firm. Such summons may be served either upon any one or more of the partners or upon the person in control of the business [r 3]. The present rule provides that the person served should be informed by notice in writing given at the time of service, whether he is served as a partner, or as a person in management of the business, or in both characters. In default of notice, the person

(v) *Hari Singh v. Karam Chand* (1907) 8 Lah 1, 100 I C 721 (27) A I 115
(u) *Mathuradas v. Ibrahim* (1907) 51 Bom 98, 105 I C 871, (27) A B 581, 1 usuf 9

Budha (1929) 52 Mad 885 119 I C 803,
(29) A M 733 *Ram Narain v. Ram Prasad* (1930) 52 All 964, 130 I C 712
(31) A A 65

served will be *deemed*—not merely *presumed*—to be served as a partner. If he contends that he is not a partner, the proper course for him to adopt is to appear under protest under r 8 below denying that he is a partner. If he does not do so, he will be deemed to have been served *personally* as a partner within the meaning of O 21, r 50, sub r 1, cl (c), and execution may be granted against him personally (x).

Service on manager—If service is effected on the person in control of the business and no notice is served as provided by this rule the service is not effective, and cannot be made so [Annual Practice, notes to O 48A, r 4].

Appearance under protest—Where a summons is served upon a person as a partner, but such person appears under protest denying that he is a partner, the plaintiff may disregard the appearance altogether, and proceed as if the summons had not been served, that is, he may have service subsequently effected upon a partner or partners or upon any person having the control of the business as provided by r 3 above. The mere fact that the person served as a partner denies that he is a partner and appears under protest does not preclude the plaintiff from *otherwise* serving the summons on the firm (r 8 below).

Where a summons is served upon a person both as a partner and manager, and such person appears with denial of partnership but does not deny that he is the person in management of the business the plaintiff is entitled to a decree against the firm, for the service is then one under r 3, cl (b), and such service is good service upon the firm.

Forms of notice—Take notice that the summons served herewith is served on you—

- (i) as a partner in the defendant firm of *AB & Co*
- (ii) or as the person having the control or management of the partnership business of *AB & Co*
- (iii) or as a partner in the defendant firm of *AB & Co* and also as the person having the control or management of the partnership business of *AB & Co*

6. [New R. S. C., O. 48A, r. 5.] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Appearance of partners—Though all proceedings in a suit instituted against a firm in the firm name must be conducted in the firm name the partners should so far as appearance is concerned appear individually in their own names. The reason of the rule is that a firm cannot appear as a firm. Where a suit is brought against a firm in the firm name, the appearance of one partner is the appearance of the firm (y).

The only person entitled to appear in a suit against a firm are—

- (i) persons who allege they are partners of the firm sued or were partners at the time the cause of action arose and
- (ii) persons who are served as partners but deny that they are partners of the firm sued or were partners of the firm at the time the cause of action accrued. Such person may appear under protest. See rr 7 and 8 below.

A person served as a manager of the partnership business need not appear unless he is a member of the firm sued (r 7 below). A managing partner of a business firm has

(x) *Barnes v Bank of Bengal* (1914) 19 C W N 105 261 (1886)

(y) *Lyngby Ltd v Clark & Co* [1901] 1 Q B 552 556

O. 30, r. 6 an implied authority, in the ordinary course of business, to appoint solicitors, to defend a suit brought against the firm in the firm name, and to instruct them to enter an appearance for the other partners as well. No suit will therefore lie against the solicitors at the instance of the other partners for entering an appearance in their name without their express authority (z)

The expression "individually" is not synonymous with "in person", hence no partner can be forced under this rule to appear in person (a)

"All subsequent proceedings shall continue in the name of the firm"—Where person are sued as partners in the firm name, the plaint (b) and every subsequent proceeding must be headed with the firm name as defendants. The proceedings in a suit so brought continue in the name of the firm even though the names of the partners are disclosed (c). The written statement must be headed in the firm name, and the decree also must be against the firm in the firm name. The Court cannot in such a suit pass a decree against the firm (d) within the

Defence—Where a suit is brought against a firm in the firm name on a claim against the partnership, the partners ought, if they can agree, to put in one written statement. But if they cannot agree on one defence, each partner is entitled to put in a separate written statement. In any case the written statement should be a written statement of the firm, but where the partners cannot agree on one defence and a partner puts in a separate defence, the proper form would be "written statement of the defendant firm of AB & Co, by XY, one of the partners appearing in the suit". It may be asked, what is the plain partners' must, to use satisfy the judge at the trial that not one of the defences prevents a judgment

defence would be the defence of the firm, and the suit would be tried upon that defence, and in that case judgment could be obtained against the firm. Of course, if the partner chose to put in an improper defence and so rendered the partnership liable in a case where it ought not to be made liable, he might thereby as between himself and his co partners be committing a breach of duty for which he would be liable to them, but so far as the plaintiff is concerned, the plaintiff would be able to obtain judgment against the firm. A partner is not entitled, in a suit against a firm in the firm name, to put in a personal defence, he can only put in a defence for and in the name of the firm (f). In an Allahabad case (g) a partner was allowed a to 'appear individually' and resist a claim, but the partner's defence was really a defence for the firm for he said that the liability was that of a co partner and not of the firm. When a partner is sued personally along with the firm, he may put in a personal defence besides a defence for the firm (h).

Decree—Where a suit is brought against a firm in the firm name, the decree must be against the firm in the firm name (i). From this it follows that if one of the partners

- (e) Per Romer L J, *Ellis v Wadson* (1899) 1 Q B 714 717
- (f) *Ellis v Wadson* [1899] 1 Q B 714. *International Colonial Concessions Co v Mehta* (1927) 54 Cal 1057, 105 I C 336, (27) A C 758
- (g) *Sital v Peary* (1930) 52 All 964 139 I D 712 (30) A A 701
- (h) *Taylor v Collier* (1882) 80 W R (Eng) 791
- (i) *Jackson v Litchfield* (1882) 8 Q B D 474

ing in the writ the partners (n) But though the decree against the firm makes the partnership property, it can only be decided in execution personally against a particular partner is personally liable to satisfy the decree (o) notes to r 8 below. As to minor partner, see notes to r 1, "Minor".

7. [New R. S. C., O. 48A, r. 6.] Where a summons is served in the manner provided by rule 2 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

See notes to r 6 above, "Appearance of Partners"

8. [New R. S. C., O. 48A, r. 7.] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Appearance under protest —Where a person served with a summons as a partner denies that he is a partner, he may enter appearance under protest under this rule. Where an appearance is entered under protest, its effect is to nullify the service altogether as regards the defendant firm (p) In such a case the plaintiff may disregard the appearance under protest altogether, and have the summons served upon one who is

- | | |
|--|---|
| (j) <i>Jackson v Litchfield</i> (1842) 8 Q B D 474 | (o) (1924) 26 Bom L R 344 801 C 773 (24) |
| 478 | A B 366 <i>supra</i> |
| (k) <i>Adam v Townsend</i> (1884) 14 Q B D 103 | (p) <i>International Colonial Outfitters Co v</i> |
| (l) <i>Lyons Ltd v Clark & Co</i> (1891) 1 Q B | <i>Melita</i> (1927) 54 Cal 1027 1051 C 356 |
| 552 556 | (25) A C 754 <i>Cherry v Lukomul</i> (1927) |
| (m) <i>Adarappa v Probst</i> (1924) 26 Bom L R | 50 Bom 605 601 C 425 (26) A B 625 |
| 344 801 C 753 (24) A B 366 | (q) <i>Iskandae v Hanaraj</i> (1921) 23 Bom L R |
| (n) <i>Poon Prasad v Anandji</i> (1922) 49 Cal 524 | 1212 611 C 844 (21) A B 44 |
| 621 C 285 (22) A C 404 | (r) <i>Kodumal v Manpalram</i> (1932) 34 Bom |
| | L R 610 1381 C 777 (32) A B 262 |

O. 30,
rr. 8-10

Party appearing under protest not entitled to file written statement on his own behalf.—A party appearing under protest under this rule is not entitled to file a written statement on his own behalf even on denying that he is a partner (s).

Party appearing under protest not entitled to dispute liability of firm.—In England a party appearing under protest is not allowed to plead in the alternative that if he is a partner in the firm he is not liable (t).

Defence to party appearing under protest in proceeding under O. 21, r. 50.—A party appearing under protest is entitled to take any personal defence in a proceeding against him under O. 21, r. 50, in addition to the defence that he was not a partner of the defendant unless to do so will be to negative the provisions of a rule of procedure (u).

9. [New. R. S. C., O. 48A, r. 10.] This order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

Scope of the rule.—This rule provides that suits between a firm and one of its members, or between two firms with a common member, may be instituted in the firm name, provided the firms carry on business in British India (r. 1). But no execution can be issued in such a suit *except by leave of the Court*.

Neither this nor any of the rules of this Order alter the substantive law as it

10. [New. R. S. C., O. 48A, r. 11.] Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply.

Suit against person carrying on business in name other than his own

Scope of the rule.—A person trading by himself as a firm or in an assumed or

(s) *International Continental Caoutchouc Com-
pagnie v. Mehta & Co* (1927) 54 Cal
1057, 105 I C 358 (27) A C 758

(t) *Weir & Co v. McFicar & Co* (1925) 2 K B
127

(u) *Chhattoo Lal Visser & Co v. Naraindas*
(1929) 56 Cal 705, 121 I C 403, (30)
A C 53

(v) *Meyer & Co v. Faber* (No. 1) (1923) 2 Ch
421, 435, and see *Public Trustee v. Elder*

(1926) Ch 776

(e)

(w)

(z)

against him in his trade name, the suit is one against a dead man and a nullity (y) If he dies *pending the suit*, the suit will abate unless his legal representative is brought on the record within 90 days from the date of his death (z) This rule does not enable a plaintiff to sue the proprietor of a newspaper in the name of the newspaper (a) O. 3

Amendment of plaint allowed—When a man carrying on business in a firm name sued in that name, he was allowed to amend his plaint by inserting his own name as plaintiff on payment of all costs up to the date of the amendment (b)

Non resident foreigner.—As to the corresponding English rule it has been held that it does not apply where the person carrying on business in a name other than his own is a foreign subject resident out of the jurisdiction, though he may carry on business through an agent within the jurisdiction The decision proceeded upon the broad ground that an English Court has no jurisdiction over foreigners residing abroad merely because they carry on business within the jurisdiction, and that the words "any person," though large enough to include a foreigner, refer only to an English subject (c) The question as to whether the Courts of this country have jurisdiction over foreigners residing abroad merely because they carry on business here through an agent arose in the recent Privy Council case of *Annamalai v Murugasa* (d), but the point was not decided by their Lordships In both Courts in India it was assumed that the Court had jurisdiction, but their Lordships said "This assumption appears to their Lordships to require more attention than it has received"

Application of foregoing rules—By the latter part of this rule all the foregoing rules of this Order relating to proceedings against firms are to apply to a person trading in a name other than his own *so far as the nature of the case will permit* By virtue of r 1, this rule does not apply unless the business is carried on in British India By virtue of rr 1 and 2, the person sued in his trade name may be required to disclose his real name and private address By virtue of r 3 the summons may be served upon the person sued or upon any person having the control or management of the business, but in the latter case execution cannot be issued against the personal property of the persons sued except by leave of the Court [O 21, r 50] As regards appearance the person sued must appear in his own name (r 6)

ORDER XXXI

Suits by or against Trustees, Executors and Administrators

1. [S. 437.] In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to

Representation of beneficiaries in suits concerning property vested in trustees etc

- (y) *Haribandhu v Harimohan* (1930) 5 Cal 931, 126 I C 314 (30) A C 327
Pampayab v Chakrabarty (1923) 25 ILR 1111 C 464 (24) A B 103
 (z) *Pam Prasad v Anandji & Co* (1922) 49 Cal 524 64 I C 845 (22) A C 404
 (a) *De Lemaire v New York Herald* (1903) 2

- Q B 97 (note)
 (b) *Negi v Sardar Nihal* (1931) 35 C W N 432 131 I C 1700 (31) A C 770
 (c) *St Gobain Chaux and Ciment Co v Hoyer-
 mann & Agency* (1903) 2 Q B 96
 (d) (1903) 26 Mal 544 552, 30 I A 220

O. 31, rr. 1, 2 the suit But the Court may, if it thinks fit, order them or any of them to be made parties

Scope of the rule—This rule applies only where the contention is between the beneficiaries and a third person It does not apply where the contention is between beneficiaries and trustees or between the beneficiaries *inter se* In suit between beneficiaries and a third person the trustees sufficiently represent the beneficiaries (e), though the beneficiaries are an unascertained and unascertainable class (f) or persons (g) So if a legatee sues an executor for payment of a legacy and for administration of the estate the executor is the only necessary party (h) As to declaratory decrees it is provided by s 43 of the Specific Relief Act, 1877, that a declaration made under s 42 of that Act is binding where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees Compare RSC 16, r 8

When beneficiaries may be added as parties—Beneficiaries should always be made parties when the executors are wholly uninterested in the case as where they have fully administered the estate (i), or where they have an interest adverse to that of the beneficiaries (j) Where a suit was brought by an executor, and the names of the beneficiaries who took possession of the estate pending the suit were substituted as plaintiffs, it was held that it did not amount to a substitution of new plaintiffs within the meaning of s 22 of the Limitation Act (k)

A purchases certain property at an execution sale in the name of B If the judgment debtor seeks to set aside the sale, A is, by virtue of this rule, not a necessary party to the proceeding (l)

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them :

Joinder of trustees, executors and administrators

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties

Trustees—The word ' trustees ' has been newly added in this rule

Several trustees executors or administrators—This rule applies only to suits against, and not to suits by, trustees, executors or administrators It provides that all executors who have proved the will should be made parties to the suit The Court may, however, entertain an application as for a receiver even though all proving executors are not made parties to the suit (m) An executor who has neither proved nor intermeddled with the estate cannot be sued as representing the estate (n) See Indian Succession Act 39 of 1925, sec 311

" Outside British India "—These words have been substituted for the words " beyond the local limits of the jurisdiction of the Court ' (o)

Administration decree—A decree for general administration cannot be passed without a general administrator (p)

(e) See as to beneficiaries under a will *Arleau v*

(f) "

(g) "

(h)

(i)

(j)

(k) *Jal nabai v Brajo* (1903) 7 C W N 817

(l) *Baroda v Chunder* (1907) 29 Cal 68^o

(m) *Hafizabad v Kazi Abdul* (1895) 19 Bom 83, 85

(n) *Mohamud v Pichie* (1894) A C 437

(o) See *Kumar Saradindu v Dharendra* (1905) 2 Cal L J 484

(p) See *Re Toleman* [1897] 1 Ch 686

3. [S. 439.] Unless the Court directs otherwise, the O. husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her

Husband of married
executrix not to join

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind

1. [S. 440, 1st para.] Every suit by a minor shall O. be instituted in his name by a person who in such suit shall be called the next friend of the minor

Minor to sue by next
friend

Minor—Every person domiciled in British India who has not completed the age of 18 years is a minor. In the case, however, of a minor of whose person or property a guardian has been appointed by a Court of Justice, or whose property is under the superintendence of a Court of Wards, the age of majority is deemed to have been attained on the minor completing his age of 21 years see Indian Majority Act I of 1875, s. 3

Object of having next friend or guardian ad litem—As a minor is deemed incapable of prosecuting or defending a suit himself, it is necessary that his interests in the suit should be watched by an adult person. Such person is, in the case of a minor plaintiff, called his next friend and in the case of a minor defendant his guardian ad litem or guardian for the suit. But neither the next friend nor the guardian ad litem is a party to the suit (g). The next friend or guardian ad litem may choose his own attorneys or change them (r). As to liability of next friend for costs, see notes below.

Title of suit—Where a suit is brought on behalf of a minor the title of the suit should run thus: *A B a minor by his next friend C D v. X Y*. Where a suit is brought against a minor the title of the suit should be: *X Y v. A B a minor by his guardian ad litem C D*. Where the title of a suit in a case was *A B for self and his minor daughter C D* instead of *A B and C D a minor by her next friend A B* and the objection was raised for the first time in appeal it was held that the error did not affect the merits of the case, and that it was not therefore fatal to the suit (s) [s. 441]. See notes to r. 3 below under the head: Where a minor defendant is substantially represented by a guardian ad litem.

Objection to authority of next friend—Where a minor plaintiff has a cause of action no objection to the authority to sue of the next friend through whom the suit is brought will be entertained in appeal (t).

When minor may sue without next friend—A minor may sue in a Presidency Small Cause Court without a next friend when the amount claimed does not exceed Rs. 500 and is due to him for wages or for work done as a servant. Presidency Small Cause Court Act 15 of 1882 s. 32.

Liability of next friend for costs—Where a suit brought by a minor by his next friend is dismissed and the Court finds that the suit was not for the benefit of the

(g) *Pup Chand v. Dandha* (1904) 30 All. 55, 56.

(s) *Alm v. Jha* (1886) 12 Cal. 48.

(r) *Dinendra v. Wilson* (1901) 28 Cal. 264.

(t) *Hardy v. Fowler* (1884) 10 Cal. 226, 111 & 26.

O. 32, r. 1 *minor, the Court may direct the next friend personally to pay the costs (u). But if the Court finds that there were reasonable grounds for instituting the suit, and the next friend has acted bona fide, the Court will not mulct the next friend in costs, and will direct the costs to come out of the property of the minor (t).*

There is nothing in the Code to authorise a Court to decree costs against a guardian ad litem except in the case referred to in r 11 below (u)

Suit on behalf of an alleged minor who in fact is not a minor.—A suit is instituted on behalf of a person alleged to be a minor by his next friend. It is found that the plaintiff was not in fact a minor at the date of the institution of the suit. In such a case according to the Allahabad (x) Calcutta (y) Madras (z) and Lahore (a) decisions the plaint should be returned for amendment. The Allahabad High Court at one time held that the suit should be dismissed (b) but these decisions have been superseded by the latest Full Bench case (c).

Adult sued as minor.—Where an adult is sued as a minor by his guardian ad litem and a decree is passed against him he is estopped from disputing the validity of the decree if he knew of the suit before the decree was passed. If his property is sold in execution of the decree he is estopped from impeaching the same if he knew of the suit or of the proceedings in execution before the sale (d).

Minor suing as adult—Where a suit is brought by a minor without a next friend and the defendant is aware of the plaintiff's minority but does not object and the plaintiff attains majority before the decree is passed the decree is binding upon the parties (c)

Estoppel—A minor who, representing himself to be a major, collects rents and gives receipts therefor, is estopped from again recovering the rents once paid to him by instituting a suit through a next friend (f). Similarly a minor who representing himself to be of full age sells certain property and executes a deed of sale, is estopped from suing to set aside the sale on the ground that he was a minor at the date of sale (g). But if the purchaser knew that the vendor was a minor, the purchaser could not be said to have been misled by the false representation as to the vendor's age and the suit to set aside the sale would not then be barred (h). A Court of Equity will deprive a fraudulent minor of the benefit of the plea of infancy but he who invokes the aid of the Court must establish not only that a fraud was practised on him by the minor, but that he was deceived into action by the fraud (i). It is clear that if the purchaser knew that the vendor was a minor, he could not be said to have been deceived into action by the minor's misrepresentation as to his age.

Where question of minority is in dispute—Where a person is sued as a major but he claims to be a minor, the Court should frame an issue for the determination of the question of minority and for that purpose appoint a guardian for the alleged minor (f)

- | | |
|---|--|
| (w) Elumalai v Kuppamall (1930) 53 Mad 718 1-8 IC 158 (31) A M 249 Geeseeballa v Chunder Kant (1885) 11 Cal 213 | Rishi Amin v Shankar Lal (1923) 45 All 01 77 IC 30 (74) A A 54 |
| (z) Deikabai v Jefferson (1880) 10 Bom 248 | (c) 54 All 57 supra |
| (x) | (d) Seelapuri v Hanumantha (1915) 39 Mad 1031 32 IC 391 Ramachari v Durai gami (1898) 21 Mal 18" |
| | (e) Ful D bi v Khokar (1978) 50 Cal "10 111 IC 349 ('8) A C 573 |
| | (f) Ram Ratun v Shew Nantan (1907) 29 Cal 126 |
| (y) Tagui Jan v Obaidulla (1894) 21 Cal 866 | (g) Ganesh v Bapu (1897) 21 Bom 194 |
| (z) Shanmuga v Varayutta (1917) 40 Mad "45 41 IC 510 | (h) Mohor v Dharmadas (1903) 30 Cal 539 30 A 114 |
| (a) Amrindra v Gamun (1926) 89 IC 363 (26) A I 8" | (i) Brahma Ditt v Dharmadas (1899) 26 Cal 391 |
| (b) Shorana v Bharat Singh (1899) 20 All 90. | (j) Narai v Sachin Ranath (1930) 54 Bom "5 (29) A B 475 |

Attorney's Costs.—An attorney is entitled to recover from the infant's estate the costs of a proper suit or defence of a suit in which the estate was involved. He is also entitled to have a charge declared on the estate for the amount of his costs (l)

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend plaint to be taken off the file

(2) Notice of such application shall be given to such person and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Taking the plaint off the file.—This rule contemplates the case where a suit is instituted without a next friend by a person who is alleged by the defendant to be a minor. In such a case the defendant may apply under this rule to have the plaint taken off the file. To bring his case within the rule, the defendant must show that the plaintiff is a minor and that the suit was instituted without a next friend. Now the fact of minority—

(i) may either be apparent on the face of the plaint, or

(ii) it may be ascertained upon objection by the defendant and enquiry by the Court

In case (i), the practice is to take the plaint off the file (l)

In case (ii), i.e., where the fact of minority is established after evidence has been taken on the point, it may be found—

(a) that the plaintiff instituted the suit with the knowledge of the fact of minority and with the intention of deceiving the Court and evading the payment of costs in the event of failure, or

(b) that the plaintiff had no such knowledge or intention

In case (a), the practice according to the Bombay decisions, is to make an order under this rule directing the plaint to be taken off the file (m). According to the Calcutta decisions, the Court should pass a decree dismissing the suit. The Calcutta High Court holds that the procedure prescribed by this rule, namely, taking the plaint off the file applies only to those cases where the fact of minority is apparent on the face of the plaint, that is to say, in case (i), and that it does not apply where the fact of minority is established on enquiry held by the Court upon that point (n). The difference between the practice of the two Courts is important in this way, that while an appeal lies from a decree dismissing a suit, no appeal lies from an order directing a plaint to be taken off the file.

In case (b), the practice is to stay proceedings and to allow sufficient time to enable the minor plaintiff to be represented by a next friend (o)

(l) *Hattings v. Dhunnoo Baboo* (1881) 7 Cal 140
Sham Charan v. Chowdhry Detya Singh
 (1884) 21 Cal 872 *Amar Arachna v.*
Hari Narain (1916) 43 Cal 676 33 I C
 708 see also *Branson v. Appasami* (1894)
 17 Mad 257
 (f) *Pani Jam Bahut v. Pam Lal* (1886) 13 Cal
 189 *Rattonbas v. Chabildas* (1889) 13
 B m 7

(m) *Rattonbas v. Chabildas* (1889) 13 Bom 7.
 (n) *Pani Jam Bahut v. Pam Lal* (1886) 13 Cal
 189
 (o) *Pani Jam Bahut v. Pam Lal* (1886) 13 Cal
 189, *Rattonbas v. Chabildas* (1889) 13
 B m 7 *Saradhan v. Manaktani* (1923)
 44 Mad L.J. 515, 74 I C 309, (23) A.M.
 553

O. 32,
rr. 2, 3

The Court should take notice of the irregularity and refuse to proceed even if the suit is *ex parte* (j) If the defendant appears and does not object the Court should not reject the plaint but should allow the plaintiff time to get himself properly represented (q) When a next friend is appointed the objection that the suit was originally instituted without a next friend can no longer be urged (r) If the plaintiff attains majority before the Court has decided that he is a minor there is no necessity to appoint a next friend (s)

Costs—When a suit is instituted by a minor without a next friend the pleader or any other person presenting the plaint is liable for costs and the Court should not render the property of the minor liable for costs (t)

Decree for a minor in a suit instituted by him without a next friend—Where a suit is instituted by a minor without a next friend and the defendant does not object to it he will be deemed to have waived his objection The defendant cannot in such a case after a decree has been passed against him object to the execution of the decree on the ground that the suit was instituted by the minor without a next friend The absence of a next friend does not make the suit a nullity The institution of a suit by a minor without a next friend is merely an irregularity which can be waived by the conduct of the defendant (u)

3. [S. 446, 1st para, S 456.] (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor

Guardian for the suit to be appointed by Court for minor defendant

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule

Sub-rule (4) is new

(p) *Maung San v Maung Myi* (1900) 3 Ban

(q)

(r)

(s) *Rarehan v Manakkal* (1903) 44 Mad. L.J. 515 41 C. 09 (23) A.M. 553

(t) *Am Chand v Collector of Sahar pur* (1939) 13 Bom. 234

(u) *Kamalakshi v Ramasami* (1926) 10 Mad. 10

Guardian ad litem—Where a guardian ad litem has once been appointed, his appointment endures for the whole of the litigation including proceedings in execution and appeal (1) The Calcutta High Court has held that a guardian ad litem appointed in the original suit does not continue as such in execution proceedings without fresh appointment (2) But it is submitted that this is erroneous for execution proceedings are a continuation of the suit

A guardian ad litem is *not* a party to a suit or appeal Therefore a suit or an appeal is not time barred, merely because the order appointing a guardian ad litem is not made until after the expiration of the period of limitation prescribed for the suit or appeal (3)

"Proper" person to be appointed guardian ad litem—It is the duty of the judge himself to decide who is the proper person to be appointed as guardian ad litem (4)

Plea of minority—A sues B B alleges that he is a minor In such a case the Court should frame a preliminary issue of the question of minority, and appoint a guardian for the purpose of the enquiry on the question of minority If the defendant is found to be a minor, a guardian ad litem should be appointed for him, but if he is found to be a major, the guardian appointed for the inquiry should cease to act and the defendant may conduct his own case (5) So also if a dispute arises as to whether a minor is the legal representative of a deceased party, the Court should appoint a guardian ad litem and decide the matter (6)

Minor member of joint Hindu family—Guardian necessary—A decree against a manager of a joint Hindu family as such binds a minor member of the joint family but if the plaintiff impleads the minor in his individual capacity a guardian must be appointed under this rule (7)

Non representation—The provisions of this rule as to the appointment of a guardian ad litem for a minor defendant are imperative Hence if a minor is sued without a guardian ad litem and a decree is passed against him the decree is a nullity and it cannot be enforced against him (8) For the same reason it cannot operate as *res judicata* (9)

The Allahabad High Court has held that a minor against whom a decree has been passed without the appointment of a proper guardian ad litem may if the facts of the case justify, in that very suit, (1) appeal from the decree or (2) apply for a review of judgment or (3) apply for an order under r 5 (2) below, according as the circumstances of the case may permit, or he may bring a regular suit to set aside the decree and the sale (if any) in execution of the decree (10) A minor, however, cannot resist execution of the

(1)

(2)

(3)

(4)

(5) *Jamchandra Das v Jot prasad* (1907) 29 All 63 6-4

(6) *Kari Doss v Karam Sad* (1903) 16 Mad 344

(7) *Yachmani v Ierunagami* (1911) 4 Mad L J 30 80 I C 91* (*4) A M 813

(8) *Chand v Balaji* (1931) 53 All 4-7 129 I C

(9) *Datta v Fakrya* (1920) 44 Bom. 76- 36 I C 455

(10) *Shayran v Faruk Sult Doss* (1917) 32 All. 8 10-11 36 I C 366 *Kam Lal v Gharla* (1901) 23 All. 459 [suit]

O. 32, r. 3 decree on the ground that the decree is a nullity, for a minor not represented by a proper guardian ad litem, as where the guardian ad litem is a person whose interest is adverse to that of the minor (r. 4), "cannot be said to be a party" to the suit within the meaning of s. 47 above (f)

The Allahabad High Court has held that where a decree in a suit against a minor is set aside in a subsequent suit by the minor on the sole ground that he was not represented by a proper guardian ad litem, the Court whose decree is set aside has inherent power to restore the suit and to proceed with the appointment of a fit and proper person as guardian ad litem for the minor defendant (g). But the Madras High Court has held that there is no such inherent jurisdiction (h). Again the Allahabad High Court has held that where an ex parte decree has been passed against a minor not properly represented, the minor may apply to have the decree set aside under O. 9, r. 13 (i). The Madras High Court has held that no such application is competent, the reason given being that a minor not properly represented in a suit cannot be regarded as a "party" to a suit, and an application under O. 9, r. 13, can only be made by a party to the suit (j).

Substantial representation—When a minor defendant is not represented at all as in the cases referred in the preceding paragraph he is not a party to the suit and the decree as against him is a nullity. That must be distinguished from another class of cases where the Court has recognised a guardian ad litem but has made no formal appointment or has made an appointment which is open to objection owing to some defect of procedure. The rule in this latter class of cases is different, for the decree will bind the minor unless it is shown that the defect of procedure has prejudiced him. In this class of cases the leading case is that of *Halim v. Banke Behari* (k). That was a suit brought against a minor, but no order was applied for and none was made for the appointment of a guardian ad litem. In the plaint, however, which was admitted by the Court, the mother of the minor was described as his guardian. Further, the mother appeared throughout the proceedings in the suit as the minor's guardian. A decree was passed against the minor and in the decree and the execution proceedings the mother was described as the minor's guardian. In a suit brought by the minor on attaining majority to set aside the decree passed against him on the ground that no guardian ad litem had been appointed as required by the present rule, it was held by their Lordships of the Privy Council, overruling the decision of the Calcutta High Court, that the Court in which the former suit was instituted had by its action given sanction to the appearance of the mother as a guardian ad litem, and that the absence of a formal order of appointment was not fatal to the suit unless it was shown that the defect in procedure prejudiced the minor. Their Lordships observed that there was nothing in the proceedings of that suit to suggest that the interests of the minor were not duly protected by the mother or that the defect in procedure had prejudiced the minor and they accordingly held that the decree was binding upon the minor. The particular defects of procedure that have been condoned on the ground of no prejudice to the minor are—omission to make a formal order of appointment (l), an appointment made without the affidavit required by r. 3(3)

(f)

(g)

(h) *Ponnaya v. Jangala* (1919) 37 Mad. L. J. 399, 53 I. C. 184. *Arumiga v. Ieruvanappa* (1921) 46 Mad. L. J. 348, 78 I. C. 76. (24) A. M. 489.

(i) (1917) 39 All. 8, 36 I. C. 366, *supra*.

(j) (1919) 37 Mad. L. J. 399, 53 I. C. 184, *supra*.

(k) (1903) 30 Cal. 1021, 30 I. A. 18.

(l) *Kedar v. Protap* (1893) 20 Cal. 11. *Hari v. Bh. Baneshwari* (1888) 15 J. A. 195, 16 Cal. 40. *Suresh Chander v. J. gat Chunder* (1887) 14 Cal. 204. *Syaif Amir v. Sheikh Maslani* (1916) 40 Bom. 541, 37 I. C. 186. *Keshavnasharindra v. Rani Debendra* (1919) 4 Pat. L. J. 213, 48 I. C. 245. *Narain Das v. Ralls* (1915) Punj. Rec. no. 61 p. 270, 31 I. C. 457. *A. H. v. Debi Parashod* (1921) 5 Lah. 38, 75 I. C. 443, (23) A. L. 575. *Talib Ali v. Pursey* (1907) 50 All. 974, 128 I. C. 438, (30) A. A. 644. *Moti Chand v. Balram* (1933) 55 All. 136, 143 I. C. 36, (33) A. A. 116.

being filed (m), or without notice to the minor under r 3 (4) (n), appointment of a Court guardian without notice to the person in whose care the minor is (o) But such irregularities will vitiate the decree if there is prejudice to the minor as in *Sadashu v Trimbal* (p) and *Shail Abdul Karim v Thakurdas* (q), where no formal appointment was made and the minor's interest was not protected, or in *Bhagwan v Param* (r) where a Nazir was appointed guardian without notice to the mother with whom the minor lived and he for want of funds took no steps to defend the suit The rule is well stated by Wallace, J, in *Tirumalacharyulu v Ammisethi* (s) as follows "No irregularity by way of omission to send notice as required by O 32, r 3, shall operate to render void the presumed representation of the minors in a suit, unless such an omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof."

Notice—Notice should be served both on the proposed guardian and on the minor and the wishes of the minor should be considered (t) But if there is no fraud or collusion failure to give notice to the minor is an irregularity which does not justify the Court in setting aside the decree (u)

Service of summons—There is no express provision in the Code for service on minors Hence where the defendant is a minor, he should be served with the summons in the way provided for service upon adults (v) But where a guardian ad litem has been appointed by the Court, service of summons or of notice of hearing in the case of an appeal on such guardian is sufficient (w) As to service in suits brought against wards of Courts of Wards, see Bengal Court of Wards Act, 1879 s 54, and Bombay Court of Wards Act, 1900, s 34

Fraud of next friend or guardian ad litem—A decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult but it is open to the minor to impeach the decree by a suit in cases where the next friend or guardian for the suit has been guilty of fraud or collusion in allowing the decree to be passed against him (x) or of culpable negligence which has brought prejudice to the minor (y)

Probate proceedings—Until a contest arises section 141 of the Code is not applicable to a probate proceeding so as to attract the applicability of this Order But where a will of which probate is sought affects the interests of a minor it may be expedient as a rule of practice to appoint a guardian ad litem (z)

- (m) *Munni Lal v Ghulam Abbas* (1910) 37 I A 287 3 All 287 6 I C 784 *Inam D v J. ranchand* (19 0) 1 Lah 7 55 I C 833
- (n) *Phili v Del's Farshad* (19 4) 5 Lah 38 5 I C 449 (23) A I 575
- (o) *Maruthamalai v Lalani* (1918) 37 Mad 535 18 I C 19 *Lammaswami v Doraswami* (19-3) 44 Ma 1 I J 99 73 I C 409 (23) A M 465 *Lakshmi Kantara v Jagannatharaj* (19 4) 46 Mad L J 1 1 I C 464 (24) A M 41 *Tirumalacharyulu v Ammisethi* (19-4) 46 Mad L J 363 80 I C 541 (4) A M 763
- (p) (19 1) 44 All 10 0 56 I C 393
- (q) (19-4) 55 Cal 1 41 (24) A 4 844
- (r) (1915) 37 All 179 73 I C 63
- (s) (19-4) 46 Mad L J 363 365 80 I C 541 (24) A M 763 See also *Sultan v Haridyan* (19-5) 84 I C 294 (25) A 4 544
- (t) *Fajendra v Irtabdi* (19-1) 6 lat L J 82 59 I C 936 (21) A 1 25
- (u) *Sulka v Lachmi* (19-2) 26 All LJ 834 (24) A 4 621
- (v) *Jatindra v Srinath* (1905) 26 Cal 67 71 2-2 *Abdul v Lpper* (19-10) 35 Cal 147

- 184 See *In the goods of Amrita Lal* (1900) 27 Cal 50 and *Rebella v Rebella* (189 1) C W N 100 (both cases of a vice of citation) See also *Trevelyan on Minors* 4th ed 1 269
- (w) *Isak v Kumar Jyotish* (19-6) 30 C W N 949 97 I C 614 (26) A C 1106 *Dissenting from Surab Ekander v Jugat Chander* (1886) 14 Cal 204 215 See also *Chand Lam v Muhammad Ali* (191-1) Punj Rec no 25 p 115 111 C 31
- (x) *Chandras v Ladhakhu* (1895) 19 Bom 5 1 *Lalla v Lammandan* (1895) 22 Cal 8 *Aggarwal v Bhava* (18-6) 1 Cal 69 *Bini Prasad v Lajja Lam* (1916) 34 All 45 35 I C 63
- (y) *Mst v Raj v Mohamed Ali* (193-2) 54 All 616 13-1 C 465 (32) A A 293 3 B 1 *Brij Lal v Lam Narup* (1926) 49 All 4 89 I C 1014 (26) A A 35 *Amrita v Sudakras* (19-7) 29 Bom L J R 135 105 I C 53 (2) A B 613
- (z) *Radhakshyam Dass v Punja Sundari* (1920) 24 C W N 541 59 I C 674 *Narkhyda v Hironomoye* (19-0) 24 C W N 534 59 I C 435

O. 32,
rr. 3, 4

Execution proceedings.—The provisions of this order do not directly apply to execution proceedings. The non representation of a minor by a guardian ad litem in execution proceedings is not in itself sufficient to set aside an execution sale (a)

4. [Ss. 445, 457 ; ss. 440, 443 ; s. 456, and R. S. C., O. 65, r. 13.]

Who may act as next
friend or be appointed
guardian for the suit

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

Code of 1882.—Sub-r (1) corresponds to ss. 445 and 457 of the Code of 1882 sub-r. (2) to ss. 440 and 443, 2nd paragraph, and sub-r (4) to s. 456, 2nd paragraph and R. S. C. O. 65, r. 13. Sub-r (3) is new. It is in accordance with a Bombay ruling in the undermentioned case (b)

Married woman as guardian ad litem.—Under the Code of 1882, though a married woman could be appointed next friend of a minor plaintiff, she could not be appointed guardian ad litem of a minor defendant. Under this Code she may also be appointed guardian ad litem

(a) *Fau v. Surendra* (1920) 31 Cal. L. J. 91
52 I C 333 *Mafiar Farul v. Abdul*
Said (1926) 30 C W N 26 29 I C
765 (2) A C 109, *Banai Dhar v.*

Mohammed Suliman (1926) 8 Lah. L.J.
461, 97 I C 1-1 (26) A L 490.

(b) *Jalov v. Chhapra* (1901) 5 Bom. 305

Sub rule (1) adverse interest.—This rule provides that a person whose interest is adverse to that of a minor should not be appointed guardian ad litem. This has given rise to the question whether if a minor is represented by a guardian ad litem whose interest is adverse to that of the minor the decree passed in the suit is a nullity. The leading case on the subject is *Rishid un nissa v. Mufarimal (c)*. In that case a suit was brought by a minor for a declaration that two decrees and three sales in execution affecting her share in her father's estate were invalid as against her as she was represented in the suit by her uncle whose interest was obviously adverse. The Subordinate Judge decreed in her favour but the High Court set aside the decree holding that the suit was barred by sec. 244 of the Code of 1882 (now sec. 47) and that the proper course for the plaintiff, if he had any objection to make to the execution of the decrees, was to raise it in execution proceedings. The judgment of the High Court, however, was reversed in appeal to the Privy Council. In the course of the judgment their Lordships said: "With all respect to the learned judges of the High Court their Lordships are unable to agree with this conclusion. Sec. 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister Ufat un nissa was a married woman and therefore disqualified under sec. 457 of the Code from being appointed guardian for the suit, and if *Mufarimal's* [uncle's] interest is obviously adverse to that of the minor. This decision has been followed by the High Court of Madras and it has been held that where the interest of a guardian ad litem is obviously adverse the decree is a nullity (d). A similar view has been taken by the High Court of Allahabad (e). The same point was raised in another Madras case but the learned judges said that they were not prepared on the facts of this case to hold that the guardian ad litem was so wholly disqualified as to render the suit null but they stated as a reservation at all (f). In a later case (g) the same question was raised and whether *Rishid un nissa v. Mufarimal* went to the point raised in the present case. A guardian ad litem whose interest was adverse rendered the suit null and void in every case (h).

The question whether a guardian ad litem appointed by the Court has an interest adverse to that of the minor is one of fact. Where a mortgage or other transaction has been entered into by a person on behalf of a minor and a suit is brought against the minor to enforce the transaction the question arises whether such person can be appointed the guardian of the minor for the suit. It has been held by a Full Bench of the Madras High Court that there is nothing either in the Code of Civil Procedure or in any of the authorities to lay down not merely that such a person should not be appointed but cannot in any circumstances be validly appointed (i).

Sub rule (2) guardian appointed by competent authority.—A guardian of his minor son appointed by a Hindu father under his will is not a guardian appointed by competent authority within the meaning of this rule (j).

Sub rule (3) provides that where a minor has a guardian appointed by competent authority no person other than such guardian shall be appointed his guardian ad litem. The Allahabad High Court has held that where the Court is in ignorance of the fact that the minor has a guardian appointed by competent authority appoints another person as guardian for the suit such appointment is not an illegality but a mere irregularity, and it

(c) (1930) 36 L. A. 169 (75) 31 All. 57. 31 C.

(d) *Sellappa Chundan v. Mada Nallem* (1941) 47 Mad. 79 76 L. C. 114 (74) 4 M. 9.

(e) *Airways Ltd. v. Syed Hussain Ali* (1940) 46 All. 61 (1941) 550 C. 41 A. 751.

(f) *Ayyappasamy v. Kamaammal* (1941) 43

(g) *Mad. 84, 50 L. C. 100*

(h) *Rishid un nissa v. Mufarimal* (1931) 57 Cal. 1, 11 (1931) 4 All.

(i) *Indulal Mondal v. J. S. Indulal Mondal* (1941) 50 Mad. 5 115 L. C. 101

(j) *Indulal v. J. S. Indulal* (1941) 31 L. C. 113

on a false affidavit that there is no other person fit and willing is vitiated by fraud and is of no legal effect. A decree so obtained is not binding on the minor (b). But the mere fact that no inquiry has been made by the Court into the question whether there was any other person fit and willing to act as guardian ad litem does not make the decree a nullity; the case is merely one of irregularity (c). The Deputy Registrar who has been appointed guardian of minor respondents in a High Court appeal may also be appointed to represent them in proceedings for obtaining leave to appeal to Privy Council but upon the final admission of the appeal he ceases to represent them (d). The High Court cannot provide for the costs of a guardian ad litem in an appeal to Privy Council (d). As to irregularities in the appointment of a Court guardian see notes under rule 3 above.

5. [Ss. 441, 444.] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub rule (2), shall be made by his next friend or by his guardian for the suit.

Representation of minor by next friend or guardian for the suit

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

6. [S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—

Receipt by next friend or guardian for the suit of property under decree for minor

- (a) by way of compromise before decree or order, or
(b) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

(b) *Parathan v. Manakhal* (1923) 44 Mad. L. J. 515. 41 C. 288 (23) A. M. 553.
(c) *Hutenda v. Sakdab* (1924) 8 Pat. 554.

115 I. C. 846, (29) A. P. 369.
(d) *Maharaja of Kutch v. Ali Ahmad* (1928) 55 Cal. 244. 106 I. C. 867 (24) A. C. 286.

O. 32,
rr. 6, 7

Joint Mitakshara family.—The Calcutta High Court had held that this rule did not apply when the next friend was the manager of a Mitakshara joint family of which the minor was a member and that qua manager he could receive monies due on a decree in favour of himself and the minor (e). But this conflicts with the Privy Council ruling in *Ganesh Rao v. Tuljaram* (f) that a manager of a joint family if he is a next friend or guardian is subject to the control of the Court and that he cannot do in his capacity of manager acts that he is debarred from doing as next friend or guardian without the leave of the Court. Accordingly when payment under a decree in favour of a minor and of the manager of a joint Hindu family was certified to the Court by the manager alone who was the next friend of the minor, the Court refused to record it as the leave of the Court had not been obtained, and for the same reason the Court refused to recognize the payment as a valid discharge and granted an execution application for the recovery of the whole amount (g).

Security for protection of minor's property.—A bond passed by a surety under sub r (2) cannot be enforced by summary process under s 145 (h). The Court may authorize a person to enforce the bond by suit. Such authorization is not an assignment to which the Transfer of Property Act applies and no deed is necessary and the order of the Court is sufficient (i).

Protection of property of deceased person.—This rule does not control s 194 of the Indian Succession Act, 1929. If property left by a deceased is delivered to the possession of a guardian on behalf of a minor no security is necessary (j).

7. [S. 462.] (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Agreement or compromise by next friend or guardian for the suit

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Alterations in the rule.—The words "expressly recorded in the proceedings" in sub r (1), and the words "so recorded" in sub r (2), are new. They give effect to the practice established under the old section. See notes below, "Compromise decree when binding on a minor."

Scope of the rule.—This rule contemplates the following steps to be taken in order before a compromise decree is passed in a suit to which a minor is a party, namely, (1) an application by the next friend or guardian ad litem for leave to compromise the suit, (2) the granting of leave by the Court if the Court thinks the case is a fit one for leave, and (3) the consent of the next friend or guardian ad litem to the proposed compromise after the Court has granted the leave (k). If the leave is granted, and the next friend or guardian ad litem assents to the compromise, the parties may apply to the Court under O 23, r 3, for a consent decree in terms of the compromise, and if the compromise is lawful, it is the duty of the Court under that rule to pass the decree applied

- (e) *Hanbar Pershad v. Mathura Lal* (1908) 35 Cal 561
(f) (1913) 40 I A 132 30 Mad 295 19 I C 515
(g) *Pitchakkulatti v. Doraiswami* (1944) 47 Mad L J 498 82 I C 588 (2a) A M 230
(h) *Kurugodappa v. Soogamma* (1918) 41 Mad

(i) 40 33 I C 978

(j)

(k)

for If the next friend of a minor plaintiff agrees to compromise a suit on behalf of the minor subject to the leave of the Court, and then withdraws from the compromise before the leave of the Court is applied for, the Court will not enforce the compromise at the instance of the defendant, even though the terms of the compromise might appear beneficial to the minor. The reason is that such compromise is not binding unless it is sanctioned by the Court (l). The Court cannot force a compromise upon a minor against the opinion of the guardian ad litem or next friend (m). But if the guardian or next friend is acting improperly in refusing to consent to a beneficial arrangement, the Court may take steps to remove him and substitute some other person (n).

Compromise decree when binding on minor—The provision contained in this rule making it necessary to obtain the leave of the Court is of great importance for the protection of minor's interests (n) and it has been extended to a compromise by a natural guardian who has put herself in the place of a guardian ad litem by applying to the Court to sanction a compromise (o). To render a decree passed in pursuance of a compromise binding on a minor, the following conditions must be complied with—

- (a) The next friend or guardian ad litem must apply to the Court for leave to enter into the proposed compromise (p), stating specifically that the compromise is sought to be made on behalf of the minor (q), and also setting forth the terms of the proposed compromise (r).
- (b) On such an application being made to the Court the Court must exercise a judicial discretion as to the propriety, in the interests of the minor, of the proposed compromise (s). It is not possible to lay down any hard and fast rule as to what materials a Judge may call for before he is satisfied with the compromise and that is a matter which must be left to his discretion (t). And if the Court sees reason to grant leave it should record an order showing that an application has been made to it that the terms of the proposed agreement or compromise have been considered by it, and that having regard to the interests of the minor, it has granted leave to make the agreement or compromise (u). 'It is not sufficient that the terms of a compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained (v). A compromise will be deemed to be beneficial to the interests of a minor if it secures to the minor some demonstrable advantage, or averts some obvious mischief (w). A certificate of counsel for the minor that the compromise is for his benefit is according to ordinary practice sufficient (x).

- (l) *Panga v. Pajapala* (1899) 20 Mad 379.
- (m) *Gulab Devi v. Lash Malor Co.* (19-5) 4 All 782 881 C 4 9 (20) A 4 570.
- (n) *Hemangini v. Bhagwati* (19-3) 22 C W N 792 751 C 65 (23) A C 6-5.
- (o) *Subramanian v. Paja Jayaswara* (1916) 39 Mad 115 12 3-1 C 254 (1 C).
- (p) *Gurmallappa v. Mallappa* (19 0) 44 Bom 5 4 5 1 C 41.
- (q) *Kalivati v. Chedu* 1 (1890) 17 All 531.
- (r) *Manohar Lal v. Jadunath Singh* (19 0) 24 All 5-5 331 C 1.
- (s) *Gurmallappa v. Mallappa* (19 0) 26 F m 11.
- (t) *Kalarati v. Chedu* 1 (1890) 17 All 531.

- (u) *Dharmas nath v. Kusandas* (19 6) 28 Bom L R 30 941 C 101 (26) A B 231.
- (v) *Manohar Lal v. Jadunath Singh* (19 0) 23 All 5-5 331 A 124 *Kalarati v. Chedu* 1 (1890) 17 All 531 *Gorindasami v.*
- (w) 2
- (x)

O. 32, r. 7

In Bombay it has been held that in sanctioning a compromise as for the benefit of a minor the Court should have before it an affidavit by the next friend or guardian of the minor to that effect and in heavy cases there should be an opinion of counsel or else a statement by counsel at the bar that in his opinion the compromise is for the benefit of the minor. It has also been held that the Court is not bound to pass a decree in the exact form of the terms of the compromise agreed to by the parties and that it may make such alterations as it deems expedient (y).

- (c) The leave must be *express*, not implied. It must, in the language of this rule, be *expressly recorded* in the proceedings. From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court. The Court by passing a decree in pursuance of a compromise does not *per factum* sanction the compromise (x). The provisions of this rule are complied with if the leave of the Court is expressly recorded, it is not necessary that the order granting leave should state that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor (a).

But the non-observance of the above conditions does not render the compromise decree void or affect the jurisdiction of the Court to record it (b). The decree is only *voidable*, and that too at the option of the minor. No other party to the suit can call the decree in question, the minor alone is entitled to call it in question, and thus he may do either on attaining majority or before then through a next friend (c).

Procedure to set aside compromise decree—A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree (d). But it cannot be called in question by way of objection to any proceeding taken in execution of it (e).

It was doubtful whether under the Code of 1852 a compromise decree can be set aside by an *appeal* from the decree. Where an appeal was preferred from a compromise decree on the ground that the lower Court did not consider the question as to whether the compromise was a proper one in the interests of the minor, the High Court of Allahabad entertained the appeal (f), in a similar case, the High Court of Calcutta refused to entertain the appeal (g). Under the present Code no appeal lies from a consent decree [s. 96, sub-r (3)].

Compromise under misapprehension of a material fact—Where a compromise is entered into under a misapprehension of a material fact, it will be set aside even though it may have been sanctioned by the Court under this rule (h). See Indian Contract Act 1872, s. 20. Something in the nature of fraud must be shown before a compromise sanctioned by the Court is set aside (i).

(g) *Chandulal v. Nagindas* (1909) 31 Bom. L. R. 621 119 I. C. 663 (29) A. P. 350.

(i) *Manohar Lal v. Jadunath Singh* (1906) 23 All. 550 33 I. A. 122. *Parthab Singh v. Lakshmi Singh* (1913) 32 All. 422 40 I. A. 142, 21 I. C. 244. *Virupakishappa v.*

Lah. 164 62 I. C. 794 (27) A. L. 166

Jahan Chandra v. Narsaran (1923) 2 Pat. 534 50 I. C. 1049 (23) A. P. 124. *Padurani Kuvavar v. Jambhavar* (1911) 46 All. 575 83 I. C. 72 (24) A. A. 625. *Tarubala v. Sourdendra* (1905) 29 C. W. N.

(d)

(e)

(f)

(g)

(h)

(i)

(a) *Janki v. Nandimal* (1917) Punj. Rec. 36, p. 146 33 I. C. 53.

(b) *Fam. Gulum v. Sham Sahas* (1929) 5 Pat. L. J. 39 62 I. C. 234.

(c) *Virupakishappa v. Shidappa* (1900) 26 B. M. 109. *Jita Singh v. Manmohar* (1911) 2

Minor attaining majority pending suit.—If the minor attains majority while the suit is still pending a compromise entered into by his guardian is not binding on him even though it has been sanctioned by the Court (j)

Compromise of execution proceedings.—Execution proceedings are a continuation of the suit and a next friend or guardian cannot after decree enter into a compromise or an adjustment of the decree without the sanction of the Court (l) See O 21, r 2 And this is so even though the guardian ad litem had power as natural guardian to sell the minor's property (l) But the rule is confined to an agreement, or compromise in the course of the suit A transfer by a guardian ad litem of a decree in favour of a minor made not with reference to the suit or execution proceeding does not require the sanction of the Court (m)

Agreement to be bound by oath under Indian Oaths Act, 1873, s. 9, not within this rule.—An agreement by the next friend (n) or guardian (o) of a minor that an issue in the suit should be determined by the oath of the defendant, does not come within the purview of this rule, and the sanction of the Court is not necessary In such a case the minor is bound by the agreement, provided there is no fraud or gross negligence on the part of the next friend

Abandonment of issue does not amount to a compromise.—A next friend or guardian ad litem may abandon an issue in the course of the trial of the suit and the sanction of the Court is not requisite for that purpose, for the abandonment of an issue does not amount to a "compromise" within the meaning of this rule The abandonment is binding on the minor provided there is no fraud or gross negligence on the part of the next friend or guardian ad litem (p)

Agreement to refer to arbitration—It has been held by the High Courts of Madras (q) and Bombay (r) and by the Chief Court of the Punjab (s), that an agreement by a next friend or guardian ad litem to refer any matter in controversy in a suit to arbitration is an agreement within the meaning of this rule, and that the sanction of the Court is therefore necessary According to the Allahabad High Court such an agreement is not within this rule, and the sanction of the Court is not necessary (t) See schedule II, r 1

The decisions cited above relate to cases where the agreement to refer was made during the pendency of a suit But cases also occur in which no suit is pending and an agreement to refer is made to which a minor is a party by his guardian In such cases the application of the rule depends upon whether—

- (1) that there should be a pending suit as indicated by the words "no next friend or guardian for the suit," and
- (2) that there should be an agreement to refer

- | | |
|---|--|
| <p>(j) <i>Savvasi v. Iyeran Naidu</i> (1928) 51 Mad 1763 (28) A M 204</p> <p>(k) <i>Virupakshappa v. Shitappa</i> (1902) 26 Bom 101 <i>Arunachalam v. Pamanandham</i> (1906) 21 Mad 303 <i>Darud v. Iramasami</i> (1916) 31 Mad L J 307 35 I C 70 <i>Ilavedin Kanakappa v. Mulpuru</i> (1921) 41 Mad L J 75 63 I C 285 (21) A M 57 <i>Kanalappa v. Venkataramayya</i> (1925) 49 Mad L J 443 90 I C 1049 <i>(25) A M 127</i> <i>Muthukattammal v. Narappa</i> (1931) 56 Mad 43 142 I C 62 (33) A M 456 31</p> <p>(l) <i>Gurmalappa v. Malappa</i> (1920) 44 Bom 574 57 I C 417</p> <p>(m) <i>Corundarajulu v. Ianoa Pao</i> (1921) 40 Mad L J 124 62 I C 205 (21) A M 115</p> <p>(n) <i>Chengal v. Venkata</i> (1889) 12 Mad 483 <i>Ara Nath v. Nuth Lal</i> (1900) 27 Cal 229</p> <p>(o) <i>Dewan v. Akbar</i> (1927) 49 All 842</p> | <p>102 I C 38 (27) A A 584</p> <p>(p) <i>Venkata v. Lhasalvalarlu</i> (1899) 22 Mad 538 See also <i>Swamirao v. Collector of</i></p> <p>(q) " " " " " "</p> <p>(r) " " " " " "</p> <p>(s) <i>Ganesha v. Mulchand</i> (1917) Punj Rec 95 p 38 151 I C 161 (16 R) <i>Muhammad Ibrahim v. Allah Jushk</i> (1919) Punj Rec 145 p 37 152 I C 327</p> <p>(t) <i>Hardeo v. Gouri Shankar</i> (1906) 25 All 31 <i>Lalawan v. Lachya</i> (1914) 36 All 21 1 C 309 (16 R)</p> |
|---|--|

O. 32, r. 7

In Bombay it has been held that in sanctioning a compromise as for the benefit of a minor the Court should have before it an affidavit by the next friend or guardian of the minor to that effect and in heavy cases there should be an opinion of counsel or else a statement by counsel at the bar that in his opinion the compromise is for the benefit of the minor. It has also been held that the Court is not bound to pass a decree in the exact form of the terms of the compromise agreed to by the parties and that it may make such alterations as it deems expedient (y)

- (c) The leave must be *express*, not implied. It must, in the language of this rule, be *expressly recorded* in the proceedings. From the mere fact that the Court has passed a decree in accordance with a compromise it cannot be inferred that any of the steps preliminary and necessary to the making of the decree have been taken by the Court. The Court by passing a decree in pursuance of a compromise does not *ipso facto* sanction the compromise (z). The provisions of this rule are complied with if the leave of the Court is expressly recorded, it is not necessary that the order granting leave should state that the Court had considered the terms of the compromise and regarded them to be beneficial to the minor (a)

But the non observance of the above conditions does not render the compromise decree void or affect the jurisdiction of the Court to record it (b). The decree is only voidable, and that too at the option of the minor. No other party to the suit can call the decree in question, the minor alone is entitled to call it in question, and this he may do either on attaining majority or before then through a next friend (c)

Procedure to set aside compromise decree—A compromise decree may be set aside either in a regular suit or upon an application for review to the Court that passed the decree (d). But it cannot be called in question by way of objection to any proceeding taken in execution of it (e)

It was doubtful whether under the Code of 1882 a compromise decree can be set aside by an *appeal* from the decree. Where an appeal was preferred from a compromise decree on the ground that the lower Court did not consider the question as to whether the compromise was a proper one in the interests of the minor, the High Court of Allahabad entertained the appeal (f), in a similar case, the High Court of Calcutta refused to entertain the appeal (g). Under the present Code no appeal lies from a consent decree [s 96 sub r (3)]

Compromise under misapprehension of a material fact—Where a compromise is entered into under a misapprehension of a material fact it will be set aside even though it may have been sanctioned by the Court under this rule (h). See Indian Contract Act 1872, s 20. Something in the nature of fraud must be shewn before a compromise sanctioned by the Court is set aside (i)

(y) *Chaudhulal v. Nagindas* (1929) 31 Bom. L. R. 621 119 I C 663 (20) A B 350 n

(z) *Id.*

Jah 164 6 I C 794 (22) A L 166

(i)

(e)

(a) *Janki v. Naunihal* (1917) Punj Rec no 36 p 146 39 I C 53

(b) *Ram Gulam v. Sham Nihal* (1900) 5 Pat L J 379 62 I C 234

(c) *Tirupathappa v. Shidappa* (1900) 26 Bom 109 *Jita Singh v. Man Singh* (1921) 2

(f)

(g)

(h)

(d)

Minor attaining majority pending suit.—If the minor attains majority while the suit is still pending a compromise entered into by his guardian is not binding on him even though it has been sanctioned by the Court (1)

Compromise of execution proceedings.—Execution proceedings are a continuation of the suit and a next friend or guardian cannot after decree enter into a compromise or an adjustment of the decree without the sanction of the Court (1). See O 21, r 2. And this is so even though the guardian ad litem had power as natural guardian to sell the minor's property (2). But the rule is confined to an agreement, or compromise in the course of the suit. A transfer by a guardian ad litem of a decree in favour of a minor made not with reference to the suit or execution proceeding does not require the sanction of the Court (3).

Agreement to be bound by oath under Indian Oaths Act, 1873, s 9, not within this rule.—An agreement by the next friend (n) or guardian (o) of a minor that an issue in the suit should be determined by the oath of the defendant, does not come within the purview of this rule, and the sanction of the Court is not necessary. In such a case the minor is bound by the agreement, provided there is no fraud or gross negligence on the part of the next friend.

Abandonment of issue does not amount to a compromise.—A next friend or guardian ad litem may abandon an issue in the course of the trial of the suit and the sanction of the Court is not requisite for that purpose, for the abandonment of an issue does not amount to a "compromise" within the meaning of this rule. The abandonment is binding on the minor provided there is no fraud or gross negligence on the part of the next friend or guardian ad litem (n).

Agreement to refer to arbitration—It has been held by the High Courts of Madras (q) and Bombay (r) and by the Chief Court of the Punjab (s), that an agreement by a next friend or guardian ad litem to refer any matter in controversy in a suit to arbitration is an 'agreement' within the meaning of this rule, and that the sanction of the Court is therefore necessary. According to the Allahabad High Court such an agreement is not within this rule, and the sanction of the Court is not necessary (t). See schedule II, r 1.

The decisions cited above relate to cases where the agreement to refer was made during the pendency of a suit. But cases also occur in which no suit is pending and an agreement to refer is made to which a minor is a party by his guardian. In such cases the application of the rule depends upon whether—

- (1) that there should be a pending suit as indicated by the words 'no next friend or guardian for the suit, and
- (2) that there should be an agreement to refer

(j) Samayal v Jeyanaidu (19-2) 51 Mad
63 (2-) A M 294

(k)

(l)

(m) Govindaswami v Pappa Rao (19-1) 40 Mad
1, 2 124 82 I C 2-5 (21) A M 115

(n) Chengal v Venkata (18-5) 12 Mad 483
Naraiah v Nalla Lal (19-8) 2 Cal 227

(o) Jeeva v Akkaraju (19-7) 49 All 842

(p) Venkata v Jijashvatarlu (18-9) 22 Mad
534 See also Narasimha v Collector of

(q)

(r)

(s) Ganesh v Mulchand (1912) Punj Rec
no 95 p 230 15 I C 161 [B], 3M
Ammad Ibrahim v Allah Lakhsh (1919)
Punj Rec no 145 p 371 52 I C 32-

(t) Hardeo v Gouri Shanker (1906) 24 All
35 Lalauar v Lakhya (1914) 36 All
60 21 I C 9-9 [B].

O. 32, r. 7 If either of these conditions is wanting, the present rule does not apply and no leave of the Court is necessary. *A* and *B* carry on business in partnership. *A* dies leaving a minor son and a widow. Disputes arise between the parties as to accounts, and an agreement is made between the minor through his mother and *B* to refer the disputes to arbitration. The arbitrators make their award, and the minor, by his mother, applies to file the award under para 20 of Sch II. The application is registered as a suit between the minor applicant as plaintiff and *B* as defendant [see the 2nd clause of para 20]. Notice is then given as required by the 3rd clause of para 20 to *B*, and no objection to the award having been made by *B*, the award is filed and a decree passed in terms of the award as provided by para 21 of Sch II. Does the agreement to refer require the sanction of the Court under this rule? No, because it was not made during the pendency of a suit and the first of the two conditions mentioned above is wanting (v). Does the decree on the award require the sanction of the Court? No, because the application to file the award being made by the minor as plaintiff, it cannot be said that there was an agreement on behalf of the minor not to object to the award and to allow a decree to be passed on the award, in this case the second of the two conditions mentioned above is wanting (t). Again if the application to file the award was made by *B*, in which case the application would be registered as a suit between *B* as plaintiff and the minor as defendant, would the decree on the award require the sanction of the Court? Yes if the minor's guardian agreed not to object to the award and to allow a decree to be passed on the award, in this case both the conditions mentioned above are present, namely, that there is an agreement on behalf of the minor and the agreement is made in the course of a suit started by the application to file the award (u). Similarly if a suit is referred to arbitration a compromise entered into by a guardian of a minor cannot be accepted by the arbitrator without the sanction of the Court (w).

Withdrawal of suit by next friend—If the next friend of a minor plaintiff withdraws from the suit and such withdrawal is in pursuance of an agreement or compromise entered into with the defendant, the withdrawal must be with the sanction of the Court under this rule, if the sanction of the Court is not obtained, the order of withdrawal may be set aside at the instance of the minor (x). If an appeal is withdrawn on terms and there are parties concerned who are not *sui juris*, the leave of the Court must be obtained (y). But if the withdrawal is not in pursuance of an agreement or compromise entered into with the defendant, the sanction of the Court is not necessary, and the withdrawal is binding on the minor plaintiff, provided there is no fraud or gross negligence on the part of the next friend (z).

Where the minor is a member of a joint Hindu family—In a suit brought by some of the members of a joint Hindu family one of whom was a minor, a compromise decree was passed after the compromise had been sanctioned by the Court. The minor had no separate interest, the adult members of the family had taken part in the compromise and assented to it and the Court declared that it was for the benefit of the minor. In a suit brought on behalf of the minor to set aside the compromise decree on the ground that the proper materials which were essential to make the compromise and decree binding upon him were not placed before the Court previous to obtaining its sanction, it was held that the decree was under the circumstances binding on the minor (a).

(u) *Yathalak v Dattaram* (1902) 26 Bom 298
(v) *Hannamram v Shannarayan* (1919) 43 Bom 258, 48 I C 238 (F B)

(t) .

(z) .

27 Mad 377
(y) *Sakunabai v Shrinai* (1920) 47 I A 88
27 Bom L R 53, 55 I C 943

(z) *Ram Sarup v Shah Lalajot* (1902) 29 Cal 735
Rajada v Ghulla (1919) 120 Ind Re 59 p 148 47 I C 508

(a) *Rameswar Iershad v Ram Bahadur Shag*
(190) 34 Cal 70

When the father of a minor, a member of a joint Hindu family, of which the father is the managing member, is appointed his *guardian ad litem*, his powers as managing member, so far as they relate to the minor's interest, are controlled by the provisions of the present rule, and he cannot, without the leave of the Court, enter into any agreement of compromise on behalf of the minor with reference to the suit. Such an agreement is not binding on the minor even if it was a *bona fide* settlement of a disputed claim (f).

Minor in charge of Court of Wards—The sanction of the Civil Court required by this rule is not necessary, having regard to the provisions of ss 18 and 21 of the Court of Wards Act (Beng Act 9 of 1879), to validate a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under its charge (c).

Mutation proceedings—The sanction of the Court is not necessary to a compromise on behalf of a minor of mutation proceedings in a Revenue Court under s 231 of the Oudh Land Revenue Act, 1901 (d).

Joint bond by a Minor and an adult—In a compromise of a suit two defendants of whom one is a minor, enter into a bond by which they jointly agree to pay a certain sum of money to the plaintiff at a future date. The leave of the Court is not obtained on behalf of the minor as required by this rule. The bond is not enforceable against the minor, but it is enforceable to the full amount against the adult promisor (e).

8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

Retirement of next friend—A suit is brought by A and B both minors by their mother as their next friend. The mother is also appointed guardian of the person and property of the minors under the Guardian and Wards Act 1890. Subsequently, on the application of the mother A who has then attained majority is appointed guardian of the person and property of B in her place. This is not tantamount to A being appointed next friend of B for the suit. The mother therefore cannot retire without first procuring a fit person to be put in her place and giving security for the costs already incurred (f).

9. [S. 448.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within

(b) *Ganesa Iyer v. Tuljaram Poo* (1913) 36

Mil 205 40 IA 132 19 IC 515

(c) *Nakima v. Lemba* (1917) 44 Cal 8 9 3 IC

9 1

(d) *Silla v. Sargur* (1932) Luck 493 136 IC

254 (37) 40 44

(e) *Jemna Iyer v. Iyand Iyer* (1916) 43 J A,

99 39 Mil 4 31 IC 213

(f) *Dhanraj Prasad v. Ram Narain* (1905) 30

All 105

O. 32,
rr. 9, 10

British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

Alterations in the rule—The words and make such other order as to costs as it thinks fit in sub r (1) are new The words and shall thereupon appoint etc at the end of sub r (2) are also new

Where the next friend does not do his duty—Where a Court finds that a next friend does not do his duty in relation to a suit it is its duty not to permit him to prejudice the interests of the minor but to adjourn the suit in order that some one interested in the minor may apply on behalf of the minor for the removal of the next friend and for the appointment of a new next friend or that the minor plaintiff himself may on coming of age elect to proceed with the suit or withdraw from it (g) So also if he is acting improperly in refusing to consent to a beneficial compromise (h)

Appeal after expiry of limitation period—In a suit brought against a minor by his guardian a decree is passed against the minor The interest of the minor requires

to be
and
nted
riod

of limitation for the appeal may have expired (i)

Non appearance of next friend—When the next friend does not appear the suit should not be dismissed for default even though a reservation is made that such dismissal is without prejudice to the minor The proper course is to stay further proceedings pending the appointment of another next friend (j)

10. [Ss. 448, 449] (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place

Stay of proceeding on removal etc of next friend

(g) *Dorairam v Thangaraj* (1904) 27 Mad 377
(h) *Hemangul v Bhagwati* (1903) 27 C W N 51 C 65 (3) A C 655

(i) *Carsandas v Ladhachao* (1890) 90 B m 104
(j) *Krit v Chanchal* (1911) 6 Pat L J 317 63 I C 30 (1) A P 193

(2) Where the pleader of a suit is a minor, and no other person is appointed, any person interested in the suit may apply to the Court for an order, and the Court may appoint such person as it thinks fit.

Proceedings shall be stayed—If no other person is appointed, the suit cannot abate until three years after the minor attains majority.

11. [Ss. 458, 459.] (1) Where a minor plaintiff desires to retire from a suit, or where other sufficient persons are appointed to appear, the Court may order the guardian to retire or may remove him in such order as to costs as it thinks fit.

(2) Where the guardian for the minor is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

The words 'may permit such guardian to retire' in section 458 mean that the guardian does not cease to be a guardian merely because he retires. Until he is removed by the Court he represents the minor. If the guardian does not appear in an appeal does not necessarily mean that he is to act for he may think it is in the interests of the minor not to appear. The appellate Court is not in a position to judge whether the interests of the minor are being properly looked after it may make a formal order removing the guardian and appoint a new guardian in his place (n). The High Court of Patna has held that it is necessary to give notice under rule 3 (4) before appointing a new guardian (o).

Appointed guardian refuses to appeal—Appeal by natural guardian not competent—If a decree is passed against a minor and the natural guardian ad litem refuses to appeal it is not competent to the father or mother to prefer an appeal joining the guardian ad litem as a pro forma respondent, but he may annex to his appeal an application to remove the guardian ad litem and appoint himself instead. If that application is granted the appeal may be treated as properly filed (p).

12. [Ss. 450, 453.] (1) A minor plaintiff or a minor defendant, when a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

(k) *Pul v. Pul* (1933) 3 C. W. N. 184, 144 I. C. 62 (33) A. C. 504.

(l) *Kuppaswami v. Kuppaswami* (1933) 50 Mat. 357, 101 I. C. 349 (33) A. M. 534.

(m) *Zarina v. Harzaddi* (1933) 59 Cal. 11 & 140, 1 C. 832 (33) A. C. 833.

(n) *Uppendy v. Dinkha* (1933) 37 C. W. N. 971, 146 I. C. 874 (33) A. C. 794.

(o) *Radha Krishna Copal v. Lalshmi Narayan* (1933) 2 Lat. 273, 11 C. 341 (33) A. M. 345.

(p) *Lalshmi v. Muhammed* (1930) 52 All. 641, 124 I. C. 44 (30) A. A. 456.

O. 32,
rr. 12-14

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus —

“ A B, late a minor, by C D, his next friend, but now having attained majority ”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend

(5) Any application under this rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend

When title to be corrected.—The provisions of this rule which require the title of a suit to be corrected apply to a *pend ng* suit and not to a suit in which a final decree has been passed and in which it only remains to proceed in execution (g)

Next friend's indemnity for costs.—Under sub rule (4) the next friend has a right of indemnity for costs against the minor who abandons a suit on attaining majority unless the minor can show that the action was improperly instituted (q1) See O 3 r 14 (?)

13. [S. 454] (1) Where a minor co plaintiff on attaining majority desires to repudiate the suit he shall apply to have his name struck out as co plaintiff, and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit

Where minor co-plaintiff
attain n^o majority
to repudiate suit

(2) Notice of the application shall be served on the next friend, on any co plaintiff and on the defendant

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs

(4) Where the applicant is a necessary party to the suit the Court may direct him to be made a defendant

Sub-r (4) is new

14. [S. 455] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper

Unreasonable or improper suit

(2) *Doorga Mohun Das v Tah r Ally* (1890) 11 Cal 100
(31) *Chakanna v DhanaLoti* (1933) Mad

L. J 841 See *ceden v Walden* (1910) Ch 395

(2) Notice of the application shall be served on all the parties concerned, and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit

See note Next friend's indemnity for costs under O 32 r 12

15. [S 456] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued

Applicat n of rules to
persons of unsound mind

P. 32, r. 16

16. [S. 464.] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

A ruling chief sued in his personal capacity, if not domiciled in British India, is not subject to the Majority Act. If he has attained majority according to his personal law, no guardian ad litem need be appointed (w)

ORDER XXXIII.

Suits by Paupers.

P. 33, r. 1

Suits may be instituted in forma pauperis

1. [S. 401.] Subject to the following provisions, any suit may be instituted by a pauper.

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

Scope and object of the order.—A plaintiff suing in a civil Court must pay the Court fee prescribed by law for the plaint and subsequent proceedings in the suit. These fees are prescribed by the Court Fees Act VII of 1870. But a person may be poor to pay the Court fee, and the object of this Order is to enable such person to bring and prosecute suits without payment of Court fees (x). There are, however, certain fees from which even a pauper is not exempted, namely, fees for service of process; such fees must be paid by him (r. 8). If the pauper succeeds in the suit, the Court has a first charge on the subject-matter of the suit for the amount of the Court fees which would have been paid by him if he had not been permitted to sue as a pauper (r. 10). If the pauper fails in the suit, the Court should order him to pay the Court fees due by him (r. 11). An order directing a pauper plaintiff to pay the defendant

An order granting leave to file a suit in forma pauperis is not a judgment within the meaning of cl. 15 of the Letters Patent and is not appealable as such (a)

(w)

(x)

(y)

(z) *Lim Pin Sun v. Eng Wan Hock* (1928) 6 Rang 561, (28) A R 308

(a) *Ma Than v. Maung La* (1926) 4 Rang 24, 95 I C 523, (26) A R 110

application for permission to sue as a pauper shall contain the particulars required in regard to plants in suits and to immovable property belonging to the applicant, and the estimated value thereof, shall be signed and verified for the signing and verification of

the procedure to be followed when a suit is

leave to sue in forma pauperis. In the hearing of the application the applicant is to be represented by the deceased applicant. The right to sue as a pauper is a personal right and it is the deceased applicant. But the legal representative may sue in forma pauperis if he himself

pauper—Rule not applicable—If the suit is the plaintiff applies to continue it as a pauper, this rule is not applicable. It is sufficient to see if the plaintiff after notice to the opposite side and to the defendant is really a pauper (b).

withstanding anything contained in the rules the application shall be presented to the Court by the applicant in person unless he is exempted from appearing. The application may be presented by a person who can answer all material questions and who may be examined in person or by a person who may be examined in person or by a person who may be examined in person.

It need not be to the Court itself. Presentation in person is necessary in order to comply with rule 4 (1) but personal presentation is not necessary (c1).

A woman exempted from appearing in person may apply for leave to sue as a pauper by

the rule applies to the applicant for leave

O. 33, r. 1 Prosecution of suit as pauper.—A plaintiff may be allowed to continue as a pauper a suit instituted by him in the ordinary way (n)

Minor Plaintiff—A minor pauper may sue through a next friend although the latter is not a pauper (o) In England when a minor applies to sue as a pauper, it must be proved that the minor *as well as the next friend* are paupers But this rule of English practice does not apply in India, and it is enough if it is proved that the minor is a pauper, it is not necessary to prove that the next friend also is a pauper (p)

Pauper defendant—It has been held by the High Court of Calcutta that although the Civil Procedure Code provides only for suits to be brought by a pauper plaintiff, the Court has inherent power to allow a *defendant* to defend in forma pauperis (q)

Legal representative of pauper—The legal representative of a deceased person may be allowed to institute a suit in forma pauperis, if the deceased himself had been allowed to sue as a pauper if the proceedings had been instituted in his lifetime, provided the legal representative is also himself a pauper (r) Similarly, on the death of a pauper plaintiff, his legal representative may be allowed to continue the suit in forma pauperis, provided the legal representative is also himself a pauper (s) But in *Sivagamm Sivagami v Gopalaswami* (t) it was said that it was immaterial that the legal representative, has means in his private capacity and that he can continue the suit as a pauper if he has not come into possession of sufficient means out of the estate This conflicts directly with *In re Radalrishna Iyer* (u) decided a few months earlier by the same Court, but they are both decisions of a single judge In England an executor or administrator is not allowed to sue or defend as a pauper (t) unless he is also a beneficiary (u)

Suit in a representative capacity—If plaintiffs sue in a representative capacity as trustee or sebast and has not in his possession sufficient property of the trust, he may be allowed to sue as a pauper although he has sufficient personal property of his own (x)

Official liquidator—The word 'person' in this rule includes a company [see General Clauses Act 10 of 1897, s 3 (39)] An official liquidator therefore of a company is competent to apply for leave to sue in forma pauperis on behalf of the company if the company is a pauper within the meaning of this rule The fact that the liquidator in his personal capacity is not a pauper does not affect the question (y)

Married woman—The mere fact that the applicant's husband has property is not sufficient reason for disallowing her application for leave to sue in forma pauperis (z)

Pauper appeals—As to pauper appeals, see Order 44 below

- (n) *Hafiz v Fateh Nazib* (1933) 60 Cal 827, 147 J C 3389 (24) A C 25, *Raja Sakib* 41 J C 319
- (o) *Gulshunness v Prosonobis* (1873) 11 B L R 373, *Nambola v Janni* (1923) 37 Cal L J 344, 70 J C 919 (23) A C 656
- (p) *Venkataramaswamy v Ichemma* (1881) 3 M L J 3, *Nenichetty v Keralchand* (1924) 6 B M J R 330, 80 J C 748, (24) A B 419
- (q) *Dorji Churn v Sitaldity* (1880) 5 Cal 810
- (r) *Hill in re* (1884) 7 M L J 390
- (s) *Mamaji v Khandloo* (1912) 36 Bom 270, 11 J C 724, *In re Dhanubhai* (1894) 18

- Bom 237, *Lalit Mohan Mandal v Satish Chandra Das* (1906) 33 Cal 1163, *In re Jadalashna Iyer* (1925) 88 J C 91 (25) A M 819 which explains *Rhegopal v Batorim* (1865) 3 W R M Ls 20
- (t) (1925) 48 Mad L J 390, 87 J C 372 (25) A M 78
- (u) (1925) 88 J C 91, (25) A M 819
- (v) *Paradise v Sheppard* (1745) 1 Dick 130, *Oldfield v Cobbett* (1845) 1 Phil 613
- (w) *Williams on Executors* 10th ed, p 1641, *Daniel's Ch Pr*, pp 87, 88
- (x) *Mahab v Sreeth Sathora* (1927) 45 Cal L J 68, 100 J C 284, (27) A C 309
- (y) *Perumal v Thirumalaiahapuram Nuthi LA* (1917) 41 Mad 824, 45 J C 164
- (z) *Suryanunnesa v Nazni* (1918) 2 Pat L J 178, 44 J C 7-3

2. [S. 403.] Every application for permission to sue as a pauper shall contain the particulars required in regard to plants in suits a

Contents of application

schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

Procedure—Rules 2 to 8 prescribe the procedure to be followed when a suit is proposed to be instituted in forma pauperis

Death of applicant—Where an application for leave to sue in forma pauperis has been made, but the applicant dies pending the hearing of the application the application cannot be continued by the legal representative of the deceased applicant. The reason is that the right to apply for leave to sue as a pauper is a personal right, and it does not survive to the representative of the deceased applicant. But the legal representative may present a *fresh application* for leave to sue in forma pauperis, if he himself is a pauper (a)

Application to continue suit as pauper—Rule not applicable—If the suit is instituted in the ordinary way and the plaintiff applies to continue it as a pauper, this rule is not applicable for the plaint is already filed. It is sufficient to see if the plaint discloses a cause of action and then after notice to the opposite side and to the Government pleader to inquire if the plaintiff is really a pauper (b)

3. [S. 404.] Notwithstanding anything contained in

Representation of applicant

these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person

Presented to the Court—Presentation need not be to the Court itself. Presentation to the proper officer of the Court is sufficient (c). Presentation is necessary in order that the Court may examine the applicant under rule 4 (1) but personal presentation is not necessary in the case of an amended application (d)

Purdanashin woman—A purdanashin woman exempted from appearing in Court under s. 132 above may present the application for leave to sue as a pauper by a duly authorized agent (f)

Pauper appeals—The provisions of this rule apply also to applications for leave to appeal as a pauper. See O. 44 r. 1

- (a) *Ind. M. K. v. S. A. Chandra* (1907) 3 Cal. 1103; *Karee v. J. Sarda* (1908) 51 M.L.J. 6; 119 I.C. 518; (20) A.M. 1
- (b) *S. G. P. v. J. Sarda* (1908) 51 M.L.J. 45; 121 I.C. 527; (20) A.M. 1
- (c) *Ch. J. v. S. A. Chandra* (1907) 3 Cal. 1103; *Karee v. J. Sarda* (1908) 51 M.L.J. 6; 119 I.C. 518; (20) A.M. 1
- (d) *Ch. J. v. S. A. Chandra* (1907) 3 Cal. 1103; *Karee v. J. Sarda* (1908) 51 M.L.J. 6; 119 I.C. 518; (20) A.M. 1
- (e) *Ch. J. v. S. A. Chandra* (1907) 3 Cal. 1103; *Karee v. J. Sarda* (1908) 51 M.L.J. 6; 119 I.C. 518; (20) A.M. 1
- (f) *S. G. P. v. J. Sarda* (1908) 51 M.L.J. 45; 121 I.C. 527; (20) A.M. 1

O. 33, r. 1 Prosecution of suit as pauper—A plaintiff may be allowed to continue as a pauper a suit instituted by him in the ordinary way (*n*)

Minor Plaintiff—A minor puper may sue through a next friend although the latter is not a puper (o). In English law when a minor applies to sue as a puper it must be proved that the minor as well as the next friend are pupers. But this rule of English practice does not apply in India and it is enough if it is proved that the minor is a puper it is not necessary to prove that the next friend also is a puper (p).

Pauper defendant—It has been held by the High Court of Calcutta that although the Civil Procedure Code provides only for suits to be brought by a proper plaintiff the Court has inherent power to allow a *defendant* to defend in forma pauperis (9)

Legal representative of pauper—The legal representative of a deceased person may be allowed to institute a suit in forma pauperis if the deceased himself had been allowed to sue as a pauper if the proceedings had been instituted in his lifetime provided the legal representative is also himself a pauper (x). Similarly, on the death of a pauper plaintiff his legal representative may be allowed to continue the suit in forma pauperis provided the legal representative is also himself a pauper (y). But in *Sugam v Sugam v Gopals* (z) it was said that it was immaterial that the legal representative has means in his private capacity and that he can continue the suit as a pauper if he has not come into possession of sufficient means out of the estate. This conflicts directly with *Indra Prakash v Jyer* (u) decided a few months earlier by the same Court but they are both decisions of a single judge. In England an executor or administrator is not allowed to sue or defend as a pauper (v) unless he is also a beneficiary (u).

Suit in a representative capacity—If plaintiff sues in a representative capacity as trustee or seahit and has not in his possession sufficient property of the trust he may be allowed to sue as a pauper although he has sufficient personal property of his own (x)

Official liquidator—The word person in this rule includes a company [see General Clauses Act 10 of 1897 s 3 (39)]. An official liquidator therefore of a company is competent to apply for leave to sue in forma pauperis on behalf of the company if the company is a pauper within the meaning of this rule. The fact that the liquidator in his personal capacity is not a pauper does not affect the question. (J)

Married woman—The mere fact that the applicant's husband has property is not sufficient reason for disallowing her application for leave to sue *in forma pauperis* (2)

Pauper appeals—As to pauper appeals see Order 44 below

- () *Hafiz v Futeh Asab* (1933) 60 Cal 87
147 I C 1189 (341) A C 95 *Fatra Sahab*
- 319
- (a) *Gulnarpunee v Pano o no* (1831) 11 B L
1 J 3 *Asaf v Jamin* (1933) 37 Cal
L J 344 60 I C 919 (93) A C 636
- (p) *Fenat ara a ju v Achema* (1891) 3
M 1 3 *Nen ha v Fetal hand* (1924)
11 I R 340 80 I C 748 (1) A B
440
- (q) *Doory Cl rn v tok Hy* (1820) 5 Cal 519
- (r) *Bil an re* (1884) 7 M 1 300
- (s) *M a3 Kka v loo* (1911) 38 I n 979 11
1 C *A. I. re v C I n* (1894) 18
- Bon 977 *Lal v Moh n Afandul v So sh*
Chandra Dita (1963) 33 Cal 1163 *In re*
R v Ir sh Tyer (1920) 88 I C 91 (a)
A M 819 *with explns Hlagat v*
Bolora n (1865) 3 W R M 20
- (t) (1951) 48 Mad L J 300 87 I C 3 (a)
A M 80
- () (1920) 88 I C 91 (95) A M 619
- (v) *Pa nd v S. Lppard* (1745) 1 Dik 136
Of field v Cobbett (1845) 1 Phil 613
- (w) *W lams on Executors* 10th ed p 1641
Dia ula C 1r pp 87 88
- (x) *Moh a v Sh Ah Salkara* (1927) 45 Cal L J
68 160 I C 264 (7) A C 303
- (j) *Per nol v Tl run alara p ram v Jai Ed*
(101) 41 Mad 6 45 I C 164
- (z) *Sharf neza v Azn* (1918) 3 Pat L J
18 441 C 73

O. 33,
rr. 4, 5

4. [S. 406.] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

If presented by agent,
Court may order appli-
cant to be examined by
commission

Examination.—This Order contemplates examination of two kinds, namely (1) the examination of the applicant which may as indicated in this rule be regarding (a) the merits of the claim and (b) pauperism, and (2) the examination of persons other than the applicant which should be confined to pauperism only as indicated by the provisions of rr. 6 and 7 below. Persons other than the applicant cannot be examined on the merits of the applicant's claim (e)

5. [Ss. 405, 407.] The Court shall reject an application for permission to sue as a pauper—

Rejection of application

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Alteration in the rule.—The expression "cause of action" in cl (d) has been substituted for the words "right to sue in such Court". See notes below under the head, "Clause (d) cause of action"

Clause (a) application not framed as required by rule 2—Failure to calculate the Court fee value in accordance with the provisions of the Court Fees Act and O 7, r 1, of the Code, is a non-compliance with the provisions of clause (a) of this rule, and the application must be rejected (f). In a later decision the Rangoon High Court has held that a mistake in the calculation of Court fee can be remedied by an amendment (f1)

(e) *Jogen Ira v Durga* (1919) 46 Cal 651, 52 I C 610

(f) *Maling Per v Ma Saue* (1929) 7 Rang 359 118 I C 15, (29) A. R. 124

(f1) *Ma Lon v Ma Shre Thia* (1933) 11 Rang 410 147 I C 700 (33) A. R. 416, dissenting from 7 Rang 359, *supra*

Clause (c) fraudulent disposal of property—Thus if a person has property worth Rs. 1,000, and he disposes of it in August 1915 to enable himself to sue as a pauper and applies for leave to sue as a pauper in September 1915, the application should be rejected under this rule

Clause (d) cause of action—The corresponding clause of the old section ran thus "That his allegations do not show a *right to sue in such Court*" It was contended, that the words "sue in such Court," referred to the *jurisdiction* of the Court and not to the *cause of action* disclosed in the application. But this contention was rejected and it was held that the clause did not limit the Court to an inquiry whether the right to sue arose within the *jurisdiction*, but that it had a more extended meaning and that the Court was to ascertain if the application showed a good subsisting *cause of action* capable of enforcement in Court and calling for an answer, and not barred by the law of limitation or any other law (g) It was accordingly held that the application to sue as a pauper must be rejected, if the right to sue was barred by the law of limitation (h), or if it did not disclose a good cause of action as where the application was for leave to sue on a contract which was void as being immoral and opposed to public policy (i) The expression 'cause of action' has been substituted for the words 'right to sue in such Court' to give effect to these decisions Under the present rule the Lahore (j) and Madras (k) High Courts have held that the application must be rejected if the cause of action is barred by limitation, but not if the question of limitation is a complicated one about which there has been considerable difference of judicial opinion (l) The Allahabad High Court, on the other hand, considers that the effect is only to make it clear that the Court's discretion is not limited to ascertaining whether the right to sue arose within its jurisdiction or not and not to affirm the decisions under the old section (m) That High Court has therefore held that a cause of action under this rule includes a cause of action which is barred by limitation (n) or by *res judicata* (o) But of course it admits that an application cannot be rejected without an inquiry into pauperism because the case is weak on the merits (p)

Rule 4 provides that where the application is in proper form and duly presented, the Court may *examine* the applicant regarding the *merits* of the claim and the property of the applicant The expression the *merits* of the claim has reference to r 5 (d) which says that the Court shall reject the application if the allegations of the applicant do not show a cause of action. It has accordingly been held that it is the duty of the Court to consider not only the statements made in the plaint but also the statements made by the applicant in his examination in order to determine whether his allegations do or do not show a cause of action (q) and further to determine at the preliminary stage whether the plaintiff is or is not entitled to succeed on the basis of the alleged cause of action In some cases it was contended that in order to determine whether there was a cause of action the allegations in the plaint were the sole matters to be looked to As to this the Allahabad High Court (r) said If the allegations in the plaint were the sole matters to be looked to and if the applicant were admittedly a pauper the granting of

- (g) *Chattarpal v. Ilya Ram* (1885) 7 All 661
Kamrakh Nath v. Sundar Nath (1888) 20 All 203
Jupendra v. Nalendra (1886) 19 Mad 19
Am Atham v. Alwar (1904) 2 Mad 37
Dulari v. Vallabhai (1889) 13 Bm 196
 (h) *Chattarpal v. Ilya Ram* (1885) 7 All 661
 (i) *Dulari v. Vallabhai* (1889) 13 Bm 196
 (j) *Hare Kaur v. Munni Lal* (1919) 1 L no 154 p 248 53 L C 411
 (k) *Govindram v. The Municipal Council Kum*
Bikram (1915) 41 Mad 62 45 L C 95
 (l) *Govindram v. Palsu v. Municipal Council*
Kum-Bikram (1915) 41 Mad 62 45 L C 95
 (m) *Fayaz v. Mahmood* (117) 54 All 525 135 L C 536 (2) 4 A 543

- (n) 54 All 525 *supra*
 (o) *Lachmi v. Pam Fakar* (1903) 23 All L J 280 66 L C 741 (2) 4 A 25
 (p) *Sumra Devi v. Harari Lal* (1920) 52 All 92 126 L C 1 (30) A A 58
 (q) *Chattarpal v. Ilya Ram* (1885) 7 All 661
Kamrakh Nath v. Sundar Nath (1888) 20 All 203
Dulari v. Vallabhai (1889) 13 L no 126
Nawal Fakar v. Harari Chandra (1911) 13 Cal L J 523 11 L C 55
Jupendra v. Durga (1912) 46 Cal 621 62 L C 610
Govindram v. Palsu v. Municipal Council Kum-Bikram (1915) 41 Mad 62 45 L C 95
 (r) *Kamrakh Nath v. Sundar Nath* (1888) 20 All 203 52 L

O. 33,
rr. 5-7

this application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of the gentleman who drafted his petition and his plaint, and the examination as to the merits under sec 406 (r) would be superfluous."

Insolvency is not one of the grounds on which an application can be rejected under this rule (s)

Clause (e): transfer of interest in subject matter of proposed suit.—The interest transferred may be either vested or contingent. Thus an agreement authorising a pleader to recover his fees out of the revenues of a village forming the subject matter of the proposed suit, in the event of the applicant failing to pay the fees to the pleader, is an agreement under which the pleader obtains a contingent interest in the subject-matter of the suit. If such an agreement is proved, the application for leave to sue in forma pauperis must be rejected (t)

Revision.—An order rejecting an application under this rule is not appealable (u), but it is open to revision in a proper case (v). The Allahabad High Court in its latest decision also holds that such an order is open to revision (u). When an application was rejected under clause (a) on the ground that it was not correctly verified the Allahabad High Court set aside the order of rejection under sec 151 and remanded the application for correct verification (u1). See note 'Interlocutory order' under s 113 at p 373.

Letters Patent appeal.—No appeal is allowed by the Code from an order made under this rule. But the Madras High Court has held that an appeal lies under cl 15 of the Letters Patent from an order allowing or refusing to allow a plaintiff to sue as a pauper, on the ground that such an order is a judgment, and that it is neither interlocutory nor made in the exercise of discretion (x).

6. [S. 408.] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Notice of day for receiving evidence of applicant's pauperism

Evidence.—See notes to r 4 above under the head, "Examination."

Notice.—As to form of notice, see App H, form no 12

7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

Procedure at hearing

(a) *Chitambaram v Kather* (1925) 48 Mad L 101
(b) "
(u) "
(v) "
441, *Mā Mīn Thū v Mu* (1911) 36 Ind 86 1321 C 705 (31) A R 1-1,
Jai Chand v Chetdol (1935) 56 Bm 555 100 L C 341 (32) A 1 544

(u) *Siddhi Devi v Hazari Lal* (1930) 52 All 9-7 126 L C 1 (30) A A 754
dissenting from *Shankar Lal v Jam Poo* (1928) 48 All 414 91 L C 481 (26) A A 416
Lalji v Mahomet (1913) 54 All 525 134 L C 396 (32) A A 543
(u1) *Ware Lal v Durgin Lal* (1933) 55 All 216 145 L C 43 (37) A A 235
(x) *Lala v Farud al-Hussain* (1925) 48 Mad 1 710, 85 L C 701 (25) A 21 167 dmlf 66
Ajmal v Sumantra (1903) 26 Mad 437

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Sub rule (2) —The Court when issuing notice under r 6 for receiving evidence in proof of pauperism, has presumably decided *ex parte* that none of the prohibitions in r 5 exists. But this rule enables the parties to argue the question if they so desire whether the application is or is not subject to any of the prohibitions specified in rule 5 and does not preclude the Court, if no argument is offered from considering the question (y). But although it is clear that after an inquiry under this rule the Court may come to a fresh decision both as to pauperism and as to the prohibitions in rule 5, yet there is no doubt but that the evidence taken under rule 7 is confined to the question of pauperism and that the question of the prohibitions, whether it be that the applicant has no cause of action (z), or that his claim is barred by limitation (a) is not to be decided on the evidence of witnesses but on that of the applicant. A Full Bench of the Rangoon High Court has explained that this is because the existence of a cause of action must under rule 5 (d) be decided on 'his allegations', i.e., the allegations of the applicant (b). To the same effect is a Full Bench decision of the Madras High Court under the old section (c).

Review—An order under this rule refusing leave to sue as a pauper is subject to review (d). The application for review is not liable to any Court fee (e).

Propriety of order allowing applicant to sue *in forma pauperis*.—Where after due consideration of an application for leave to sue as a pauper, the Court of first instance has allowed the suit to be instituted *in forma pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant, in appeal from the decree, to question the propriety of the order permitting the plaintiff to sue as a pauper. Sec 105 does not apply to such an order (f).

Legal representative—If the applicant dies before the application is granted and registered as a suit, there is no suit pending and his legal representative cannot be brought on the record to continue the application (J)

Limitation where application granted—Where an application for leave to sue as a pauper is *granted*, the date on which the application is *filed* will be deemed to be the date on which the pauper suit is instituted for all purposes of limitation, and *not* the date on which the application is *numbered and registered as a suit* [Limitation Act, 1908, s. 3]. Therefore when the rate of Court fee was enhanced between the date of filing and the date of granting the application, the Court fees were in the calculation.

- (g) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(h) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(i) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(j) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(k) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(l) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(m) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(n) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(o) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(p) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(q) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(r) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(s) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(t) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(u) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(v) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(w) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(x) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(y) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)
(z) *Amorpha* *Alfredi* (1911) 101 101 101 101 (20)

O. 33, r. 7 of costs assessed at the former rate (h) Time will run from the date of the application even though it is not signed and verified in the manner prescribed by rule (2) (i)

Limitation where application refused—Where an application for leave to sue as a pauper is refused, and the applicant subsequently institutes a suit in respect of the same subject matter in the ordinary way (r 15), the suit will be deemed for the purposes of limitation to have been instituted on the date on which the plant is presented and not the date on which the rejected application was filed. The reason is that upon an order of refusal under this rule, the proceedings instituted under r 2 come to an end (j). This was so decided under the old Code, but under the present Code the Court has power to treat the refused application as an unstamped plaint and to permit the requisite Court fee to be paid within a time to be fixed by the Court even though such date be after the expiry of the period of limitation (k).

Limitation where application is converted into a plaint on payment of court fees—A person who has applied for leave to sue as a pauper may, at any time before an order is made under this rule, convert his application into a plaint by paying into Court the necessary Court-fees. In such a case if the application was made *bona fide*, the suit would be deemed to have been instituted for the purposes of limitation on the day on which the application was filed and not the day on which the Court fees were paid. But if it is found that the application was made in bad faith, the suit would be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed (l).

Illustrations

1 A applies for leave to sue as a pauper. On the day fixed for the hearing of the application A, alleging that he has succeeded in negotiating a loan for the payment of the Court fees, pays the necessary Court fees into Court. The application is thereupon numbered and registered as a plaint. The application for leave to sue as a pauper having been made in good faith the suit will be deemed to have been instituted on the day on which the application was filed, and not on the day on which the Court fees were paid.

2 On the last day of the period of limitation prescribed for the institution of a suit A applies for leave to sue as a pauper. The application is heard a fortnight later. It transpires at the hearing of the application that A is as possessed of sufficient means to enable him to pay the Court fees. Before an order is made under this rule rejecting the application A pays the necessary Court fees into Court and the application is thereupon converted into a plaint. The application not having been made in good faith the suit will be deemed to have been instituted on the day on which the Court fees were paid, and not on the day on which the application was filed. The Court fees having been paid after the expiration of the period of limitation the suit is time barred.

Limitation where plaintiff dispaupered—Where a plaintiff is dispaupered under r 9, and he pays the Court fees as provided by r 11 he is entitled to continue the suit and no question of limitation arises (m).

Revision—An order refusing an application to sue in forma pauperis is open to revision if the Court has acted with material irregularity and if there has been a conscious violation of the procedure of this order (n).

(h) *Kaman v. Mills* (1905) 49 Mad. L. J. 535.
81 I.C. 309 (1906) A. M. 159.

(i) *Tora v. Japan Trading Co.* (1931) 32

(j)

(k) *St. arif Skinner v. Orde* (1890) 2 All. 241.
Narain v. Malton (1895) 17 All.

(m)

(n)

(l) *Bank of Bihar v. Sri Tinkar* (1930) 9 Pat.
637 118 I.C. 3-9 (1930) A. 1 637

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

Procedure if application admitted

Application to continue suit as pauper—Rule not applicable—If a suit is instituted in the ordinary way and the plaintiff applies to continue it as a pauper this rule is not applicable (a) See note under the same heading under rule 2

Limitation where application granted—See notes to r 7 above

9. [S. 414] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering

- if he is guilty of vexatious or improper conduct in the course of the suit,
- if it appears that his means are such that he ought not to continue to sue as a pauper, or
- if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter

Clause (a)—Non disclosure by the plaintiff of a life policy worth Rs 205 in a suit where the Court fees were over Rs 500 was held not to justify his being dispaupered (p)

Clause (b)—Receipt of interim maintenance during the suit is not a ground for dispaupering the plaintiff if it is not enough to enable her to save the amount required for Court fees (q) Nor can she be dispaupered because she is living with a rich relation and appearing by eminent counsel (r)

Limitation where plaintiff dispaupered—See notes to r 7 under the same heading

10. [S. 411.] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, such amount shall be recoverable

Costs where pauper succeeds

(a) *Sahla Poo v. Lanka Pratham* (1929) 53 Mad 43 1-11 A 85 (1929) 4 M 88

(p) *Shankarhat v. Nalharumhik* (1946) 46 B m 111 70 I C 964 (1946) A B 15

(q) *Shrimad v. Secretary of State* (1923) 2 Pat 89 1-1 A 611 (1923) 4 A 1

(r) (1923) 2 Pat 89 1-1 A 611 (1924) A P 1-1 A 611

O. 33, r. 7 of costs assessed at the former rate (h) Time will run from the date of the application even though it is not signed and verified in the manner prescribed by rule (2) (i)

Limitation where application refused—Where an application for leave to sue as a pauper is *refused*, and the applicant subsequently institutes a suit in respect of the same subject matter in the ordinary way (r 15), the suit will be deemed for the purposes of limitation to have been instituted on the date on which the plaint is presented and *not* the date on which the *rejected application* was filed. The reason is that upon an order of refusal under this rule, the proceedings instituted under r 2 come to an end (j). This was so decided under the old Code, but under the present Code the Court has power to treat the refused application as an unstamped plaint and to permit the requisite Court fee to be paid within a time to be fixed by the Court even though such date be after the expiry of the period of limitation (k).

Limitation where application is converted into a plaint on payment of court fees—A person who has applied for leave to sue as a pauper may, at any time before an order is made under this rule, convert his application into a plaint by paying into Court the necessary Court fees. In such a case, if the application was made *bona fide*, the suit would be deemed to have been instituted for the purposes of limitation on the day on which the application was filed and not the day on which the Court fees were paid. But if it is found that the application was made in bad faith, the suit would be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed (l).

Illustrations

1 A applies for leave to sue as a pauper. On the day fixed for the hearing of the application, A, alleging that he has succeeded in negotiating a loan for the payment of the Court fees, pays the necessary Court fees into Court. The application is thereupon numbered and registered as a plaint. The application for leave to sue as a pauper having been made in good faith, the suit will be deemed to have been instituted on the day on which the *application* was filed, and not on the day on which the Court fees were paid.

2 On the last day of the period of limitation prescribed for the institution of a suit A applies for leave to sue as a pauper. The application is heard a fortnight later. It transpires at the hearing of the application that A *was possessed of sufficient means to enable him to pay the Court fees*. Before an order is made under this rule rejecting the application, A pays the necessary Court fees into Court and the application is thereupon converted into a plaint. The application not having been made in good faith, the suit will be deemed to have been instituted on the day on which the Court fees were paid and not on the day on which the application was filed. The Court fees having been paid *after* the expiration of the period of limitation the suit is time barred.

Limitation where plaintiff dispaupered—Where a plaintiff is dispaupered under r 9 and he pays the Court fees as provided by r 11, he is entitled to continue the suit, and no question of limitation arises (m).

Revision—An order refusing an application to sue *in forma pauperis* is open to revision if the Court has acted with material irregularity and if there has been a conscious violation of the procedure of this order (n).

- (h) *Faman v Mali*, (1925) 49 Mal L J 599
91 I C 307 (26) A M 159
(i) *Tora v Japan Trading Co.* (1931) 32
B M L R 1343 128 I C 675 (31) A B
47
(j) *Naraini v Malan Lal* (1895) 17 All 576
Krishan v Jishidrao (1896) 21 Bom
512 *Kulhavy v L. Sessiers* (1897) 24
(Cal 849)
(k) *Bank of Bihar v Sri Thakur* (1930) 9 Pat
637 118 I C 379 (29) A 1 637

- (l) v
.
.
(m)
(n)

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit

Procedure if application admitted

Application to continue suit as pauper—Rule not applicable—If a suit is instituted in the ordinary way and the plaintiff applies to continue it as a pauper this rule is not applicable (o) See note under the same heading under rule 2

Limitation where application granted—See notes to r 7 above

9. [S. 414.] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

D paupering

- if he is guilty of vexatious or improper conduct in the course of the suit,
- if it appears that his means are such that he ought not to continue to sue as a pauper, or
- if he has entered into any agreement with reference to the subject matter of the suit under which any other person has obtained an interest in such subject matter

Clause (a)—Non disclosure by the plaintiff of a life policy worth Rs. 225 in a suit where the Court fees were over Rs. 500 was held not to justify his being dispaupered (p)

Clause (b)—Receipt of interim maintenance during the suit is not a ground for dispaupering the plaintiff if it is not enough to enable her to save the amount required for Court fees (q) Nor can she be dispaupered because she is living with a rich relation and appearing by eminent counsel (r)

Limitation where plaintiff dispaupered—See notes to r 7 under the same heading

10. [S. 411.] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper, such amount shall be recoverable

Costs where pauper succeeds

(o) *Sulda Jao v. Venkateswami* (1920) 53 Mad 43 121 I C 207 (2) *A. M. S. v. S. K. S.* (1921) 46 R. 10

(p) *Chandrasekhar v. Subbaram* (1921) 46 R. 10

(q) *Prinsep v. Sanyal* (1923) 2 Pat. 241 A. 1 27

(r) (1923) 2 Pat. 241 A. 1 27

O. 33, r. 10 by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

See rr 12 and 13

Amount of Court fees shall be a first charge—The charge is to be enforced by an application for the attachment and sale of the subject matter of the suit. A separate suit for the sale of the subject matter to realise the Court fees is now barred, see r 13 below and s 47 (a). The application for execution by the Government must be made within three years from the date of the decree in the proper suit (i).

Recovery of Court fees by Government from party ordered to pay the same—If the plaintiff is directed to pay the Court fees the Government may realise the same by an application for execution against the person or property of the plaintiff and if the defendant is directed to pay the Court fees, the Government may realise the same by an application for execution against the person or property of the defendant.

Mode of realization of Court fees by Government—The plaintiff in a suit *in forma pauperis* obtains a decree against the defendant for possession of certain property. It is decreed by the decree that the amount of Court fees shall be a first charge on the property, and that the same shall also be recoverable by the Government from the defendant. In such a case if the defendant fails to pay the Court fees, the Government may, at its option realise the Court fees either by attachment and sale of the property which was the subject matter of the suit, or it may realise the same by an application for execution against the person or property of the defendant (u). The former right is not lost merely because the property for the recovery of which the pauper

of recovering such amount (x). The Madras High Court appointed a receiver to collect it and pay Government by instalments (y). But according to the Bombay High Court a receiver cannot be appointed of future maintenance. See note "Right of future maintenance," under s 51, at p 202.

Effect of first charge—Since the amount of Court fees recoverable by Government is a first charge on the subject matter of the suit (z), it follows that a sale held in execution of such charge must prevail against a subsequent sale (a). For the same reason, the defendant against whom the decree is passed cannot set off against the subject matter of the suit any sum due by him against the plaintiff. A obtain *in forma pauperis*. A is directed by pay the same. Thereupon the Government apply to attach and sell the judgment-debt of Rs 1,500 due to A from B. B claims to set off Rs 1,475 due to him under a decree held by him against A. B is not entitled to the set off claimed by him, for the Government has a first charge on Rs 1,500, that being the subject matter of the suit (b).

- (i) 43 All 100
(u) *Ram Das v Secretary of State* (1896) 12 All 419
(v) *Dabhu v Secretary of State* (1919) 4 Pat 114 106 501 f 315
(w) *Ivan Kristo v Collector of Moorshedabad*

- (x) (1871) 15 W R 203
Jotindra Nath v Dinkar Nath (1893) 2 All 111
(y) *Secretary of State v Ierika* (1900) 49 All 56, 94 IC 254 (20) A M 663
(z) *See Ganpat v Collector of Kanara* (1874) 3 J M 7
(a) *Pattil v Ierika* (1900) 42 All 731
(b) *Janki v Collector of Allahabad* (1887) 8 All 64

Crown's prerogative of precedence in respect of Court fees—If the plaintiff succeeds in the suit, and the amount payable under the decree by the defendant is paid into Court the Government is entitled to payment of the Court fees out of the fund in the Court on a mere application for payment without attaching the fund in the first instance. This is because the Crown is entitled to precedence in respect of a Crown debt over all other creditors of the pauper decree holder. A obtains a decree against B for specific performance and costs in a suit brought in *forma pauperis*. It is directed by the decree that B should pay the Court fees to Government and the Court fees are also declared to be a first charge on the property directed to be conveyed by B to A. B fails to pay A's costs. Thereupon applies for attachment and sale of certain property belonging to B for payment of his costs. The property is sold, and the sale proceeds amounting to Rs. 1,000 are paid into Court. Thereafter A's solicitor, C, applies to the Court for payment to him out of the Rs. 1,000 of the costs incurred by him on behalf of A. At the same time a claim is made by the Government Solicitor for payment of the Court fees out of the Rs. 1,000 in priority to C's claim. The Government are entitled to precedence in respect of the Court fees and C is entitled only to the balance left after payment of the Court fees (c).

It is to be observed that in the Calcutta case cited above, C was a creditor of A inasmuch as he was entitled to be paid his costs by A. But he was merely an ordinary creditor as distinguished from a secured creditor. It is also to be observed that Court fees form a Crown debt, and the Crown was to that extent a creditor of A. It has to be borne in mind that it is only when claims of the Crown and claims of ordinary creditors or "common persons" (to use an old expression) concur or come into competition that the Crown is preferred. The Crown has no more right than a common person to seize A's property and apply it in or towards discharge of a debt due from A. It was so observed by Lord Macnaghten in a case in which the Privy Council held that where a money decree is obtained by a plaintiff in a suit by him against B and B is directed by the decree to pay the Court fees the Government are not entitled to realize the Court fees by a sale of B's property previously mortgaged by him to A, so as to defeat the right of A (d). All that could be sold by the Government in such a case is the equity of redemption of B in the property (e).

Appeal—Questions arising between the Government and any party to the suit under this rule would be questions relating to the execution discharge and satisfaction of a decree within the meaning of s. 47. And it is provided by r. 13 below that they should be deemed to be questions arising between the parties to the suit within the meaning of s. 47. It follows that an order deciding any such question is appealable as a decree (see s. 2 cl. (2) and s. 96j (f)). Under the Code of 1852 it was held by the High Courts of Bombay and Madras that the Government not being a party to the suit, such questions could not be said to be questions arising between the parties to the suit within the meaning of s. 244 (now s. 47) and that orders determining such questions were not appealable as decrees (g). On the other hand the High Court of Allahabad held that such orders were appealable (h). Rule 13 (which is new) sets this conflict at rest by providing that though the Government is not a party to the suit, the Government shall be deemed to be a party to the suit for the purposes of s. 47.

(c) *Cavanah v. Jutta Kista* (1906) 33 (al) 1040 (*Empress v. Collector of Kanara* (1906) 12 (al) 1040 (*Secretary of State v. Jutta Kista* and *Apping Co.* (1906) 5 (al) 1040).

(d) *Faghe Prasad v. Mewa Lal* (1917) 31 (al) 223 321 A 22 151 (1).

(e) *Ishak Muhammad v. Man Faw* (1907) 32 (al) 53.

(f) *Secretary of State v. Narayan* (1905) 22 (al) 102.

(g) *Collector of Palnasya v. Jamaran* (1907) 31 (al) 1040 (*Collector of Kanara v. Jamaran* (1907) 31 (al) 1040 (*Collector of Trichur v. Jamaran* (1907) 31 (al) 1040).

(h) *Secretary of State v. Jamaran* (1907) 31 (al) 1040.

IT

- (1) where the plaintiff *fails* in the suit,
- (2) where the plaintiff is *dispaupered* under r 9
- (3) where the suit is *withdrawn* or
- (4) where the suit is *dismissed* under the circumstances specified in cl (a) or cl (b)

If follows from what has been stated above that where an application for leave to sue *in forma pauperis* is returned under O 7, r 10, for want of jurisdiction to be presented to the proper Court, no order can be made under this rule directing the applicant to pay the Court fees. It cannot be said in such a case that the plaintiff has failed in the suit (m). The decision may also be put on the ground that the present rule does not apply until the application is granted, and is numbered and registered under r 8 above. But a dismissal of the suit at the request of the plaintiff and the defendant, on the suit being settled out of Court, amounts to a failure within the meaning of this rule (n).

"Withdrawn"—This word has been newly added. Under the old section there was a conflict of decisions as to whether the Court could order the plaintiff to pay the Court fees if the suit was withdrawn (o). The insertion of the word 'withdrawn' makes it clear that the Court has the power under this rule to order the plaintiff to pay the Court fees if the suit is withdrawn, whether the withdrawal is without the leave of the Court or with leave to bring a fresh suit under O. 23, r. 1.

Costs—This rule does not preclude the Court from awarding a successful defendant his costs in a pauper suit. The Court has full power under s. 35 to give and apportion costs in any manner it thinks fit. Nothing in this rule limits or otherwise affects the power conferred upon the Court by s. 35 to give and apportion costs (*p*). It has been held that the discretion of the Court under s. 35 empowers the Court to order that the Court fees which would have to be paid by a minor plaintiff suing as a proper should be paid by his next friend (*q*).

Omission to make an order for payment of Court fees—The Government has the right at any time to apply to the Court to make an order for the payment of the Court fees (r 12). If the order is refused, the Government may, by virtue of the provisions of r 13 (which is new), prefer an appeal from the order refused. Under the Code of 1882 it was held that the Government, not being a party to the suit had no right of appeal, and it could therefore proceed only by an application for *restitution* (r).

12. [New] The Government shall have the right at any time to apply to the Court to make an order for the payment of Court-fees under rule 10 or rule 11.

Government may apply
for payment of Court fees

This rule is new. It enables the Government, in cases of error and omission with regard to Court fees, to have the error or omission rectified by a mere application to the Court. See r (13) below.

| | |
|---|--|
| (m) Collector of Ponnagiri & Janardana (1882) 6 ft. m 590 | Kanara & Krishnappa (1921) 15 ft. m -- Chandaba & Kaver (1924) 18 ft. m 464 |
| (n) Secretary of State & Narayan (1911) 35 ft. m 44 12 1 (29) | " " " " " " " " " " " " |
| (o) Collector of Tanjore & Abdul Kharim (1899) 21 ft. m 113 Secretary of State & Narayan (1905) 29 ft. m 102 Secretary of State & P. Rajaratnam (1907) 31 ft. m 10 (all are ordered) Collector of | " " " " " " " " " " " " |

O. 33,
rr. 10, 11

Costs where pauper partly succeeds and partly fails—Rule 10 deals with the case of a pauper plaintiff who succeeds in the suit. Rule 11 deals with the case of a pauper plaintiff who fails in the suit. There is no separate provision for the case in which a pauper plaintiff has partly succeeded and partly failed. Presumably the Court is intended to deal with such a case by combining the provisions of the two rules. In such a case therefore the Court fees payable on the plaint should be apportioned between the plaintiff and the defendant. The Madras and Allahabad High Courts have held that it is illegal to lay upon the defendant in such a case a larger proportion of the Court fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful (i). But the Calcutta High Court considers that the Court has a discretion and is not bound by any hard and fast rule of apportionment (j). In a suit for Rs. 3,000 the plaintiff got a decree for Rs. 88 15 0 and was ordered to pay the defendant's costs amounting to Rs. 101. The Court held that as plaintiff was precluded by O. 21 r. 19 from executing his decree the case fell under rule 11 (k). Again when a pauper appeal was allowed on a point that did not touch merits of the case the Court ordered the Court fees to be paid by the appellant and respondent in equal moieties (l).

11. [S. 412.] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

Procedure where pauper fail

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

See rules 12 and 13

Alterations in the rule

- 1 The word withdrawn has been newly added. See notes below under the head Withdrawn.
- 2 Besides the liability to pay the Court fees the plaintiff was under the old section subject to a further penalty of fine or imprisonment if the Court found that the suit was frivolous or vexatious. This provision has been omitted in the present rule.

(i) *Candrasekara v. Secretary of State* (1890) 14 Mad 183. *Ga. v. Lavra* (1916) 38 All 463. 55 I C 46. *Secretary of State v. Tripura* (1908) 50 Mad L J 280. 96 I C 117. (1906) A M 44. *Srinasa v. Lakshmi* (1908) 54 Mal L J 530. 108 I C 717. (1908) A M 16. *Rami Reddy v. Ialamna* (1930) 53 Mad 80. 190 I C

66 (30) A M 1000.
(j) *Noh v. A. mar v. Kusum Farnia* (1908) 35 Cal 488. 105 I C 25. (28) A C 196.
(k) *Chakrapani v. Government of India* (1901) 40 Mad L J 191. 69 I C 743. (1901) A M 103.
(l) *Balamani v. Pama* (1925) 48 Mad L J 273. 87 I C 57. (25) A M 786.

Dismissal of application for default or for want of prosecution—It has been held in some cases that the dismissal of a pauper application for default (a) or dismissal owing to the applicant's failure to prosecute the application is a bar to a subsequent application (a), while in some that it is not (b)

Bar to subsequent application—The bar to a subsequent application being a bar to the jurisdiction of the Court, the Court is competent and bound to take notice of it at any stage of the suit (c)

Right to sue—There is no substantial distinction between the words "right to sue" in this rule and the words "cause of action" in rule 5. It has accordingly been held that the dismissal of an application to sue in forma pauperis for maintenance for a particular period is no bar to a subsequent application for maintenance for a different period (d)

16. [S. 415.] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

Costs

ORDER XXXIV.

Suits relating to Mortgages of Immovable Property.

1. [New Act 4 of 1882, s. 85.] Subject to the provisions of this Code all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage

Explanation—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit, and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage

Suits relating to mortgages—This Order is new. It is a re-enactment with some alteration of sections 85, 90, 92, 94, 96, 97 and 100 of the Transfer of Property Act, 1882 relating to suits on mortgage. The Transfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the preliminary decree. This omission has now been remedied and provision has been made in rules 3, 5 and 8 for the passing of a final decree in such cases. The object of transferring the provisions relating to mortgage suits from the Transfer of Property Act to the Code is explained in the notes to r. 3, below. Limitation for application for final decree

Transfer of Property Act, 1882, s. 85—This rule is a re-enactment with some alterations of sec. 85 of the Transfer of Property Act, which ran as follows:

Subject to the provisions of the Code of Civil Procedure s. 43 "no one shall be

- | | |
|---|---|
| (a) <i>Fanchud v. J. and J.</i> (1896) 2 B. & M. 286 | (c) <i>Fanchud v. J. and J.</i> (1896) 2 B. & M. 286 |
| (d) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 | (e) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 |
| (f) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 | (g) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 |
| (h) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 | (i) <i>Shal Chandra v. J. and J.</i> (1915) 2 B. & M. 286 |

O. 33,
rr. 13-15

13. [New.] All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Government to be deemed a party

This rule is new See notes to r 10 under the head "Appeal," and notes to r 11 under the head "Omission to make an order for payment of Court fees"

14. [New.] Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to be sent to Collector

The order operates as a decree in favour of the Collector and the Civil Court under this rule informs the Collector of the order But the collection of revenue is no part of the business of the Court and the copy of the order should not be sent to the Collector for necessary action (s)

15. [S. 413.] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature

Order refusing to allow applicant to sue as pauper—An order refusing to allow the applicant to sue as a pauper is an order under rule 7 A Full Bench of the Rangoon High Court has held that if an application is refused under rule 7, this rule is a bar to a subsequent application, and that it makes no difference that the application has been refused on one of the grounds specified in rule 5 on which it might have been rejected (t). The Calcutta High Court has also held that rule 15 only applies when the application has been refused under rule 7 (u). In some cases (v) it has been said that there is no distinction between an order of rejection under rule 5 and an order of refusal under rule 7 but in all these cases the order which was held to be a bar was one of refusal under rule 7 The Lahore High Court has held that the refusal of an application on the ground specified in rule 5(a) is tantamount to a rejection and does not operate as a bar (w). The Madras High Court has held that if the refusal is on the merits it operates as a bar and not otherwise (x). As to this Page, C.J., observes that however meritorious the interpretation may be there is not a word to that effect in the rule (y).

(s) *Tan v. Collector of Mandalay* (1930)

(t)

(u)

(v) *Banchoo v. Bhanoo* (1898) 20 Bom 86, *Atli Chandra v. Raja Jeary* (1913) 20 C. W. 33 I C 612, *Ali Afzal v. Jarna* (1924) 40 Cal. J. 188, 84 I C 791 (24) A C 1039

(w)

(x)

(y)

other High Courts in holding that a person who claimed adversely to the mortgagor and the mortgagee is not a necessary party to such suit. Thus if *A* mortgages certain property to *B*, and *B* sues *A* for sale of the mortgaged property, and *C* claims the property as his own and denies *A* a right to mortgage it, *C* is not a necessary party to the suit and the question of *C*'s paramount title cannot be litigated in *B*'s suit (*l*). And this is certainly the law under the present rule, *C* is not a necessary party (*l*) and should be dismissed from the suit (*m*).

On the other hand the question is not one of jurisdiction but at most one of misjoinder, and when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee (*n*) or is in possession and likely to resist the claim of the successful plaintiff in the mortgage suit (*o*) it may be convenient to join him as a party.

See notes below under the head Parties to suits for redemption foreclosure or sale.

Explanation prior mortgagees—The Explanation to the rule is new. It is intended to supersede certain decisions under sec. 85 of the Transfer of Property Act to the effect that a prior mortgagee is a necessary party to a suit for sale or foreclosure by a puisne or subsequent mortgagee (*p*). The Explanation declares that a prior mortgagee is not a necessary party to such a suit. Thus if *A* mortgages his property to *B* and subsequently to *C*, *C* may sue for sale without making *B* a party to the suit. In such a case if a decree for sale is passed, the property will be sold subject to *B*'s mortgage (*q*). But this rule does not preclude *C* from joining *B* as a party, in fact, *B* would be a proper party if *C* offered to redeem *B*'s mortgage (*r*). But if *C* merely joins *B* as a party and claims no relief against him, *B*'s position is that of a holder of a paramount title outside the controversy and he will not be affected by the decree for sale which *C* obtains for that sale will be subject to *B*'s mortgage. This is what happened in the case of *Ridha Kishan v. Khursid Hossein* (*s*). The prior mortgage was of 1892 to *A* whose interest devolved on *B* who assigned it in September 1906 to the plaintiff. The puisne mortgage was of 1894 to *C* who sued for sale in August 1906 making *B* a party but claiming no relief against him. After *C* obtained his decree for sale, the plaintiff sued on his prior mortgage and was met by the plea of res judicata on the ground that his predecessor *B* might and ought to have enforced the security in the former suit. The defence failed as *C* had not in his suit sought to displace *B*'s title or to postpone it to his own.

With reference to the first branch of the Explanation it had been held that a mortgagee having successive mortgages from the same mortgagor of the same property could sue on the mortgage of later date reserving his rights under the prior mortgage. But this is no longer the law for under secs. 61 and 67A inserted in the Transfer of Property Act by Act 20 of 1929 the mortgage must enforce all the mortgages unless there is a contract to the contrary, while the mortgagor may redeem each separately. See *Mulla's Transfer of Property Act* note 'Mortgagee bound to consolidate' at p. 392 and note 'Two or more mortgages' at p. 366.

(k) *Akairati v. Janni Jeyum* (1904) 30 All 240. *Jodi Prasad v. G. S. Khan* (1909) 31 All 11. 11 C 53. *Gowardhan v. Munna Lal* (1918) 40 All 544. 46 IC 559.

(l) *Satapanda v. Salapa* (1900) 44 Bom C 45. 1 C 57.

(m) *Tinjarhi v. Narayanaiah* (1932) 59 Cal 313. 13 ALJ 61 (37) AC 312.

(n) *Phukan Mahan v. Coopers & Lysons* (1920) 29 C W N 2. 28 IC 266 (25) ALJ 93.

(o) *Kish Lal v. Jhappi Kunda* (1904) 3 Pat 214. 25 IC 205 (24) ALJ 613. See also

Easdeo v. Dwarika (1903) 2 Pat 805, 83 IC 478 (24) ALJ 234.

(p) *Mala D. v. Karim Husain* (1891) 13 All 432. *Norajis v. Jittonji* (1892) 22 L. M. 701. *Asker Jam v. Jankhod* (1906) 30 L. M. 156. *Kanti Jam v. Kishbudh* (1892) 22 Cal 33. In *Princed v. Ramunabai* (1906) 22 All 84 and the point was considered in a useful note.

(q) *Kant Jam v. Kishbudh* (1895) 22 Cal 33.

(r) *Isa v. Gurnary v. Feroz Madhab* (1897) 1 C W N 453.

(s) (1907) 47 L. A. 11. 47 Cal 602. 53 IC 923.

O. 34, r. 1 all persons having an interest in the *property comprised in a mortgage* must be joined as parties to any suit under this chapter relating to such mortgage, *Provided that the plaintiff has notice of such interest* "

A comparison of the present rule with sec 85 of the Transfer of Property Act will shew that the words "in the mortgage security or in the right of redemption" have been substituted for "in the property comprised in the mortgage." An Explanation has been added and the proviso relating to notice is omitted. The explanation was added as it was generally thought that sec 85 made it imperative on a puisne mortgagee to make a prior mortgagee a party to his action for foreclosure. The substitution of the words "in the mortgage security or in the right of redemption" have made it clear that an adverse claimant who is a stranger to the security or the equity of redemption need not be joined (e) see notes below, "Persons having an interest either in the mortgage security or in the right of redemption."

Scope and object of the rule—The object of this rule requiring all persons having an interest either in the mortgage security or in the right of redemption to be joined as parties is to avoid multiplicity of suits (f). The rule applies only to suits relating to a mortgage, that is to say, to suits for foreclosure, sale and redemption as indicated by the marginal note to the rule. The rule therefore does not apply to suits by a mortgagee for a *personal decree* against the mortgagor (as to which see r 6 below).

"Persons having an interest either in the mortgage security or in the right of redemption"—The corresponding words in the Transfer of Property Act, s 85, were persons having an interest in the *property comprised in a mortgage*. These words gave rise to a conflict of views. According to one view, which coincides with the English law and the law as enunciated in the present rule, those persons only should be joined as parties to a suit relating to a mortgage who were either interested in the mortgage security or in the right of redemption. A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to such suit, for he is neither interested in the mortgage security nor in the right of redemption (g). Thus if A lets his property on a lease to B, and B mortgages the leasehold to C, A holding the property by title paramount, should not be joined as a party defendant to a suit by C to enforce the mortgage (h). Similarly, if A and B are co owners of certain property and B mortgages his undivided share to C, A should not be joined as a party to a suit for sale by C, as A has no interest in the right of redemption (i). According to the other view which prevailed in Allahabad all persons must be joined as parties if they had an interest in the *property*, though they might have no interest either in the mortgage security or in the equity of redemption. The word "property," according to the Allahabad High Court, means the actual immovable property mortgaged, and not merely particular rights and interests in such property, such as a bare right to redeem (j). The view held by the Allahabad High Court is no longer tenable. The present rule gives effect to the former view which as already stated, is in accordance with the English law.

But though the Allahabad High Court held that all persons interested in the mortgage property must be joined as parties to a suit on mortgage, that Court agreed with the

- (e) Ghose on mortgage 4th ed p 92²
 (f) *Lala Suraj Prasad v Golab Chand* (1901) 28 Cal 517 529 530 *Shalansale v Sadashir* (1919) 43 Bom 575 578, 511 C 223
 (g) *Milant Banerji v Surend Chandra* (1886) 12 Cal 414 421 422 121 A 171 *Jagjeevar Dutt v Bhuban Mohan* (1908) 33 Cal 425, *Radhakumari v Ravi* 40 Cal 431 (1916) 43 Cal 187 188 34 All 493 431 351 C 939, *Mang San v L. Pon G. jow*

- (1914) 2 Rang 106 80 I C 753 (1914) A R 240 *Puwanathan v Ma Aye* (1910) 4 Rang 214 93 I C 11 (20) A R 208
 (h) *Jagjeevar Dutt v Bhuban Mohan* (1906) 33 Cal 425 See also *Arishna Aggar v Muth Kumaraswami* (1906) 29 Mal 217 244
 (i) *Chand*
 (j)

other High Courts in holding that a person who claimed adversely to the mortgagor and the mortgagee is not a necessary party to such suit. Thus if *A* mortgages certain property to *B* and *B* sues *A* for sale of the mortgaged property, and *C* claims the property as his own and denies *A*'s right to mortgage it *C* is not a necessary party to the suit and the question of *C*'s paramount title cannot be litigated in *B*'s suit (*l*). And this is certainly the law under the present rule, *C* is not a necessary party (*l*) and should be dismissed from the suit (*m*).

On the other hand the question is not one of jurisdiction but at most one of misjoinder, and when it is alleged that the person claiming adversely or by title paramount is a benamidar of the mortgagee (*n*) or is in possession and likely to resist the claim of the successful plaintiff in the mortgage suit (*o*) it may be convenient to join him as a party.

See notes below under the head Parties to suits for redemption foreclosure or sale

Explanation prior mortgagees—The Explanation to the rule is new. It is intended to supersede certain decisions under sec. 83 of the Transfer of Property Act to the effect that a prior mortgagee is a necessary party to a suit for sale or foreclosure by a puisne or subsequent mortgagee (*p*). The Explanation declares that a prior mortgagee is not a necessary party to such a suit. Thus if *A* mortgages his property to *B* and subsequently to *C*, *C* may sue for sale without making *B* a party to the suit. In such a case if a decree for sale is passed the property will be sold subject to *B*'s mortgage (*q*). But this rule does not preclude *C* from joining *B* as a party, in fact, *B* would be a proper party if *C* offered to redeem *B*'s mortgage (*r*). But if *C* merely joins *B* as a party and claims no relief against him *B*'s position is that of a holder of a paramount title outside the controversy and he will not be affected by the decree for sale which *C* obtains for that sale will be subject to *B*'s mortgage. This is what happened in the case of *Radha Kishan v. Khursid Hossein* (*s*). The prior mortgage was of 1892 to *A* whose interest devolved on *B* who assigned it in September 1906 to the plaintiff. The puisne mortgage was of 1834 to *C* who sued for sale in August 1906 making *B* a party but claiming no relief against him. After *C* obtained his decree for sale, the plaintiff sued on his prior mortgage and was met by the plea of res judicata on the ground that his predecessor *B* might and ought to have enforced the security in the former suit. The defence failed as *C* had not in his suit sought to displace *B*'s title or to postpone it to his own.

With reference to the first branch of the Explanation it had been held that a mort-

by Act 20 of 1929 the mortgage must enforce all the mortgages unless there is a contract to the contrary while the mortgagor may redeem each separately. See Mulla's Transfer of Property Act note 'Mortgagee bound to consolidate' at p. 392 and note 'Two or more mortgages' at p. 366.

(k) *Ahirsati v. Janni Begum* (1902) 30 All. 240. *Joti Prasad v. G. & Khan* (1904) 31 All. 111. *C. 53* *Chandhan v. Munna Lal* (1918) 4 All. 544. 461 C. 559.

(l) *Satapata v. Satapa* (1901) 44 B.M. 632. 51 C. 522.

(m) *Tindark v. Narayanaiah* (1923) 59 Cal. 314. 134 C. 61. (37) 4 C. 512.

(n) *Bhuvan Mohan v. Co-operative Finance* (1925) 29 C. W. N. 28. 281 C. 266. (25) 4 C. 93.

(o) *Khub Lal v. Jhapot Kundu* (1904) 3 Pat. 244. 31 C. 253. (24) A. 1. 613. See also

Indra v. Dwar Ka (1903) 21 at 805. 83 I. C. 478. (24) A. 1. 234.

(p) *Mata D. v. Kaim Hussain* (1891) 13 All. 432. *Noraj v. Pattonis* (1894) 22 B.M. 701. *Keshar Lam v. Lachhad* (1906) 30 B.M. 156. *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 33. In *Prin Raja v. Jumanabai* (1906) 29 Mad. 84, 86, the point was considered to be a doubtful one.

(q) *Kanti Ram v. Kutubuddin* (1895) 22 Cal. 33. (r) *Jai Coomary v. Iero Madhub* (1897) 1 C. W. N. 453.

(s) (1900) 47 I.A. 11. 47 Cal. 662, 55 I. C. 92.

A mortgages his property to *B*. *B* sues *A* on the mortgage. During the pendency of the suit *A* executes a second mortgage of his property to *C*. *C* is not a necessary party to *A*'s suit, the mortgage to him having been executed subsequently to the institution of the suit (k).

Trustees, executors and administrators—The rule begins with the words "subject to the provisions of this Code." The reference is to O 31, r 1, which provides for suits, concerning property vested in a trustee, executor or administrator. Having regard to the provisions of that rule, a suit for redemption (l) or foreclosure (m), or sale may be brought by trustees without making the beneficiaries parties.

Benamidar—A benamidar can maintain a suit on a mortgage. Thus if a mortgage is executed ostensibly in favour of *A*, but the real mortgagee is *B*, *A* may sue the mortgagor on the mortgage. It is not open to the mortgagor to contend that *A* being merely the benamidar he cannot maintain the suit (n).

Sub mortgagee—A mortgagee may create such estates as he pleases. He may convey by way of sub mortgage to whom and in as many parcels as he pleases (o). If the mortgagor sues to redeem the mortgage, he must make the sub mortgagee a party as he is interested in the mortgage security as assignee of the mortgagee (p). It has been held by a Full Bench of the Allahabad High Court that when a mortgagee has sub mortgaged his interest in the property mortgaged to him, the sub mortgagee is entitled to sell the interest in the property of his sub mortgagor without impleading the mortgagor and foreclosing his equity of redemption in other words he is entitled to sell the sub mortgagor's interest leaving the equity of redemption outstanding in the mortgagor (q). In an earlier case (r) the Allahabad High Court took the view that a sub mortgagee is entitled only to a decree for money against the sub mortgagor, but this was doubted in later cases (s) and it is not good law. See notes to r 2 below, * Sub mortgage.

A person cannot be both plaintiff and defendant—In a foreclosure action by a first mortgagee where the plaintiff also joined himself as a defendant as one of the puisne mortgagees his name was struck out as a co defendant (t).

Consequences of non joinder—Under the corresponding section 85 of the Transfer of Property Act, it was held by the Allahabad High Court that the non joinder of a person who ought to have been made a party to a suit on a mortgage was a defect fatal to the suit and that the suit should therefore be dismissed but that the Court if it sees fit to do so may add him as a party under sec 32 of the Code of 1882 [O 1, r 10 (2)]. Those decisions proceeded on what the Court said was the imperative character of the word must in section 85 of that Act (u). In a recent case under the present rule the same Court held that the result of non joinder of a subsequent mortgagee in a suit on a prior mortgage, though intentional, would not be the same.

(k) *Ishaq Ali Khan*

(l) *Mills v Jennis*

6 App Cas 1

(m) *Worley v. Mo* (1851) 10 Jur 203
[Interests of a plaintiff trustee *Francis v Harrison* (1888) 43 C 1] 183

(n) *Gur Narayan v. Nihal Lal* (1891) 46 I A 19 46 Cal 560 574 49 I C 1 *Phola*
Arshad v. Jam Lal (1891) 21 Cal 34
Jary v. Mahabir (1898) 22 Bom 672
Lad Lal v. L. Mung Singh (1891) 21 All 35

(o) *Tay v. Russell* [1891] A C 255 per Lord H. Macmillan

(p) *Frankaramana v. Panayarama* (1897) 101 I C 77 (2) 14 M 712

(q) *Fam. Sankar v. Ganesh Prasad* (1897) 22 All 285 [1891] approved in *Ganesh v.*

(r) *Ganesh Prasad v. Channu Lal* (1896) 14 All 113 *Jam Jalon Lal v. Fakhir Singh* (1898) 22 All 511

(s) *Fam. Nuthay v. Narasingh* (1905) 27 All 472
477 478 *Muthu Raja v. Venkatachallam* (1897) 21 Mad 35

(t) *Harell v. M. Chell* (1899) 64 L T 540

(u) *Mata Ram v. K. M. Hussain* (1891) 13 All 437 465 *Jawant Prasad v. Kalia* (1891) 17 All 537 555-556 *Gulam Azeer Khan v. Mustafa Khan* (1897) 14 All 113 112 *Kundan Lal v. Fager Chand* (1897) 27 All 75 [parties added], *T. Ram v. K. K. Thakur Kulkarni* (1897) 20 All 177 [parties added].

O. 34, r. 1 property affected by the subsequent mortgage (v) The High Courts of Bombay (w) and Calcutta (x) took the same view as the Allahabad High Court

The word "must" which occurred in sec 85 of the Transfer of Property Act having been dropped, and the section having been transferred into the Code, the question as to the effect on non joinder is, it is submitted, governed by the provisions of the Code O 1, r 9, provides that no suit shall be defeated by reason of non joinder of parties, and O 34, r 1, is subject to O 1, r 9 (y) Under O 1, r 10 (2) the Court has the power to add parties at any stage of the suit By sec 90 of the Code it is enacted that no decrees shall be reversed or substantially varied in appeal on account of any misjoinder of parties [which include non joinder (z)], unless it affects the merits of the case or the jurisdiction of the Court. The result is that no suit on a mortgage should be dismissed by reason of non joinder of parties unless the parties are *necessary* parties and the plaintiff refuses to add them as parties If the parties are merely *proper* parties, as distinguished from necessary parties (a), the Court may, though the plaintiff refuses to add them as parties proceed under O 1 r 9 to deal with the matter in controversy so far as regards the rights and interest of the parties actually before it This was in effect held by the High Court of Bombay in *Shahasheb v Sadasakur* (b) a case under the present rule In that case a suit was brought by a mortgagee against the widow and daughters of the deceased mortgagor for sale of the mortgaged properties The deceased was a Mahomedan, and besides the widow and daughters he left a brother as one of his heirs It was contended on behalf of the defendants that the brother having an interest in the right of redemption he ought to have been joined as a defendant, and that the plaintiff having omitted to join him as a defendant the suit should be dismissed in its entirety At the date when the objection as to non joinder was taken by the defendants, the period of limitation as against the brother had expired It was held overruling the contention that the brother was not a *necessary* party and that a decree could be passed against the widow and the daughters to the extent of their interest in the properties Following this case it has been held that if a mortgagee sues for sale making some only of the heirs of the mortgagor a party the Court may deal with the matter in controversy so far as regards the rights and interests of the parties before it and make an order for sale proportionate to share of the defendants (c) See note infra 'Mahomedan co heirs,' at p 985

In a mortgagee's suit for sale a puisne mortgagee is a proper but not a necessary party and the suit should not be dismissed because he has not been joined (d) This has been extended in two cases (e) by the Allahabad and Calcutta High Courts to the case of a part mortgagee who has been allowed to sue for sale of his proportionate share joining the co mortgagees after the period of limitation for a suit by them had become timebarred. But a later decision of the Calcutta High Court, without reference to these cases held that if the part mortgagee is joined after the period of limitation has expired the whole suit must be dismissed (f) See note (O 34, r 1 is subject to O 1, r 9) at p 468

(e) *Alam Singh v Gokal Singh* (1913) 35 All 434 21 I C 271

(w)

(x)

(y)

(z)

(a)

parties and proper parties see notes to O 1, r 10 (2) Who ought to have been joined

(b) (1919) 43 Bom 575 51 I C 223

(c) *Akheradamoyi Dasi v Habb Shaha* (1925)

29 C W N 51 82 I C 638 (25)
A C 152 *Mest Walayatunnissa v*
Mest Chalakhi (1931) 10 Lat 341 132
I C 100 (31) A P 164

(d) *Sdal Prasad v Asho Singh* (1922) 2 Pat

(e)

(f)

Where a person who ought to have been joined as a party under this rule is not joined as a party, and a decree is passed in the suit, the decree cannot affect his rights (g) [see notes below, "Mahomedan co heirs"] To take a case which frequently occurs, if a second or subsequent mortgagee who ought to be, but is not joined as a party to a suit by the prior mortgagee, the proceedings in the suit are not binding on him so as to affect his rights under the second mortgage (h) As second mortgagee he could have sued the mortgagor for a sale of the property subject to the first mortgage, or he could have redeemed the first mortgage and then sued the mortgagor for sale on both the mortgages The point to be noted is that the second mortgagee does not lose either of these rights, merely because a decree has been passed in the prior mortgage suit, and the mortgaged property has been sold in execution of the decree The sale has not the effect of displacing the second mortgagee and leaving him with nothing but a claim against the balance (if any) of the sale proceeds of the property after satisfying the first mortgagee (i) The omission to implead the second mortgagee does not in any way prejudice his rights (j) That his right to sue for sale (subject, of course, to the first mortgage) is not lost, has been held by a Full Bench of the Calcutta High Court (k)

terms he is entitled to redeem the first mortgage In *Umesh Chander v Zahur Latima* (m) it was held by the Judicial Committee that a second mortgagee desiring to redeem is bound to pay the whole amount due under the first mortgage, and not merely the portion realised at the sale held in execution of the first mortgagee's decree When this was in *Umesh Chander's* case was made, the Transfer of Property Act had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood (n) By sec 89, however, of the Transfer of Property Act it is provided that where a suit is brought by a mortgagee for a sale and an order absolute for sale is made the defendant's (mortgagor's) right to redeem and the security shall both be extinguished, in other words, an order absolute for sale under sec 89 substitutes the rights under the decree for those under the mortgage. The result of this extinction is that in cases governed by the Transfer of Property Act if the first mortgagee obtains a decree for sale without making the second mortgagee a party to his suit, and the mortgaged property is sold in execution of the decree the second mortgagee afterwards suing for a sale decree under his mortgage, is entitled to a decree for sale on payment

amount of the first

Matru Mal v Durga

- (g) *Brojanath v Khelut Chunder* (1871) 14 B L A 144 *Ingho v Siva v Baikrishna* (1880) 9 B L R 128 *Hazranbhai v Umaji* (1904) 28 B L R 153 *Tam Narayan v Bhandi Jershad* (1904) 31 Cal 73 *Judgo Singh v Habibulla* (1904) 12 C W N 107 *Hira Lal v Krishna Lal* (1897) 19 All 543 *Fry Kulkore v Maitho Singh* (1906) 24 All 279 *Sirath v Pamasubhagpur* (1894) 21 B L R 61 *Punithavelu v Pashayam* (1902) 25 Mad 406 *Pangasam v Jella* (1903) 26 Mad 484 *Mall Karjunnadu v Linga Murti* (1903) 26 Mad 332 *Kalash v Surya* (1912) 33 Cal 925 *Lal C. S. v. Prakash Singh v Naredo Prasad* (1924) 3 Pat 114 *S. I. C. 942* (24) A 1 452 *Parasram v Landuhi* (1924) 44 All 462 *C. I. C. 533* (27) A 1 355 *M. H. v. M. J. v. M. J.* (1923) 11 Junc 112 *1431 C. 829* (33) A 1 92
- (h) *Umesh Chander v Zahur Latima* (1897) 18 Cal 164 *17 J. A. 21* *H. J. v. M. J.* (1914) 43 J. A. 133 *43 All 407* *410* *45 J. C. 100* *Matru Mal v*
- Kunwar* (1920) 47 J. A. 71 *42 All 264* *55 J. C. 963* *Maug Shaw v Karam* (1924) 41 All 122 *110 J. C. 701*, (28) A 1 12
- (i) *Gobai Lal v Pamjanam* (1894) 21 Cal 70 *20 J. A. 160*
- (j) *Pam Prasai v Bhikari Das* (1903) 26 All 464 *467*
- (k) *Debdanda Narayan v Pamaram* (1907) 30 Cal 509 *See also Explanation to the rule*
- (l) *Mall Karjunnadu v Linga Murti* (1903) 26 Mad 332 *Mohan Manor v Toga Lala* (1896) 10 B L R 224 *Audrat v. Kulkore* (1901) 23 All 24 *Mukund Singh v Lallanji* (1927) 43 All 204 *61 J. C. 942*
- (m) (1897) 14 Cal 164 *17 J. A. 201*
- (n) (1902) 47 J. A. 71 *55 J. C. 963* *28 J. A. 160*
- (o) (1927) 47 J. A. 71 *47 All 264* *55 J. C. 963* *H. J. v. M. J.* (1914) 43 J. A. 133 *43 All 407*, *410* *45 J. C. 100*

O. 34, r. 1 Act and decided prior to *Matru Mai* a case, the Indian Courts seem to have overlooked the provisions of sec 89 of the said Act, and they held as was done by the Judicial Committee in *Umesh Chunder* s case that the second mortgagee can only redeem upon payment of the entire amount due under the first mortgage (p) It was also held that he was not bound to pay for any improvements which the purchaser might have made in the meantime (q) It was further held that where the property was purchased by a third party, and the purchase money paid by him did not fully satisfy the amount of the first mortgage, the amount payable by the second mortgagee should be apportioned between the purchaser and the first mortgagee, that is to say, the purchaser should be paid the amount of the purchase money paid by him at the sale and the balance should be paid to the first mortgagee Thus if the amount due under the first mortgage was Rs 10,000 and the property was sold in execution of the first mortgagee s decree for Rs 1,050 and the second mortgagee desired to redeem the purchaser, the amount payable by the second mortgagee, namely, Rs 10 000 should be apportioned between the purchaser and the first mortgagee, the former receiving Rs 1,050, and the balance going to the first mortgagee (r) The decision in *Matru Mai* s case (s) was based upon the words " the defendant s (mortgagor s) right to redeem, and the security shall both be extinguished " which occurred at the end of sec 89 of the Transfer of Property Act (t) But these words have been omitted in the corresponding r 5 of this Order The result would seem to be that the second mortgagee who is not made a party to the first mortgagee s suit can only redeem under the present law on payment of the entire amount due under the first mortgage as held in *Umesh Chunder* s case (u), and in the case of *Sukhi v Ghulam Safdar Khan* (v), the Privy Council decided that this is so and that the law is now as it was before the Transfer of Property Act A Calcutta case (w) gave terse expression to the same conclusion by saying that the puisne mortgagee could not both approbate and reprobate the prior mortgagee s decree If the prior mortgagee has brought the property to sale and purchased it himself, he will, when redeemed by the puisne mortgagee, be entitled to interest at the mortgage rate up to the date when he took possession (x)

Where a person has come into possession subsequently to the date of the first mortgage either as putnidar or as usufructuary mortgagee, he should be joined as a party to a suit by the first mortgagee, and thus given an opportunity of redeeming the mortgage If he is not joined as a party, the purchaser under the mortgage decree is not entitled to obtain possession without paying off his charge (y)

If the mortgagee obtains a decree for sale on his mortgage without making an assignee of the mortgagor a party and sells the property, the auction purchaser as assignee of the mortgagee can institute a fresh suit on the mortgage against the assignee of the mortgagor (z)

If the mortgagee obtains a decree for sale and purchases the property, without having made an assignee of the mortgagor a party, and that assignee remains in possession for 12 years after the date of the mortgage, the mortgagee cannot

(p) *D. P. Narain v. Hira Singh* (1897) 18 All

(q) *Itangayya v. Parthasarathi* (1897) 20 Mad 120
Venkateswara Iyer v. Gompertz (1904) 21 Mad 425

(r) *Wahid un nass v. Gobardhan Das* (1903) 5 All 345

(s) (1890) 47 I A 71, 42 All 364 55 I C 603

(t) See *Het Pam v. Shikhi Lal* (1918) 45 I A 130, 133 40 All 497, 410 45 I C 795

(u) (1891) 18 Cal 161 17 I A 201

(v) (1911) 48 I A 465 43 All 463 62 I C 151
(1911) A J C 11 *Nannu Mai v. Fira Charan* (1930) 52 All 331 175 I C 824
(30) A A 485

(w) *Jaganendra v. Shorashi* (192-) 49 Cal 626
61 I C 759 (27) A C 23

(x) *Nannu Mai v. Ram Charan* (1930) 52 All 331 126 I C 824 (30) A A 485

(y) *Jail Jussore v. Kartic Chatter* (1891) 21 Cal 116 *Jaganmoy v. Jelli Bala* (1903) 26 Mad 444 *Jambha Chetty v. J. Ramani* (1903) 26 Mad 516

(z) *Te Lal v. Kijappi* (1974) 47 Mad 351
83 I C 1022 (21) A M 600

dispossess him, for he has only acquired the mortgagee's right by his purchase and the O. 3 suit on the mortgage is barred by limitation (a)

Mahomedan co heirs.—A Mahomedan mortgages his property to A. He then dies leaving as his heirs a widow, two daughters and a brother. After his death, A sues the widow and the daughters for sale of the mortgaged property. The brother is not joined as a party to the suit. According to the Bombay High Court the brother is not a necessary party to the suit (b). But there is a conflict of opinion whether the Court can in such a case pass a decree for the sale of the whole property. In *Lirchand v Kondu* (c), the Court held that it can. In a later Bombay case (d) however, Pratt, J., expressed the opinion that a decree can be passed for the sale only of the right, title and interest of the widow and the daughters. See Mulla's Principles of Mahomedan Law, 10th ed., art. 36, p. 20.

Joint Hindu family.—There is a conflict of decisions as to whether where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are necessary parties to the suit having regard to the provisions of the present rule. It has been held by the High Court of Allahabad (e), Madras (f) and Patna (g), following a decision of the Privy Council (h), that where a suit is brought on a mortgage by or against the manager of a joint Hindu family in his representative capacity, the other members of the family are not necessary parties to the suit, and that the suit will not fail by reason of the non joinder of those members. It makes no difference whether the manager is a father or collateral relation such as an uncle or a brother.

According to the Bombay decisions it would seem that the other coparceners are necessary parties to a suit brought on a mortgage by or against the manager (i). But if they are not joined as parties and a decree is passed for the sale of the joint family property against the manager in his representative character and the property is sold in execution of the decree the sale it has been held passes the interest of the other coparceners also in the property. The mere fact that they were not parties to the mortgage suit is no ground for setting aside the sale, unless it be shown by them that the debt contracted by the manager was one for which they are not liable (j).

According to the Calcutta High Court, the other coparceners are necessary parties to a suit on a mortgage of joint family property, and if a decree is passed in such a suit without their being joined as parties the decree is not binding on them and they may by suit obtain a declaration that not being parties to the suit their interests are not bound by the decree in the suit (k).

- (a) *Bhatlasi v Verle* (1911) 43 Cal. 111.
(b) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(c) *Lirchand v. Kondu* (1911) 43 Cal. 111.
(d) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(e) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(f) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(g) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(h) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(i) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(j) *Pratt v. J. J. J.* (1911) 43 Cal. 111.
(k) *Pratt v. J. J. J.* (1911) 43 Cal. 111.

. 34, r. 1 In another case before the Privy Council governed by the Transfer of Property Act, 1882, where a foreclosure decree was passed against the *manager* of a joint Hindu family, and the other members brought a suit to set aside the decree on the ground of their non joinder as persons interested in the equity of redemption under s 85 of the Transfer of Property Act, their Lordships held that the decree was in the circumstances of the case binding upon them, though they were not parties to the suit. Their Lordships said "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound." It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied. "*There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself, and no question arises under s 85 of the Transfer of Property Act [O 34, r 1], because the mortgagee had no notice of the plaintiff's interests*" (l). Note that the words "provided that the plaintiff has notice of such interest," which occurred in s 85 of the Transfer of Property Act, do not occur in the present rule.

The recent Privy Council case of *Ganpat Lal v Bindbasini Prasad* (m) is an authority for the proposition that in a suit on a mortgage against the manager of a joint Hindu family all the other members of the family are represented by the manager. The mortgage was by the manager and the mortgagee obtained a decree for sale joining as parties the manager and the other members of the family. The mortgagee purchased the property himself. But one of the members of the family who was a minor was wrongly described in the suit as an adult. He sued to redeem on the ground that not having been represented in the suit by a guardian *ad litem* he was not a party to the mortgagee's suit. This claim would have been unanswerable if he had not been represented by the manager in the suit. But the Privy Council held that as he had not sued to set aside the sale and did not impeach the mortgage or the decree, the suit was not maintainable. In other words, he was represented by the manager and it did not matter whether he was a party or not. The only ground which he could take was that he was not liable for the mortgage debt contracted by the manager and that he had not done. The same rule was applied by the High Court of Bombay in a suit for sale on a mortgage against the grandfather who was the manager (n).

Where parties are not governed by the Hindu law, and the only interest which a son has under the customary law is a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations the son has no such interest in the property as is contemplated by the present rule and he is not therefore a necessary party to a suit on a mortgage against his father (o).

Punjab Redemption of Mortgages Act, 1913—O 34 has no application to a suit under s 12 of the Punjab Redemption of Mortgages Act 2 of 1913. The object of such a suit is merely to get rid of the order of the Collector under s 12 allowing redemption (p).

(l) *Shoa Shankar v Jalloo Kinnar* (1914)

(m)

(n) *Malhus dan v Bhagwan* (1909) 53 Bom 444 1181 C 788 (20) A B 213

(o) *Shiv Deo Singh v Jat Ram* (1910) Punj Rec no 125 p 3-7 531 C 411

(p) *Fakir Khan v Juma Khan* (1933) 14 Lah 218 1411 C 264 (33) A L 179

2. [New Act IV of 1882, sec 86.] (1) In a suit for O.
Preliminary decree in foreclosure, if the plaintiff succeeds, the
foreclosure-suit Court shall pass a preliminary decree—

- (a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—
 - (i) principal and interest on the mortgage,
 - (ii) the costs of suit, if any, awarded to him, and
 - (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security, together with interest thereon, or
- (b) declaring the amount so due at that date, and
- (c) directing—
 - (i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required retransfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him or, where the plaintiff claims by derived title by those under whom he claims and shall also, if necessary, put the defendant in possession of the property, and

O. 34, r. 1 In another case before the Privy Council governed by the Transfer of Property Act, 1882, where a foreclosure decree was passed against the *manager* of a joint Hindu family, and the other members brought a suit to set aside the decree on the ground of their non joinder as persons interested in the equity of redemption under s 85 of the Transfer of Property Act, their Lordships held that the decree was in the circumstances of the case binding upon them, though they were not parties to the suit Their Lordships said "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions including foreclosure suits when the managers of a joint Hindu family so effectively represent all other members of the family, that the family as a whole is bound" It is quite clear from the facts of the case and the findings of the Courts upon them that this is a case where this principle ought to be applied "*There is not the slightest ground for suggesting that the manager of the joint family did not act in every way in the interests of the family itself, and no question arises under s 85 of the Transfer of Property Act [O 34, r 1], because the mortgagee had no notice of the plaintiff's interests*" (l) Note that the words "provided that the plaintiff has notice of such interest," which occurred in s 85 of the Transfer of Property Act, do not occur in the present rule.

The recent Privy Council case of *Ganpat Lal v Bindbasini Prasad (m)*, is an authority for the proposition that in a suit on a mortgage against the manager of a joint Hindu family all the other members of the family are represented by the manager The mortgage was by the manager and the mortgagee obtained a decree for sale joining as parties the manager and the other members of the family The mortgagee purchased the property himself But one of the members of the family who was a minor was wrongly described in the suit as an adult He sued to redeem on the ground that not having been represented in the suit by a guardian *ad litem* he was not a party to the mortgagee's suit This claim would have been unanswerable if he had not been represented by the manager in the suit But the Privy Council held that as he had not sued to set aside the sale and did not impeach the mortgage or the decree, the suit was not maintainable In other words, he was represented by the manager and it did not matter whether he was a party or not The only ground which he could take was that he was not liable for the mortgage debt contracted by the manager and that he had not done The same rule was applied by the High Court of Bombay in a suit for sale on a mortgage against the grandfather who was the manager (n)

Where parties are not governed by the Hindu law, and the only interest which a son has under the customary law is a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations, the son has no such interest in the property as is contemplated by the present rule and he is not therefore a necessary party to a suit on a mortgage against his father (o)

Punjab Redemption of Mortgages Act, 1913—O 34 has no application to a suit under s 12 of the Punjab Redemption of Mortgages Act 2 of 1913 The object of such a suit is merely to get rid of the order of the Collector under s 12 allowing redemption (p)

(l) *Sheo Shastri v Jaddoo Kunwar* (1914)

(m)

(n) *Madh isidan v Bhagwan* (1070) 53 Bom 444 1181 C 788 (20) A B 215

(o) *Shiv Dee Singh v Jai Ram* (1910) Punj Rec no 125, p 327, 53 I C 411

(p) *Fatir Khan v Jamil Khan* (1933) 14 Lah 218 141 I C 264, (33) A L 179

2. [New Act IV of 1882, sec 86.] (1) In a suit for O.
Preliminary decree in foreclosure suit
foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security, together with interest thereon, or

(b) declaring the amount so due at that date, and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title by those under whom he claims and shall also if necessary, put the defendant in possession of the property; and

O. 34, r. 2

(n) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No 9 or Form No 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require

The old rule —The above rule substituted for old r 2 by the Transfer of Property (Amendment) Supplementary Act 1929, which came into operation on the 1st April 1930. The old rule was in operation till the above date. It was as follows —

2 In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

(a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree and directing—

(c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or where the plaintiff claims by derived title, by those under whom he claims and shall also, if necessary, put the defendant in possession of the property, but

(d) that, if such payment is not made on or before the day to be fixed by the Court the defendant shall be debarred from all rights to redeem the property

Transfer of Property Act, 1882, s 85—This rule corresponds to s 86 of the O. 34, Transfer of Property Act except in the following particulars—

- 1 The words "to the plaintiff or" which occurred in s 86 after the word "pays" in cl (c) have been omitted, the object being that in every case the defendant shall pay the money *into Court*.
- 2 In cl (c) the words "if so required" have been added before the words "re-transfer the property" as according to *malussil* practice a re-transfer is not ordinarily required.

The old rule and the new rule—

- 1 The new rule expressly states that the decree to be passed under it is a *preliminary decree*.
- 2 The old rule was not clear as to the date up to which accounts were to be taken. The new rule makes it clear that the Court should direct accounts to be taken up to the date of the preliminary decree.
- 3 The new rule expressly provides that in taking accounts the amount to be spent by a mortgagee for necessary costs, charges and expenses incurred by the mortgagee in respect of the mortgage security together with interest thereon should be taken into account.
- 4 The old rule was not clear as to the day on which payment was to be made by the mortgagor in cases where accounts were directed to be taken. This is now made clear in sub rule (1) (c) (i).
- 5 The provision in new sub rule (1) (c) (i) as to subsequent interest is new. See rule 11 (b).
- 6 New sub rule (1) (c) makes it clear that the costs of re-transfer are to be borne by the mortgagor.
- 7 New sub rule (1) (c) (u) makes it clear that if default is made by the mortgagor in payment of the amount due under the preliminary decree, the mortgagee has to apply to the Court for a final decree.
- 8 New sub rule (2) relates to the power of the Court to extend the time for payment. It is in substance a reproduction of old rule 3 (2). See note below, Power to extend time in foreclosure suits.
- 9 New sub rule (3) draws specific attention to the forms of decrees to be passed where subsequent mortgages are joined as parties to a suit for foreclosure.

Form of preliminary decree for foreclosure—See Appendix D, Form No 3, when accounts are directed to be taken, and Form No 3A, when no accounts are taken and the Court declares the amounts due.

Foreclosure and sale—Until 1st April 1930, i.e., until the Transfer of Property (Amendment) Act, 1929, comes into operation, a suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale. After that date it is no longer open to the holder of an English mortgage to sue for foreclosure. In the case of a mortgage by deposit of title deeds in Bombay, where the remedy by way of foreclosure was held to be open to such a mortgagee s 15 (2) of the Transfer of Property (Amendment) Supplementary Act allows a period of two years, i.e., upto 1st April 1932, to such a mortgagee to enforce his remedy by way of foreclosure. Under the Transfer of Property Amending Act, 1929, the remedy, by way of foreclosure is allowed only (1) in the case of a mortgage by conditional sale and (2) an anomalous mortgage where there is an express stipulation in that behalf. A suit for sale can only be brought where the mortgage is an English mortgage or a simple mortgage.

O. 34, r. 2

- (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require

The old rule —The above rule substituted for old r. 2 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was in operation till the above date. It was as follows —

2 In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree—

- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims, by derived title, by those under whom he claims and shall also, if necessary, put the defendant in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all rights to redeem the property

Transfer of Property Act: 1908, Section 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 87

Transferred to I - see above

1. The ...
2. In ...

The City's seal is -

1. The new rule expressly provides that the mortgagee is to be paid out of the sale proceeds of the mortgaged property.
2. The new rule was necessary because the old rule which was not fully complied with by the mortgagees was that the mortgagee was to be paid out of the sale proceeds of the mortgaged property.
3. The new rule expressly provides that in taking account of the amount to be paid to the mortgagee for necessary costs, charges and expenses incurred by the mortgagee in respect of the mortgage security, the other with interest thereon shall be taken into account.
4. The old rule was not clear as to the day on which payment was to be made by the mortgagee in cases where accounts were directed to be taken. This is now made clear in sub-rule (1) (c) (ii).
5. The provision in new sub-rule (1) (c) (ii) as to subsequent interest is new. See rule 14 (b).
6. New sub-rule (1) (c) makes it clear that the mortgagee is to be paid out of the sale proceeds of the mortgaged property.
7. New sub-rule (1) (c) (ii) makes it clear that if default is made by the mortgagee in payment of the amount due under the preliminary decree, the mortgagee has to apply to the Court for a final decree.
8. New sub-rule (2) relates to the power of the Court to extend the time for payment. It is in substance a reproduction of old rule 3 (2). See para below, "Power to extend time in foreclosure suits".
9. New sub-rule (3) draws special attention to the forms of decrees to be passed where subsequent mortgagees are joined as parties to a suit for foreclosure.

Form of preliminary decree for foreclosure—See Appendix D, Form No. II, when accounts are directed to be taken, and Form No. JV, when no accounts are taken and the Court declares the amounts due

Foreclosure and sale.—Until 1st April 1930, i.e., until the Transfer of Property (Amendment) Act, 1929, comes into operation, a suit for foreclosure can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale. After that date it is no longer open to the holder of an English mortgage to sue for foreclosure. In the case of a mortgage by deposit of title deeds in Bombay, where the remedy by way of foreclosure was held to be open to such a mortgagee, s. 15 (2) of the Transfer of Property (Amendment) Supplementary Act allows a period of two years, i.e., upto 1st April 1932, to such a mortgagee to end a suit is remedy by way of foreclosure. Under the Transfer of Property Amendment Act, 1929, the remedy, by way of foreclosure is allowed only (1) in the case of a mortgage by conditional sale and (2) an anomalous mortgage where there is an express stipulation in that behalf. A suit for sale can only be brought where the mortgage is an English mortgage or a mortgage by conditional sale.

O. 34, r. 2

The holder of a mortgage by conditional sale cannot institute a suit for sale. A simple mortgagee cannot institute a suit for foreclosure. A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of Property Act, s 67]. Rules 2 and 3 provide for decrees for foreclosure. Rules 4 and 5 provide for decrees for sale.

The Transfer of Property Amending Act, 1929, places a mortgage by deposit of title deeds on the same footing as a simple mortgage. In the case, therefore, of a mortgage by deposit of title deeds the only remedy open to the mortgagee is by way of sale except in Bombay where the mortgagee is allowed a further period of two years as stated above. See secs 67, 96 and 100 of the Transfer of Property Act, 1882 and r 15 below.

Right of redemption—The mortgagor has, at any time after the mortgage money has become payable by him, a right on payment of deposit in Court or tender of the mortgage money, to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to re-transfer the property to him. This right is called the right of redemption. The right to redeem subsists so long as a mortgage subsists (g) [Transfer of Property Act, s 60]. Rules 7 and 8 provide for decrees for redemption.

Account against mortgagor—Whether the suit be one for foreclosure, sale or redemption, the preliminary decree in each case must either declare the amount due or direct an account to be taken of what is due to the mortgagee for principal, interest and costs and for other costs, charges and expenses in respect of the mortgage security. Where the same property is mortgaged to several persons in succession, and the subsequent mortgagees are joined as parties to the suit, they are entitled if they appear and prove their mortgages, to ask for a decree for an account on each of their mortgages and a declaration of their right in a suit for sale to participate in the surplus sale proceeds in order of priority. An account is then taken of what is due on each mortgage, the sums so found due to each mortgagee are included in one report, and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (r). See Appendix D Forms of Decrees, Nos 9 to 11. Where the mortgagee is in possession an account is to be taken of what is due to the mortgagee for principal and interest and also of the income derived by him from the property. Whatever may be the nature of the suit it lies upon the mortgagee to prove what is due to him for principal and interest. If the mortgage deed is not put in evidence as where it is not stamped and the mortgagee refuses to pay the penalty, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal (s).

Principal—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage. Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument. But an admission is not conclusive proof of the matter admitted (f) and it is open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (u). But the burden of proof in that case lies on the mortgagor (v). But though an admission is not conclusive proof of the matter admitted, it may operate as an estoppel, so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the

- (g) *Pimji v. Pantharimuth* (1919) 43 Bom 534 49 I C 894 *Jamchintar v. Hanant* (1920) 44 Bom 953 54 I C 45
(r) *Berhamdeo Pershad v. Tara Chand* (1906) 33 Cal 9, 111
(s) *Ganpat Vilik v. Buvaji* (1842) 6 Bom 660 60

- (f) *Evid. nec. Act* 1877 s 31
(u) *Evidence Act* 1872 s 9th proviso (1)
(v) *Malabar Prasad v. Bhaban Dyal* (1905) 7 All 71 *Ali Khan Jahalur v. Indul* *Jurrah* (1896) 23 Cal 953 25 I 22
See also *Jalrah case* v. *Jalrah* (1831) 6 Cal 263 277 278

instrument of mortgage (w) This is so in cases where the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage-deed has not been received. In such a case the mortgagor is not entitled to redeem except on payment to the transferee of the amount stated in the mortgage-deed to have been received by the mortgagee (x)

Interest.—See r 11 below and notes. See also notes to sec 34, 'The rule of damdupat'

Costs of suit.—Whether the suit is one for foreclosure, sale or redemption, the mortgagee is entitled to all costs properly incurred (y) by him including costs subsequent to decree (r 10). This right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract" (z). Thus costs incurred by the mortgagee after a proper tender has been made have been disallowed (a). And where in a suit for redemption the mortgagee, though he had been fully paid, contended that a large amount was still due to him, he was directed to pay costs of the suit (b).

Other costs, charges and expenses.—Sec 72 of the Transfer of Property Act, 1882, enables the mortgagee to spend such money as is necessary for the preservation of the mortgaged property from destruction, forfeiture or sale, for supporting the mortgagor's title to the property for making his own title thereto good against the mortgagor, etc., and, in the absence of a contract to the contrary, to add such money to the principal money at the rate of interest payable on the principal. Sec 63A enables the mortgagee in possession to make such improvements as are necessary to preserve the property from destruction or deterioration and to add such money to the principal money at the rate of interest payable on the principal. These are the costs, charges and expenses referred to in r 2 (1) (a) (iii) and they are to be taken into account in determining the amount payable by the mortgagor to the mortgagee (c). Rule 10 below provides for payment by the mortgagor to the mortgagee of similar costs, charges and expenses incurred by the mortgagee after the date of the preliminary decree up to the time of actual payment.

Subsequent interest.—There was no provision either in old r 2 or in old r 3 for payment of interest by the mortgagor subsequent to the day fixed under the decree for payment of the amount due. Provision has now been made for it in r 11 (b) below.

Plaintiff to apply for final decree for sale.—Sub rule (1) (c) (ii) makes it clear that if default is made by the mortgagor in payment of the amount due, the mortgagee has to apply for a final decree for sale. In one case the application was made by the

Account against mortgagee in possession.—Where under the terms of a usufructuary mortgage the mortgagee is to enjoy the rents and profits in lieu of interest, or the rents and profits are to be taken as an equivalent of the interest and of specific portions of the principal, there is no obligation on the mortgagee to render any accounts (e). In other cases a mortgagee in possession is bound to render an account of the rents and profits

- (w) Evidence Act, ss 31, 115
 (x) *Bickerton v Walker* (1886) 31 C D 151.
 (y) *Baleman v Hunt* (1904) 2 K B 530.
 (z) *Dryden v Frost* (1834) 8 L J Ch 235.
Maharaj Bahadur Singh v Basuruddin
 (1925) 41 Cal L J 607, 93 I C 364, (25)
 A C 1135
 (a) *Bank of New South Wales v Connor* (1849)
 14 App Cas 273, 275

- (a) *Dhondo v Balkrishna* (1884) 8 Bom 190
 (b) *Ashworth v Lord* (1887) 30 Ch D 545. See
 also *Charles v Jones* (1887) 35 Ch D 545
 (c) See *Daudbhai v Daudbhai* (1890) 14 Bom
 113
 (d) *Fainakar v Chaman* (1919) 4 Pat L J 317,
 353, 51 I C 881
 (e) Transfer of Property Act, ss 62, 76 and 77

O. 34, r. 2 The holder of a mortgage by conditional sale cannot institute a suit for sale. A simple mortgagee cannot institute a suit for foreclosure. A usufructuary mortgagee cannot institute a suit either for foreclosure or sale [Transfer of Property Act, s 67]. Rules 2 and 3 provide for decrees for foreclosure. Rules 4 and 5 provide for decrees for sale.

The Transfer of Property Amending Act, 1929, places a mortgage by deposit of title deeds on the same footing as a simple mortgage. In the case, therefore, of a mortgage by deposit of title deeds the only remedy open to the mortgagee is by way of sale except in Bombay where the mortgagee is allowed a further period of two years as stated above. See secs 67, 96 and 100 of the Transfer of Property Act, 1882, and r 15 below.

Right of redemption—The mortgagor has, at any time after the mortgage money has become payable by him, a right on payment of deposit in Court or tender of the mortgage money, to require the mortgagee to deliver up to him all documents in the mortgagee's possession relating to the mortgaged property, and to re-transfer the property to him. This right is called the right of redemption. The right to redeem subsists so long as a mortgage subsists (q) [Transfer of Property Act, s 60]. Rules 7 and 8 provide for decrees for redemption.

Account against mortgagor—Whether the suit be one for foreclosure, sale or redemption the preliminary decree in each case must either declare the amount due or direct an account to be taken of what is due to the mortgagee for principal, interest and costs, and for other costs, charges and expenses in respect of the mortgage security. Where the same property is mortgaged to several persons in succession, and the subsequent mortgagees are joined as parties to the suit they are entitled, if they appear and prove their mortgages, to ask for a decree for an account on each of their mortgages and a declaration of their right in a suit for sale to participate in the surplus sale proceeds in order of priority. An account is then taken of what is due on each mortgage, the sums so found due to each mortgagee are included in one report, and the sale proceeds are subsequently divided between the plaintiff and the puisne mortgagees in accordance with their claims as found by the report (r). See Appendix D Forms of Decrees, Nos 9 to 11. Where the mortgagee is in possession an account is to be taken of what is due to the mortgagee for principal and interest and also of the income derived by him from the property. Whatever may be the nature of the suit, it lies upon the mortgagee to prove what is due to him for principal and interest. If the mortgage deed is not put in evidence, as where it is not stamped and the mortgagee refuses to pay the penalty, he can only be credited in the account with the sum which the mortgagor admits was the amount of the principal (s).

Principal—The amount of principal and the rate of interest payable thereon are almost invariably stated in the instrument of mortgage. Such statement amounts to an admission on the part of the mortgagor that he has received the amount mentioned in the instrument. But an admission is not conclusive proof of the matter admitted (t) and it is open to the mortgagor to show that a smaller consideration or no consideration at all passed under the instrument of mortgage (u). But the burden of proof in that case lies on the mortgagor (v). But though an admission is not conclusive proof of the matter admitted, it may operate as an estoppel so as to preclude the mortgagor from asserting that a smaller consideration or no consideration passed under the

(g) *P. 1131 v. Pandhar nath* (1919) 43 Bom 334 49 I C 894. *P. merchant v. Han nanta* (1904) 44 L M 933 54 I C 45.

(i) *Berk nates Pershad v. Tara Chind* (1906) 33 Cal 92 111.

(s) *C. 1091 M d d v. Dav ji* (1922) 6 L M 689 60.

(t) *Evid. Act 1872 s 31*.

(u) *Evidence Act 1872 s 92 proviso (1)*.

(v) *M. Chahar Traval v. Nisham Dayal* (1905) 7 All 71. *All Khan J. Chahar v. Inid Traval* (1898) 23 L J 920 23 3 A 90. See also *Amrabad v. P. Hanunda* (1891) 6 Cal 264 27 28.

instrument of mortgage (*w*) This is so in cases where the mortgagee transfers his interest in the mortgage to a third party who has no notice that the full amount acknowledged to have been received on the face of the mortgage deed has not been received. In such a case the mortgagor is not entitled to redeem except on payment to the transferee of the amount stated in the mortgage-deed to have been received by the mortgagor (*x*)

Interest.—See r 11 below and notes. See also notes to sec 31, "The rule of damdupat"

Costs of suit.—Whether the suit is one for foreclosure, sale or redemption, the mortgagee is entitled to all costs properly incurred (*y*) by him including costs subsequent to decree (r 10). This right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract (*z*). Thus costs incurred by the mortgagee after a proper tender has been made have been disallowed (*a*). And where in a suit for redemption the mortgagee, though he had been fully paid, contended that a large amount was still due to him, he was directed to pay costs of the suit (*b*).

Other costs, charges and expenses.—Sec 72 of the Transfer of Property Act, 1882, enables the mortgagee to spend such money as is necessary for the preservation of the mortgaged property from destruction, forfeiture or sale, for supporting the mortgagor's title to the property for making his own title thereto good against the mortgagor, etc., and, in the absence of a contract to the contrary, to add such money to the principal money at the rate of interest payable on the principal. Sec 63A enables the mortgagee in possession to make such improvements as are necessary to preserve the property from destruction or deterioration and to add such money to the principal money at the rate of interest payable on the principal. These are the costs, charges and expenses referred to in r 2 (1) (a) (iii) and they are to be taken into account in determining the amount payable by the mortgagor to the mortgagee (*c*). Rule 10 below provides for payment by the mortgagor to the mortgagee of similar costs, charges and expenses incurred by the mortgagee after the date of the preliminary decree up to the time of actual payment.

Subsequent interest.—There was no provision either in old r 2 or in old r 3 for payment of interest by the mortgagor subsequent to the day fixed under the decree for payment of the amount due. Provision has now been made for it in r 11 (b) below.

Plaintiff to apply for final decree for sale.—Sub rule (1) (c) (ii) makes it clear that if default is made by the mortgagor in payment of the amount due, the mortgagee has to apply for a final decree for sale. In one case the application was made by the

Account against mortgagee in possession.—Where under the terms of a usufructuary mortgage the mortgagee is to enjoy the rents and profits in lieu of interest, or the rents and profits are to be taken as an equivalent of the interest and of specific portions of the principal, there is no obligation on the mortgagee to render any accounts (*e*). In other cases a mortgagee in possession is bound to render an account of the rents and profits

- (w) Evidence Act ss 31, 115
- (x) *Buckerton v Walker* (1886) 31 C D 151, *Bateman v Hunt* (1904) 2 K B 530
- (y) *Dryden v Frost* (1832) 8 L J Ch 235, *Maharaj Bhakhar Singh v Basraddin* (1935) 41 Cal L J 60, 931 C 384 (-5) A C 1135
- (z) *Bank of New South Wales v Connor* (1829) 14 App Cas 273, 278

- (a) *Dhondo v Balkrishna* (1884) 8 I L M 190
- (b) *Ashworth v Lord* (1887) 30 Ch D 545 See also *Charles v Jones* (1887) 35 Ch D 515
- (c) See *Daudbhai v Daudhai* (1880) 14 I L M 113
- (d) *Patnagar v Chandra* (1910) 4 Pat L J 317, 353 511 C 881
- (e) Transfer of Property Act ss 62, 76 and 77

O. 34, r. 2 of the mortgaged property (f) As to annual rents against a mortgagee in possession, see the undermentioned cases (g)

Power to extend time in foreclosure suits—The proviso to old r 3 (2) empowered the Court upon good cause shown and upon such terms as it thought fit from time to time to postpone the day fixed for payment by the mortgagor of the mortgage money. This proviso has now been transferred to sub rule (2) of the present rule with some alterations. Sub rule (2) empowers the Court upon good cause shown and terms to be fixed by the Court, from time to time at any time before a final decree is passed, to extend the time fixed for payment. The power to extend the time is discretionary and the mortgagor is not entitled to an extension as of right (h). It is not a good ground for extending the time that the mortgagor was under a misconception or payment in time was unnecessary (i). It was held under the old rule that the application for extension of time need not be made before the expiry of the time originally fixed for payment and that it could be made even after the expiry of that time provided it was made before a final decree for foreclosure was passed (j). This is now made clear by substituting the words "extend the time" for the words "postpone the day".

It was held under the old rule that even if there was no order postponing the day fixed for the payment of the mortgage money, a payment into Court by the mortgagor of the mortgage money before the passing of a final decree for foreclosure was an effectual payment (k). Effect has been given to these decisions by substituting in r 3 (1) the words

"before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed for the words "on or before the day fixed which occurred in old r 3 (1) (l).

Appeal from order refusing to extend time—An appeal lies from an order refusing to extend the time for payment under O 43 (1) (o).

Sub mortgage—A sub mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself (m). Where the sub mortgagee is a party to the suit, the preliminary decree must direct an account to be taken of what is due to the mortgagee and of what is due to the sub mortgagee. As to the form of decree in a suit by a sub mortgagee against the mortgagee and mortgagor see Appendix D form No 11. As to the form of decree in a suit for redemption by the mortgagor against the mortgagee and sub mortgagee see the undermentioned case (n). See notes to r 1 above. Sub mortgagee.

Subsequent incumbrancers—For forms of decree in cases where there are subsequent incumbrancers see Appendix D forms Nos 9, 10 and also the undermentioned case (o).

Mortgage of chattels and of intangible property—A mortgagee of chattels is entitled to sue for a decree for sale (p). So also a mortgagee of intangible property, such as *pilas* or turns of worship in a temple (q).

| | |
|---|-------------------------------|
| (f) Transfer of Property Act s 76 (e) | (11) M.L. 360 Nankar v. Lohaj |
| (g) <i>Jagat Prasad v. Colahat</i> (1884) 6 All 303 | (1884) 6 All 303 |
| (h) <i>Corl v. Lort</i> (1885) 30 C.D. 550 | (1885) 30 C.D. 550 |
| (i) <i>N. also 11 h. r. M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (j) <i>11 h. r. M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (k) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (l) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (m) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (n) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (o) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (p) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |
| (q) <i>M. r. 8 s. 4</i> | (1885) 30 C.D. 550 |

Res Judicata.—See notes to s 11, Application of the above rules to suits on mortgage, on p 56 above O. 34

3. [New Act 4 of 1882, s. 87.] (1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where payment in accordance with sub rule (1) has not been made, the Court shall on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged

The old rule—The above rule was substituted for old r 3, by the Transfer of Property (Amendment) Supplementary Act 1929, which came into operation on 1st April 1930. The old rule was in operation till the above date. It was as follows —

3 (1) Where, on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required—

(b) ordering him to re transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

O. 34, r. 2 of the mortgaged property (f) As to annual rents against a mortgagee in possession see the undermentioned cases (g)

Power to extend time in foreclosure suits—The proviso to old r 3 (2) empowered the Court upon good cause shown and upon such terms as it thought fit from time to time to postpone the day fixed for payment by the mortgagor of the mortgage money. This proviso has now been transferred to sub rule (2) of the present rule with some alterations. Sub rule (2) empowers the Court upon good cause shown and terms to be fixed by the Court from time to time at any time before a final decree is passed to extend the time fixed for payment. The power to extend the time is discretionary and the mortgagor is not entitled to an extension as of right (h). It is not a good ground for extending the time that the mortgagor was under a misconception or payment in time was unnecessary (i). It was held under the old rule that the application for extension of time need not be made before the expiry of the time originally fixed for payment and that it could be made even after the expiry of that time provided it was made before a final decree for foreclosure was passed (j). This is now made clear by substituting the words "extend the time" for the words "postpone the day".

It was held under the old rule that even if there was no order postponing the day fixed for the payment of the mortgage money, a payment into Court by the mortgagor of the mortgage money before the passing of a final decree for foreclosure was an effectual payment (k). Effect has been given to these decisions by substituting in r 3 (1) the words "before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed" for the words "on or before the day fixed which occurred in old r 3 (1) (l)".

Appeal from order refusing to extend time—An appeal lies from an order refusing to extend the time for payment under O 43 (1) (o).

Sub mortgage—A sub mortgagee may sue for foreclosure or sale to the same extent as the mortgagee himself (m). Where the sub-mortgagee is a party to the suit, the preliminary decree must direct an account to be taken of what is due to the mortgagee and of what is due to the sub mortgagee. As to the form of decree in a suit by a sub mortgagee against the mortgagee and mortgagor see Appendix D form No 11. As to the form of decree in a suit for redemption by the mortgagor against the mortgagee and sub mortgagee see the undermentioned case (n). See notes to r 1 above. Sub mortgage.

Subsequent incumbrancers—For forms of decree in cases where there are subsequent incumbrances see Appendix D forms Nos 9, 10 and also the undermentioned case (p).

Mortgage of chattels and of intangible property—A mortgage of chattels is entitled to sue for a decree for sale (q). So also a mortgagee of intangible property, such as a share or turn of worship in a temple (q).

- | | |
|---|---|
| (f) Transfer of Property Act s 6 (e) | (12) = Mad 3 Nagan v Jadhav (1933) 10 M 101 |
| (g) <i>Jagjit Lal v Gobind</i> (1884) 6 All 303 | (13) = 10 M 101 |
| <i>Adarshi v Parth</i> (188) 351 D 345 350 | (14) = 10 M 101 |
| Also <i>Elion M. S. 11 8 8 4</i> | (15) = 10 M 101 |
| <i>A. T. L. v. L. v. L. 18 370 p. 304</i> | (16) = 10 M 101 |
| (h) <i>M. v. P. n. (1910) 39 M. 11</i> | (17) = 10 M 101 |
| <i>31 I. C. n. P. L. v. Chandra</i> | (18) = 10 M 101 |
| <i>(1910) 4 Lat. L. J. 34 51 I. C. 841 11</i> | (19) = 10 M 101 |
| <i>31 I. C. 841 11</i> | (20) = 10 M 101 |
| <i>31 I. C. 841 11</i> | (21) = 10 M 101 |
| (i) <i>W. v. 33 I. C. 1</i> | (22) = 10 M 101 |
| (j) <i>M. v. T. L. v. L. (10 8) 5 I. A</i> | (23) = 10 M 101 |
| <i>55 Cal 8 11 I. C. 40 (4) A</i> | (24) = 10 M 101 |
| <i>1 C 13</i> | (25) = 10 M 101 |
| (k) <i>N. v. N. v. N. (1913) 123</i> | (26) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (27) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (28) = 10 M 101 |
| (l) <i>N. v. N. v. N. (1913) 123</i> | (29) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (30) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (31) = 10 M 101 |
| (m) <i>N. v. N. v. N. (1913) 123</i> | (32) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (33) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (34) = 10 M 101 |
| (n) <i>N. v. N. v. N. (1913) 123</i> | (35) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (36) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (37) = 10 M 101 |
| (o) <i>N. v. N. v. N. (1913) 123</i> | (38) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (39) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (40) = 10 M 101 |
| (p) <i>N. v. N. v. N. (1913) 123</i> | (41) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (42) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (43) = 10 M 101 |
| (q) <i>N. v. N. v. N. (1913) 123</i> | (44) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (45) = 10 M 101 |
| <i>31 I. C. 11 I. C. 11</i> | (46) = 10 M 101 |

Res judicata.—See notes to r 11 Application of the above rules to suits on mortgage, on p 56 above **O. 3.**

3. [New Act 4 of 1882, s. 87.] (1) Where before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,
and, if necessary —

(b) ordering him to re transfer at the cost of the defendant the mortgaged property as directed in the said decree,
and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where payment in accordance with sub rule (1) has not been made, the Court shall on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged

The old rule—The above rule was substituted for old r 3, by the *Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on 1st April 1930* The old rule was in operation till the above date It was as follows —

3 (1) Where on or before the day fixed, the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,
and, if so required—

(b) ordering him to re transfer the mortgaged property as directed in the said decree,
and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

O. 34, r. 3 (2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

Provided that the Court may, upon good cause shown and upon such terms (if any)

Power to enlarge time as it thinks fit, from time to time postpone the day fixed for such payments

Discharge of debt (3) On the passing of a decree under sub rule (2) the debt secured by the mortgage shall be deemed to be discharged

Transfer of Property Act, 1882, s 87—This rule corresponds to s 87 of the Transfer of Property Act, except in two particulars, viz, (1) sub r (1) provides for the passing of a decree where payment is made, s 87 of the Transfer of Property Act contained only the words "the defendants shall (if necessary) be put into possession of the mortgaged property" (2) Sub r (2) again provides for the passing of a decree where no payment is made Under s 87 the Court had merely to pass an order See as to this distinction, notes to r 5 below, "Final decree for sale, Limitation"

The old rule and the new rule —

(1) The new rule makes it clear that the decree to be passed under it is a *final decree*

(2) The words "before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed" in new sub rule (1) have been substituted for the words "on or before the day fixed" which occurred in old sub rule (3)

(3) The defendant mortgagor has to *apply* to the Court for a decree after paying the amount into Court

(4) The proviso to old sub rule (2) regarding the power of the Court to extend the time for payment has been transferred to new rule 2

(5) In sub rule (3) it is made clear that on the passing of the final decree for foreclosure not only the mortgage debt is extinguished, but all liabilities of the defendant in respect of the mortgage and on account of the suit are discharged

Final decree for foreclosure—For form, see Appendix D, new form No 4 [old form No 10] Where the mortgagor fails to pay the amount due by him on the date fixed by the preliminary decree, the mortgagee may apply under sub r (2) for a *final decree* declaring that the mortgagor is debarred from all right to redeem the mortgaged property No formal notice of such application is necessary to a mortgagor who is sui juris, but notice is necessary where the mortgagor is a minor, absence of notice, however, will not invalidate the final decree unless prejudice is caused to the minor (r) until a final decree is passed, the mortgagor may apply under rule (2) for an extension of the time for payment He may, even without an extension, at any time before the final decree is passed, pay the money into Court and so avert foreclosure (a) See note to r 2 above "Power to extend time in foreclosure suits"

Only one final decree for foreclosure—The law contemplates the passing of only one final decree and that a final decree can be made only after the Appellate Court has decided the appeal from the preliminary decree Thus if A sues B for foreclosure of a mortgage comprising two properties, and a preliminary decree for foreclosure is passed as regards one of the properties, but the suit is dismissed as regards the other, and A appeals from that part of the decree by which his suit was dismissed, and pending the appeal

(r) *Mahadeo v Somnath* (1946) 48 All 828

97 L C 277 (20) A 75

(a) *Somesh v Ram Krishna* (1900) 27 Cal 705,

Sing Ram v Murari (1903) 25 All 231

See also *Bibi Iqbal v Jai Karam* (190-21 All 479

applies for and obtains a final decree for foreclosure in respect of the property ordered to be foreclosed, he cannot afterwards, if he succeeds in the appeal, obtain another final decree for foreclosure of the other property (t). See note to r. 5 below, "Only one final decree in a suit for sale."

Payment into Court.—The payment into Court may be made by the mortgagor at any time before the final decree for foreclosure has been passed (u). See notes to r 2 above. 'Power to extend time in foreclosure suits.'

Effect of appeal on time for payment.—A preliminary decree is passed in a foreclosure suit fixing a period of six months from the date of the decree for payment by the mortgagor of the amount due. The mortgagor prefers an appeal from the decree but the decree is confirmed in appeal. The decree of the appellate Court is *silent as to the time allowed for redemption*. This does not operate as an extension of the time for payment so as to enable the mortgagor to redeem the mortgage within six months from the date of the appellate decree. The mortgagee is entitled to a final decree for foreclosure after the expiration of six months from the date of the original decree, though six months may not have expired from the date of the appellate decree. The appellate decree, simply confirming the original decree, cannot be read as giving the mortgagor six months from the date of the decree on appeal (t). Nor does the summary dismissal of an appeal extend the time for payment (w). This is in accordance with the general principle that where time is prescribed by the decree of the lower Court for the performance of a condition precedent, and the appellate Court simply confirms the decree of the lower Court or summarily dismisses the appeal, it cannot be regarded as enlarging the time fixed by the original decree for the performance of the condition (x). The result is the same where the appeal is withdrawn and no decree is passed in appeal. The withdrawal does not give the mortgagor a fresh period for redemption (y). To avoid the difficulty arising in such cases, the mortgagor should take care to have a fresh date fixed for payment by the appellate Court, offering at the same time to pay interest up to that date (z), or he should apply under r. 2 (2) for an extension of the time for payment. See note under s. 34, "Time for payment fixed by decree."

Sub rule 3 Discharge of debt, etc., on foreclosure—Old sub rule (3) provided that on the passing of a final decree for foreclosure the debt secured by the mortgage shall be deemed to be discharged. The present sub rule (3) provides that on the passing of a final decree for foreclosure, all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged. The liabilities in respect of the mortgage refer not only to the mortgage debt but also to the “other costs, charges and expenses” referred to in r 2 (1) (a) (ii). The liabilities on account of the suit include costs of the suit awarded against the mortgagor.

Limitation for application for a final decree—The period of limitation for an application for a final decree in a suit for foreclosure, sale or redemption is 10 years under art 181 of the Limitation Act, 1908. As to limitation for execution of a final decree for foreclosure, sale or redemption, see note below, "Limitation for execution of final decree."

- (f) *Sham Sundar v Muhammad* (1905) 27 All 501
- (u) *Sant Baksh v Bhagwandin* (1931) 6 Luck 610 131 I C 435 (31) A O 121
- (r) *Bhola Nath v Kant Chandra* (1899) 25 Cal 311 *Basant Kumar v Radha Kani* (1922) 26 C W N 440 70 I C 735 (22) A C 379 See also *Chiranj Lal v Dharam Singh* (1896) 18 All 455 *Manantraman v Laxmipann* (1892) 15 Mad 170.

- Kanara v Gorinda (1847) 15 Ind 26
where the same question arose as to
for redemption n
- (w) Dattatraya v Haseguda (1927) 8 Ind 1023
76 I C 1023 (23) A B 57
- (x) Ramasami v Sundara (1910) 11 Ind 261
Amabali v Kulu (1901) 15 Ind 47
- (y) Palloju v Gannu (1901) 15 Ind 47
same v Ishwarper i by s mms
- (z) Rajkumars v Jai v Thiruvannamur
20 Cal 272

O. 34, r. 3

Where no payment is made by the mortgagor of the amount due on or before the day fixed, the mortgagee may apply for a final decree. The procedure prescribed by the Transfer of Property Act in suit for foreclosure, redemption and sale was in the first place to pass a "decree," and then an "order absolute." This phraseology gave rise to conflicting decisions. In some cases it was held that an application for an order absolute for sale under s. 89 of the Transfer of Property Act was an application to execute the decree, and that the period of limitation was three years from the date of the decree as provided by art. 179 of the Limitation Act of 1877 [Limitation Act, 1908, art. 182]. In other cases it was held that such an application was one to obtain a further decree, that the only article of the Limitation Act that could possibly apply to it was the general article 178 [now art. 181] but that even that article could not apply as it applied only to applications under the Code of Civil Procedure, and that there being no other article, there was no period of limitation at all for an application for an order absolute under the Transfer of Property Act. [It is interesting to note that the former view was taken by the Privy Council in cases under the Transfer of Property Act decided in 1914 (a)]. To put an end to this conflict of decisions it is now provided that the application which follows a preliminary decree is one to obtain a final decree [see r. 3 (2), r. 5 (3), r. 8 (1)] so as to bring it within the purview of art. 181 of the Limitation Act of 1908 [old art. 178] and not one to execute the decree (b). Further, the provisions relating to mortgage suits have been transferred from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code (c). The result is that an application for a final decree for foreclosure, sale, or redemption is now governed by the residuary article 181 of the Limitation Act, 1908, and the period of limitation is three years from the date on which the right to apply accrues (d). Where an appeal is preferred from the preliminary decree the right to make such an application accrues not on the expiry of the time limited by the preliminary decree but on the date of the decree of the Court of appeal (e), and even when the appeal was withdrawn and an order was made granting leave to withdraw and dismissing the appeal it was held that the order of the appeal Court was a decree and gave a new starting point for limitation (e1). Thus rule applies although the decree of the Appellate Court has been made three years after the time fixed for redemption by the decree of the trial Judge (f). Where a decree was passed before the new Code came into force, and the application for a final decree was made after the new Code came into force, it was held that "the right to apply" never having accrued to the decree holder until the new Code conferred it upon him, the period of limitation under art. 181 did not begin to run until the new Code came into force that is, until 1st January 1909 (g). If the preliminary decree directs the mortgagee to pay off a prior mortgage but fixes no period for such payment, the starting point for limitation for an application for a

(a) *Abul Majid v. Jaahir Lal* (1914) 36 All 200 21 C 619 (P. C.) *Batuk Nath v. Munni Dai* (1914) 38 All 284 41 J A 104 31 C 614 f. *Hovell v. Muhammad v. Abilul Karim* (1916) 39 Mad 544 29 I C 23

(b) *Bluth v. Tara Chand* (1920) 25 C W N 500 597, 50 I C 177

(c) *Imloak Chani v. Sarat Chander* (1911) 35 Cal 913 9219 11 I C 913 affm. sub-nominee *Munna Lal v. Sarat Chander* (1915) 42 I A 88 42 Cal 776 71 C 693

(d)

" " " " " "

" " " " " "

" " " " " "

" " " " " "

" " " " " "

J 384 381 C 385, *Mumtaz v. Yendia* (1922) 42 Mad L J 51, 69 I C 386 (-)

(e) *Jowad Hussain v. Genita Singh* (1926) 53 I A 137 61at 41 98 I C 493 (26) A 1 C 92 approving *Gopalhar v. Kishan* (1917) 31 All 611 42 J A 93 overruling *Madho v. Ashok* (1916) 38 All 21 30 I C 494, *Nazim v. dan v. Bhoira* (1918) 40 All 203 43 I C 870 *J. Janti Veni Ha v. Demasetti* (1921) 44 Cal 714 61 J C 470 (21) A M 411

(e1) *Mahapatrao v. Mahata Patrao* (1923) 56 Mad 50 143 I C 413 (33) A M 412

(f) *Fitzholmes v. Bank of Ceylon Ltd.* (1907) 54 I A 52 8 Lall 257 100 I C 2 (27) A M 25

(g) *Narsingrao v. Banda* (1918) 42 Bm N 46 1 C 107 New All I C 107 *Debra v. J. Janti Veni Ha* (1919) 41 I A 213 48 I C 45

final decree is at the expiry of six months from the preliminary decree (h) In a case where the Court erroneously expressed an opinion that a puisne mortgagee could not sell the property without paying off a prior mortgagee it was held that limitation was suspended for the time spent in ascertaining the balance due to him (i) An omission to draw up a final decree has been treated as an irregularity and in a case where the Court erroneously made an order absolute instead of a final decree for sale execution was allowed to proceed (j)

Application for execution of final decree—Limitation for an application for execution of a final decree is under art 182 of the Limitation Act 1908 (k)

4. [New Act 4 of 1882, s. 88.] (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (1) of sub-rule (1) of rule 2 and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms

(h) *Gyan Singh v. Ata Hussain* (1911) 43 All. 370 60 I C 817 (21) A A 56

(i) *Remendra v. Dharani* (1911) 25 C W 5 36 I C 418 (21) A C 381

(j) *Chhagan Lal v. Jayaram* (1907) 51 Bom 1-5 100 I C 958 (27) A B 131

(k) *Samar Singh v. Deonandan* (1907) 6 Pat 780, 100 I C 811 (27) A P 215 [suit for sale]

O. 34, r. 4

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No 9, Form No 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require

The old rule—The above rule was substituted for old r 4 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930 The old rule was as follows —

4 (1) In a suit for sale, if the plaintiff succeeds the Court shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same

(2) In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms

Transfer of Property Act, s 68.—This rule corresponds with sec 68 of the Transfer of Property Act The reference to "subsequent interest and subsequent costs" is new

The old rule and the new rule —(1) The new rule expressly says that the decree to be passed under it is to be a *preliminary decree*

(2) The new rule says that on default in payment by the mortgagor the mortgagee has to *apply* for a final decree for sale

(3) The new rule makes it clear that the mortgagee has to pay not only subsequent interest and subsequent costs as under the old rule, but also subsequent costs, charges and expenses See r 10 below

(4) Sub rule (2) of the new rule empowers the Court to extend the time for payment. There was no such provision in the old rules

(5) Sub rule (4) of the new rule provides for decrees in suits to which subsequent mortgagees are parties

Preliminary decree for sale.—A suit for sale of mortgaged property can only be brought where the mortgage is an English mortgage or a simple mortgage or a mortgage by deposit of title deeds or where the property is subject to a charge within the meaning of sec 100 of the Transfer of Property Act (see r 15 below) The preliminary decree to be passed in a suit for sale corresponds to the preliminary decree in a suit for foreclosure in all respects except that instead of a direction providing for foreclosure, the decree

is to contain a direction providing for sale of the mortgaged property. The notes therefore on r 2 above as to the taking of accounts and the determination of principal interest and costs apply equally to this rule.

Sub rule (1). Subsequent costs, charges, expenses and interest—See rr 10 and 11 below.

Sub rule (2). Power to extend time in suit for sale—This sub rule is new. It empowers the Court in a suit for sale to extend the time fixed for payment of the amount due by the mortgagor on good cause shown. There was no such provision in the old rule enabling the Court to extend the time for payment in a suit for sale. It was, therefore, held that if the mortgagor failed to pay on or before the day fixed, the Court has no power to extend the time for payment and that it was bound to pass a final decree for sale (l). At the same time it was held that even if time was not extended the mortgagee was entitled under O 21, r 69, to stop the sale by payment of the amount due and costs (m), and further, if the property was sold, to have the sale set aside on making the deposit as provided by O 21, r 89 (n). In the cases cited above the Court held that the provisions of the Code relating to execution of decrees applied to sales under mortgage decrees. There were, however, cases in which it was held that the sections of the Code relating to execution did not apply to sales under mortgage decrees (o). But the latter view is no longer tenable, and it was to negative that view that the sections of the Transfer of Property Act relating to decrees in mortgage suits were transferred to the Code. As to O 21, r 83 it is expressly provided that nothing contained therein applies to a sale in execution of a mortgage decree (p). See notes to r 5 below, 'Mortgagor's rights before confirmation of sale.'

Form of decree—As to the form of a preliminary decree for sale, see Appendix D, Form No 5 [old Form No 4]. On referring to the form it will be observed that it does not contain any declaration of *personal* liability of the defendant for principal, interest or costs. Such a declaration in fact ought not to be included in the decree for sale. If the sale proceeds are not sufficient to pay the amount due to the mortgagee, the mortgagee may apply for a personal decree against the mortgagor under r 6 below (q). See Appendix D, Form No 8 [old Form No 11].

Subsequent incumbrancers—For the contents of a decree for sale in a suit by the first mortgagee (r), see Appendix D, Form No 9 [old Form No 7]. For the contents of a decree for sale in a suit by a second mortgagee, see Appendix D, Form No 10 [old Form No 8].

Rights of second mortgagee in a suit for sale by first mortgagee—If mortgages his property first to A, and then to B. A sues M for a sale of the mortgaged property making B a party defendant. In such a suit the only right of B, the second mortgagee, is to redeem A's mortgage or to receive his mortgage money out of the surplus sale proceeds after satisfaction of A's mortgage. He is entitled to treat the suit brought by A, the first mortgagee, as one for his benefit. It follows, therefore, that B cannot ask for a sale of the property if A's claim is satisfied by M before sale. Also if a decree for sale is passed in A's suit, B cannot ask for a decree for sale of another

(l) *Taniram v Gajanan* (1900) 24 Bom 300.

(m) *Harjot Rai v Rameshar* (1898) 20 All 354.
Gaya Ram v Chuni Lal (1897) 19 All 205.
Bibijan v Sacha (1904) 31 Cal 863.
Adipuranam v Gopalanam (1908) 31 Mad 354.

(n) See *Turmal v Syed Dastaghiri* (1899) 22 Mad 286.
Mallikarjunadu v Lingamurti (1902) 25 Mad 244.
Arishnaji Mahadev (1901) 23 Bom 104.

(o) See *Pramatha Chandra v Kheta* (1902) 29 Cal 651.

(p) *Kara Lal v Punjab National Bank* (1923) 5 Lah L J 67 55 I C 816 (21) A L 331.

(q) See *Kamalamma v Komandur* (1907) 30 Mad 464.

(r) See *Berhamdeo v Tara Chand* (1906) 33 Cal 92, 111.

O. 34,
rr. 4, 5

property of *M* included in his mortgage. In either case, *B* must bring a separate suit for sale on his mortgage (s)

Award and consent decree—An arbitrator is not bound by this rule. A decree in terms of an award may order the sale of the property mortgaged although no preliminary decree under this rule or final decree under rule 5 has been passed (t). So also if the decree is a consent decree (u). In *Kashi Chandra v Priyanath (v)* Mookerjee, J, directed that before execution an order absolute should be obtained under O 34 r 5 but the consent decree in that case was in the form of a preliminary decree.

Sub rule (3) Power to decree sale in a foreclosure suit—Under the Transfer of Property Amending Act, 1929, foreclosure is allowed in the case only of anomalous mortgage where there is an express stipulation in that behalf and in the case of a mortgage by conditional sale. The remedy by way of foreclosure is no longer open in the case of an English mortgage. The words in the case of an anomalous mortgage have accordingly been added after the words in a suit for foreclosure in new sub rule (3) which corresponds to old r 4(2). In the case of a mortgage by conditional sale the only remedy open to the mortgagee is foreclosure and there is no scope for an alternative decree for sale.

Appeal from order refusing to extend time—An appeal lies from an order refusing to extend the time for payment under O 43, r (1) (o). The provision for extension of time contained in sub rule (2) of this rule is new and so is the provision for an appeal from an order refusing to extend the time under sub rule (2). See O 43, r (1) (o) and notes, clause (o).

5. [New Act 4 of 1882, s. 89.] (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree in suit for a final decree passed under sub rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property

- (t) *Narott Chandra v Mahapatra* (1910) 37 Cal 107 81 C 114^a *Velargua v Malera* *Hansa Sahai Nigai Co* (1919) 42 Mad 90 491 C 36
(u) *Nripendra Nath v Jhumak* (1924) 3 Pat 241 801 C 588 (-1) A 1 463
(v) *Hemendra Lal v Fakirchand* (1923) 50 Cal 60 741 C 9 9 (-1) A C 8 6 *Ishan Chand v Niranjan* (19-3) 2 Pat 53^a

- 721 C 1019 (23) A 1 184 *Sat Singh v Bhagwanth* (19-3) 44 All 684 751 C 485 (-1) A 383 *Askari Hussain v Jahanara Mal* (1922) 43 All 207 1001 C 52 (27) A 107 F 31 *Jumar Gangadhar v Mahapatra & R. Measur* *Nag* (1927) 6 Pat 348 1021 C 443 (-1) A 1 71
(r) (1914) 8 C W N 50 831 C 424 (24) A C 615

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub rule (1) of rule 4

The old rule—The above rule was substituted for old r 5 by the Transfer of Property (Amendment) Supplementary Act, 1929 which came into operation on the 1st April 1930. The old rule was as follows —

5 (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up

and if so required —

(b) ordering him to re transfer the mortgaged property as directed in the said decree

and also if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where such payment is not so made the Court shall on application made in that behalf by the plaintiff pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4

Transfer of Property Act 1882, s 89—This rule corresponds with sec 89 of the Transfer of Property Act except in the following particulars —

- 1 The provision contained in sub r (1) for the passing of a *decree* in the case where payment is made in accordance with the terms of the preliminary decree is new
- 2 By sub rule (2) it is provided that the application which follows a preliminary decree for sale is not for an *order* for sale as it was in sec 89 of the Transfer of Property Act but for a *decree* for sale. See notes below. Final decree for sale. Limitation
- 3 The words *to the plaintiff or* which occurred in sec 89 after the word *pays* (see l 2 of this rule) have been omitted. See notes below. *Payment into Court*
- 4 The words *and thereupon the defendant's right to redeem and the security shall both be extinguished* which occurred at the end of sec 89, have been omitted. See notes to r 1 above, *Consequences of non joinder*

O. 34,
rr. 4, 5

property of *M* included in his mortgage. In either case, *B* must bring a separate suit for sale on his mortgage (*s*).

Award and consent decree.—An arbitrator is not bound by this rule. A decree in terms of an award may order the sale of the property mortgaged although no preliminary decree under this rule or final decree under rule 5 has been passed (*f*). So also if the decree is a consent decree (*u*). In *Kashi Chandra v. Priyanath* (*v*) *Mookerjee, J.*, directed that before execution an order absolute should be obtained under O 34, r 5, but the consent decree in that case was in the form of a preliminary decree.

Sub rule (3): Power to decree sale in a foreclosure suit.—Under the Transfer of Property Amending Act, 1929, foreclosure is allowed in the case only of anomalous mortgage where there is an express stipulation in that behalf and in the case of a mortgage by conditional sale. The remedy by way of foreclosure is no longer open in the case of an English mortgage. The words "in the case of an anomalous mortgage" have accordingly been added after the words "in a suit for foreclosure" in new sub rule (3) which corresponds to old r 4 (2). In the case of a mortgage by conditional sale, the only remedy open to the mortgagee is foreclosure, and there is no scope for an alternative decree for sale.

Appeal from order refusing to extend time.—An appeal lies from an order refusing to extend the time for payment under O 43, r (1) (o). The provision for extension of time contained in sub rule (2) of this rule is new and so is the provision for an appeal from an order refusing to extend the time under sub rule (2). See O 43, r. (1) (o), and notes, "clause (o)".

5. [New. Act 4 of 1882, s. 89.] (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree in suit for sale of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(*s*) *Surat Chandra v. Nahapiet* (1910) 37 Cal 907, 81 C 1142, *Srinivas v. Madura Hindu Sabha Nidhi Co* (1919) 42 Mad 90, 49 C 30.

(*f*) *Nrupendra Nath v. Jhumak* (1924) 3 Pat 221, 80 C 544 (24) A P 62.

(*u*) *Hemendra Lal v. Fakirchand* (1923) 50 Cal 650, 74 C 929 (23) A C 626, *Ishan Chandra v. Nidhan* (1933) 2 Pat 538,

72 C 1049 (21) A P 184, *Sital Singh v. Baijnath* (1922) 44 All 668, 75 C 485, (22) A A 337, *Asfari Hassan v. Jahangira Mal* (1927) 49 All 237, 100 C 59 (27) A A 167 (31) *Kumar Gyananand v. Mahara*, Sir I. J. *Imshewar Singh* (1927) 6 Pat 394, 102 C 449 (27) A P 271.

(*r*) (1924) 28 C W 650, 83 C 424 (24) A C 645.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4

The old rule—The above rule was substituted for old r 5 by the Transfer of Property (Amendment) Supplementary Act 1929, which came into operation on the 1st April 1930. The old rule was as follows —

5 (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10 the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up

and, if so required,—

(b) ordering him to re transfer the mortgaged property as directed in the said decree,

and also, if necessary,—

(c) ordering him to put the defendant in possession of the property

(2) Where such payment is not so made the Court shall, on application made in that behalf by the plaintiff pass a decree that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4

Transfer of Property Act 1882, s 89—This rule corresponds with sec 89 of the Transfer of Property Act except in the following particulars —

- 1 The provision contained in sub r (1) for the passing of a *decree* in the case where payment is made in accordance with the terms of the preliminary decree is new
- 2 By sub rule (2) it is provided that the application which follows a preliminary decree for sale is not for an *order* for sale as it was in sec 89 of the Transfer of Property Act but for a *decree* for sale. See notes below. Final decree for sale. Limitation
- 3 The words *to the plaintiff or* which occurred in sec 89 after the word *pays* (see l 2 of this rule) have been omitted. See notes below. *Payment into Court*
- 4 The words *and thereupon the defendant's right to redeem and the security shall both be extinguished* which occurred at the end of sec 89, have been omitted. See notes to r 1 above. *Consequences of non joinder*

O. 34, r. 5

The old rule and the new rule —

- (1) The words "or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub rule (3) of this rule" in sub rule (1) are new
- (2) If the mortgagor pays the amount due into Court he has to apply for a final decree for a re transfer of the mortgaged property to him, and if a final decree has already been passed and the amount is deposited before confirmation of sale, for an order for a re transfer
- (3) Sub rule (2) is new There was no such provision in the old rule
- (4) Sub rule (3) makes it clear that if the mortgagor fails to pay the amount into Court the mortgagee has to apply for a final decree for sale

Consent decree providing for payment in instalments—Where in a suit for sale on a mortgage the consent decree provides for payment of the mortgage money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due as provided by r. 4, r. 4 has no application, and consequently it is not necessary for the mortgagee to apply for a final decree in terms of the present rule (u)

No power to go behind preliminary decree—On an application of the mortgagee for a final decree the Court has no power to go behind the preliminary decree Its powers are limited to those mentioned in this rule (x)

Preliminary decree under appeal—In *Gajadhar v. Kishen* (y) Banerji J., said 'It seems to me that this rule, i.e. the rule regulating applications for final decrees in mortgage actions— contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the cause.' This statement of the law was approved by the Judicial Committee in *Jowad Hussain v. Gendan Singh* (z). But these cases turned upon a point of limitation and the preliminary decree having been superseded by the decree of the Appellate Court, limitation for an application for a final decree ran from the date of the appellate decree. There could be only one final decree because the preliminary decree which had been superseded could not be made final. It does not follow that during the pendency of the appeal the preliminary decree is a nullity (a). The effect of the appeal from the preliminary decree is to imperil the final decree passed while the appeal was pending (b) for if the preliminary decree were reversed on appeal, the final decree would fall with it. The Court which passed the preliminary decree has power to pass a final decree but should under rule 4 (2) extend time until the disposal of the appeal (b1).

Mortgagor's rights before confirmation of sale—In sub rule (1) the words

Mulla's Transfer of Property Act note 'By decree of a Court at p. 314. A Bench of the Calcutta High Court so interpreted the rule in the undernoted case (c). But in another

(w) *Aslari Hasan v. Jalang ra Mal* (1927) 40

(z)

(y)

(i)

(a) *Sat Farkash v. Jibad Das* (1931) 53 All. 233
(31) A.A. 306 F. 15, overruling *Lalman*

(b)

(b1)

(c) *Kul puri v. Mukerji v. Bisanta Kumar* (1931)
53 Cal. 117, 138 Cal. 177, (3-) A.C. 121

O. 34,
rr. 5, 6

to the purchaser (l) By a sale of mortgaged property in execution of a mortgage decree, the interest both of the mortgagor and mortgagee passes to the purchaser (m) See notes to r 1 above under the head "Consequences of non joinder"

Injunction restraining mortgagor from receiving income of mortgaged property—It has been held in Allahabad that it is not competent to the Court after a final decree for sale has been passed to restrain the mortgagor by an injunction from receiving the income of the mortgaged property even if there be a good ground for it The reason given is that all that the decree holder is entitled to is to have the property sold, and nothing more (n)

Limitation for application for final decree—See note to r 3 above under the same head

Limitation for application for execution of final decree—See note to r 3 above under the same head

Appeal—Under the present Code, a party aggrieved by a preliminary decree passed under r 4 of this Order may appeal from it, if he does not appeal from it, he is precluded from disputing its correctness in an appeal which may be preferred from the final decree passed under this rule [s 97] "Even under the old Code the correctness of the decree under sec 88 of the Transfer of Property Act [now O 34, r 4] could not be questioned in an application for an order absolute under sec 89 [now O 34, r 5] or in an appeal, from an order absolute made on such an application" (o)

An adjudication dismissing an application under this rule for a final decree for sale is not an order under sec 47, but a decree and is appealable as such under sec 96 (p) and is therefore not open to revision (q)

Dekkan Agriculturists Relief Act 17 of 1879—As to the applicability of this rule to cases under the Dekkan Agriculturists Relief Act, see the undermentioned cases (r)

Court fees Act—An appeal from a final decree for sale under this rule requires an ad valorem court fee and cannot be stamped as an appeal from an order (s)

Costs not recoverable from mortgagor personally—In a mortgage decree for sale, costs are part of the amount due upon the mortgage and are recoverable from the mortgaged property, and not personally from the mortgagor unless the decree itself so directs (t)

6. [New. Act 4 of 1882, s. 90.] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is

Recovery of balance due on mortgage in suit for sale

- (l) See notes to O 21 r 91
(m) *Maanlal v. Shikra* (1895) 22 Bom 945
 Devas Lallabhai v. Mundas (1896) 20
 Bom 390, *Ierumat v. Kaseri* (1893) 18
 Mad 121
(n) *Muhammad Inam ulah v. Narain* (1915)
(o) " " " " " "
(p) " " " " " "
(q) " " " " " "
(r) *Kashinath v. Iama* (1918) 40 Bom 492 37
 1 C 255 *Sulfi v. Sulfi* (19-4) 48
 Bom 17- 81 1 C 624 (21) A B 163,

- Ram Krishna v. Ramchandra* (1930) 54
Bom 7-6 123 1 C 424 (30) A B 504
(s) *Pragati Lal v. Mahabir* (1913) 35 All 476,
21 1 C 409 (F B) *Jankibai v. Chaima*
(19-0) 22 Bom L R 811, 57 1 C 579
(t) *Matukhari v. Rimdas* (1917) 2 Pat L J
51, 34 1 C 214 *Damhar Singh v. Kalwar*
Singh (1918) 40 All 109 43 1 C 557,
Maqbul v. Lalla (1819) 20 All 5-3
Muhammad v. Binki Lal (1914) 45 All
630 73 1 C 950 (24) A A 104 But
see *Amina v. Iam* (1919) 41 All 473 50
7 C 730 *Shro Darghan v. Ieni Chaudhri*
(19-6) 48 All 425 94 1 C 872 (26) A A
4-4

legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance

The old rule—The above rule was substituted for old r 6 by Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was as follows —

6 Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount

The old rule and the new rule—The words 'any sale held under the last preceding rule' in the new rule have been substituted for the words 'any such sale'. It is thus made clear that this rule applies to a sale held in execution of a decree passed under rule 5 while rule 8 A applies to a sale held in execution of a decree passed under rule 8

Personal Decree for balance against mortgagor—Where after the sale of the mortgaged property, there is still a balance due to the mortgagee and that amount is legally recoverable from the mortgagor, the mortgagee may apply for and obtain a decree under this rule against the mortgagor personally which he may execute against the person of the mortgagor or by attachment and sale of his other properties (u). A decree under this rule is a decree to be passed in the original suit and not in a fresh suit (v). The object of the rule is to obviate the necessity of a fresh suit to recover the balance (w). Such a suit, in fact, could not be brought except where the mortgagee had reserved his right to do so with the leave of the Court under O 2 r 2 (x). A personal decree under this rule for the balance should not be passed until after the mortgaged property had been sold and the proceeds found insufficient to pay the mortgage money in other words the Court should not while passing a decree for sale under r 5 pass a personal decree for the balance and a personal decree can only be passed when the sale proceeds are found to be insufficient to satisfy the mortgagee's claim (y). In a recent case the Judicial Committee held that a decree for sale under sec 88 of the Transfer of Property Act 1882 can validly provide that if the proceeds of sale are not sufficient to pay the mortgage debt, the mortgagor should pay the balance personally though the personal decree could not be executed until after the property was sold and the nett sale proceeds were found to be insufficient to satisfy the debt (z). The form of the decree to be passed under this rule [Appendix D, Form No 11] makes it clear that a personal decree cannot be passed until after the sale is held and the balance ascertained. If it is passed before sale and the mortgagor does not object he is estopped from doing so at a later stage (a). When the decree only gives the mortgagee a remedy against the mortgaged property the personal remedy having become time barred the mortgagee can only recover against the mortgaged property (b). See App A Form No 43 and App D Form No 4

A personal decree cannot be passed under this rule unless all the properties directed to be sold under rr 4 and 5 have been sold. This is because the remedy of the mortgagee in the first instance is against the properties mortgaged and such properties should in the first instance be exhausted before a personal liability can be imposed upon the mortgagor. But this does not mean that if a portion of the properties is destroyed or

| | |
|--|--|
| (u) <i>Sonatan Shah v Ali Veseaz</i> (1889) 16 Cal 453 | <i>Ilan</i> (1900) 20 All 404 <i>Aiyasamur</i> |
| (v) <i>Faj Singh v Purmanant</i> (1889) 11 All 486 | " " |
| <i>Misakheb v Inayat ul lah</i> (189) 14 All 513 | (z) " " |
| (w) <i>Mallikarjunat v L ngamurti</i> (1902) 25 Mad 144 2-6 | (a) " " |
| (x) <i>Ibid</i> p 2-6 | " " |
| (y) <i>Lal Chary S na v Hab bur Fakman</i> (1899) 6 Cal 166 <i>I am Janjin v Indra Nara n</i> (1906) 33 Cal 200 <i>Bhmodhar v Iyanku</i> (190) 31 Bom 44 <i>Ladri Das v Inayat</i> | (b) <i>Hannant v Ishahendrarao</i> (19 2) 24 Bom L.J. 410 6 1 C 64 (29) 4 B 23 |

O. 34, r. 6 has ceased to be available for sale through no fault of the mortgagee, there can be no decree for personal liability against the mortgagor (c) It has similarly been held that the omission to include in the plaint a portion of the mortgaged property does not debar the mortgagee from obtaining a personal decree under this rule provided the omission was not intended to prejudice, and has not prejudiced the mortgagor (d) In a case of a mortgage by the father of a joint Hindu family, not being one for necessity, the High Court of Madras held that the mortgagee was entitled to a conditional decree under this rule against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance in case the sale proceeds of the father's share of the mortgaged property were insufficient (e) Where a sale in execution of a decree on a mortgage by a Hindu lady was set aside at the instance of her grandson who was the real owner, the Allahabad High Court passed a personal decree against her under this rule saying that the mortgagee having been compelled to refund the purchase money to the purchaser the net proceeds of the sale were nil and therefore insufficient to pay the amount due (f) The absence of any reservation in the preliminary decree of liberty to the decree holder to apply for a personal decree does not disable him from doing so later (g)

Where net proceeds of any such sale held under r 5 are found insufficient—A personal decree under this rule can only follow the mortgage decree under which the sale is held Therefore, if a sale has taken place under a decree on a prior mortgage, that would not entitle a subsequent mortgagee, who has also obtained a decree for sale, to apply for and obtain a decree under this rule The reason is that the sale was not held under his decree (h) Similarly, where a person holding two mortgages over the same property brings two suits on those mortgages and obtains two decrees, and the mortgaged property is sold under one of those decrees, the fact that the sale proceeds, after discharging that decree, are not sufficient to pay the amount due under the other decree, would not entitle him to apply for and obtain a personal decree under this rule for the balance due under the other decree The reason is that the property was sold, not under that decree, but under the first decree (i)

"Amount due"—A personal decree under this rule can only be passed where the net proceeds of the sale are insufficient to pay the amount due to the mortgagee. The expression "amount due" includes costs (j) [see r 4 (1)] It also includes, when a paise mortgage is plaintiff, the amount paid by him in satisfaction of prior mortgages (k)

Personal obligation to pay a question of construction—In India a mortgage does not necessarily import a personal obligation to repay Prima facie this obligation is present in simple mortgages, and of course, in English mortgages Prima facie it is not present in mortgages by conditional sale, and in usufructuary mortgages In each

(c) *C. v. C.*

(f) *Dadul Singh v. Debi Saran* (1927) 49 All 506 100 I C 775 (27) A A 395

(g) *Gorindaswami v. Kundaswami* (1927) 57

(h)

(i)

(j)

(d) *Gopal v. Baluntha* (1917) 2 Pat L.J. 534, 42 I C 56

(e) *Kandaswami v. Kuppi Mooppan* (1920) 43 Mad 4-1, 55 I C 3-0

(k) *Ali Jan v. Marum Bibi* (1904) 26 All 93

case the question is one of construction of the mortgage instrument, and the personal liability to repay may become barred before the right of recourse to the mortgaged property is barred (l)

"Legally recoverable"—No decree can be passed for the balance under this rule unless the balance is *legally recoverable*. The balance is not legally recoverable if the right to recover the mortgage debt from the mortgagor personally is barred by limitation at the date of the suit for sale. It would be barred in the case of an unregistered instrument after the expiration of three years from the date on which it is repayable and in the case of a registered instrument after the expiration of six years from that date (m) unless the right is kept alive by acknowledgment as provided by s. 19 of the Limitation Act, 1908, or by payment of interest or part payment of principal as provided by s. 20 of that Act. If the right to recover the mortgage debt from the mortgagor personally is not barred at the date of the suit for sale, the mortgagee is entitled if there is a deficiency, to a personal decree for the balance, though the application under this rule may be made after the expiry of the period of limitation for a suit for a personal decree (n). The mortgagee, however, is not entitled to wait indefinitely for a personal decree after the deficiency has been ascertained. He must apply for a personal decree within three years from the date when the deficiency is ascertained as provided by Art. 181 of the Limitation Act, otherwise the application will be time barred (o). Time begins to run from the date of the order under O. 21, r. 92, confirming the sale (p), and this is so even if the decree holder's costs have not been taxed (q).

"Legally recoverable from the defendant otherwise than out of the Property sold"—These words mean, by way of illustration, that the balance must be a balance which the mortgagee is not precluded by the terms of the mortgage from realizing otherwise than out of the property sold (r).

Personal liability not enforceable against purchaser from mortgagor—The transferee of the equity of redemption in mortgaged property who has agreed with the mortgagor to pay to the mortgagee the amount due to him is not a person from whom the balance is legally recoverable within the meaning of this rule, there being no contract between him and the mortgagee. Hence no personal decree can be passed against the transferee under this rule at the instance of the mortgagee (s). Nor can, personal decree be made against a puisne mortgagee (t).

Personal liability enforceable against surety—The personal liability of the surety for the mortgagor may be enforced by a decree under this rule (u).

(l) *Pell v. Gregory* (1925) 52 Cal. 879, 813, 844, 89 I.C. 1 (1) A.C. 834; *Janga Singh v. Chandar Mal* (1908) 30 All. 388 (simple mortgage).

(m) *Pam. Paghbar v. United Refineries* (1933) 54 Cal. 878, 891 I.C. 1 (25) A.C. 834 (H.B.).

(n) *Abdul Karim* (1901) 34 Cal. 672, 114 I.C. 76 (2) A.O. 59.

(o) *Yahannat v. Alim un Nissa* (1918) 40 All. 551, 47 I.C. 56; *Tell v. Gregory* (1925) 52 Cal. 878, 891 I.C. 1 (25) A.C. 834 (H.B.).

(p) *Krishnabandhu v. Panchkari* (1931) 54 Cal. 41, 130 I.C. 815 (31) A.C. 188.

(q) *Pradymna Kumar v. Gopendra* (1933) 60 Cal. 19, 143 I.C. 679 (33) A.C. 251.

(r) *Musahab Zaman v. Inayat ul lah* (1892) 14 All. 513, 518.

(s) *Jana Das v. Pan. Anwar* (1917) 34 All. 63, 39 I.C. 13, 14, 34 (1 C.) affirming (1909) 31 All. 352, 2 I.C. 460; *Nanku Prasad v. Kanta Prasad* (1925) 54 Cal. 195, 143 I.C. 770 (25) A.C. 54 (H.C.).

(t) *Fali Krishna v. Jagannath* (1931) 54 Cal. 1314, 14 I.C. 684 (32) A.C. 225.

(u) *Tuli v. D. P. Prakash* (1931) 53 All. 693, 132 I.C. 561 (31) A.C. 631.

(v) *Abdul Karim* (1901) 34 Cal. 672, 114 I.C. 76 (2) A.O. 59.

(w) *Yahannat v. Alim un Nissa* (1918) 40 All. 551, 47 I.C. 56; *Tell v. Gregory* (1925) 52 Cal. 878, 891 I.C. 1 (25) A.C. 834 (H.B.).

(x) *Krishnabandhu v. Panchkari* (1931) 54 Cal. 41, 130 I.C. 815 (31) A.C. 188.

(y) *Pradymna Kumar v. Gopendra* (1933) 60 Cal. 19, 143 I.C. 679 (33) A.C. 251.

(z) *Musahab Zaman v. Inayat ul lah* (1892) 14 All. 513, 518.

(aa) *Jana Das v. Pan. Anwar* (1917) 34 All. 63, 39 I.C. 13, 14, 34 (1 C.) affirming (1909) 31 All. 352, 2 I.C. 460; *Nanku Prasad v. Kanta Prasad* (1925) 54 Cal. 195, 143 I.C. 770 (25) A.C. 54 (H.C.).

(ab) *Fali Krishna v. Jagannath* (1931) 54 Cal. 1314, 14 I.C. 684 (32) A.C. 225.

(ac) *Tuli v. D. P. Prakash* (1931) 53 All. 693, 132 I.C. 561 (31) A.C. 631.

O. 34,
rr. 6, 7

Costs against puisne mortgagee—A prior mortgagee is not entitled to a decree under this rule against a puisne mortgagee for the amount of his costs. The present rule does not apply to such a case (i).

Personal decree against non mortgagor for costs—A decree for sale was passed against a mortgagor and his sons, who though they had not joined in the mortgage were bound by it. On the sale proceeds proving insufficient the Court made a personal decree for costs against the sons (u). The Court distinguished two Allahabad cases (w) in which it was held that a personal decree could not be passed under s. 90 of the Transfer of Property Act against a puisne mortgagee on the ground that the rule is wider, the words 'the amount due to the plaintiff' being substituted for the words 'the amount for the time being due on the mortgage'.

Limitation—See notes above, "Legally recoverable"

Consent decree—A consent decree or a decree on an award may provide for personal recovery from the mortgagor by execution of the decree if the sale proceeds are insufficient, and in that case no further decree under this rule is necessary (x). But the fact that the consent decree is silent as to the personal remedy is no good reason for supposing that the decree holder has given up his right to recover the money from the judgment debtor if the security is insufficient. O. 34 r. 6, is a provision giving direction to the Court as to the time and manner in which the personal decree is to be given. The strict form of order may be departed from in a consent decree. If the consent decree does not deprive the mortgagee of the benefit of the personal covenant, it is open to the High Court on a motion in a consent decree to give a personal judgment against the mortgagor (y).

Appeal—An appeal from a decree under this rule lies to the District Judge and not to the High Court notwithstanding that the decree be for a sum exceeding Rs. 5,000 if the original mortgage suit was valued at less than Rs. 5,000 (z). See notes to sec. 96 "Forum of appeal".

7. [New. Act IV of 1882, s. 92.] (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

Preliminary
redemption suit

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and
- (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) *I am Lal v. Titchand* (1911) 23 All. 431, 50
Mata Amber v. Tri Dhar (1901) 26 All.

(v) *Jagopalswami v. Palaniswami* (1917) 55

(vi) *I am Lal v. Lal Chand* (1901) 23 All. 431

(z) *Mata Amber v. Tri Dhar* (1901) 26 All.

(x) *Ajaya Prasad v. Hargorind Singh* (1908)

3 Luck. 431 1081 C. 723 (24) A. C. 430
Laifis v. Fazlulabbil (1909) 54 B. 11
302 1-5 I. C. 913 (30) A. B. 204

(y) *S. intermull v. J. C. Gadhia* (1909) 33 C.

W. N. 300 1-10 J. C. 110 (21) A. C. 347

on a p. (1931) 60 Mad. L.J. 170 1 C.

(z) *Bisoyan Nandan v. Shankar* (1919) 41 All.

(c) directing—

- (i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall also, if necessary put the plaintiff in possession of the property, and
- (ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges expenses and interest, the defendant shall be entitled to apply for a final decree—
 - (a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold or
 - (b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property

- 34, r. 7 (2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest

The old rule—The above rule was substituted for old r 7 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930 The old rule was as follows —

- 7 In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—
- (a) *ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or*
 - (b) *declaring the amount so due at the date of such decree, and directing—*
 - (c) *that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary put the plaintiff in possession of the property, but*
 - (d) *that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold*

The old rule and the new rule —

1 The general changes in this rule are on the lines of those in new rules 2 and 4 above See note to r 2 and to r 4, "The old rule and the new rule"

2 In sub rule (1) (c) (ii) the cases in which a decree for sale and the cases in which a decree for foreclosure can be passed have been specifically mentioned See Transfer of Property Act, sec 67

3 Sub rule (2) empowers the Court to extend the time for payment until a final decree for foreclosure or sale has been passed.

Preliminary decree for redemption—This rule, excepting sub rule (1) (c) (ii), corresponds with r 2 above which relates to a preliminary decree for foreclosure The notes on that rule apply mutatis mutandis to this rule For the form of a preliminary decree for redemption, see Appendix D, form no 5

"Other costs, charges and expenses"—See notes to r 2 above under the same head

"Subsequent costs, charges and expenses"—See r 10 below

"Subsequent interest"—See r 11 below

Power to extend time in suit for redemption—The proviso to old r 8 was in these terms 'provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time, postpone the day fixed for payment'. Under the present rule the Court has the power to extend the time *at any time before the passing of a final decree for foreclosure or sale*. It is clear that the new sub rule 7 (2) applies in every case where a decree for redemption has been passed, whatever may be the nature of the mortgage (a). When in a partition suit an alienation of part of the property was held binding for a certain amount only and the alienee was ordered to give possession on payment being made of that amount in a certain time, this was held to be in effect a decree for redemption and subject to the power of enlargement of time (b). But this decision is of doubtful authority. It has been dissented from by the Allahabad High Court (b1), but followed in a later Madras decision (b2). See notes to r (2) above, 'Power to extend time in foreclosure suit'. The application for extension of time should be made to the Court of the first instance even if the decree for redemption was passed by the appellate Court (c).

Appeal—An appeal lies from an order refusing to extend the time for payment under O 43, r 1 (o).

8. [New Act 4 of 1882, s. 93.] (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount

(a) *Narsing v. Irlap* (1924) 50 All 582 111
I L 212 (2) A A 48

(b) *Idumba Parvati v. Pethi Peddy* (1920) 43
Mad 357 541 C 451

(b1) *Sandilumar v. Sajan* (1921) 43 All 25 57
I L 1000

(b2) *Guruswami v. Govindappa* (1933) 65 Mad
L J 597 145 I C 97 (33) A M 76

(c) *Pam. Dhani v. Lalit Singh* (1929) 31 All
328 21 C 220, *Dharmaraja v. Srinivasa*
(1916) 39 Mad 876 31 I L 210 *Bent*
Prasad v. Harnam Das (1917) 39 All.
326, 39 I L 630

- O. 34, r. 7** (2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

The old rule—The above rule was substituted for old r 7 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was as follows—

- 7 In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree—
- (a) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or
 - (b) declaring the amount so due at the date of such decree, and directing—
 - (c) that, if the plaintiff pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary put the plaintiff in possession of the property, but
 - (d) that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem or (unless the mortgage is by conditional sale) that the mortgaged property be sold

The old rule and the new rule—

1 The general changes in this rule are on the lines of those in new rules 2 and 4 above. See note to r 2 and to r 4, "The old rule and the new rule"

2 In sub rule (1) (c) (u) the cases in which a decree for sale and the cases in which a decree for foreclosure can be passed have been specifically mentioned. See Transfer of Property Act, sec 67

3 Sub rule (2) empowers the Court to extend the time for payment until a final decree for foreclosure or sale has been passed.

Preliminary decree for redemption—This rule, excepting sub rule (1) (c) (u) corresponds with r 2 above which relates to a preliminary decree for foreclosure. The notes on that rule apply mutatis mutandis to this rule. For the form of a preliminary decree for redemption, see Appendix D, form no 5

"Other costs, charges and expenses"—See notes to r 2 above under the same head

"Subsequent costs, charges and expenses."—See r 10 below

"Subsequent interest"—See r 11 below

Power to extend time in suit for redemption—The proviso to old r 8 was in these terms “provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for payment Under the present rule the Court has the power to extend the time *at any time before the passing of a final decree for foreclosure or sale* It is clear that the new sub rule 7 (2) applies in every case where a decree for redemption has been passed, whatever may be the nature of the mortgage (a) When in a partition suit an alienation of part of the property was held binding for a certain amount only and the alienee was ordered to give possession on payment being made of that amount in a certain time, this was held to be in effect a decree for redemption and subject to the power of enlargement of time (b) But this decision is of doubtful authority It has been disented from by the Allahabad High Court (b1), but followed in a later Madras decision (b2) See notes to r (2) above, “Power to extend time in foreclosure suit” The application for extension of time should be made to the Court of the first instance even if the decree for redemption was passed by the appellate Court (c)

Appeal—An appeal lies from an order refusing to extend the time for payment under O 43, r 1 (o)

8. [New Act 4 of 1882, s. 93.] (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addition to the amount

(a) *Narsing v. Irtan* (1928) 50 All 842 111
I C 242 (28) A A 480

(b) *Idamban Narayan v. Pethi Peddy* (1920) 43
Mad 357, 54 I C 451

(b1) *Nanilumar v. Sajan* (1921) 43 All 25, 57
I C 1000

(b2) *Guruswami v. Corindippa* (1933) 65 Mad
L J 892 145 I C 92 (33) A 31 76.

(c) *Pam Dhani v. Ishi Sinja* (1911) 31 All
324 214 211, *Dharmaraja v. Srinivasa*
(1916) 33 Mad 876 31 I C 210 *Joni*
Prasad v. Harnam Das (1917) 33 All
376, 32 I C 630

O. 34, r. 8 mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinafter referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property, or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same

The old rule—The above rule was substituted for old r 8 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was as follows—

8 (1) Where, on or before the day fixed, the plaintiff pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required,—

(b) ordering him to re transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property

(2) Where such payment is not so made, and the mortgage is a simple usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same.

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time, postpone the day fixed for payment.

The old rule and the new rule—The changes in this rule have been made on the lines of those in rules 3 and 5 above. See notes to rr. 3 and 5, "The old rule and the new rule".

The provision regarding the power of the Court to extend the time for payment which appeared as a proviso to old rule 8 (4) has been transferred to new rule 7.

Sub-rule (1) decree for mortgagor—Sub-rule (1) of this rule corresponds with sub-rule (1) of rules 3 and 5. See notes to rules 3 and 5. Where the amount declared due in a decree for redemption is paid by the mortgagor into Court, the mortgagor does not lose his right to a decree under sub-rule (1) because he has attached and withdrawn from Court a portion of the sum so paid in execution of that portion of the decree which awarded him costs against the mortgagee (d). If time for payment has been extended, payment within the time so extended gives the mortgagor a right to a decree (e). The mortgagee is not entitled under O. 21, r. 1 (c), to notice of payment into Court (f). The mortgage money must be paid into Court and a payment or adjustment out of Court cannot be pleaded against the passing of a final decree (g).

Sub-rule (2)* decree for foreclosure—The mere fact that the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed does not disentitle the mortgagee to a decree for foreclosure or sale as the case may be. The omission of the Court to draw up the proper decree under r. 7 does not deprive the mortgagee of the relief provided by this rule (h). The decree for foreclosure or sale under this rule should be passed by the Court which passed the preliminary decree for redemption, notwithstanding that the latter decree has been varied by the appellate Court (i).

8A. [New] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by

Recovery of balance due on mortgage in suit for redemption

- (d) *Parmanand v. Lokman Das* (1905) 27 All 39.
(e) *Moru v. Ganqabai* (1916) 50 Bom 730 98.
I.C. 942 (1917) A.B. 3.
(f) *Ambs v. Jalla* (1913) 45 Mad L.J. 687 73.
I.C. 566 (1914) A.M. 10.

(g)

(h)

(i)

O. 34, r. 8 mentioned in sub rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into Court by the purchaser

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof

(3) Where payment in accordance with sub rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is heretofore referred to in rule 7, pass a final decree declaring *that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property*, or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same

The old rule—The above rule was substituted for old r 8 by the Transfer of Property (Amendment) Supplementary Act, 1939, which came into operation on the 1st April 1930. The old rule was as follows —

8 (1) Where on or before the day fixed the plaintiff pays into Court the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and, if so required —

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also if necessary —

(c) ordering him to put the plaintiff in possession of the property

(2) Where such payment is not so made, and the mortgage is not a simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after deducting thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit from time to time, postpone the day fixed for payment.

The old rule and the new rule—The changes in this rule have been made on the lines of those in rules 3 and 5 above. See notes to rr. 3 and 5, "The old rule and the new rule."

The provision regarding the power of the Court to extend the time for payment which appeared as a proviso to old rule 8 (4) has been transferred to new rule 7.

Sub rule (1): decree for mortgagor.—Sub rule (1) of this rule corresponds with sub rule (1) of rules 3 and 5. See notes to rules 3 and 5. Where the amount declared due in a decree for redemption is paid by the mortgagor into Court, the mortgagor does not lose his right to a decree under sub rule (1), because he has attached and withdrawn from Court a portion of the sum so paid in execution of that portion of the decree which awarded him costs against the mortgagee (d). If time for payment has been extended, payment within the time so extended gives the mortgagor a right to a decree (e). The mortgagee is not entitled under O 21, r 1 (c), to notice of payment into Court (f). The mortgage money must be paid into Court and a payment or adjustment out of Court cannot be pleaded against the passing of a final decree (g).

Sub rule (2): decree for foreclosure.—The mere fact that the preliminary decree for redemption does not contain a direction for foreclosure or sale in default of payment on the day fixed does not disentitle the mortgagee to a decree for foreclosure or sale as the case may be. The omission of the Court to draw up the proper decree under r 7 does not deprive the mortgagee of the relief provided by this rule (h). The decree for foreclosure or sale under this rule should be passed by the Court which passed the preliminary decree for redemption, notwithstanding that the latter decree has been varied by the appellate Court (i).

8A. [New.] Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by

Recovery of balance due on mortgage in suit for redemption

- (d) *Paramanand v Lokman Das* (1905) 27 All 392
(e) *Moru v Ganqubai* (1926) 50 Bom 730, 99 IC 942 (27) A B 32
(f) *Ambi v Falla* (1923) 45 Mad L J 687, 75 IC 566, (24) A 31 102

- (g) *Adani v Anandaram* (1906) 32 Cal 100
(h) "
(i) "

O. 34,
rr. 8A-10

him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

Personal decree in suit for redemption—This rule is new. It has been added by the Transfer of Property (Amendment) Supplementary Act, 1929. Rule 6 provides for a personal decree against the mortgagor in a suit for sale brought by the mortgagee. The present rule provides for a personal decree in a suit for redemption brought by the mortgagor.

9. Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

Decree where nothing is found due or where mortgagee has been overpaid

This rule provides for cases where nothing is found due to the mortgagee and for cases where the mortgagee has been overpaid as may well happen where he is in possession. There was no such provision in the Transfer of Property Act, but the practice followed under that Act was the same as that prescribed by this rule (j).

10. [New. Act 4 of 1882, s. 94.] In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree

The old rule—The above rule was substituted for old r. 10 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on 1st April 1930. The old rule was as follows—

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

"Other costs, charges and expenses"—The words "and other costs, charges and expenses" are new. The addition of these words makes it clear that all costs, charges

(j) See *Kachu v. Lakshminingh* (1901) 25 Bom. 115, *Unayak v. Dattatraya* (1902) 26 Bom. 661.

and expenses properly incurred by a mortgagee in respect of the payment of the preliminary decree are to be added to the mortgage money and the mortgagor has to pay them before he can redeem the mortgage. Such costs and charges and expenses were added to the mortgage money even before the amendment of the present rule by the Act of 1906. But costs of an appeal by the mortgagee from an order striking off execution proceedings cannot be added. The mortgagor is liable for them personally. (d) If the costs of an appeal from a preliminary decree have not been admitted in the final decree, the Court of execution cannot include them. (e) Subsequent interest not mentioned in the final decree must be taken as refused. (n)

11. [Ayer] In any decree passed in a suit for foreclosure, sale or redemption where interest is legally recoverable the Court may order payment of interest to the mortgagee as follows, namely:—

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

- (i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,
- (ii) on the amount of the costs of the suit awarded to the mortgagee—at such rate as the Court deems reasonable from the date of the preliminary decree, and
- (iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage security up to the date of the preliminary decree and added to the mortgage money,—at the rate agreed between the parties or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent per annum, and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

- (i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause, and

(k) *Allahabad Bank v. Mot Lal Barmen* (1911) 44 Cal 448 31 C. 93
 (l) *Het Ram v. Raja Dutt* (1916) 48 All 63
 (m) *Ram Sarup v. Naran Das* (1913) 45 All 198 69 IC 944 (3 A A 141)
 (n) *Tekaji Krishna v. Surendra* (1906) 5 Pat L J 593 58 IC 3

D. 34, r. 11

(u) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10

The old rule—This rule relates to interest. The old r 11 had nothing to do with interest. It gave a right to a mesne mortgagee to redeem and foreclose. It is now transferred to the Transfer of Property Act as sec 94. It was as follows—

11 Where property is mortgaged for successive debts to successive mortgagees any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor

Interest in mortgage suits—This rule is new. It was added by the Transfer of Property (Amendment) Supplementary Act, 1929. It came into operation on 1st April 1930. It gives effect to judicial decisions under the Transfer of Property Act, 1882 and under O 34 of the Code. Summarising those decisions it may be said that in a suit on a mortgage the Court awarded—

- (1) interest on the principal prior to the date of the suit at the rate provided by the mortgage [Usury Laws Repeal Act, 1853, s 2] unless the rate is penal, in which case the Court may award such interest as it deems proper (o) [Indian Contract Act 1872 s 74] or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it [Usurious Loans Act 1918 s 3], and
- (2) interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage debt, also at the rate provided by the mortgage [Transfer of Property Act, ss 86, 88, now O 34 rr 2 and 4] unless the rate is penal in which case the Court may award interest at such rate as it deems proper (p) or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it (q). The interest is on the principal amount only excluding interest up to date of suit (q1)
- (3) interest on the aggregate amount of principal, interest and costs, from the date fixed for the payment of the mortgage debt up to the date of realisation or actual payment at such rate as the Court deems proper. It may be allowed at the Court rate that is 6 per cent per annum (r) or at any other rate (s). The Court is not bound to award it at the contract rate (t).

As to item (3) above it was contended on behalf of the mortgagor before their Lordships of the Privy Council in *Maharaja of Bharatpur v Kanno Dei* (u) that, according to the true construction of s 88 of the Transfer of Property Act, the Court had no power to award interest subsequent to the date fixed for payment of the mortgage debt, but this contention was overruled, and it was held that that section did not preclude the payment of such interest and this view was reiterated by their Lordships in *Sunder Aker*

(o)

case having been hinged up by his persistence in asserting an unwarrantable claim for interest

(p)

(q)

v. Poo Sham Kishen (r) and Poo G. Lallu v. Sheth Ghaneram (w) O 31 r 4 which is in substance a reproduction of sec. 38 of the Transfer of Property Act now contains an express provision for payment of subsequent interest.

On a preliminary decree for foreclosure sale under r. 2 and 4 a mortgagee is entitled to interest at the rate and with the rests stipulated in the mortgage down to the date fixed for redemption by the decree, and if the decree is varied on appeal, down to the date fixed for redemption by the Appellate Court (x).

Although a mortgage of family security provides for excessive and usurious interest, no presumption arises that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will (y).

There was a considerable conflict of decisions as to whether if there was no express provision in the mortgage deed for payment of interest after the due date for payment specified in the deed the Court could allow interest subsequent to that date. It was held in some cases that if on an examination of the deed the Court came to the conclusion that there was an intention to pay interest not only up to the due date but also after that date and up to the date of payment, the Court should allow interest on the footing that the deed contained a provision for the payment of such interest (z). Where the deed contained a stipulation for periodical payment of interest and there was nothing in the deed to suggest that the liability in respect of interest should cease on the due date, it was presumed by the Court that there was an intention to pay interest up to the date of payment (a). If, on the other hand, the Court came to the conclusion that there was no intention to pay interest after the due date, the practice was to allow interest by way of damages at the contract rate. At the same time it was recognised that the contract rate was not necessarily the measure of damages (b). Where interest was allowed by way of damages it was held by the High Courts of Calcutta and Madras that it could be added to the mortgage money and recovered out of the mortgaged property (c). The High Court of Allahabad held that it could not be recovered out of the mortgaged property and that there could only be a personal decree against the mortgagor for such interest (d). It was thought in some cases that the claim for interest by way of damages being a claim for compensation for breach of contract, the claim would be barred unless it was made in a suit on a mortgage within three years from the due date fixed for payment of the mortgage money in the case of an unregistered instrument and six years in the case of a registered instrument (e). In the undermentioned case (f), however, the Judicial Committee observed that such a claim was a recurring one within the meaning of sec. 23 of the Limitation Act and that so long as the principal was not barred, interest for three or for six years as the case may be could be recovered. These nice distinctions

- | | | |
|--|----------------------|--|
| (c) (1907) 33 Cal 350 34 J 49 | 27 All 511 23 IA 199 | <i>Mathura Das v. Raja Narindar</i> (1891) 19 All 39 23 IA 138 |
| (w) (1908) 35 Cal 21 35 IA 28 | | |
| (z) | | (c) <i>Bukramji v. Durga Dayal</i> (1894) 21 Cal 971 |
| (y) | | |
| (z) <i>Mathura Das v. Raja Narindar</i> (1897) 19 All 39 23 IA 138 | | |
| <i>Bundara Naik v. Ganga Saran Bahu</i> (1898) 20 All 171 | | |
| | | (d) <i>Narindra Bahadur v. Khadim Husain</i> (1895) 17 All 581 |
| | | <i>Rishi Ram v. Sheo</i> |
| (a) | | |
| | | |
| | | |
| | | |
| (b) | | (f) |

O. 34, r. 11

- (u) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

The old rule—This rule relates to interest. The old r 11 had nothing to do with interest. It gave a right to a mesne mortgagee to redeem and foreclose. It is now transferred to the Transfer of Property Act as sec 94. It was as follows—

11 Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Interest in mortgage suits—This rule is new. It was added by the Transfer of Property (Amendment) Supplementary Act, 1929. It came into operation on 1st April 1930. It gives effect to judicial decisions under the Transfer of Property Act, 1882, and under O 34 of the Code. Summarising those decisions it may be said that in a suit on a mortgage the Court awarded—

- (1) interest on the principal prior to the date of the suit at the rate provided by the mortgage [Usury Laws Repeal Act, 1855, s 2], unless the rate is penal, in which case the Court may award such interest as it deems proper (o) [Indian Contract Act, 1872 s 74] or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it [Usurious Loans Act 1918 s 3] and
- (2) interest on the principal from the date of the suit up to the date fixed by the Court for payment of the mortgage debt, also at the rate provided by the mortgage [Transfer of Property Act, ss 86, 88, now O 34 rr 2 and 4] unless the rate is penal, in which case the Court may award interest at such rate as it deems proper (p), or the interest is excessive and the transaction was substantially unfair in which case also the Court may reduce it (g). The interest is on the principal amount only excluding interest up to date of suit (q1)
- (3) interest on the aggregate amount of principal, interest and costs, from the date fixed for the payment of the mortgage debt up to the date of realisation or actual payment at such rate as the Court deems proper. It may be allowed at the Court rate, that is, 6 per cent per annum (r), or at any other rate (s). The Court is not bound to award it at the contract rate (t).

As to item (3) above, it was contended on behalf of the mortgagor before their Lordships of the Privy Council in *Maharaja of Bharatpur v Kanno Dei* (u) that, according to the true construction of s 88 of the Transfer of Property Act, the Court had no power to award interest subsequent to the date fixed for payment of the mortgage-debt but this contention was overruled, and it was held that that section did not preclude the payment of such interest, and this view was reiterated by their Lordships in *Sunder Koer*

(o)

(p)

case having been hung up by his persistence in asserting an unwarrantable claim for interest.

(q1)

(r)

(s)

(t)

(u) (1901) 23 All 181 28 I A 30

v. Poo Nam Kuten (v) and Poo G. Lallu v. Sath (ghazim) (w) 1934 14 which is 0.5
in substance a reproduction of sec. 28 of the Transfer of Property Act now contains an
express provision for payment of subsequent interest

On a preliminary decree for foreclosure under sec. 2 and 4 a mortgagee is enti-
tled to interest at the rate and with the rests stipulated in the mortgage down to the
date fixed for redemption by the decree and if the decree is varied on appeal down
to the date fixed for redemption by the Appellate Court (x)

Although a mortgage for ample security provides for excessive and usurious interest
no presumption arises that it was induced by undue influence in the absence of proof
by the mortgagee that the mortgagee was in a position to dominate his will (y)

There was a considerable conflict of decisions as to whether if there was no express
provision in the mortgage deed for payment of interest after the due date for payment
specified in the deed the Court could allow interest subsequent to that date. It was
held in some cases that if on an examination of the deed the Court came to the con-
clusion that there was an intention to pay interest not only up to the due date but also
after that date and up to the date of payment, the Court should allow interest on the
footing that the deed contained a provision for the payment of such interest (z). Where
the deed contained a stipulation for periodical payment of interest and there was nothing
in the deed to suggest that the liability in respect of interest should cease on the due date,
it was presumed by the Court that there was an intention to pay interest up to the date
of payment (a). If, on the other hand, the Court came to the conclusion that there was
no intention to pay interest after the due date the practice was to allow interest by way
of damages at the contract rate. At the same time it was recognised that the contract
rate was not necessarily the measure of damages (b). Where interest was allowed by
way of damages it was held by the High Courts of Calcutta and Madras that it could
be added to the mortgage money and recovered out of the mortgaged property (c). The
High Court of Allahabad held that it could not be recovered out of the mortgaged
property and that there could only be a personal decree against the mortgagor for such
interest (d). It was thought in some cases that the claim for interest by way of damages
being a claim for compensation for breach of contract, the claim would be barred unless
it was made in a suit on a mortgage within three years from the due date fixed for pay-
ment of the mortgage money in the case of an unregistered instrument and six years in
the case of a registered instrument (e). In the undermentioned case (f), however, the
Judicial Committee observed that such a claim was a recurring one within the meaning
of sec. 23 of the Limitation Act and that so long as the principal was not barred, interest
for three or for six years as the case may be could be recovered. These like distinctions

- | | | |
|--|--|---|
| (v) (1933) 34 Cal 150 34 I L J 6 | } | y ⁿ NW 511 22 N Y 100, <i>Mahura Das</i> |
| (w) (1908) 35 Cal 211 35 I A 28 | | <i>v. Jijit Narain</i> (1897) 19 All 39 23 |
| (z) | | I A 138 |
| (y) | (c) <i>Jalimut v. Deep Dayal</i> (1814) 21 Cal | |
| | | f |
| (z) <i>Mahura Das v. Raja Narain</i> (1897) 19 | } | |
| All 39 23 I A 138 <i>Dinakar Nair v.</i> | | |
| (a) | | (d) <i>Narindra Bihari v. Khalim Hussain</i> |
| | | (1893) 17 All 581 <i>Rakhi Ram v. Sher</i> |
| (b) | | (e) |
| | | (f) <i>Mahura Das v. Jijit Narain</i> (1907) 19 |
| | | All 39 47, 43 I A 138 |

O. 34, have been done away by the present rule, and provision is made in sub rule (b) for interest
rr. 11-13 subsequent to the date of the preliminary decree, and the rate of interest is left to the discretion of the Court. In a case where the mortgagee instead of proceeding with the sale spent two years in an appeal, no subsequent interest was allowed (g)

12. [Act 4 of 1882, s. 96.] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage

Sale of property free from prior mortgage.—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r 1]. In such a case, as also where the prior mortgagee is joined as a party and his mortgage is admitted (h), the prior mortgagee may consent to the property being sold free from his mortgage, in which case he acquires the right to have his claim satisfied first out of the proceeds of the sale of the mortgaged property [see r 13 below]

Where the prior mortgagee is a usufructuary mortgage—A holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage. Can A sue for sale of the mortgaged property on the simple mortgage free from the usufructuary mortgage, and claim to be paid out of the sale proceeds the amount due upon the usufructuary mortgage under this and the next rule? Yes, according to the Madras rulings (i). No, according to the Allahabad rulings unless the two mortgages are in favour of different persons (j).

The High Court of Patna has held that where a person holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage, he is entitled to sue for the sale of the mortgaged property on the simple mortgage subject to his prior usufructuary mortgage, and also that he is entitled to have the prior mortgage notified at the sale in execution of the decree obtained on the subsequent mortgage for the information of bidders at the sale though the prior mortgage was not mentioned in his plaint. The omission to mention the prior mortgage in the plaint does not preclude him from keeping alive that mortgage by notifying it at the sale (k).

13. [Act 4 of 1882, s. 97.] (1) Such proceeds shall be brought into Court and applied as follows:—

Application of proceeds

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

(g) *Registered Secured Loan Co v Shalijanath* (1912) 59 Cal 722 139 IC 455, (3)
A C 683

(h) *Sri vasa v Yamunabai* (1906) 29 Mad 81

(i) *Pengasami v Subburaya* (1907) 30 Mad 408
(j) *Bhajan Das v Bhawanji* (1904) 28 All 14
(k) *Jayaram v Mohra Kaur* (1917) 2 Pat
1 J 118 39 IC 76

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed and of the costs of the suit in which the decree directing the sale was made.

fourthly, in payment of the principal money due on account of that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

Application of proceeds.—Compare sec. 73, proviso (c), which relates to subsequent and not prior incumbrances. See notes to sec. 73, "Clauses (a), (b) and (c)."

Whatever is due to the prior mortgagee.—This includes interest on the mortgage up to the date of the confirmation of the sale (f).

"Persons interested in the property sold"—It is provided by the last clause of sub-r (1) that the residue of the sale proceeds should be paid to "persons interested in the property sold." This expression includes subsequent incumbrancers (m). But it does not include unsecured creditors who cannot be said to be interested in the property sold, they are at liberty, however, to enforce their claims against any surplus payable to the mortgagor (n).

Usufructuary mortgage.—See notes to r. 12 above

14. [Act 4 of 1882, s. 99.] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

Scope and object of the rule.—This rule corresponds with sec. 99 of the Transfer of Property Act except that the words "claim arising under the mortgage" have been

(D) *Benode v Harsh* (1910) 15 C W N 723,
81 C 4

(m) See *Padmanabha v Kanna* (1904) 18 B m

684 687 688
(n) *Padmanabha v Kanna* (1904) 18 B m 684,

O. 34,
rr. 11-13

have been done away by the present rule, and provision is made in sub rule (b) for interest subsequent to the date of the preliminary decree, and the rate of interest is left to the discretion of the Court. In a case where the mortgagee instead of proceeding with the sale spent two years in an appeal, no subsequent interest was allowed (g)

12. [Act 4 of 1882, s. 96.] Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage

Sale of property free from prior mortgage.—A puisne mortgagee may sue for foreclosure or sale without making the prior mortgagee a party to the suit [see the Explanation to r 1]. In such a case, as also where the prior mortgagee is joined as a party and his mortgage is admitted (h), the prior mortgagee may consent to the property being sold free from his mortgage, in which case he acquires the right to have his claim satisfied first out of the proceeds of the sale of the mortgaged property [see r 13 below]

Where the prior mortgagee is a usufructuary mortgage—A holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage. Can A sue for sale of the mortgaged property on the simple mortgage free from the usufructuary mortgage, and claim to be paid out of the sale proceeds the amount due upon the usufructuary mortgage under this and the next rule? Yes, according to the Madras rulings (i). No, according to the Allahabad rulings unless the two mortgages are in favour of different persons (j)

The High Court of Patna has held that where a person holds two mortgages on the same property, the first a usufructuary and the second a simple mortgage, he is entitled to sue for the sale of the mortgaged property on the simple mortgage subject to his prior usufructuary mortgage, and also that he is entitled to have the prior mortgage notified at the sale in execution of the decree obtained on the subsequent mortgage for the information of bidders at the sale though the prior mortgage was not mentioned in his plaint. The omission to mention the prior mortgage in the plaint does not preclude him from keeping alive that mortgage by notifying it at the sale (k)

13. [Act 4 of 1882, s. 97.] (1) Such proceeds shall be brought into Court and applied as follows :—

Application of proceeds

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

(g) *Registered Jeetore Loan Co v Shasthyanath* (1832) 59 Cal 722, 139 IC 455, (32) A C 689

(h) *Srinivasa v Ramunaba* (1906) 29 Mad 84

(i) *Renganam v Subbhuroya* (1907) 30 Mad 408

(j) *Bhagwan Das v Bhawan* (1901) 26 All 14

(k) *Jagannath v Mohra Auror* (1917) 2 Pat L J 118, 32 IC 76

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed and of the costs of the suit in which the decree directing the sale was made,

fourthly, in payment of the principal money due on account of that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

Application of proceeds—Compare sec 73, proviso (c), which relates to subsequent and not prior incumbrances. See notes to sec 73, "Clauses (a), (b) and (c)"

Whatever is due to the prior mortgagees—This includes interest on the mortgage up to the date of the confirmation of the sale (l)

"Persons interested in the property sold"—It is provided by the last clause of sub r (1) that the residue of the sale proceeds should be paid to "persons interested in the property sold". This expression includes subsequent incumbrancers (m). But it does not include unsecured creditors who cannot be said to be interested in the property sold, they are at liberty, however, to enforce their claims against any surplus payable to the mortgagor (n).

Usufructuary mortgage—See notes to r 12 above

14. [Act 4 of 1882, s. 99.] (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended

Scope and object of the rule—This rule corresponds with sec. 99 of the Transfer of Property Act except that the words "claim arising under the mortgage" have been

(l) *Benode v Harish* (1910) 15 C W N 783
S I C 4

(m) See *Padmanabh v Khemu* (1894) 18 Bom

684 687 688
(n) *Padmanabh v Khemu* (1894) 18 Bom 684

O. 34, r. 14 substituted for the words "any claim, whether arising under the mortgage or not" The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. In such a case the rule provides that the mortgagee shall not be entitled to bring the mortgaged property to sale in execution of the decree—he can have the property sold only by instituting a regular suit for sale (o) and obtaining a decree for sale under rules 4 and 5. It is clear that where a mortgagee brings a regular suit for sale, and a decree is passed in such suit, what would be sold is the mortgaged property free from the mortgage, while in the other case where the suit is not for sale, but on the mortgage debt only what would be sold is the mortgaged property subject to the mortgage, in other words it is only the mortgagor's equity of redemption that would be sold. The object of the present rule is to prevent mortgagees from suing their mortgagors on the mortgage debt as such and in the execution selling the bare equity of redemption thereby depriving the mortgagors of the right of redemption that would be given to them by the decree for sale (p) [see r. 4 above]. A mortgages his property to B to secure repayment of Rs. 5,000. B sues A to recover Rs. 5,000, and obtains a personal decree against A. B then applies for attachment and sale of A's interest in the mortgaged property in execution of the decree. The property may be attached, for there is nothing in this rule to bar the attachment (q), but the sale must be refused under this rule. B cannot bring the property to sale except by means of a regular suit for sale. Suppose now that B sues A on a debt unconnected with the mortgage, and obtains a decree against A. Is he entitled to have A's interest in the mortgage sold in execution of such decree? Yes, for the rule only precludes B from bringing the mortgaged property to sale in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. Under sec. 99 of the Transfer of Property Act, however, B could not bring the mortgaged property to sale even if the decree was for a debt unconnected with the mortgage debt (r). The scope of that section was very wide for it precluded a mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not. It may here be stated that the present rule is a rule of procedure and not a rule of substantive law, it has, therefore, a retrospective operation (s).

Sale made in contravention of this rule is voidable, not void—It was at one time thought that a sale made in contravention of this rule was absolutely void (t) and that the purchaser at such sale was not therefore entitled to recover possession from the mortgagor (u), and that if he did acquire possession, he was bound to account for the rents and profits realized from the mortgaged property during the term of his possession (v). But this view is no longer tenable, and it has been held in recent cases that a sale in contravention of this rule is not void, but only voidable at the instance of the mortgagor or any other person interested in the equity of redemption (w). The rule in other words, is valid until it is set aside. The procedure to set aside the sale is by way of application under sec. 47, a separate suit is barred under that section. The application must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. The sale

(o) See Transfer of Property Act 1882 s. 67

(p) — " — — — — —"

(q) *Chuntra Nath v Barroda* (1895) 22 Cal 813, *Nathubhai v Bai Ujam* (1908) 32 Bom 405

(r) *Tarak Nath v Bhubaneswar* (1915) 42 Cal 780 30 I C 938

(s) *Bai Ganga v Rajaram* (1911) 31 Bom 248,

10 I C 815

(t) *Shroten v Pam Saran* (1899) 28 Cal 164
Sonu Singh v Behari Singh (1906) 33 Cal 283
Lignaswara v Bapayya (1893) 16 Mad 433

(u) *Basuridi v Karas* (1906) 33 Cal 113

(v) *Shib Das v Lal Kumar* (1903) 30 Cal 463

(w) *Kharajmat v Daim* (1905) 32 Cal 296
32 I A 23, *Ashwlesh v Bhari Lal* (1904) 35 Cal 61
Muhammad Abdul v Diluxth (1905) 27 Ali 517, *Ashan Lal v L. Mrao Singh* (1904) 30 Ali 146

cannot be set aside after it is confirmed by the Court (x). Nor is it open to the mortgagee after confirmation of the sale to redeem the mortgage, whether the property has been purchased by a third person (y) or by the mortgagee himself (z).

"Decree.—An order directing a person who has stood surety on behalf of a judgment-debtor for the performance of a decree to pay the amount specified in the surety bond is a decree within the meaning of this rule. It is therefore competent to the decree-holder to have the property secured by the bond for the performance of the decree sold in execution under sec. 145 without instituting a regular suit for sale (a).

"Decree for the payment of money in satisfaction of a claim arising under the mortgage.—This rule does not apply unless the decree obtained by the mortgagee is for the payment of money in satisfaction of a claim arising under the mortgage. The mortgage referred to in this rule must be a mortgage existing prior to the date of the decree, and not one created by the decree [ills (1) and (2)]. Further, it must be a subsisting mortgage, and not one which by reason of the efflux of time or any other like circumstance has ceased to be enforceable at law [ill (3)]. Again the rule is not applicable when a usufructuary mortgagee has leased the mortgaged property to the mortgagor or leases him for rent (b), unless the lease was part of the mortgage transaction (c). Nor does the rule prevent a mortgagee purchasing with leave of the Court the equity of redemption at a Court sale in execution of his money decree on a claim independent of the mortgage (d).

Further, the rule does not prevent a mortgagee who has two distinct mortgages, one on property A and another on property B from selling B, in execution of a money decree on a claim arising out of the mortgage on A and selling A in execution of a money decree on a claim arising out of the mortgage on B (e).

Illustrations

(1) A mortgages certain property to B which was then in the possession of X, and agrees to deliver possession thereof to B after recovering possession thereof from X. A recovers possession of the property from X, but does not deliver possession thereof to B. B sues A for possession, and a decree is made in B's favour for possession and for costs. In execution of the decree for costs, B applies for attachment and sale of the mortgaged property. Is B entitled to the order applied for? Yes, for the claim in respect of costs is not a "claim arising under the mortgage" within the meaning of this rule. It arises under the decree passed for costs (f).

(2) In a suit for money a decree is passed by consent whereby the defendant is directed to pay to the plaintiff Rs. 35,000. It is further declared by the decree that the plaintiff should have a first charge on certain immovable property belonging to the defendant. Is the plaintiff entitled to have the property sold in execution of the decree without instituting a regular suit for sale on the charge? Yes, because there being no

(x)

(y)

(z)

(a)

O. 34, r. 14 substituted for the words 'any claim, whether arising under the mortgage or not' The effect of this alteration is to confine the operation of the present rule to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. In such a case the rule provides that the mortgagee shall not be entitled to bring the mortgaged property to sale in execution of the decree; he can have the property sold only by instituting a regular suit for sale (o) and obtaining a decree for sale under rules 4 and 5. It is clear that where a mortgagee brings a regular suit for sale and a decree is passed in such suit what would be sold is the mortgaged property free from the mortgage, while in the other case where the suit is not for sale, but on the mortgage debt only what would be sold is the mortgaged property subject to the mortgage, in other words it is only the mortgagor's equity of redemption that would be sold. The object of the present rule is to prevent mortgagees from suing their mortgagors on the mortgage debt as such and in the execution selling the bare equity of redemption, thereby depriving the mortgagors of the right of redemption that would be given to them by the decree for sale (p) [see r. 4 above]. A mortgages his property to B to secure repayment of Rs 5,000. B sues A to recover Rs 5,000 and obtains a personal decree against A. B then applies for attachment and sale of A's interest in the mortgaged property in execution of the decree. The property may be attached for there is nothing in this rule to bar the attachment (q), but the sale must be refused under this rule. B cannot bring the property to sale except by means of a regular suit for sale. Suppose now that B sues A on a debt unconnected with the mortgage, and obtains a decree against A. Is he entitled to have A's interest in the mortgage sold in execution of such decree? Yes, for the rule only precludes B from bringing the mortgaged property to sale in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. Under sec. 99 of the Transfer of Property Act, however, B could not bring the mortgaged property to sale even if the decree was for a debt unconnected with the mortgage-debt (r). The scope of that section was very wide for it precluded a mortgagee from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not. It may here be stated that the present rule is a rule of procedure and not a rule of substantive law, it has, therefore, a retrospective operation (s).

Sale made in contravention of this rule is voidable not void—It was at one time thought that a sale made in contravention of this rule was absolutely void (t) and that the purchaser at such sale was not therefore entitled to recover possession from the mortgagor (u) and that if he did acquire possession, he was bound to account for the rents and profits realized from the mortgaged property during the term of his possession (v). But this view is no longer tenable, and it has been held in recent cases that a sale in contravention of this rule is not void, but only voidable at the instance of the mortgagor or any other person interested in the equity of redemption (w). The sale in other words, is valid until it is set aside. The procedure to set aside the sale is by way of application under sec. 47; a separate suit is barred under that section. The application must be made before confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. The sale

(o) See Transfer of Property Act 1882 s. 67

(p) See *Said Enam v. Raj Coomr Doss* (1875) 73 W. R. 187; *Kharajmal v. Daim* (1905) 3 Cal. 226; 22 J. A. 22; *Chaurasi v. Bhagan* (1903) 2 Pat. 787; 74 I. C. 144 (21) A. F. 20

(q) *Chitra Nath v. Burrofa* (1890) 22 Cal. 813; *Nathubhai v. Bai Ljani* (1908) 32 Bom. 290

(r) *Tarak Nath v. Bhaneeswar* (1915) 42 Cal. 780; 30 I. C. 988

(s) *Das Gupta v. Rajaram* (1911) 30 Bom. 248

10 I. C. 815

(t) *Shreehari v. Ram Saran* (1899) 26 Cal. 164; *Son v. Sug v. Lefari Sing* (1906) 33 Cal. 283; *igneswara v. Bopayya* (1833) 16 Mad. 435

(u) *Ramraddi v. Farlas* (1900) 33 Cal. 113

(v) *Sub Das v. Kali Kumar* (1903) 30 Cal. 483

(w) *Kharajmal v. Daim* (1905) 30 Cal. 226; 32 I. A. 23; *Ashutosh v. Behari Lal* (1904) 30 Cal. 61; *Muhammal Abi v. Dinkar* (1905) 27 All. 517; *Ashani Lal v. Umrao Singh* (1908) 30 All. 146

cannot be a sale after it is confirmed by the Court (x). A mortgagor to the mortgagee after confirmation of the sale to redeem the mortgage, whether the property has been purchased by a third person (y) or by the mortgagee himself (z).

"Decree. An order directing a person who has stood surety in behalf of a judgment-debtor for the performance of a decree to pay the amount specified in the surety in a decree. Not in the meaning of this rule. It is therefore incompetent to the decree-holder to have the property secured by the bond for the performance of the decree sold in execution under sec. 14 without instituting a regular suit for sale (a).

"Decree for the payment of money in satisfaction of a claim arising under the mortgage. This rule does not apply unless the decree obtained by the mortgagee is for the payment of money in satisfaction of a claim arising under the mortgage. The mortgage referred to in this rule must be a mortgage existing prior to the date of the decree and not one created by the decree itself (1) and (2). Further it must be a subsisting mortgage and not one which by reason of the efflux of time or any other like circumstance has ceased to be enforceable at law (3). Again the rule is not applicable when a usufructuary mortgagee has leased the mortgaged property to the mortgagor or an assignee (4) unless the lease was part of the mortgage transaction (c). Nor does the rule prevent a mortgagee purchasing with leave of the Court the equity of redemption at a Court sale in execution of his money decree in a claim independent of the mortgage (d).

Further, the rule does not prevent a mortgagee who has two distinct mortgages, one on property A and another on property B from selling B in execution of a money decree on a claim arising out of the mortgage on A and selling A in execution of a money decree on a claim arising out of the mortgage on B (e).

Illustrations

(1) I mortgages certain property to B which was then in the possession of A and agrees to deliver possession thereof to B after recovering possession thereof from A. A recovers possession of the property from A, but does not deliver possession thereof to B. B sues A for possession, and a decree is made in B's favour for possession and for costs. In execution of the decree for costs B applies for attachment and sale of the mortgaged property. Is B entitled to the order applied for? Yes, for the claim in respect of costs is not a 'claim arising under the mortgage' within the meaning of this rule. It arises under the decree passed for costs (f).

(2) In a suit for money a decree is passed by consent whereby the defendant is directed to pay to the plaintiff Rs. 35,000. It is further declared by the decree that the plaintiff should have a first charge on certain immovable property belonging to the defendant. Is the plaintiff entitled to have the property sold in execution of the decree without instituting a regular suit for sale on the charge? Yes, because there being no

(x) *Ashutosh v. Behari Lal* (1908) 35 Cal 61

(b)

(c)

(y)

(z)

(a)

(d) *Raja Jagadish Chandra v. Bhubaneswar* (1920) 27 C W N 38 76 I C 241 (23) A C 121

(e) *Bal Noorjan v. Hansraj* (1924) 49 Bom 208 85 I C 870 (25) A B 239

(f) *Haribans Ray v. Sri Nivas* (1913) 35 All 518, 20 I C 896

O. 34, r. 14 mortgage or charge prior to the decree, the decree cannot be said to have been obtained 'for the payment of money in satisfaction of a claim arising under the mortgage' within the meaning of this rule. The immovable property must have been made security for the payment of the money before the decree was obtained, otherwise the provisions of this rule do not apply (g)

(3) A mortgages two properties X and Y to B. Subsequently by reason of the wrongful act of A, B is deprived of part of his security, namely, property Y. B thereupon sues A under sec 68 of the Transfer of Property Act, and obtains a personal decree for the mortgage debt against A. In execution of the decree B applies for sale of property X. At this date B's remedy on the mortgage had become barred by limitation. The mortgage not being a subsisting mortgage [and A not having to redeem it] B is entitled to have property X sold in execution without bringing a regular suit for sale on the mortgage (h)

(4) A executes a usufructuary mortgage in favour of B to secure a debt of Rs. 8,000 whereby he mortgages a fixed rate holding and his right to receive offerings at a temple. By a subsequent agreement between him and B, A binds himself to pay annually Rs 700 to B in lieu of the offerings. Subsequently B sues A on that agreement and obtains a decree against A for Rs 3,200 being the arrears of the annual payments. This is a decree for the payment of money in satisfaction of a claim arising under the mortgage within the meaning of this rule, and B is not entitled to bring the mortgaged property to sale in execution of the decree. B's right to receive the money rested on his position as mortgagee (i)

"He may institute such suit notwithstanding anything contained in O 2, r 2"—See notes to O 2, r 2, under the head "Exceptions to the rule against the splitting of reliefs."

Charge—This rule applies not only to mortgages but also to charges (j). The Rangoon High Court decreed a suit for unpaid price on a sale of immovable property and incorporated in the decree an order for sale in realisation of the seller's charge but the Privy Council observed that the procedure was irregular (k). In a Calcutta case the holder of a charge on certain properties brought a suit on the charge and obtained a decree against the defendant personally with a declaration that the plaintiff was entitled to a charge on the properties. It was held that the plaintiff was not entitled to sell the properties in execution but must file a suit to enforce the charge as provided by this rule (l). But where in a suit on a mortgage bond a decree was passed by consent in the terms that 'the plaintiff will be entitled to realise the whole amount by taking out execution the property mortgaged shall remain charged under the mortgage,' it was held that the plaintiff was entitled to sell the property in execution (m).

In Patna it has been held that where in a suit for maintenance a decree is passed for the plaintiff, directing the defendant to pay a fixed sum every month and declaring that the allowance fixed by the decree shall be a charge on certain property the plaintiff is

(g) Ar

(h)

(i)

(j)

- (k) *Pam Raghbir v United Refractories* (1913) 60 I A 183 111 Ind 186 142 I C 788
(33) A I C 143
(l) *Golinda v Kailas* (1917) 45 Cal 530 41 I C 73
(m) *Kashi Chandra v Irya Nath* (1914) 24 C W N 550 83 I C 4-4 (24) A C 645

entitled to sell the property in execution and no separate suit is necessary (n). In a Bombay case the suit was for money and a consent decree was passed directing the defendant to pay a sum of money to the plaintiffs and declaring a charge on certain properties belonging to the defendant. It was held that the plaintiff was entitled to sell the property in execution and that it was not necessary to bring a separate suit for sale (o). But in a similar case the Allahabad High Court held that a suit for sale was necessary (p).

Security bond—A security bond given during the pendency of an appeal creating a charge on the sureties property can be enforced by summary procedure and this rule does not apply when no person is named as mortgagee, for the Court is not a judicial person (q). See note under O 41, r 5, *post*. Security for the performance of the decree, and see 145.

Consent decree—This rule does not apply to consent-decrees for the mortgagor can waive the benefit of the rule (r).

Transferee of money decree from mortgagee—It has been held by the High Courts of Bombay and Madras that the transferee of a money-decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by this rule, and that he cannot therefore bring the mortgaged property to sale in execution of the decree (s). The contrary has been held by the High Court of Allahabad (t).

Mortgage of movables—O 34 does not apply to mortgages of movable property and so this rule does not enable a mortgagee of movable property who has obtained a personal decree for the sum secured by the mortgage to sue on the mortgage (u).

Sub section (2)—In the Punjab where the Transfer of Property Act does not apply a mortgagee may bring the property mortgaged to sale in execution of a money decree (v).

15. [New. Cf. Act 4 of 1882, ss. 96 and 100.] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of sec. 58, and to a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882.

Mortgages by the deposit of title-deeds and charges

The old rule—The above rule was substituted for old r 15 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was as follows—

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882.

(n) *Hari v. Musammal Tapar* (1925) 4 Pat 633
88 I C 923 (26) A P 31, *Raja Praya*
Sunder v. Surat (1917) 2 Lat L J 55 38
I C 791

(o) *Ambalal v. Narayan* (1919) 43 Bom 631,
51 I C 929, *Shankar v. Ganpat* (19-9)
31 Bom L R 439 119 I C 186 (29) A B
227

(p) *Postmal v. Firm Patha Kishna* (1932)
55 All 763 138 I C 603 (32) A A 439

(q) *Raghobar Singh v. Jai Indra* (1919) 46 I A
278 42 All 158 55 I C 550 *Official*
Receiver v. Nagarathna (1923) 49 Mal L J

(r) *See O 31 C 107 (1901) A M 100*

(s) *See* *Official Assignee v. Alaminum* (1914) 87
Bom 316 142 I C 370 (33) A B 81

(t) *Rash Bial v. Manni Lal* (1903) 27 All 450

(u) *Official Assignee v. Alaminum* (1914) 87
Bom 316 142 I C 370 (33) A B 81

(v) *Abdul v. Alliance Bank* (1912) 13 Lah 143
152 I C 215 (31) A L 454

O. 34, r. 14 mortgage or charge prior to the decree, the decree cannot be said to have been obtained 'for the payment of money in satisfaction of a claim arising under the mortgage' within the meaning of this rule. The immovable property must have been made security for the payment of the money before the decree was obtained, otherwise the provisions of this rule do not apply (g)

(3) A mortgages two properties X and Y to B. Subsequently by reason of the wrongful act of A, B is deprived of part of his security, namely, property Y. B thereupon sues A under sec. 68 of the Transfer of Property Act, and obtains a personal decree for the mortgage debt against A. In execution of the decree B applies for sale of property X. At this date B's remedy on the mortgage had become barred by limitation. The mortgage not being a subsisting mortgage (and A not having to redeem it) B is entitled to have property X sold in execution without bringing a regular suit for sale on the mortgage (h)

(4) A executes a usufructuary mortgage in favour of B to secure a debt of Rs. 8,000 whereby he mortgages a fixed rate holding and his right to receive offerings at a temple. By a subsequent agreement between him and B, A binds himself to pay annually Rs. 700 to B in lieu of the offerings. Subsequently B sues A on that agreement and obtains a decree against A for Rs. 3,200 being the arrears of the annual payments. This is a decree for the payment of money in satisfaction of a claim arising under the mortgage within the meaning of this rule and B is not entitled to bring the mortgaged property to sale in execution of the decree. B's right to receive the money rested on his position as mortgagee (i)

'He may institute such suit notwithstanding anything contained in O. 2, r. 2.—See notes to O. 2, r. 2, under the head 'Exceptions to the rule against the splitting of reliefs.'

Charge.—This rule applies not only to mortgages but also to charges (j). The Rangoon High Court decreed a suit for unpaid price on a sale of immovable property and incorporated in the decree an order for sale in realisation of the seller's charge but the Privy Council observed that the procedure was irregular (k). In a Calcutta case the holder of a charge on certain properties brought a suit on the charge and obtained a decree against the defendant personally with a declaration that the plaintiff was entitled to a charge on the properties. It was held that the plaintiff was not entitled to sell the properties in execution but must file a suit to enforce the charge as provided by this rule (l). But where in a suit on a mortgage bond a decree was passed by consent in the terms that 'the plaintiff will be entitled to realise the whole amount by taking out execution, the property mortgaged shall remain charged under the mortgage,' it was held that the plaintiff was entitled to sell the property in execution (m).

In Patna it has been held that where in a suit for maintenance a decree is passed for the plaintiff, directing the defendant to pay a fixed sum every month and declaring that the allowance fixed by the decree shall be a charge on certain property, the plaintiff is

| | |
|---------------|---|
| (g) <i>An</i> | Gopal (1921) 43 All. 677 63 I C 445 (21) A A 131 |
| " | (i) |
| " | (j) |
| " | |
| (h) | (k) <i>Ram Raghobir v. United Leathers</i> 1109 80 I A 183 11 Rang 186 14-1 C 789 (33) A PC 143 |
| " | (l) <i>Gobinda v. Kailas</i> (1917) 45 Cal 530 41 I C 73 |
| " | (m) <i>Kashi Chandra v. Priya Nath</i> (1904) 23 C W N 550 63 I C 4-4 (-4) A C 615 |

entitled to sell the property in execution. And no separate suit is necessary (a). In a Bombay case the suit was for money and a consent decree was passed directing the defendant to pay a sum of money to the plaintiffs and declaring a charge on certain properties belonging to the defendant. It was held that the plaintiff was entitled to sell the property in execution and that it was not necessary to bring a separate suit for sale (c). But in a similar case the Allahabad High Court held that a suit for sale was necessary (f).

Security bond.—A security bond given during the pendency of an appeal creating a charge on the sureties' property can be enforced by summary procedure and this rule does not apply when no person is named as mortgagee for the Court is not a judicial person (g). See in *Transfer of Property Act*, 1908, Security for the performance of the decree, and see 145.

Consent decree.—This rule does not apply to consent-decrees for the mortgagor can waive the benefit of the rule (e).

Transferee of money decree from mortgagee.—It has been held by the High Courts of Bombay and Madras that the transferee of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by this rule, and that he cannot therefore bring the mortgaged property to sale in execution of the decree (d). The contrary has been held by the High Court of Allahabad (f).

Mortgage of movables.—O 34 does not apply to mortgages of movable property and so this rule does not enable a mortgagee of movable property who has obtained a personal decree for the sum secured by the mortgage to sue on the mortgage (u).

Sub section (2).—In the Punjab where the Transfer of Property Act does not apply a mortgagee may bring the property mortgaged to sale in execution of a money decree (v).

15. [New. Cf. Act 4 of 1882, ss. 96 and 100.] All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of sec. 58, and to a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882.

Mortgages by the deposit of title-deeds and charges

The old rule.—The above rule was substituted for old r. 15 by the Transfer of Property (Amendment) Supplementary Act, 1929, which came into operation on the 1st April 1930. The old rule was as follows:—

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of sec. 100 of the Transfer of Property Act, 1882.

- | | |
|---|--|
| (n) <i>Hari v. Mahomed Ali</i> (1915) 41 All. 611 | 643 921 C 497, (26) A. M. 194 |
| 88 J. 1 1923 (20) A. 1 31; (11) C. 1141 | (r) <i>Indramani Dasi v. Sarendra</i> (1921) 35 Cal. 1 J. 61 641 C 832 (27) A. C. 35 |
| <i>Sunder v. Harilal</i> (1917) 21 All. J. 15 38 | <i>Kashyap v. Praga Nath</i> (1924) 28 C.W.D. 550 831 C 424 (24) A. C. 645 |
| 1 C. 791 | (s) <i>Chhagan v. Lakshman</i> (1901) 31 Bom. 462, |
| (o) <i>Abdul v. Narain</i> (1910) 37 B.M. 631, | <i>Jigarathnam v. Srinivasa</i> (1908) 31 Mad. 33 |
| 51 J. 1 1923 (20) A. 1 31; (11) C. 1141 | (t) <i>Ram Lal v. Manni Lal</i> (1902) 27 All. 450 |
| 31 B.M. 1 1923 (20) A. 1 31; (11) C. 1141 | (u) <i>Official Assignee v. Chinnaram</i> (1932) 57 Bom. 346 |
| (p) <i>Postmit v. Firm Rishi</i> (1932) 57 All. 763 134 J. 1 1923 (20) A. 1 31 | (v) <i>Abdul v. Ali</i> 132 J. C. 13 Lah. 143 |
| (q) <i>Raghunath Singh v. Jitendra</i> (1909) 46 J. A. 24 42 All. 154 15 J. 1 1923 (20) A. 1 31 | |
| <i>Receivers v. Najirana</i> (1925) 42 Mad. 1, J. | |

O. 34, r. 15 The old rule and the new rule.—

- 1 The words "as to the sale or redemption of the mortgaged property" which were in the old rule have been omitted, and instead thereof it is now provided in general terms that the provisions applying to simple mortgages shall apply to charges
- 2 The words "mortgage by deposit of title deeds within the meaning of sec 58 are new

Charge—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property [Transfer of Property Act, s 100]. A charge for rent created by sec 65 of the Bengal Tenancy Act (w), or by sec 5 of the Madras Estates Land Act, I of 1908 (x), is not a charge within the meaning of sec 100 of the Transfer of Property Act. See notes to r 14, "Charge". See Ghose on Mortgage, 5th ed., pp 109-110.

Mortgage by deposit of title deeds.—By sec 96 of the Transfer of Property Act, a mortgage by deposit of title deeds is now placed on the same footing as a simple mortgage.

Sale—A charge is enforced by sale and not foreclosure.

ORDER XXXV.

*Interpleader.*O. 35,
rr. 1, 2

1. [S. 471.] In every suit of interpleader the plaintiff shall, in addition to other statements necessary for plaints, state—
 - (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;
 - (b) the claims made by the defendants severally; and
 - (c) that there is no collusion between the plaintiff and any of the defendants

Interpleader suits—See sec 88 and notes thereto

2. [S. 472.] Where the thing claimed is capable of being paid into Court, or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit

"May be required to so pay or place it"—These words have been substituted for the words "must so pay or place it" in view of the addition of the words "immovable property" in sec 88. The procedure by payment or deposit is plainly not applicable to immovable property.

(w) *Fotick Chunder v Foley* (1888) 15 Cal 492
Rajendra v Kali Nath (1906) 33 Cal 985

(x) *Suramma v Surianarayana* (1919) 42 Mad 114, 48 I C 794

3. [S. 47.] Where any of the defendants in an interpleader suit is actually suing the plaintiff in respect of the subject matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader suit has been instituted, stay the proceedings as against him, and his costs in the suit so stayed may be provided for in such suit, but if, and in so far as they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit

Alteration in the rule—The words "on being informed by the Court in which the interpleader suit has been instituted" have been substituted for the words "on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stakeholder that such decree has been passed". Under the old section proceedings in other litigation relating to the same subject matter could only be stayed on the *passing of a decree* in the interpleader suit. Under the present rule they can be stayed on the *very institution* of the interpleader suit.

Appeal—An appeal lies from an order under this rule (O 43 r 1 cl. (p)).

Procedure at first hearing

4. [S 47, R. S C, O 57, r 7.] (1) At the first hearing the Court may—

- (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed award him his costs, and dismiss him from the suit, or
- (b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed

(3) Where the admissions of the parties do not enable the Court so to adjudicate it may direct—

- (a) that an issue or issues between the parties be framed and tried, and
- (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner

O. 34, r. 15 The old rule and the new rule —

- 1 The words 'as to the sale or redemption of the mortgaged property' which were in the old rule have been omitted, and instead thereof it is now provided in general terms that the provisions applying to simple mortgages shall apply to charges
- 2 The words 'mortgage by deposit of title-deeds' within the meaning of sec 58 are new

Charge—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage the latter person is said to have a charge on the property [Transfer of Property Act, s 100]. A charge for rent created by sec 65 of the Bengal Tenancy Act (w) or by sec 5 of the Madras Estates Land Act, I of 1908 (z), is not a charge within the meaning of sec 100 of the Transfer of Property Act See notes to r 14,

Charge See Ghose on Mortgage, 5th ed, pp 109-110

Mortgage by deposit of title deeds—By sec 96 of the Transfer of Property Act a mortgage by deposit of title-deeds is now placed on the same footing as a simple mortgage.

Sale—A charge is enforced by sale and not foreclosure

ORDER XXXV*Interpleader*

**O. 35,
rr. 1, 2**

1. [S. 471.] In every suit of interpleader the plaintiff shall, in addition to other statements necessary for plaintiffs, state—

Plaint
suits in interpleader

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs,
- (b) the claims made by the defendants severally, and
- (c) that there is no collusion between the plaintiff and any of the defendants

Interpleader suits—See sec 53 and notes thereto

2. [S. 472.] Where the thing claimed is capable of being paid into Court, or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit

Payment of thing claimed
into Court

"May be required to so pay or place it."—These words have been substituted for the words 'must so pay or place it' in view of the addition of the words "immovable property" in sec 53. The procedure by payment or deposit is plainly not applicable to immovable property

(w) *Potluck Chunder v Foley* (1894) 15 Cal 410
Poyraddi v Kali Nath (1906) 33 Cal 935

(z) *Suramma v Suramareyana* (1910) 42 Mad 114 48 I C 791

3. [S. 47.] Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

Alteration in the rule—The words "on being informed by the Court in which the interpleader suit has been instituted" have been substituted for the words "on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stake holder, that such decree has been passed" Under the old section proceedings in other litigation relating to the same subject matter could only be stayed on the *passing of a decree* in the interpleader suit Under the present rule they can be stayed on the *very institution* of the interpleader suit

Appeal—An appeal lies from an order under this rule [O 43, r 1, cl (p)]

Procedure at first hearing

4. [S. 47, R. S. C., O. 57, r. 7.] (1) At the first hearing the Court may—

- (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ; or
- (b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

- (a) that an issue or issues between the parties be framed and tried, and
- (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

O. 35,
rr. 4, 5

Non appearance of claimant-defendants—Where the claimants do not appear at the first hearing the Court may, if the suit is properly instituted, declare under sub r (1) that the plaintiff is discharged from all liability to the defendants in respect of the money claimed, award him his costs and dismiss him from the suit (y)

Sub rule 3—This sub rule has been taken from O 57, r 7, of the English Rules

Appeal—An appeal lies from an order under this rule [O 43, r 1, cl. (p)]

5. [S. 474.] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords

Agents and tenants may
not institute interpleader
suits

Illustrations

(a) A deposits a box of jewels with B as his agent C alleges that the jewels were wrongfully obtained from him by A, and claims them from B B cannot institute an interpleader suit against A and C

(b) A deposits a box of jewels with B as his agent He then writes to C for the purpose of making the jewels a security for a debt due from himself to C A afterwards alleges that C's debt is satisfied, and C alleges the contrary Both claim the jewels from B B may institute an interpleader suit against A and C

Interpleader suit by Agents—In ill (a), C does not claim through A (principal) but *adversely* to him hence no interpleader suit can be brought In ill (b) C claims *through* A hence B may institute interpleader suit against A and C

Interpleader suit by tenants—A lets certain lands to B C alleges that the lands never belonged to A and claims the rent from B B cannot institute an interpleader suit against A and C this is because C claims *adversely* to A (landlord) But if C claims the rent alleging that the lands were sold to him by A after the same were let to B, B may institute an interpleader suit against A and C the reason is that in this case C claims *through* A, that is as purchaser from A The result is that an interpleader suit by a tenant can only be maintained if the defendant other than the landlord claims *through* the landlord (z) The following is a peculiar case A grants a perpetual lease of certain villages to his wife B B sub lets the villages to C A alleging that the lease granted by him to B was executed by him *benami* in the name of B gives notice to C, claiming the rents of the villages B denies that the transaction was *benami*, and she also claims the rents from C C can maintain an interpleader suit against A and B The reason given is that A must be deemed to claim *through* B (a) See Indian Evidence Act s 116

Interpleader suit by a Railway Company—A Railway Company is not an 'agent' of the consignor within the meaning of this rule, so as to preclude it from filing an interpleader suit against the consignor in view of the adverb claiming adversely to the consignor (b) The procedure by payment or deposit of the property

(y) *Khow*

Shyck Chinter v Folru (1888) 15 Cal 49—
Koyraddi v Aoli Nath (1906) 33 Cal 985

(z) *Suramma v Suridanaraya*
114 48 I C 794

(1910) 33 Mad 200
C I Ry (1915) 17
I C 918

6. [S. 475.] Where the suit is properly instituted the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way

Appeal — An appeal lies from an order under this rule [O. 17 r. 1, cl. (1)]

ORDER XXXVI

Special Case

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them, or

(b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them, or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby

Clause (1) —When the provisions of this clause were not complied with the Court refused to entertain the case (c)

2. [S. 528.] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement

O. 36,
rr. 3-5

3. [S. 529.] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

Agreement to be filed and
registered as suit

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

4. [S. 530.] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

Parties to be subject to
Court's jurisdiction

5. [S. 531.] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suits so far as the same are applicable.

Hearing and disposal of
case

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bonâ fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

Birth after case set down—In the case of the subsequent birth of an infant the former order to set down should be discharged and the special case amended by making the infant a party (d) So also when an infant born a few days before was accidentally omitted to be made a party (e)

Fit to be decided—The Court will not make an abstract declaration in a case where the parties have another specific remedy (f)

(d) *Saraga v. Snell* (1870) L. R. 11 Lq. 264
(e) *Jarnaby v. Tassell* (1870) L. R. 11 Lq. 363
(f) *Trustees of the Port of Bombay v. Municipal*

Corporation of Bombay (1930) 54 Bom. 625
125 I. C. 899 (30) A. B. 232

ORDER XXXVII.

Summary Procedure on Negotiable Instruments

Application of order 1. [S. 532.] This Order applies only to—

- (a) the High Courts of Judicature at Fort St. George, Madras and Bombay,
- (b) the Chief Court of Lower Burma,
- (c) the Court of the Judicial Commissioner of Assam and
- (d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied

Courts of Small Causes in Calcutta, Madras and Bombay—The corresponding Chapter of the Code of 1882 applied also to Presidency Small Cause Courts.

Clause (d)—Although sections 532 to 537 have been applied to a subordinate Court, yet the subordinate Judge of that Court when exercising Small Cause Court powers has no jurisdiction under this order (g)

Lahore High Court—The Lahore High Court is not mentioned in clause (a) of the rule. See as to this the undermentioned case (h)

2. [S. 532] (1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed, but the summons shall be in Form No. 4, Appendix B or in such other form as may be from time to time prescribed

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge hereinafter provided so to appear and defend, and, in default of his obtaining such leave or of his appearance and defend

O. 37, r. 2 in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree—

(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(c) for such sum for costs as may be prescribed:

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.

Old Section.—This rule corresponds with s 532 of the Code of 1882 except in the following particulars —

- 1 The explanation to s 532 has been omitted, and in lieu thereof the words "the allegations in the plaint shall be deemed to be admitted" have been added into sub r (2) See notes below under the head "The allegations in the plaint shall be deemed to be admitted"
- 2 The fourth paragraph of s 532, which provided that the Court should not require the defendant to pay the amount claimed into Court or to give security therefor unless the Court thought that the defendant had not a *prima facie* case or that the defence was not made in good faith, has been omitted See r 3, sub r (2), below
- 3 See also notes below "Changes in sub r (2)"

Changes in sub-rule (2).—Clauses (a), (b) and (c) of sub r (2), and sub rule (3) were substituted after the words "shall be entitled to a decree" in sub r (2), for the following words, by Act 30 of 1926, s 4 —

"for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith"

See notes below "Interest"

Points of difference between summary suit and ordinary suit on negotiable O. instruments:

- (1) A plaintiff enforcing a negotiable instrument may either bring a *summary* suit or he may bring a suit in the *ordinary* manner. The advantage of a summary suit is that the defendant is not, as in a suit brought in the ordinary manner, entitled as of right to defend the suit. The defendant in a summary suit must *apply for leave* to defend within 10 days from the service of the summons upon him (see Limitation Act, 1908, sch. I, art. 159), and such leave will be granted only if the affidavit filed by the defendant discloses such facts as would make it incumbent on the plaintiff to prove consideration or such other facts as the Court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted the plaintiff is entitled to a decree.
- (2) A summary suit must be brought within one year from the date on which the debt becomes due and payable [Limitation Act, 1908, sch. I, art. 5]. The period of limitation for a suit brought in the ordinary manner on a negotiable instrument is 3 years. Article 5 of the Limitation Act, 1908, as it originally stood, referred to suits under the summary procedure referred to in section 128 (2) (f) of the Code, and this was construed as not including suits under O. 37 (a). That article was accordingly amended by Act 30 of 1925 by adding to the entry in the first column the words "where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under O. 37 of the said Code". At the same time the period of limitation was extended from six months to one year.
- (3) A summary suit can only be brought in the Courts mentioned in r. 1.

A negotiable instrument means a promissory note, bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person or to the bearer thereof, or to a specified person or the bearer thereof (Negotiable Instruments Act 26 of 1881, s. 13).

A bill of exchange is an instrument in writing containing an unconditional order signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument (Negotiable Instruments Act, s. 5).

A promissory note is an instrument in writing (not being a bank note or a currency note) containing an *unconditional* undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of that instrument (Negotiable Instruments Act, s. 4).

Illustrations

(a) A executes an instrument whereby he promises to pay Rs. 5,000 to B on demand. By the same instrument it is provided that B should not be entitled to call for payment of the said sum *unless* A fails to deliver certain goods to B within six months. The instrument is not a promissory note, for the undertaking to pay Rs. 5,000 is *conditional* upon A's failure to deliver the goods, *Simon v Hakim Mahomed* (1896) 19 Mad 368.

(b) A executes an instrument whereby he promises to pay Rs. 5,000 to B on demand. At the same time a *separate* agreement is made between the parties whereby B agrees not to demand payment of the sum of Rs. 5,000 *unless* A fails to deliver certain goods to him within six months. The instrument is a promissory note. *Simon v Hakim Mahomed* (1896) 19 Mad 368.

37, r 2 Limitation for suit—See notes above Points of difference between summary suit and ordinary suit on negotiable instruments

Limitation for application for leave to defend—The period of limitation for an application for leave to appear and defend is 10 days from the date when the summons is served Limitation Act sch I art 159 The Court has no power to extend the time (3) unless the Court has by a rule framed in that behalf made sec 5 of the Limitation Act applicable to such application as has been done by the High Court of Bombay See App IV below [Rules made by the High Court of Bombay]

Form of summons in a summary suit—The summons in such a suit requires the defendant to obtain leave from the Court within 10 days from the service thereof to appear and defend the suit and within such time to cause an appearance to be entered on his behalf see Appendix B Form No 4

Defendant shall not appear unless he obtains leave—This rule provides that a defendant who has failed to obtain leave to defend cannot be allowed to appear

instalments (L1)

Interest—Sub rule (2) before it was amended by Act 30 of 1906 was in almost the same terms as s 39 of the Code of 1859 The sub rule has now been amended and provision has been made for interest first up to the date of the institution of the suit secondly up to the date of the decree and thirdly after the decree As to interest up to the institution of the suit it is to be calculated in accordance with the provisions of sec 79 or sec 80 as the case may be of the Negotiable Instruments Act 1881 See the undernoted case (i) As to interest from the date of the institution of the suit to the date of the decree it may be awarded at the discretion of the Court at the same rate as aforesaid or at such other rate as the Court thinks fit As to interest from and after the date of the decree the same may be awarded under sec 34 of the Code See 79 of the Negotiable

ords
was
ther
If
olly
d it
t of
can
ould
ling

- | | |
|--|--|
| (j) <i>Mahendar v Sarat Chandra</i> (1900) 5 C W N 259 | 398 141 I C 809 (33) A M 299 |
| (k) | (m) See <i>Karler Buzak v Shaik Serajuddin</i> (1909) 49 Cal 716 70 I C 130 (22) A C 512 |
| (ll) | (n) <i>Hemfry v Shillingford</i> (1861) 1 Cal 130 |
| (lll) | (o) <i>Bhupat v Sourendra</i> (1903) 30 Cal 416 418 |
| (l) | (p) <i>Venka achalapathi v Nanappa</i> (1933) 59 Mad 399 141 I C 809 (33) A M 9 |

Suit against firm—The question whether when a summary suit is brought against a firm an *ex parte* service is effected upon a person as an alleged partner, and such person appears under protest denying that he was a partner, he could appear without obtaining leave under this rule is discussed in the unreported case (g)

3. [S. 533.] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application

Defendant showing
defence on merits to have
leave to appear

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit

Alterations in the rule—Under the old sections it was obligatory upon the Court to grant leave to the defendant to appear and defend if he paid into Court the amount claimed by the plaintiff and mentioned in the summons. It is no longer so under the present rule. The words upon the defendant paying into Court the sum mentioned in the summons or, which occurred in s. 533 after the word suit in the third line have been omitted.

Limitation—The application for leave to appear and defend must be made within 10 days from the date of service of the summons on the defendant. The date shown in the Sheriff's return as the date of service is the only date to which reference could be made to determine the question of limitation arising on an application under this section (r).

Sub rule (2)—As a rule leave to defend should be given unconditionally if the defendant shows a *prima facie* case or raises a triable issue. Leave should be made conditional if the Court doubts the *bona fides* of the defendant or thinks that the defence is only put in to gain time (s).

Appeal—No appeal is allowed under the Code from an order under this rule. The High Court of Calcutta has held that an order under this rule directing a defendant to give security as a term on which leave to defend should be given is not a 'judgment' within the meaning of cl. 15 of the Letters Patent, and not therefore appealable as such (t). But the Bombay High Court holds that an appeal lies from the final judgment in a summary suit (u), and that an appeal also lies from an order refusing leave to appear and defend or an order granting leave on terms for the order though in terms interlocutory has the effect of determining the rights of the parties and is technically a judgment from which an appeal lies under the Letters Patent (v).

(g) *Chetry v. Pookomal* (1906) 50 Bom 665 99

1 C 495 (26) A B 585

(r) *Madhub Lall v. Hoopendranatha* (1896) 23

Cal 573

(s) *Roulet v. Fetterle* (1894) 18 B m 17 *Periya*

Miyana v. Subramania Iyer (1904) 46

Mwl LJ 255 78 IC 505 (-4) A M 612

(t) *Sukhlal v. Eastern Bank Ltd* (1915) 42 Cal

735 31 I C 234

(u) *Madanlal v. Kedarnath* (1930) 32 Bom L R

660 125 IC 434 (30) A B 364

(v) *Ramanlal v. Chunilal* (1932) 56 Bom 63

137 I C 397 (3-) A B 163

O. 37,
rr. 4-7

4. [S. 534.] After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit

Power to set as de d cree

Power to order bill etc
to be deposited with officer
of Court.

5. [S. 535.] In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof

Recovery of cost of
noting non acceptance of
dishonoured bill or note

6. [S. 536.] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note

Procedure in suits

7. [S. 537.] Save as provided by this order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner

ORDER XXXVIII

Arrest and Attachment before Judgment

Arrest before judgment

O. 38, r. 1

When defendant may be
called upon to furnish
security for appearance

1. [Ss. 447, 478.] Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d) the Court is satisfied, by affidavit or otherwise,—

- (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

- (i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of O. the jurisdiction of the Court, or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

The proviso to the rule is new

Scope of the Order—Order 21 deals with the arrest of a judgment debtor and the attachment of his property in execution of a decree passed against him. The present Order lays down rules for the arrest of a defendant and the attachment of his property before judgment. The object of these rules is to secure the plaintiff against any attempt on the part of the defendant to defeat the execution of any decree that may be passed against him.

Reasonable probability—Where the defendant is about to leave British India it is not necessary to prove any intent on his part to obstruct or delay the execution of any decree that may be passed against him. It is enough if the circumstances under which he is about to leave British India afford a reasonable probability that any decree that may be passed against him in the suit will thereby be obstructed or delayed in execution (w). The Court must be satisfied on two points (1) that the plaintiff has a cause of action which is *prima facie* unimpeachable subject to his proving the allegations in his plaint and (2) that the Court should have reason to believe on adequate materials that unless jurisdiction is exercised there is real danger that the defendant will remove himself from the ambit of the powers of the Court (x).

The suit must be bona fide—In every case where an application is made under this rule the Court must be satisfied that the suit is *bona fide*. Where the plaintiff is indisputably entitled to a part of the relief claimed in the plaint the mere circumstance of the rest of the plaintiff's claim being of a disputable character does not render the suit *mala fide* (y).

(w) *Goitre v. Robert* (18 0) 2 N. W. P. 353

(x) *Seth Chand Mull v. Furushollah* (1927) 50

Mad. 97 94 I. C. 512 (26) A. M. 584

(y) *Probode Chunder v. Doutry* (1887) 14 Cal. 695

O. 38,
rr. 1-3

Consequences of obtaining arrest on insufficient grounds.—See s 95
Form.—For form of warrant of arrest before judgment, see App F, form no 1

2. [S. 479.] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other

Security.

property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Rateable distribution—Insolvency of defendant—Where money is deposited by the defendant in Court under this rule, it is a payment into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter for obtaining a decree in his favour. Where after payment into Court other judgment-creditors of the defendant attach the money or the defendant becomes an insolvent, the plaintiff on obtaining his decree is entitled to priority over the claims respectively of the attaching creditors and the Official Receiver. The reason is that the amount so paid cannot be taken to have been ordered and levied as security for the defendant's appearance (2). See notes to r 5 below, "Rateable distribution. Insolvency of defendant."

Money sufficient to answer the claim—In a Calcutta case (a), Rankin, C J, said "When one looks at Order 38 Rule 2, and Form 2 of Appendix F, one does not find it contemplated that a defendant, on failing to make deposit, is to give security for appearance in a particular sum to be fixed by the Judge, but that if this security takes the form of a bond by a surety, it is to be the whole amount of the decree. If the defendant can give the security himself, he will give it for the claim by deposit of money or property. Otherwise he will get some one to go bail for his appearance. This is, I think, the scheme of Order 38."

Security for his appearance.—The condition of the surety's bond is to produce the defendant when called upon and the bond is not forfeited if the defendant is adjudicated insolvent and so exempted from arrest (a1).

Appeal—An appeal lies from an order under this rule [O 43, r 1, cl (q)]

Form.—For form of security, see App F, form no 2

3. [S. 480.] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application
by surety to be discharged

(2) *Ramiah v Gopalier* (1918) 41 Mad 1053
49 I C 20
(a) *Flie Goldberg v Sarojini* (1929) 55 Cal 700,

703, 120 I C 815, (29) A C 732
(a1) *Pera Appanami v Krishnakumari* (1933)
65 Mad L J 793 (34) A M 24

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Appeal—An appeal lies from an order under this rule [O 43, r 1 cl (q)]

Form—For form of summons to defendant see App F, form no 3

4. [S. 4.] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied

Procedure where defendant fails to furnish security or find fresh security

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject matter of the suit does not exceed fifty rupees

Provided also that no person shall be detained in prison under this rule after he has complied with such order

Appeal—An order for arrest is appealable (b) under section 104 (h) though it is not specified under O 43 r 1

Form—For form of order for committal see App F form no 4

Attachment before Judgment

5. [Ss. 483, 484.] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

O. 38, r. 5 the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

Alterations in the rule.—The words "or has quitted the jurisdiction of the Court leaving therein property belonging to him" which occurred in the old section after cl (b) of sub r (1) have been omitted

Object of the rule.—The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree, if one is eventually passed, from the defendant's property (c).

The Court is satisfied—Vague allegations are insufficient (d) The power to attach is not to be exercised lightly and without clear proof of the mischief aimed at (e)

"Is about to dispose of the whole or any part of his property"—The expression "property" includes property of every description whether movable or immovable (f) The expression "his property" refers to the property of the defendant It does not refer to property which is the joint property of the plaintiff and the defendant Thus where A sued B for partnership accounts, and applied for an attachment before judgment of the *Partnership* property on the allegation that B was about to dispose of the same, it was held that the case was not one for an attachment before judgment, but for the appointment of a receiver under O 40 below (g) A man is not debarred from dealing with his property because a suit is filed against him and an attempt to sell a small portion of a large estate does not warrant the inference that the defendant intends to obstruct or delay execution (h)

Effect of order of adjudication on attachment before judgment—See *rules* to r 10 below under the same head

Rateable distribution—Where money is paid into Court by the defendant under this rule the plaintiff acquires no charge on the money and it passes to the Official Assignee on the insolvency of the defendant (i) This is because the money is deposited as security to produce and place at the disposal of the Court property which the defendant was about

(c) *Ganu Singh v Janji Lal* (1899) 26 Cal 531, at p 533

(d) *Sennaji v Pannappa* (1921) 48 Bom 431, 64 I C 580 (23) A B 276

(e) *Chandrika Prasad v Hirai Lal* (1923) 73 I C 721 (24) A P 312, *Radra Prasad v Chokke Lal* (1926) 48 All 510, 65 I C 829, (26) A A 406

(f) *Cheli Lal v Kuarji* (1895) 17 All 82;

Bishambar v Sukhdevi (1894) 16 All 186

(g) *Damodar v Panatal* (1907) 9 Bom L R 549

(h) *Nousoji v Deccan Bank* (1921) 45 Bom 1256, 63 I C 958 (21) A B 69

(i) *Frikulappa v The Official Assignee* (1916) 39 Mad 603 32 I C 180, *Promothi Nath v Mohini Mohun Sen* (1915) 19 C W N, 1200, 31 I C 573

to dispose of or remove from the jurisdiction of the Court (j) For the same reason the amount deposited is subject to rateable distribution under s 73 above (l) But if the defendant deposits money in Court (l1) or with plaintiff's pleader (l2) in part satisfaction of money to which plaintiff may be found entitled as the result of a pending action, the money is earmarked for payment to the plaintiff, and on defendant's insolvency is payable to the plaintiff and not to the Official Receiver

Liability of surety.—The surety is discharged if the suit is compromised without his consent and if the terms of the consent decree are prejudicial to him (l) The Rangoon High Court holds that the liability of the surety ceases with the dismissal of the suit and does not continue during the appeal (m) The Bombay High Court makes the liability continue during the appeal (n) If the defendant dies pending the suit and the cause of action survives against his legal representatives and the legal representatives are brought on the record, the death of the defendant does not operate as a discharge of the surety (o)

Mortgage suit.—An attachment before judgment may be granted in a suit on a mortgage (p) The mortgagee must shew that the mortgagor has been deliberately and fraudulently effecting sales or mortgages of his other property with the purpose of defeating any personal decree the mortgagee may get (q)

Principle of sec. 64 applies to attachment before judgment.—Sec 64 of the Code provides that when property is attached *in execution of a decree*, any private transfer of the property contrary to the attachment shall be void as against all claims enforceable under the attachment The same principle applies to the case of attachment *before judgment*, provided that a decree is ultimately passed for the plaintiff at whose instance the attachment was made This clearly appears from r 9 below which provides that an attachment before judgment shall be removed when the suit is *dismissed* (r)

Section 95 applies to a conditional attachment.—A conditional attachment under rule 3 (3) which is withdrawn on security being furnished is within s 95 and compensation may be awarded if the attachment was procured on insufficient grounds (s)

Property situated outside jurisdiction.—Where the property sought to be attached is outside the local limits of the jurisdiction of the Court, the proper course to follow is to transmit the order for attachment to the Court in whose jurisdiction the property is situated (t) See s 136 above The Court has of course no power to attach property outside British India (u)

Provincial Small Cause Court.—See r 13 below

Divorce proceedings.—An order for attachment before judgment will not be made in divorce proceedings governed by the Indian Divorce Act 4 of 1869 (v)

Forms.—For form of attachment before judgment with order to call for surety, see App F, form no 5 For form of security for productions of property, see App F, form no 6

- | | |
|--|---|
| (j) (1916) 39 Mad 903 32 I C 190 <i>et pra</i> | <i>Bishambar v Sukhdari</i> (1894) 16 All 186, |
| (k) <i>Ghansal v Todarmull</i> (1921) 26 C W N 189 | <i>Saritar v Lakshman</i> (1931) 33 Bom |
| 70 I C 539 (22) A C 19 | L R 514 (31) A B 329 |
| (k1) <i>Ex parte Banner In re Kesworth</i> (1874) | (q) <i>Shikarjanath v Jannanath</i> (1932) 36 C |
| 9 Ch App 379 | W N 746 140 I C 457, (32) A C 790 |
| (k2) <i>Gouranga v Manindra</i> (1933) 3 C W N | <i>Mohammad Wahid v Jam Katori</i> |
| 475 (33) A C 625 | (1933) 50 All 179 145 I C 622 (33) |
| (l) <i>Mohomedals v Lakshminbas</i> (1930) 54 Bom | A A 191 |
| 118 124 I C 227 (30) A B 122 | (r) (|
| (m) <i>Manackjee D v R M Chettyar</i> (1927) 5 | (s) |
| Rang 492 105 I C 540 (27) A B 310 | |
| (n) <i>Iranganada v Iranganappa</i> (1927) 51 Bom 31 | (t) 2 |
| 99 I C 820 (27) A B 84 | |
| (o) <i>Chan lal v Jeshangbhai</i> (1917) 41 Bom | |
| 402 33 I C 84 | |
| (p) <i>Jaymaya v Basiryanath</i> (1919) 45 Cal 245 | (u) |
| 50 I C 924 <i>Rani Jotimayee v Raghunath</i> | (v) |
| (1924) 3 Pat 966 85 I C 9 (25) A P 291 | 792 |

6. [S. 485.] (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

Attachment where cause
not shown or security not
furnished

(2) Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

"Property specified."—That is, the property specified by the plaintiff as required by r 5, sub r (2). Such property may be within or without the jurisdiction of the Court. The words in sec 483 of the Code of 1882 were, "property within the jurisdiction of the Court." It was accordingly held by the High Courts of Madras and Bombay that the only property that could be attached *before judgment* was property *within* the jurisdiction of the Court (*w*). On the other hand, it was held by the High Court of Calcutta and recently also by the Madras High Court that sec 483 was to be read with sec 648 [now s 136] and that the two sections read together enable the Court to attach before judgment property situate beyond the local limits of its jurisdiction (*x*). The omission of the words "within the jurisdiction of the Court" clearly shows that the Court may attach property before judgment, even though it may be situated beyond the local limits of its jurisdiction (*y*).

Wrongful attachment.—If the defendant does not obtain an order setting aside the attachment, he will not afterwards be entitled to maintain a suit in tort on the ground that the attachment was wrongfully procured (z). If the attachment was effected by an injunction in restraint of alienation he will not be entitled to damages for wrongful attachment unless he proves that he lost a chance of a profitable sale, and evidence of loss of credit is insufficient (a).

Appeal.—An appeal lies from an order under this rule in so far as it directs an attachment. The portion of the order which demands security is not appealable (b), but the question whether the property is under s 60 capable of attachment can be determined in the appeal (c). See O 43, r cl (q).

Form.—For form of attachment before judgment, see App F, form no 7

7. [S. 486.] Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of the property in execution of a decree.

Mode of making attachment

| | | | |
|-----|---|-----|---|
| (w) | | (a) | |
| (z) | | (b) | |
| (y) | Chander v Firm Dina Nath (1926) Lah L J 125 931 C 301 (26) A L 330 | | |
| (z) | Satishchandra v Manlal (1932) 59 Cal 108 141 I C 253 (37) A C 821 | (c) | Hari Das v Charan Chandra (1933) 60 Cal 1351, 147 I C 924 (33) A C 757 |

O. 38,
rr. 9, 10

revive the attachment and a private transfer made after release from attachment under O 21, r 60, will be void under sec 64 if the right to attach is subsequently established by suit (l) See notes to O 21, r 50, "Effect of order of release"

10. [S. 489.] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment before judgment not to affect rights of strangers nor bar decree holder from applying for sale

Effect of order of adjudication on attachment before judgment—Attachment before judgment does not confer any priority as against the Official Assignee, though the plaintiff at whose instance the attachment was made may ultimately obtain a decree in the suit *A* sues *B*, and attaches *B*'s property before judgment *A* decree is then passed for *A* Between the date of the attachment and the date of the decree *B*'s property vests in the Official Assignee under a vesting order The Official Assignee applies to the Court for removal of the attachment on the ground that the property has vested in him *A* contends that the attachment being prior to the date of the vesting order, his claim has a priority over that of the Official Assignee *A*'s contention will not be upheld, and the attachment will be removed (m) See notes to sec 64 under the head, "Effect of order of adjudication on attachment," on p 238 above

Attachment before judgment not to affect rights of persons not parties to the suit—*A* and *B* are members of a joint Hindu family *C* sues *A*, and obtains an attachment before judgment of *A*'s interest in the joint family property *C* then obtains a decree against *A* *A* dies after the decree On *A*'s death, his interest in the property passes by survivorship to *B*, and *C* is not entitled to have *A*'s share sold in execution of the decree (n) But according to the Madras High Court attachment before judgment followed by a decree does operate to defeat the right of survivorship (o)

Attachment before judgment not to bar rights of other decree holders—*A* institutes a suit against *B*, and obtains an attachment before judgment of *B*'s property Subsequently *C*, another creditor of *B*, obtains a decree against *B* *C* is entitled to have the property attached and sold in execution of this decree The attachment before judgment does not confer any right upon *A* to have his decree satisfied in priority to that of *C* (p)

Agreement to sell—There is a conflict of decisions as to whether an attachment before judgment will prevail over the contractual obligation created by a previous contract of sale If *A* agrees to sell property to *B*, and after the agreement, but before the sale *C* attaches it, the conveyance would under sec 64 be subject to *C*'s claim under the attachment But does *B*'s previous agreement give him priority over *C*? In some cases it has been held that it does (q), and in others that it does not (r) See *Mulla's Transfer of Property Act* note 'Attachment', at p 158

(l) *Protapchandra v Sarat Chandra* (1921) 25 C W N 544 62 J C 348 (21) A C 101

(m) *Shib Krishna v Miller* (1884) 10 Cal 150
Narayappa v Iyannama (1885) 8 J C 141

(n)

(o) *Sankaralingam v Official Receiver* (1925) 49 Mal L J 618 92 J C 501 (26) A M 72

(p) *Bisheshwar Das v Amliki* (1915) 37 All Ind 409

(q)

(r)

11. [S. 490.] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Property attached before judgment not to be re-attached in execution of decree

Scope of the rule—The effect of this rule is merely to do away with the necessity for a re-attachment of the property. But it does not exempt the plaintiff, when a decree follows the attachment, from making the usual application for execution under O 21, r 11 (2) (s). This is now made clear by the substitution of the words, "it shall not be necessary upon an application for execution of such decree to apply for re attachment of the property," for the words, 'it shall not be necessary to re attach the property in execution of such decree'. The rule was applied when the property attached before judgment was attached and brought to sale by another decree holder, the judgment-debtor paid the amount of the second decree, and on the sale being set aside, it was held that the attachment before judgment revived and that the first decree holder could in execution bring the property to sale without a fresh attachment (t). The rule does not give the decree holder at whose instance the property was attached before judgment any right to preferential treatment over other decree holders who may have applied for a rateable distribution under sec 73 (u).

The Madras High Court has held that if the execution application is dismissed, O 21, r 57, applies and that the attachment ceases (v). But the Allahabad and Calcutta High Courts hold that O 21 r 57, does not apply to an attachment before judgment (u). The Bombay High Court agrees with the latter view but holds that if the execution application is for the sale of property other than that attached before judgment, the attachment is not affected (x). See note 'Attachment before judgment' under O 21, r. 57, at p. 775.

Whether re attachment in execution operates as a waiver—Re attachment in execution of a decree, though no re attachment is necessary under this rule, is not of itself a waiver or abandonment of the attachment before judgment. The case is different whether there is an express or manifest abandonment (y).

Objection that property attached before judgment is not saleable—The defendant's omission to object to an application for attachment before judgment, on the ground that the property is not saleable within the meaning of sec 60, does not preclude him from raising that objection when an application is made for execution of the decree passed in the suit (z).

12. [New] Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower

Agricultural produce not attachable before judgment

- O. 38, r. 13 13. [New] Nothing in this Order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property
- Small Cause Court not to attach immovable property

This rule was added by the Amending Act I of 1926 and as that Act was a declaratory Act the section is retrospective (a) See notes to sec 7 above

ORDER XXXIX

Temporary Injunctions and Interlocutory Orders

Temporary Injunctions

- O. 39, r. 1 1. [S. 402.] Where in any suit it is proved by affidavit or otherwise—
- Cases in which temporary injunction may be granted

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging alienation sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders

Temporary and perpetual injunctions—Injunctions are of two kinds temporary and perpetual. Temporary injunctions are regulated by rr 1 and 2 of this Order. perpetual injunctions are regulated by sec 55 57 of the Specific Relief Act I of 1877. A party against whom a perpetual injunction is granted is thereby restrained for ever from doing the act complained of. A perpetual injunction can only be granted by final decree made at the hearing and upon the merits of the suit. A temporary or interim injunction on the other hand may be granted on an interlocutory application at any stage of the suit. The injunction is called temporary for it endures only until the suit is disposed of or until the further order of the Court. (b) Thus if A's neighbour commences to build on a plot of land belonging to him a house which if completed would obstruct the access of light and air over the said plot to the windows of A's house in respect of which A claims an easement he may sue his neighbour for a perpetual injunction restraining him from building so as to disturb the easement and may at any

(a) *Yuthu Krishna v. Ayyasami* (19 3) 55 Mad L J 33 1131 C 416 (-8) A M 11 3

(b) Specific Relief Act 1877 s 53

time after the institution of the suit apply to the Court under r 2 below for a temporary injunction restraining the defendant from building until the suit is disposed of. Interference with A's easement is an "injury" within the meaning of r 2 below.

Principles governing temporary injunction—"The granting of a temporary injunction under the powers conferred by this [rule] is a matter of discretion. True it is a matter of judicial discretion. But if the Court which grants the injunction rightly appreciate the facts and applies to those facts the true principles, then that is a sound exercise of judicial discretion" (c). One of those principles is that the Court in granting a temporary injunction must first see that there is a *bona fide* contention between the parties, and then, on which side, in the event of success, will lie the balance of inconvenience if the injunction does not issue (d). Or, as stated in the judgment of Cotton, L. J., in *Preston v. Luck* (e), to entitle a plaintiff, to an interlocutory injunction the Court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. The real point, upon an application for a temporary injunction, is not how the question ought to be decided at the hearing of the case, but whether there is a substantial question to be investigated and whether matters should not be preserved in *statu quo* until that question can be finally disposed of (f). Another principle is that where a perpetual injunction is sued for, and the plaintiff applies for a temporary injunction, the Court should grant a temporary injunction if the effect of not granting such an injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit (g). See notes to r 2, "Principles governing temporary injunction to restrain breach of contracts."

Duration of temporary injunction—A temporary injunction may be granted until the suit is disposed of or until the further order of the Court. When a temporary injunction is granted 'until the further order of the Court' and the injunction is not dissolved pending the suit, it comes to an end when the suit is disposed of. After the decree is passed the Court that passed the decree has no power to grant a further temporary injunction (h). But if an appeal is referred from the decree, the Appellate Court, it would seem, may grant a temporary injunction under this rule (i). In an appeal from an order refusing a temporary injunction, the Appellate Court granted a temporary injunction "pending final decision of the suit," and this was held to terminate with the decree of the lower Court (j).

Illustration

A sues B in the Court of a Subordinate Judge for a declaration of his title to certain property, and obtains a temporary injunction restraining B from selling the property, which B was about to sell, until the suit is disposed of. A fails to prove his title to the property, and the suit is dismissed. A appeals from the decree to the High Court. As the dismissal of the suit has dissolved the injunction and enabled B to sell the property, A applies to the Court of the Subordinate Judge for a further injunction restraining B from selling the property until the appeal to the High Court has been heard. The Subordinate Judge has no power to grant the injunction. *Gossain Money v. Guru Pershad* (1885) 11 Cal 146. In the above case, the Court said: "If any Court has a right to grant an injunction now, we presume it would be the Court of Appeal."

(c) Per White C. J. in *Subba v. Haji Badsha* (1903) 26 Mad 165 174.

(d) *Doherty v. Allman* (1878) 3 App. Cas. 709. *Subba v. Haji Badsha* (1903) 26 Mad 165 175.

(e) (1887) 27 C. D. 497 506.

(f) *Faris v. Shamser* (1914) 41 Cal 436 442 443 211 C 861.

(g) *Nanabhai v. Janardhan* (1858) 12 Bom 110.

| | | | | | |
|-----|---|---|---|---|---|
| " | - | " | . | " | " |
| (h) | . | . | . | . | . |
| (i) | . | . | . | . | . |
| (j) | . | . | . | . | . |

O. 39, r. 1 Effect of temporary injunction—A temporary injunction granted under this rule has not the effect of making a subsequent alienation of the property void. Hence if a party, against whom a temporary injunction is granted restraining him from alienating the property, sells or mortgages the property pending the injunction, the sale or mortgage is not void. The only penalty *A* incurs by alienating the property, in spite of the injunction is that prescribed by r. 2 (3), namely, that other property belonging to him may be attached and sold in order to award out of the sale proceeds compensation to the party on whose application the injunction was granted, and he may also be detained in the civil prison. In this respect a temporary injunction has a different effect from an attachment, for it will be seen on referring to s. 64 that when property is attached any private transfer of the property contrary to the attachment is void against all claims enforceable under the attachment (1).

"Property in dispute in a suit."—Note that the property in respect of which an injunction may be granted in the circumstances mentioned in cl. (a) of this rule must be property in dispute in the suit, and no other (1), for you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property (m). Where a plaintiff who is out of possession claims possession, the Court will not grant an injunction against the defendant in possession under a claim of right unless the threatened injury will be irreparable, and an injunction may be granted as to the user of premises which the plaintiff has leased to the defendant (n). In any event the plaintiff must show a *prima facie* case in support of the title asserted by him (o). For this reason the Court will as a rule refuse interim injunctions to protect patents of recent origin (p). See notes to r. 7 below.

An application for an injunction restraining a party to the suit from interfering with the applicant's right to worship in, and to have free access, to a temple which was the subject matter of the suit, pending the disposal of the suit, does not fall either under cl. (a) or cl. (b) of this rule (q).

The Court has no jurisdiction to grant an injunction restraining the President of the Legislative Assembly from proceeding with a Bill as that is an act which inflicts no legal wrong upon the plaintiff (r).

Disposal of property in fraud of creditors—The threat or intent to remove or dispose of property with a view to defraud creditors must be proved by definite evidence (s).

"Property in danger of being wrongfully sold in execution of a decree."—Certain property attached in execution of a decree obtained by *A* against *B* is notified for sale at the instance of *A*. *C*, alleging that the property belongs to him and not to *B*, sues *A* and *B* for a declaration of his title to the property, and applied for an injunction under this rule to restrain *A* from bringing the property to sale until the suit is disposed of. Has the Court power to grant the injunction under this rule? Yes, for the case is one in which the property in dispute in the suit is "in danger of being wrongfully sold in execution of the decree." It is immaterial that the Court in which the suit is brought is different from the Court executing the decree, or, so long as it has jurisdiction to entertain the suit, that it is a Court of lower grade than the Court executing the decree. Thus if the Court executing the decree is the Court of a District Judge,

- (k) *Delhi and London Bank v Ram Saran* (1857) 9 All 497. *Mamohar Das v Ram Saran* (1903) 25 All 451. *Fels Low v Ram Lal* (1925) 8 Lah. 340. 10 I.C. 937, (25) A.L. 644.
(l) *Joynarain v Shubertad* (1816) 5 W.R. 113.
(m) *Sundar Singh v Ram Saran* (1922) 3 Lah. L.J. 222. 81 I.C. 222 (23) A.L. 227.
(n) *Fulman v Fickering* (1841) 16 T.R. 660.
(o) *Ashok Prasad v Seenukash* (1911) 35 Cal. 731.

10 I.C. 256. *Eggs Dunlop & Co v Saluk*

- (p) "
(q) "
(r) "
(s) " " " " "

O. 39, r. 1 can be exercised if *A* is not resident within the local limits of the ordinary original civil jurisdiction of the Calcutta High Court, for Sale, J., held that the power can be exercised even if *A* did not reside within the limits of the jurisdiction (*d*), while Fletcher, J., (*e*) and Stephen, J. (*f*) held that it cannot be exercised unless *A* resided within those limits. The point arose in a Bombay case but it was there held that as *A* had been served and had appeared in the suit without protest, he must be deemed to have submitted to the jurisdiction of the Bombay Court and the Court had therefore power to grant the injunction (*g*), so also in a Patna case (*h*)

The High Court of Bombay has also held that it has inherent power to restrain by injunction a defendant in a suit in the High Court from proceeding with a suit filed by him in the Small Causes Court at Bombay referring to the same matter (*i*)

The Allahabad High Court holds that its inherent powers do not justify its granting an injunction to restrain a party from continuing partition proceedings in a Revenue Court pending a suit on title (*j*)

The next question to consider is, whether the power of a Chartered High Court to restrain a party from proceeding with a suit pending in another Court is confined to suits pending in a Court subordinate thereto, or whether it extends to suits pending in any Court in British India. In one of the cases cited above (*k*), the High Court of Calcutta made an order restraining a party from proceeding with a suit pending in the Court of the Subordinate Judge of Bareilly, a Court subordinate to the High Court of Allahabad. In a recent Bombay case, Macleod, J., expressed the opinion that though the High Court has power to restrain a party from proceeding with a suit pending in a Court subordinate to it, it has no such power in respect of a suit, pending in a Court not subordinate to it (*l*). In support of the above view the learned Judge relied on the provisions of s. 56, cl. (b), of the Specific Relief Act, 1877, by which it is enacted that an injunction cannot be granted to stay proceedings in a Court not subordinate to that from which the injunction is sought.

A further question that arises in this connection is whether a British Indian Court has power to restrain a party from proceeding with a suit pending in a Court of a Native State. It has been held by the High Court of Bombay that it has if there was a real hardship on the party before it or something vexatious or oppressive (*m*). The Calcutta High Court will grant such an injunction if applied for promptly and before time and trouble has been expended in the foreign suit (*n*). In England an injunction is granted to stay an action commenced in a foreign jurisdiction only if the applicant proves a substantial case of vexation resulting from the identity of proceedings, remedies and benefits or from the existence of some motive other than a *bona fide* desire to determine disputes (*o*).

Appeal.—No appeal lies from an order of a High Court refusing to restrain a defendant from prosecuting his suit in another Court. Such an order is not appealable under the Code. Nor is it a "judgment" within the meaning of cl. 12 of the Charter (*p*).

(d) *Mungle Chand v. Gopal Ram* (1907) 34 Cal 101

(e) *Vulcan Iron Works v. Bishumbhar* (1909) 36 Cal 233 11 C 927

(f) *Jumna Das v. Hareharan Das* (1911) 38 Cal 105 11 C 418

(g) 1

(h) 1

(i) 1

(j) 1

(k) *Mungle Chand v. Gopal Ram* (1907) 34 Cal 101

(l) *Narayan v. Jankibai* (1915) 39 Bom 601 30 I C 560

(m) *Naik v. Naleant* (1927) 29 Bom L. R. 139 100 I C 901 (27) A. B. 139 See also *Varichand v. Jakhm Chani* (1900) 44 Bom 212 53 I C 395 and *Jakhmram v. Poonam Chand* (1911) 45 Bom 550 50 I C 444 (21) A. B. 128

(n) *Tivmehani v. Santokh Chand* (1920) 24 C. W. N. 735 59 I C 218

(o) *Cohen v. Rothfeld* (1919) 1 K B 410, 411

(p) 44 Bom 272 53 I C 395 *supra*

Power of High Court "to stay proceedings" pending in a subordinate Court—The preceding paragraph refers to the power of a Chartered High Court to *restrain a party* to a suit pending before it from proceeding with a suit pending in another Court. The question now to be considered is whether a Chartered High Court has power in a suit pending before it to issue a *prohibition to a subordinate Court* in the mufassal from proceeding with a suit pending before the latter Court, and if so, whether that power can be exercised by a single Judge sitting on the *Original Side* of the High Court. It has been held by a Full Bench of the Bombay High Court that a Chartered High Court has power to make an order directing a Subordinate Court not to proceed

and that it cannot be made by a single Judge sitting on the *Original Side* of the High Court (q). In the case cited above, an order was made by Macleod, J., in a suit pending before him, *staying a suit* pending in the Ratnagiri Court. It was assumed by a majority of the Full Bench that such an order was a prohibition to the *Ratnagiri Court*, and not merely to the *parties*, from proceeding with the suit in that Court, and it was held that Macleod, J., had no jurisdiction to make an order. On the other hand, Macleod, J., who was one of the Judges constituting the Full Bench, declined to read his order as a *direct prohibition to the Ratnagiri Court*, and held that a single Judge sitting on the *Original Side* was competent to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the mufassal, and so in effect *stay the proceedings* within the meaning of sec 56, cl (b) referred to above. As to transfer of suits from Presidency Small Cause Courts to High Court, see notes to cl 13 of the Letters Patent.

This rule does not apply to probate proceedings—An injunction cannot be granted under this rule in a probate proceeding. The reason is that the only question in controversy in such a proceeding is that of *representation* of the estate of the deceased, there is no question of *title* in such a proceeding, and it cannot therefore be said that there is "any property in dispute" in such a proceeding as contemplated by this rule. If the Court is satisfied that the estate of the deceased is in danger of being wasted or wrongfully alienated, it may appoint an administrator *pendente lite*, and it may also make an order under r 7 below, but it cannot grant an injunction under this rule (r).

Form.—For form of temporary injunction see App F, form no 8

2. [S. 493.] (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not,

Injunction to restrain repetition or continuance of breach

the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(q) *Narmann v Janidai* (1915) 39 Bom 604
30 I C 560

(r) *David v Chammattarini* (1914) 19 CWN.
203, 21 I C 617

O. 39, r. 2

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

Alterations in the rule:—

1. The words "of any kind" after the word "injury" in sub r (1) are new See notes below under the head "Scope of the rule"
2. The words, "unless in the meantime the Court directs his release" in sub r. (3) are also new See in this connection the undermentioned case (s)

Scope of the rule.—Rule 1 enables the Court to grant temporary injunctions in the cases specified in cls (a) and (b) thereof. The present rule enables the Court to grant temporary injunctions to restrain a defendant from committing the breach of a contract or other injury of any kind. The words "of any kind" are new. They have been added to supersede an Allahabad decision where it was held that the words "other injury" in the old section did not include acts of trespass upon property (t). Such acts are now within this rule. In a Bombay case a lessee sought to execute a decree to evict his sub lessee. But at the date of the decree the term of the head lease had expired and the head lessor sued to restrain the lessee from taking possession. Macleod, C.J., held that neither rule 1 nor rule 2 applied (u). A Court hearing an election petition under rules framed under the Madras District Municipalities Act cannot grant a temporary injunction restraining the candidate from taking his seat (s).

Principles governing temporary injunction to restrain breach of contract.—Temporary injunctions to restrain the breach of a contract are regulated by the present rule. Perpetual injunctions to restrain the breach of a contract are regulated by the Specific Relief Act, 1877, s 56, cl (f) and s 57. Section 56, cl (f), of the Specific Relief Act, provides that a perpetual injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. Now the performance of a contract is not specifically enforced where damages would afford adequate relief. Hence no injunction can be granted where damages afford adequate relief. "The very first principle of injunction law is that *prima facie* you do not obtain injunctions to restrain actionable wrongs [or for breach of contracts] for which damages are the

(s) *Advocate-General of Bombay v Gangaj* (1895) 19 Lam 152

(t) *Darab Kuar v Gomti Kuar* (1900) 22 All 449

(u) *Awaserranj v Shahjads Togan* (1925) 44 Bom 939 66 I C 768, (22) A B 345

(r) *Fenkata Subba v Sreha Aiyar* (1924) 47 J (M) 700, 60 I C 661 (24) A B 797

proper remedy" (w) In the Bombay case of *Aussererungji v Gordon* (x) Sir Charles Sargent said that the issue of a temporary injunction is governed by the same principles as the granting of a permanent injunction at the trial of a case Referring to these observations, Sir Arnold White in a Madras case said "Now, having regard to the fact that the law with regard to the granting of a perpetual injunction is to be found in the Specific Relief Act and is laid down with great precision, and that the law with regard to the granting of a temporary injunction is to be found in the Code of Civil Procedure and is declared to be a matter for discretion, if it were necessary to consider the point, I am not sure I should be prepared to go quite so far as Sir Charles Sargent" (y) However that may be, the following two rules seem to govern all cases on the subject now under consideration —

1 If a suit is brought for specific performance of a contract and for an injunction to restrain the defendant from committing a breach of the contract, and the plaintiff applies for a temporary injunction to prevent the breach of the contract until the suit is disposed of, the Court will decline to grant a temporary injunction if the plaint and the affidavits filed by the parties show on the face of them that the case is not one for a perpetual injunction or for specific performance The refusal of the application for a temporary injunction in (1) *Bhaskar v Bapu Saju* (z), (2) *Haji Abdul v Haji Abdul* (a), (3) *Aussererungji v Gordon* (b), (4) *Assur v Ratanbai* (c), and (5) *In the matter of Ganpat Narain* (d) may be referred to this rule In the first case, the suit was by an association of artisans consisting of 57 members for an injunction against one of them to restrain him from committing the breach of a contract which provided that all the members of the association should bring the business of working and carving in wood into one shop and should divide the profits among them and *that no member should take any order on his own account* The plaintiffs applied for a temporary injunction against the defendant to prevent the breach of the contract until the disposal of the suit, but the injunction was refused for the agreement being on the face of it illegal (as the association though it consisted of 57 members was not registered as a Company), no specific performance or injunction could be granted In the second case the suit was for a perpetual injunction to prevent the breach of an agreement for a charter party The Court refused to grant a temporary injunction to restrain the breach on the ground that a perpetual injunction could not be granted to restrain the breach of such an agreement, though a perpetual injunction might be granted to prevent the breach of an *actually completed charter party* In the third case an application for a temporary injunction was made by the agents of a company as plaintiffs to restrain the company from employing a firm of solicitors in contravention of an agreement between the company and the agents where by the plaintiff's firm were appointed agents of the company for 25 years and the agents were empowered to employ solicitors for the company during that period The Court refused the application on the ground that since a perpetual injunction could not be granted to restrain the company from employing persons other than the plaintiff's firm as agents of the company, a temporary injunction should not be granted to restrain the company from employing solicitors other than those of the plaintiff's choice In the fourth case, the Court refused to grant a temporary injunction to restrain a Hindu widow from adopting a son in breach of an agreement entered into by her not to adopt a son The order of refusal was based on the ground that the Court could not grant a perpetual

(w) Per Lindley J in *London and Ilarwell Ry Co v Cross* (1886) 31 C D 354 369

(x) (1882) 6 Jk m 266, p 379

(y) *Subba v Haji Badsha* (1903) 26 Mad 164 175

(z) (1877) 1 Bom 550

(a) (1889) 6 Bom 5

(b) (1889) 6 Jk m 266

(c) (1889) 13 Bom 56

(d) (1886) 1 Cal 74

O. 39, r. 2 daughter in marriage to the plaintiff. The plaintiff applied for an interim injunction to restrain the defendant from giving away the girl in marriage to another person but the application was refused on the ground that the contract was not one of which specific performance could be enforced or the breach of which could be restrained by a perpetual injunction.

2 The converse of rule (1) is not always true, that is the Court will not grant a temporary injunction before the hearing in every case where a perpetual injunction might fitly be granted at the hearing, for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relief, but there must be the further ingredient that unless the defendant is restrained *forthwith* by a temporary injunction, irreparable injury or inconvenience may result to the plaintiff before the suit is decided upon its merits (e). But if a case is a proper one for specific performance, and irreparable injury is likely to be caused to the plaintiff unless the breach of the contract is forthwith restrained, the Court will grant a temporary injunction to restrain the breach of the contract. Thus where A sued B for specific performance of a contract whereby in consideration of A having advanced money to B to working certain mica mines B had agreed to deliver all the mica produced from the mines to A, and not to deliver any part on thereof to any other person, and also sued for an injunction to restrain the breach of this agreement and in the suit applied for a temporary injunction to restrain B from delivering any portion of the mica to another firm to whom B had arranged in breach of his contract to consign a portion the Court held that the case was a fit one for a temporary injunction, and the injunction was granted (f). But if the existence of the contract itself is denied no temporary injunction can be granted (g), nor should a temporary injunction be granted merely because the suit would otherwise be infructuous (h).

Sub rule (3)—The powers conferred by this sub rule can only be exercised if the Court is set in motion by a party who deems himself aggrieved, hence where a District Court committed a defendant to jail of its own motion for disobeying an injunction of the Court, it was held that the order of committal was *ultra vires*. Note however, that a High Court has inherent power to commit a defaulting party for contempt, hence a High Court can commit a defendant to jail of its own motion for disobeying an injunction issued by such Court (i). See sec 151 above.

Under sub r (3) the Court can in its discretion order either arrest or attachment on property, it is not bound in the first instance to make an order of attachment and then order imprisonment (j). There is no foundation for the proposition that the Court can only make an order of imprisonment after an order of attachment. Persons who abet disobedience of an injunction cannot be punished under this rule (k).

If the application to commit was made while the suit was pending the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for disobedience to the injunction (l).

A Court to which the business of the Court granting the injunction is transferred can exercise powers of punishment under this sub rule (m).

- (e) See Collett v Specific Relief Act 263 284
Ananbhai v Janardhan (1888) 12 Bom 110
 (f) *Subba v Haji Badsha* (1903) 26 Mad 168
Madras Ry Co v Rust (1891) 14 Mad 18
 (g) *Monochar v Jai Narayan* (1900) 2 Lah L J 293 55 I C 403
 (h) *A B Ry Administration v A B Ry Union* (1933) 14 Lah 330 (33) A L J 403

- (i) *Kochappa v Sacha Desi* (1903) 26 Mad 474
 (j) *Mawazam v Shebaah* (1927) 31 C W 814 105 I C 348 (27) A C 508
 (k) *Mawazam v Shebaah supra*
 (l) *Suppi v Kunhi* (1916) 30 Mad 607 34 I C 688
 (m) *Mouni Gururam v Sheikh Mammadu* (19--) 46 Mad 83 86 I C 65 (23) A M 0--

Temporary mandatory injunction—The Courts in England have the power to grant mandatory injunctions on interlocutory applications (n) And so have Chartered High Courts in the exercise of their ordinary original civil jurisdiction (o) The same power is possessed by Courts in the mofussil (p)

Appeal—An appeal lies under O 43 r 1 (r) from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction granted under this rule and the Appellate Court may on appeal pass the order which the lower Court should have passed (q) An undertaking not to dispose of property during the pendency of a suit given by a defendant in order to avoid an attachment has the effect of the grant of an injunction An appeal lies from an order refusing to take proceedings for breach of such an undertaking (r)

3. [S. 494.] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party

Before granting injunction Court to direct notice to opposite party

4. [S. 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order

Order for injunction may be discharged varied or set aside

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (r)]

5. [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain

Injunction to corporation binding on its officers

Interlocutory Orders

6. [S. 498, R. S. C. O. 50, r. 2.] The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once

Power to order interim sale

The words "or which for any other just and sufficient cause it may be desirable to have sold at once" have been added so as to empower the Court to order a sale of securities where the state of the market requires such a course

(n) *Robtson v Lord Byron* (185) 1 Brown Ch Cas 588 *Hervey v Smith* (1855) 1 K and Y 500

(o)

(p)

65 [Yes according to Shah J No according to Beaman J] *Irradi v Shamir* (1914) 41 Cal. 436 443-445 21 I C 861 [Yes]

(q) *Suppi v Kundu* (1916) 39 Mad 907 34 I C 588 *Dewan Chand v Jharia Coal Co* (1923) 5 Lah L J 140 66 I C 9 (22) A L 347

(r) *Chatterbhujdas v Natvarlal* (1931) 33 Bom. L R 1109 134 I C 1165 (31) A B 509

O 39,
rr 6-8rued
In
of a
TheDetention preservation
inspection etc of subject-
matter of suit

7. [S. 499, S. C. R., O. 50, r. 3.] (1)
The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

- (a) make an order for the detention, preservation or inspection of any property which is the subject matter of such suit, or as to which any question may arise therein,
- (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit, and
- (c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorised to enter under this rule

The words or as to which any question may arise therein in sub r 1 cl. (a) are new

Inspection of property which is the subject matter of the suit—In a

this rule (1)

8. [S. 500] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit

Application for such
orders to be after notice

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance

| | |
|--------------------------------------|--|
| C. S. J. C. v. C. R. O. I. I. m. Co. | (r5) <i>Codl gton v. Ja Leant de Fly Co</i> (18 3) |
| | 39 L. T. 1 st C. A. |
| | (r6) <i>As/b ry v. Berstadt</i> (1894) 10 T. L. R. 600 |
| | (s) <i>Dhoroney v. Balha</i> (189) 24 Cal. 11 |
| | (t) <i>Amm lya v. Annada</i> (1933) 3 C. W. N. |
| | 143 144 I. C. 80 (33) A. C. 475 |

9. [S. 501.] Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure,

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

10. [S. 502.] Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court

Deposits of money etc in Court

Deposit of money in Court—If *A* sues *B* to recover a sum of Rs 5 000 and *B* admits Rs 4 000 to be due to *A* and contest *A*'s claim as to the balance of Rs 1 000 this will be a proper case for *A* to apply to the Court to direct *B* to deposit Rs 4 000 in Court or to deliver the same to him. For an instance of such an order see the undernoted case (u)

Holds—This rule applies only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him (v)

Appeal—An appeal lies from an order under this rule [O 43 r 1 cl (r)]

ORDER XL

Appointment of Receivers

1. [S. 503.] (1) Where it appears O. 4
to the Court to be just and convenient, the Court may by order—

Appointment of Receivers

(a) appoint a receiver of any property, whether before or after decree,

(u) *Harbans v National Sugar Mills* (1933) 14 Lah 69 142 I C 766 (33) A L 437 | (v) *Rajah Parthasaradhi v Rajah Rengiah* (1904) 27 Mad 163

O. 40, r. 1

- (b) remove any person from the possession or custody of the property ;
- (c) commit the same to the possession, custody or management of the receiver ; and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

Alterations in the rule—

- 1 The words "to be just and convenient" have been substituted for the words "to be necessary for the realization, preservation or better custody, or management of any property, movable or immovable, the subject of a suit or attachment" The effect of this amendment is that the Court may now appoint a receiver not only in the particular cases specified in the old section, but in every case in which it appears to the Court to be *just and convenient* to do so Thus a receiver may be appointed in a suit for partition (w) See notes below under the head "Just and convenient" As to execution of decrees by appointment of a receiver, see s 51, cl (d)
- 2 The words "whether before or after decree" in cl (a) are new They give effect to the undermentioned decision under the old section (x)
- 3 The words "subject matter of a suit" which occurred in the corresponding s 503 of the Code of 1882 have been omitted See notes below under the head "Receiver in proceedings other than a suit"

Receiver in proceedings other than a suit—Sec 503 of the Code of 1882 contained the words "subject matter of a suit" The result was that under that section a receiver could only be appointed in a suit Those words have been omitted in the present rule so that a receiver may now be appointed even in proceedings other than a suit (y) A Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificate Act (z) ; or in proceedings for the removal of a trustee under s 74 of the Trusts Act (a), but may appoint a receiver in a testamentary suit (b), or proceeding

| | | | |
|-----|--|-----|---|
| (w) | | (x) | |
| (y) | | (a) | |
| (z) | | (b) | <i>Yeshwant v Shankar</i> (1893) 17 Bom 353 |

under the Guardian and Wards Act (c) If no suit or litigious proceeding is pending with reference to the property, the Court has no jurisdiction to appoint a receiver of it A receiver therefore cannot be appointed after the suit is compromised (d)

Application in open Court—The appointment of a receiver is a serious matter involving serious consequences and orders for the appointment of a receiver should be made in open Court and not in the summary manner in which directions are given in Chambers in Commercial causes (e)

Courts empowered under this order.—Under the Code of 1882 (s 505), a receiver could only be appointed by High Courts and District Courts, and not by the Courts subordinate to District Courts This bar has been now removed by the omission of s. 505 A receiver may now be appointed by subordinate Judges also

A Receiver is an officer of the Court.—"The object and purpose of the appointment of a receiver may generally be stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto" (f) "The receiver is appointed for the benefit of all concerned, he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed" (g) The appointment [of a receiver] is the act of the Court and made in the interests of justice [A receiver] is an officer or representative of the Court, and subject to its orders His possession is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immovable property, become virtually tenants *pro hac vice* of the Court, their landlord His possession is the possession of all the parties to the proceedings according to their titles The moneys in his hands are in *custodia legis* for the person who can make a title to them (h)

Legal consequences arising from the fact that a receiver is an officer of the Court —

(1) **Attachment**—Property in the hands of a receiver cannot be attached without the leave of the Court first obtained Thus if a receiver is appointed of certain property in a suit between A and B, and C obtains a decree against A or B, C cannot in execution of his decree attach the property in the hands of the receiver without the leave of the Court, such an attachment is an interference with the Court's possession through its officer, the receiver (i) But if a receiver is appointed of certain property in a suit between A and B, and the property was mortgaged by A to C before the receiver was appointed, and C obtains a decree for sale of the mortgaged property C may bring the property to sale, though it may be in the hands of the receiver, without the leave of the Court The reason is that no attachment is necessary before sale in the case of a mortgage-decree and no attachment being necessary, there cannot be any interference with the possession of the receiver (j)

(2) **Suit by or against receiver** *Leave of Court*—A receiver cannot sue or be sued except with the leave of the Court by which he was appointed receiver (k) A party feeling aggrieved by the conduct of a receiver may seek redress against him in the very suit in which he was appointed receiver, or he may bring a separate suit against the

| | |
|---|--|
| (c) <i>In re Dai Juminabai</i> (1912) 38 Dom 29 11 1 C 554, <i>Chandrasekhar v Jagannath</i> (1925) 7 Lah L J 281, 90 I C 611 (25) A L 489 | <i>Administrator-General v Prem Lal</i> (1895) 22 Cal 1011 1015, 22 I A 203, <i>Dwijendra</i> <i>v Joga</i> (1924) 39 Cal L J 40, 79 I C 520 (24) A C 600 |
| (d) <i>Chandreshwar Prasad v Bisheshwar</i> (1920) 5 Pat L J 513 58 I C 403 | (i) " |
| (e) <i>Premji v Premji</i> (1932) 34 Dom L R 717 128 I C 221 (32) A B 314 | (j) " |
| (f) <i>Jagat Tarini Das v Naba Gopal</i> (1907) 34 Cal 305, 318 | (k) " |
| (g) <i>Ib</i> , p 317 | " |
| (h) <i>Orr v Muthia</i> (1894) 17 Mad 501 503 | " |

O. 40, r. 1 receiver in which case he must obtain the leave of the Court (i) The application in the suit is for an examination *pro interesse suo* (m) The Court will dispose of the matter summarily in simple cases (n) and if the applicant has shown diligence (o) But if questions of title are involved, the Court will authorize a suit to be brought against the receiver (p) No appeal lies against an order granting leave to sue a receiver (q) There is no *statutory* provision which requires a party to take the leave of the Court to sue a receiver The rule has come down to us as a part of the rules of equity, binding upon all Courts of Justice in this country It is a rule based upon public policy which requires that when the Court has assumed possession of a property in the interest of the litigants before it the authority of the Court is not to be obstructed by suits designed to disturb the possession of the Court The institution of such suits is in the eye of the law a contempt of the authority of the Court, and therefore the party contemplating such a suit is required to take the leave of the Court so as to absolve himself from that charge The grant of such leave is made not in exercise of any power conferred by statute but in exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority (r) By giving leave to sue its receiver the Court does not relinquish possession of the property to the Court where the claim of the third party is asserted (s) The Court in which the suit is filed has no jurisdiction to issue an injunction restraining the receiver from dealing with the property (t) nor can the third party if he obtains a decree enforce it in execution His proper course is to apply to the Court which appointed the receiver to direct the receiver to act in accordance with the decree (u) In *Pramatha Nath v Khetra Nath* (v) Bodilly, J held that the leave of the Court to sue a receiver was a condition precedent to the right to sue, and that if the leave was not obtained before suit it could not be granted subsequent to the institution of the suit and the suit should be dismissed This decision was dissented from in subsequent Calcutta cases where it was held that the leave may be granted even after the institution of the suit (w) In the recent Bombay case (x) Pratt, J, after an exhaustive review of the case law on the subject, came to the same conclusion the learned judge held that failure to obtain leave prior to the institution of the suit was cured by subsequent leave As regards suits by a receiver, it has been recently held by the High Court of Calcutta that if the suit is instituted without the leave of the Court, the Court may grant leave after the institution of the suit to continue the suit (y) So also by the Madras High Court (z) No leave is necessary to sue a receiver who has been discharged by the Court and is no longer an officer of the Court when the suit is brought (a)

(2A) *Suit against receiver*—Notice under s 80—A receiver appointed under this section upon whom the powers under clause (d) have been conferred is a Public Officer under s 2 (17) and no suit can be filed against him without notice under s 80 The leave of the Court does not dispense with the necessity of notice under sec 80 of the Code (b)

- | | |
|--|---|
| (b) <i>Kamatchi v Sundaram</i> (1903) 28 Mad 49 ⁿ | 321 <i>supra</i> |
| (m) <i>Sreedhar v Alimoni</i> (19-5) 41 Cal L J 197 | (c) (1905) 32 Cal 270 |
| 86 I C 677 (25) A C 631 | (v) <i>Bank v Behari v Harendra Nath</i> (1910) 15 |
| (n) <i>K K Secunder v J A N Kasayar</i> (19-3) | C W N 54 8 I C 1 <i>Sarat Chandra v</i> |
| 1 Rang 133 76 I C 441 (23) A R 308 | <i>Apurba</i> (1911) 15 C W N 5 11 I C 18 ⁿ |
| (o) (1925) 41 Cal L J 197 86 I C 677 (25) | [execution proceedings] <i>Maharaja of</i> |
| A C 631 <i>supra</i> | <i>Burdwani v Apurba</i> (1911) 15 C W N 8 ⁿ |
| (p) (19-5) 41 Cal L J 197 86 I C 677 (25) | 10 I C 527 |
| A C 631 <i>supra</i> | (z) <i>Jamshedji v H. Seshubhai</i> (19 0) 44 B m |
| (q) <i>Shrinivas v Wazir</i> (19-0) 45 Bom. 90 59 I C | 903 58 I C 411 |
| 40 ⁱ | (y) <i>R. ato njee v Frederic Garbele</i> (1919) 46 Cal |
| (r) <i>Biraja Bhawan v Siva Chandra</i> (1919) 4 Pat | 352 51 I C 436 |
| L J 20 48 47 I C 719 | (z) <i>Amm kutty v Manavikraman</i> (19-0) 43 |
| (s) | Mad 73 59 I C 509 |
| (t) | (a) <i>D. ashale v Amrit Lal</i> (1931) 10 Pat 3 9 |
| (u) | 133 I C 459 (31) A 2 214 |
| (w) | (b) <i>Jagadish v Debendra</i> (1931) 59 Cal 850 |
| | 132 I C 634 (31) A C 503 |

(3) *Debts incurred by receiver in business*—If a receiver is appointed of the estate of a deceased person with authority to continue the business carried on by the deceased and in the course of such business debts are properly incurred by the receiver the person to whom the debts have become due may proceed not only against the receiver personally but also against the estate of the deceased, for the recovery of their debts, and they are entitled to payment of their debts in priority to other creditors of the estate. The right to proceed against the estate is founded on the just and equitable principle that as the acts of a receiver acting within his authority are the acts of the Court, the estate cannot be permitted to enjoy the benefits of those acts without being held liable for the obligations arising out of them (c)

(4) *Receiver cannot purchase*—A receiver may not purchase property of which he has been appointed receiver (d). Such a purchase offends against the principle that no one should allow himself to get into a position where his interest conflicts with his duty (e).

(5) *Agreement controlling receiver's powers*—A receiver being an officer of the Court, it is contempt of Court on the part of any of the parties to enter into an agreement with him restricting and controlling his powers. The Court alone has the power to determine the powers of a receiver (f).

(6) *Remuneration*—A receiver being an officer of the Court it is for the Court to determine his fees or remuneration (r 2 below). Hence a promise by a party to pay the remuneration of a receiver without leave of the Court is against law, and is not binding on the promisor (g).

(7) *Criminal Procedure Code s 145*—Where a receiver is appointed by a Court of property the subject of a suit a Magistrate has no jurisdiction under sec 145 of the Code of Criminal Procedure to interfere with him in respect of his possession of the property without the sanction of the Court, his possession being the possession of the Court (h). It may here be noted that a Civil Court has no power under this rule to appoint a receiver in supersession of a receiver appointed by a Magistrate under sec 146, cl. (2) of the Criminal Procedure Code (i). See sub rule (2).

(8) *Prosecution of receiver*—A receiver appointed by the High Court who has under its orders taken possession of property, cannot be prosecuted for criminal breach of trust in respect thereof without first obtaining the leave of the Court (j).

(9) *Attorney of party*—The attorney of a party should not be appointed receiver, as such an appointment interrupts the arrangement made by the party for his defence in the suit (l).

"Just and convenient"—These words have been taken from the Judicature Act 1873 s 25 sub s (8). The words in that Act are 'just or convenient', but they have been constructed to mean just and convenient (l). The words just and convenient do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient; they mean that the Court should appoint a receiver for the protection of rights or for the prevention of injury according to legal principles (m). The order

- | | |
|---|---|
| (c) <i>Mohari B di v Shyamji Bibi</i> (1903) 30 Cal 837 <i>Short v Fekering</i> (1883) 6 Mad 138 | (i) <i>B dyaprasad v Ashrafi</i> (1913) 40 Cal. 867 20 I C 269 |
| (d) <i>Jitendra v Sudha</i> (1937) 59 Cal 906 138 I C 186 (3.) A C 677 | (f) <i>Santok Chand v Emperor</i> (1919) 46 Cal 432 46 I C 836 |
| (e) <i>Vugent v Vugent</i> (1908) 1 Ch 546 | (k) " " " " " " |
| (f) <i>Manick Lal v Surat Coomaree</i> (1893) 11 Cal 648 | (l) " " " " " " |
| (g) <i>Probash Chandra v Adam</i> (1903) 30 Cal. 606 | (m) " " " " " " |
| (h) <i>Dunne v Kumar Chandra</i> (1903) 30 Cal 503 | |

O. 40, r. 1 is discretionary and the discretion must be exercised in accordance with the principles on which judicial discretion is exercised (n). Hence the Court should not appoint a receiver of property in the possession of the defendant who claims it by a legal title, unless the plaintiff can show *prima facie* that he has a strong case and a good title to the property (o). The Court must consider whether special interference with the possession of a defendant is required there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection (p). On the other hand, where property is shown to be in *medio* i.e. in the enjoyment of no one the Court can hardly do wrong in appointing a receiver, for it is the common interest of all parties to prevent a scramble (q). The mere circumstance that the appointment of a receiver will do no harm to any one is no ground for appointing a receiver (r), and a receiver cannot be appointed merely for the purpose of ascertaining the income of an estate in order to fix the amount of maintenance to be paid out of it (s). See notes above Alterations in the rules, No. 1 and notes below "Cases in which a receiver may be appointed" See also Specific Relief Act 1 of 1877, s. 44

Which Court may appoint a receiver—The power to appoint a receiver rests only with the Court trying the suit in which it is sought to appoint a receiver. Hence a District Judge has no power to appoint a receiver of property which is the subject of a suit in another Court, even though subordinate to his own (t). A Court should not appoint a receiver when another receiver has been appointed of the same property by another Court in another suit for such a procedure will lead to a conflict of jurisdiction (u).

Whether a receiver can be appointed when an executor is in possession—In England the rule is that the Court will not appoint a receiver against an executor unless gross misconduct is shown (v) and the same rule, it is submitted, applies to the case of an executor of the will of a person subject to the provisions of the Indian Succession Act. This rule, however, does not apply in the case of an executor of the will of a Mahomedan. The reason is that while in the case of persons governed by the Succession Act, a testator can dispose of the whole of his property by his will a Mahomedan testator cannot dispose of more than one third of the property by his will (w).

Where a receiver is appointed of the estate of a deceased person and the estate is being administered by the Court the Court may authorize the receiver to pay out of the estate in his hands pressing claims against the estate (x).

Company—The Court has no jurisdiction to appoint a receiver of a company (y). If it is necessary to protect the assets recourse must be had to the provisions of the Companies Acts.

Reference to arbitration—The Court has power to appoint a receiver even after a suit has been referred to arbitration (z).

Temporary injunctions and appointment of receiver—The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that while in either case it must be shown that the property

- | | |
|---|--|
| (n) <i>Benoy Prashn v. Lash Chandra</i> (1908) 55 I. A. 131 55 Cal. 720 108 I. C. 318 | (s) <i>Rajammal v. Thyaru</i> (1905) 80 I. C. 913 (25) |
| (-4) A. I. C. 49 | (t) A. M. 1245 |
| (o) <i>Sudhewari v. Abhayewari</i> (1888) 15 Cal. 818 | (u) 8 |
| <i>Chadulal v. Admanand</i> (1895) - Cal. 433 | (v) 9 |
| (p) | (w) |
| (q) | (x) <i>Hafizabai v. Fazl Abdul Karim</i> (1895) 19 |
| (r) | 6 m 83 |
| | (y) <i>Motirahu v. Fremrahu</i> (180) 16 Jon. 511 |
| | (z) <i>Ka Lash Chandra v. Salar Juna f</i> (19 5) 6- |
| | (al) 513 58 I. C. 8 6 (24) A. C. 817 |
| | (a) <i>Surendra Kumar v. Sushil Kumar & pro</i> |

should be preserved from waste or alienation, in the former case it is sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case a good *prima facie* title to the property over which the receiver is sought to be appointed has to be made out (a)

When receiver may be appointed—The appointment of a receiver is in the discretion of the Court. The power to appoint a receiver is not to be exercised as a matter of course or for the reason that it can do no harm to appoint one. A receiver should not be appointed in supersession of a bona fide possessor of the property in dispute unless there is some substantial ground for interference (b). The Court has to consider whether special interference with the possession of the defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection (c). The mere fact that a plaintiff in his plaint makes violent and wholesale charges of waste is no ground for the appointment of a receiver (d). The Court will not in a suit against trustees for the possession of land and for mesne profits appoint a receiver merely because the trustee is a poor man from whom mesne profits, if awarded, could not be recovered, unless it is alleged and shown that he was wasting the property (e). The removal, however, under suspicious circumstances of a large amount of property by the defendant during the pendency of a suit in which the question of title to that property would be determined is a good ground for the appointment of a receiver (f). The anxiety of a life tenant to transfer lands to a stranger is a danger to the interests of the reversioner, and it is a matter to be taken into consideration on an application for the appointment of a receiver (g).

Joint Hindu family—The Court will not as a general rule appoint a receiver in a partition suit between members of a joint Hindu family especially where the family property consists of immovable property. To appoint a receiver in such a case special circumstances must be proved (h). A receiver may be appointed in a suit for partition of joint Hindu family property where there is a *prima facie* case of misappropriation by the manager of the family (i).

Mortgage suits—In a mortgagee's suit for foreclosure or sale where the mortgagee is entitled to enter into possession on default in payment of the mortgage moneys the mortgagee is entitled *prima facie* to an order for the appointment of a receiver (j). The mortgagee in possession also is entitled to the appointment of a receiver, notwithstanding that he has been paid all his interest and costs out of rents received by him while in possession and that he has surplus rent in his hands. It was so held in *Mason v Westoby* (k). In that case Bacon V C, said: "It is said that the appointment of a receiver will cause great expense to the mortgagors, but that cannot be helped. The mortgagee acting in accordance with her strict right, enters into possession because she cannot get her interest. As mortgagee in possession she becomes subject to heavy responsibilities, and from those responsibilities she is entitled to be relieved by the appointment of a receiver. She has, however, while in possession, received more than the amount of her interest and costs, but that surplus she must pay to the receiver."

- | | |
|--|--|
| <p>(a) <i>Chand dat v Pad nanand</i> (1835) 3 Cal 459 See al o <i>Sham Chand v Lhaya Lam</i> (1900) 5 C W N 363</p> <p>(b) <i>Bhupendra Nath v Monolal</i> (1903) 28 C W N 86 See al o <i>Mai Lal v Mai Oah</i> (1905) 5 Rang 0 1011 C 17 (1) A R 179</p> <p>(c) <i>Benoy Krishna v Satish Chandra</i> (1908) 55 I A 131 133 53 Cal 100 108 I C 348 (28) 1 C 49</p> <p>(d) <i>Srimata Irosonomoy v Beni Madhab</i> (1883) 5 All 556</p> <p>(e) <i>Mukhammat Aslam v Nour Hussain</i> (1911) 43 All 311 60 I C 91 (1) A A 91</p> <p>(f) <i>Sia Lam v Mohabir</i> (1901) 2 Cal 179</p> | <p>(g) <i>Ahmed Armal v Bai Lhi</i> (1920) 44 Bom 17 57 I C 553</p> <p>(h) <i>Govind Narayan v Fallabhai</i> (1900) 22 Bom L R 17 53 I C 8-7</p> <p>(i) <i>Hanun ayya v Venkatasubbayya</i> (1895) 18 Mai 3</p> <p>(j) <i>Prateet v Dreu</i> (1914) 1 Ch 250 <i>Ja Ku sundia v Zenabai</i> (1890) 14 Bom 431 <i>Ghanashyam v Gobinda</i> (1902) 7 C W N 45 <i>Rameshwar Singh v Chuni Lal</i> (1904) 4 Cal 418 56 I C 839</p> <p>(k) (1844) 3 Ch D 96, 208 See al o <i>County of Worcester Bank v Fudry Merthyr Co</i> (1835) 1 Ch 6-2</p> |
|--|--|

O. 40, r. 1 The appointment of a receiver will be made almost as a matter of course in the case of an English mortgage on an application of the mortgagee if the interest payable under the mortgage is in arrears and the mortgagee is entitled to sell the property for default in payment of interest (l) A receiver is appointed to safeguard the interests of the mortgagee and if after the appointment of a receiver the mortgagor's interest is attached and sold in execution of a money decree, the purchaser is not entitled to the income of the property realized by the receiver before the sale (m) In making the appointment it has been held that the Court will not consider matters that have happened since the application though these may be the subject of a fresh application (n) A receiver may be appointed at the instance of an equitable mortgagee (o), or of a simple mortgagee (p)

A Lahore Judge seems to have held that as O 34 is self contained a receiver should not be appointed in execution of a mortgage decree (g), but this view has been dissented from by the Madras High Court (r)

Testamentary suit—A receiver may be appointed in a testamentary suit (s

Charity suits.—A receiver may be appointed in a suit by the Advocate General under sec 92 of the Code for the administration of public, religious or charitable trusts (f). A decree settling a scheme for the management of a Temple may be enforced by the appointment in execution of a receiver of properties which the scheme placed under the control of the Temple trustee (u).

Partnership suits.—In considering the question of the appointment of a receiver in partnership suits, a distinction has to be drawn between cases in which the contest is between partners and cases in which the contest is between partners on the one hand and non partners on the other.

In the first class of cases that is, where one partner seeks to have a receiver appointed against his co partners, it is necessary to distinguish cases in which the partnership has already been dissolved from those in which the partnership is still subsisting. If the partnership is already dissolved the Court usually appoints a receiver, almost as a matter of course (v). The jurisdiction of the Court to appoint a receiver is not ousted by an arbitration clause providing for a reference to arbitration of all matters in dispute between the parties (w). But if the partnership is still subsisting no receiver will be appointed unless some special grounds for the appointment can be shown. There must be fraud or gross misconduct of some kind (x), or wilful denial of the complaining partners' rights (y) or persistence under cover of right in conduct endangering the assets (z).

In the second class of cases that is, where the contest is between partners on the one hand and non partners on the other, e.g., legal representatives of a late partner, a receiver will not be granted *against a member of the firm* at the instance of the legal representatives unless some special grounds for the interference of the Court can be

- | | |
|---|--|
| (l) <i>Weatherall v Eastern Mortgage Agency Co</i> (1911) 13 Cal L.J. 495 9 I.C. 645 | 915 145 I.C. 449 (33) A.M. 570 F.D. |
| (m) <i>Eastern Mortgage and Agency Co v Fokuruddin</i> (1912) 17 C.W. 16 17 I.C. 849 | (1) <i>Leah cant v Shankar</i> (1833) 17 B.M. 354 |
| (n) <i>Ponnu v Sambasara</i> (1933) 56 Mad. 546 141 I.C. 3-2 (33) A.M. 293 | (t) <i>Kuppasurami v S. dramaniam</i> (1901) 24 Mad. L.J. 543 68 I.C. 665 (-33) A.M. 294 |
| (o) <i>Kashish Chandra v Janakinath</i> (1939) 25 (W.N.) 1141 187 I.C. 10 (3) A.L. 104 | (u) <i>Bilakrushna v Jagannada</i> (1915) 48 Mad. L.J. 534 87 I.C. 194 (23) A.M. 870 |
| (p) <i>Gan Kumar v Chartered Bank of India</i> (1905) 41 Cal. L.J. 203 8 I.C. 3-5 (23) A.C. 661 see also <i>Herron v Receiver Bthel</i> pp. 34 35 | (v) _____ |
| (q) <i>Maharajah of Pithapuram v Gokuldas</i> (1931) 54 Mad. 585 183 I.C. 504 (33) A.M. 6-0 | (w) _____ |
| (r) <i>Gudhari v Jang Ram</i> (1933) 14 Lah. 157 143 I.C. 5-1 (33) A.L. 65 | (x) _____ |
| (s) <i>Infamassan v Ramasami</i> (1933) 58 Mad. | (y) _____ |
| | (z) _____ |

established. But it is a matter of course to appoint a receiver where such appointment is sought by a partner against the legal representatives of his late co partner, or where all the partners are dead and an action is pending between their representatives (a)

Rent suit — A receiver cannot be appointed in a suit for rent in which it is not sought to enforce the forfeiture clause, for, in the absence of statutory provision to the contrary, a contract creditor before judgment is not entitled to a receiver of property on which he has no lien (b)

Decree for maintenance—Where a decree is passed for maintenance and a charge is created on a specified property to secure payment of the allowance, it is desirable, in order to facilitate execution and to avoid further litigation to appoint a receiver by the decree itself with directions, in case of default of payment to take possession of the property and sell the same, and out of the sale proceeds to pay the allowance (c)

Criminal Procedure Code, sec 145—The fact that there exists in respect of any immovable property an order of a Magistrate passed under sec 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by this rule to appoint a receiver in respect of the same property (d) It is, however, different where a receiver is appointed by a Magistrate under sec 146, cl. (2), of that Code. See note above. Legal consequences arising from the fact that a receiver is an officer of the Court,' no (7)

Receiver and administrator pendente lite—A receiver may be appointed under this rule in a testamentary suit governed by the Probate Act, 1881 (e). The Chancery Division of the High Court of England may appoint a receiver of the estate of the deceased, though proceedings have been commenced by the defendant in the Probate Court and though the defendant is prepared to apply at once in that Court for an administrator *pendente lite* (f).

Remove any person—This refers to a person other than the receiver (g) The Court should inquire into any claims by persons not parties to the suit before appointing a receiver (h) A usufructuary mortgagee who has obtained a decree for sale is not entitled to possession as against the receiver on an agreement made with the mortgagor (i)

Where security not furnished by receiver—Where the order whereby a person is appointed receiver requires him to give security so that the order is *conditional* upon his giving the security, he cannot be receiver until the security is given (j) It is otherwise where the order is not conditional but absolute in its terms in such a case the order takes effect immediately, it is made (k)

Receiver of future earnings of judgment debtor—The Court has no jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor. Unless a man has assigned or charged his future earnings or has made a sum payable out of them they cannot be prospectively impounded by any of his creditors by any ordinary process of execution whether legal or equitable" (1). See notes to sec. 51 above.

| | | |
|-----|--|--|
| (a) | | 63 IC 837 (21) AC 298 |
| (b) | | (i) <i>Hindra v Sr Rameshwar</i> (1921) 6 Pat LJ 37 61 IC 67 (21) AP 43 on appeal (1924) 26 Bom LR 1161 82 IC 794 (4) 4 IC 206 [IC] |
| (c) | | |
| (d) | <i>Birkat un nusa v Abdul Aziz</i> (1900) All 14 | (j) |
| (e) | | |
| (f) | | (k) |
| (g) | | |
| | | (l) <i>Holmes v Mullage</i> [1893] 1 QB 551 559 See also <i>Asad Ali v Haidar Ali</i> (1911) 38 Cal 13 6 IC 876 <i>Hanne Annappurni v Ram Natha</i> (1911) 34 Mad 79 6 IC 439 |
| (A) | | |

O. 40, r. 1

Receiver in execution proceedings—See notes to sec 51 See also notes to O 21, r 46 Procedure where garnishee denies debt

Receiver after decree—A receiver may be appointed even after a decree has been passed (m) See cl (a) of the rule

"All such powers as to bringing and defending suits as the owner himself has"—These words are wide enough to empower the Court to authorise a receiver to sue in his own name hence where a receiver is authorised in that behalf, he may sue in his own name (n) And it has been held by the High Court of Calcutta that where a receiver is appointed with full powers under sub r (1), cl (d), that is, with such powers as to bringing suits as the owner himself has, the receiver is entitled to sue in his own name though not expressly authorized to do so (o) As regards suits for possession, it is to be noted that though ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it, if a receiver is appointed under this rule with such powers as to bring suits as the owner himself has he is entitled to sue for possession (p) But a receiver takes such title as the owner himself had in the property, and he cannot therefore sue for possession in a case in which the owner himself could not have done so (q) A receiver empowered to collect outstanding and do all things necessary for the realization and preservation of the assets of a firm has no power to mortgage the property of the firm (r) But a receiver of mortgaged properties on whom has been conferred "the same powers of realization, management and protection as the owners themselves have" has a discretionary power of sale (s)

"Realization of property"—After the dismissal of a suit in which a receiver has been appointed, the Court has no power to give the receiver any fresh power, as for instance liberty to sell (t)

"All such powers as to the execution of documents which the owner himself has"—This includes a power to the receiver to execute a conveyance including the share of a minor defendant (u)

Suit by or against receiver—leave of Court—See notes above under the same head

Contempt proceedings—Where a receiver is appointed of property the subject of a suit and the property is forcibly taken possession of by any person, not only the parties interested in the property, but also the receiver may proceed against such person for contempt There is nothing to prevent the receiver from himself applying for a rule for contempt (v)

elver—Where a receiver then replaced by another is made a party to the

proceedings (w)

Continuance of office—A Court appointing a receiver may by its order provide that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so (x)

A sues B in the Court of a Subordinate Judge The suit is dismissed on a preliminary

(q) *Mahomed v Panchapakesa* (1912) 35 Mal 574 17 I O 233
(r) *S. Pramaniam v Lutchman* (1933) 30 I A

(tc) *Alia v Dhett* (1905) 28 Mal 157
(x) *Muthu v Mothure* (1916) 19 Mal 120 23 I A 28

the lower Court, and the case is remanded to the lower Court for trial on the merits. After the appeal is over, *T* forcibly enters into possession of the property in the possession of *R* as receiver. *R* applies to the High Court that *T* may be committed for contempt. It is contended for *T* that the appeal being over, *R* must be decreed to have been discharged from the office of receiver when the appellate decree was passed. This contention will not prevail, for though the appeal may be over, *R* must be regarded as receiver of the property until he is finally discharged by the Court. Therefore *R* is entitled to make the application to commit *T* for contempt (*y*).

A receiver in a partition suit is not discharged merely by the passing of a preliminary decree for partition (*z*).

Receiver's liability to account.—The Court appointing a receiver in a suit has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending (*a*). Although the dismissal of a suit may in some cases mean the discharge of the receiver, still the Court has jurisdiction over the receiver who is an officer of the Court. The Court has jurisdiction to require accounts from a receiver, to allow parties to examine accounts and to deal with all matters connected with the management of the receiver (*b*). Under the rules of the Bombay High Court the receiver has to file his accounts before the Commissioner. The Commissioner if he passes the accounts may issue a certificate, and the accounts so passed are on the footing of an adjusted account and cannot be re opened except for good cause shown (*b1*). See r 3 (*b*) below.

Suit by subsequent against former receiver.—A suit cannot be maintained by a present receiver of an estate against the former receiver for the recovery of money alleged to be due by the former receiver to the estate (*c*).

Receiver's lien—A receiver, though discharged, is entitled to a lien on the estate for all his just claims and allowances. Hence the Court will not compel a receiver, who has been discharged, to make over the property in his possession, until his lien has been satisfied or provided for by a sufficient indemnity (*d*).

Joint receivers—As a general rule appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable (*e*). When a receiver is appointed by one Court to take charge of certain properties, another receiver cannot, as a rule, be appointed by a different Court to take possession or exercise control over the same properties without the leave of the former Court, for such an appointment would result in a conflict of jurisdiction (*e1*).

Appeal—An appeal lies not only from an order granting an application to appoint a receiver, but from an order rejecting such application (*f*) [O 43, r 1, cl. (s)]. The Calcutta High Court holds that no appeal lies from an order appointing a receiver on condition of his furnishing security until the security is furnished (*g*), but such an order is appealable as a judgment under the Letters Patent (*h*). But, no appeal lies from directions given by a Court in passing receiver's accounts. Such directions do not come within any of the four clauses of sub r (1) (*i*). No appeal, however, lies to the

(*y*) *Grey v Hoogranahun* (1901) 23 Cal 460

(*z*) *Shankar Das v Behari* (1923) 6 Lah 442 8 J IC 932, (25) A L 445

(*a*) *Administrators-General v Prem Lall* (1900) 22 Cal 1011, 221 A 203

(*b*) *Chandreshwar Prasad v Bheswar* (1920) 5 Pat L J 513 53 I C 405

(*b1*) *Furfi v Abdullaboy* (1933) 33 Lom LR 1158 (34) A B 57

(*c*) *Pir Fiteher, J. In Dutt v Shamal* (1913) 41 Cal 92 23 I C 789

(*d*) *Prem Lall v Sambhoonath* (1890) 22 Cal 960 973

(*e*) *Woodroffe on Receivers* p 78

(*e1*) *Alahabad Bank v Raja Ram* (1933) 14 Lah 779, 146 IC 960 (33) A L 61

(*f*) " " " "

" " " "

" " " "

" " " "

" " " "

" " " "

" " " "

(*g*) " " " "

(*h*) " " " "

" " " "

(*i*) *Keshobati v Macgregor* (1900) 33 Cal 562

Sambhutta v Bhagwari (1920) 5 Pat L J 97, 55 I C 15

O. 40, r. 1

Receiver in execution proceedings—See notes to sec 51 See also notes to O 21, r 46, "Procedure where garnishee denies debt"

Receiver after decree—A receiver may be appointed even after a decree has been passed (m) See cl (a) of the rule

"All such powers as to bringing and defending suits as the owner himself has"—These words are wide enough to empower the Court to authorise a receiver to sue in *his own name* hence where a receiver is authorised in that behalf, he may sue in his own name (n) And it has been held by the High Court of Calcutta that where a receiver is appointed with full powers under sub r (1) cl. (d), that is, with such powers as to bringing suits *as the owner himself has* the receiver is entitled to sue in his own name though not expressly authorized to do so (o) As regards suits for possession, it is to be noted that though ordinarily a suit to recover possession of property can only be brought by him in whom there is a present title to it, if a receiver is appointed under this rule with such powers as to bring suits *as the owner himself has*, he is entitled to sue for possession (p) But a receiver takes such title as the owner himself had in the property, and he cannot therefore sue for possession in a case in which the owner himself could not have done so (q) A receiver empowered to collect outstanding and do all things necessary for the realization and preservation of the assets of a firm has no power to mortgage the property of the firm (r) But a receiver of mortgaged properties on whom has been conferred the same powers of realization, management and protection as the owners themselves have has a discretionary power of sale (s)

"Realization of property"—After the dismissal of a suit in which a receiver has been appointed the Court has no power to give the receiver any fresh power, as for instance, liberty to sell (t)

"All such powers as to the execution of documents which the owner himself has"—This includes a power to the receiver to execute a conveyance including the share of a minor defendant (u)

Suit by or against receiver—leave of Court—See notes above under the same head

Contempt proceedings—Where a receiver is appointed of property the subject of a suit and the property is forcibly taken possession of by any person not only the parties interested in the property, but also the receiver may proceed against such person for contempt There is nothing to prevent the receiver from himself applying for a rule for contempt (v)

Appointment of new receiver in place of old receiver—Where a receiver appointed under this rule institutes civil proceedings and is then replaced by another receiver it is necessary that the new receiver should be made a party to the proceedings (w)

Continuance of office—A Court appointing a receiver may by its order provide that the office should continue permanently after the decree when such continuance is necessary, or for so long as it may be so (x)

A sues B in the Court of a Subordinate Judge The suit is dismissed on a preliminary ground A appeals to the High Court, and pending the appeal P is appointed receiver of the property in dispute in the suit The High Court sets aside the decree of

| | |
|-----|--|
| (m) | 77 1 Rang 66 1 IC 650 (3) A PC |
| (n) | 60 " r |
| (o) | (s) |
| | (t) |
| (p) | (v) |
| (q) | (w) <i>Grey v Hongramohun</i> (1901) 4 Cal 100 |
| (r) | (w) <i>Alila v Dhelli</i> (1905) 23 Mad 157 |
| (s) | (x) <i>Mothuri v Mathari</i> (1906) 19 Mad 100 |
| | 23 IA 28 |

the lower Court, and the case is remanded to the lower Court for trial on the merits. After the appeal is over, *T* forcibly enters into possession of the property in the possession of *R* as receiver. *R* applies to the High Court that *T* may be committed for contempt. It is contended for *T* that the appeal being over, *R* must be decreed to have been discharged from the office of receiver when the appellate decree was passed. This contention will not prevail, for though the appeal may be over, *R* must be regarded as receiver of the property until he is finally discharged by the Court. Therefore *R* is entitled to make the application to commit *T* for contempt (*y*).

A receiver in a partition suit is not discharged merely by the passing of a preliminary decree for partition (*z*).

Receiver's liability to account.—The Court appointing a receiver in a suit has authority, incidental to its jurisdiction, to order him to account, although the suit may be no longer pending (*a*). Although the dismissal of a suit may in some cases mean the discharge of the receiver, still the Court has jurisdiction over the receiver who is an

account and cannot be re-opened except for good cause shown (*b1*). See r. 3 (*b*) below.

Suit by subsequent against former receiver.—A suit cannot be maintained by a present receiver of an estate against the former receiver for the recovery of money alleged to be due by the former receiver to the estate (*c*).

Joint receivers.—As a general rule appointment of more than one receiver whether by the same or a different Court, except in case of joint receivers, is not allowable (*e*).

appointment would result in a conflict of jurisdiction (*e1*).

Appeal.—An appeal lies not only from an order granting an application to appoint a receiver, but from an order rejecting such application (*f*) [O 43, r. 1, cl. (s)]. The Calcutta High Court holds that no appeal lies from an order appointing a receiver on condition of his furnishing security until the security is furnished (*g*), but such an order is appealable as a judgment under the Letters Patent (*h*). But, no appeal lies from directions given by a Court in passing receiver's accounts. Such directions do not come within any of the four clauses of sub r. 11 (*i*). No appeal lies from

(*y*) *Grey v. Woomrahun* (1901) 28 Cal 790

(*z*) *Shankar Das v. Behari* (1925) 6 Lah 442, 83 IC 932, (25) AL 445

(*a*) *Administrator General v. Prem Lal* (1890) 22 Cal 1011, 221 AL 203

(*b*) *Chandreshwar Prasad v. Balaswar* (1920) 5 Pat L J 515, 53 IC 403

(*b1*) *Isaiah v. Abdullahoy* (1933) 35 Bom LR 1154 (34) ALB 57

(*c*) *Per Ehtesham, J., in Dutt v. Shamat* (1913) 41 Cal 92, 24 IC 762

(*d*) *Prem Lal v. Sumbhoonath* (1890) 22 Cal 960, 973

(*e*) *Woodroffe on Receivers*, p. 78

(*e1*) *Allahabad Bank v. Jaja Ram* (1933) 14 Lah 779, 146 IC 906, (33) AL 671

O. 40, r. 1 Privy Council from an order refusing to appoint a receiver (j) An order refusing to remove a receiver is not appealable (k) The Calcutta High Court has held that an appeal lies under O 43 r 1 cl (s) from an order removing a receiver on the ground that a power to appoint includes a power to remove (l) But the receiver himself cannot appeal from an order removing him (m)

It has been held by the High Courts of Calcutta (n) Bombay (o) and Allahabad (p) that an order that a receiver be appointed without appointing anybody by name as receiver and adjourning the application to a later date for nominating a receiver is not an order within the meaning of this rule and it is not therefore appealable under O 43 r 1 cl (s) The contrary has been held by a Full Bench of the Madras High Court (q) and by the Patna High Court (r) No appeal lies from an order merely expressing an intention of appointing a receiver and calling upon parties to suggest names (s)

A receiver is appointed of B's property in a suit by A against B C claims to be in possession of the property under an agreement between him and B and he objects to the appointment of the receiver but the objection is dismissed The order comes within this rule though C is not a party to the suit and is therefore appealable (t) But a stranger who is not in possession has no right to object and no appeal lies from an order dismissing his objection (u) An order appointing a receiver pending an appeal on for the appointment of a common manager under sec 93 of the Bengal Tenancy Act 1885 also falls under this rule and is therefore appealable under O 43 r 1 cl (s) (v)

Letters Patent appeal—An order directing a receiver in a suit to advance money to a guardian *ad litem* to enable him to conduct the defence on behalf of a minor defendant is not a judgment within the meaning of cl 15 of the Letters Patent and no appeal lies therefrom A receiver appointed under the Letters Patent and a appointment of a receiver observed that as a unusual occasion for its exercise the power of making interlocutory orders is one which is not a suitable subject for review (z)

Revision—If a Court appoints a receiver in a case in which it has no jurisdiction to do so as for instance in a proceeding under the Succession Certificate Act 1889 the High Court may interfere in revision (a)

A receiver cannot delegate his powers to others—Where a receiver is appointed to collect the rents of an estate it is his duty to collect the rents himself or where the rents are collected by a clerk on his behalf to receive the rents and to keep proper accounts thereof If the rents received by the clerk are misappropriated the receiver is bound to make good the loss He is not justified in delegating or entrusting to another a duty entrusted to him by the Court (b)

| | |
|--|--|
| (j) <i>Chand Dutt v. Paimanund</i> (1895) 2 Cal 98 | (t) |
| (k) | (u) |
| (l) | (v) |
| (m) | (w) |
| (n) | (x) |
| (o) | (y) |
| (p) | (z) |
| (q) <i>Palanappa v. Palanappa</i> (191) 40 Mad 18 40 I C 185 | (a) <i>Kanjia v. Kanhaia</i> (10 4) 40 All 37 73 I C 303 (4) A 4 376 |
| (r) <i>Goind Ram v. Ganesh Ram</i> (19 2) 1 Pat 63 69 I C 92 (2) 1 P 577 | (b) <i>Dalay v. Ramchandra</i> (1893) 15 Bom 669 |
| (s) <i>M.ammad Akbari v. Nur Hussa</i> (10 0) 40 All 7 54 I C 570 | |

Summary jurisdiction—Where the matter complained of rests on an agreement which has not been carried out the Court may interfere to prevent its receiver giving effect to the proposed agreement, and this it may do on the mere application of a party to the suit (c). But where the matter has passed out of the stage of agreement as where a lease has already been granted by the receiver, no summary order could be passed to set aside the lease but the party aggrieved must proceed by suit against the receiver (d).

Foreign receiver—A receiver appointed by a Baroda Court of property in British India is entitled to sue in British Courts (e).

When receiver should be joined as a party to a suit—A receiver is not a necessary party to a suit for a declaration of title and possession of property of which he is appointed receiver (f) nor can he be made a party to a proceeding under sec. 145 of the Criminal Procedure Code merely in his capacity of receiver (g). There is no right of action against a Tahsildar or manager appointed by a receiver (h). It has been held by the High Court of Calcutta that where the property in the hands of a receiver is intended to be affected by the result of a suit, the receiver is a proper and necessary party to the suit by way of addition to the parties primarily responsible the reason given being that although the appointment of a receiver does not of itself debar the creditor of the person over whose estate the receiver has been appointed from suing for his claim, yet if the object of the suit is to interfere with the possession of the receiver of the jurisdiction of the Court appointing the receiver, leave of the Court must be obtained and the receiver made a party to the suit (i). In one of these cases (j) a receiver was appointed of the estate of a deceased Hindu in a suit brought by his sons for administration of his estate. One of the creditors of the deceased filed a suit against the sons and joined the receiver as a party to the suit. It was held that the receiver was a proper and a necessary party to the suit and that if he were not added as a party to the suit the suit was liable to be dismissed. In a Bombay case (k) also a creditor of the deceased in a suit brought by him against the sons of the deceased joined as a party the receiver of the estate of the deceased appointed in an administration suit brought by the sons. The Small Causes Court passed a decree not only against the sons but also against the receiver. In revision it was held that no relief could be granted against the receiver in a suit filed in the Small Causes Court and the decree passed by that Court was set aside. In the course of the judgment Macleod C. J., said: "If a party makes a claim for money due by a person who is dead against his representatives then he can only get a decree against the representatives, to the extent of the assets in their hands and if the estate is not in their hands but in the hands of a receiver the plaintiff will have to go to the Court that appointed the receiver, in order to attach the property in his hands. But by no possible conception could the receiver be a necessary party in a suit to decide whether the plaintiff was entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his life time."

Form—For form of appointment of receiver, see App. F, no. 9.

- | | |
|--|--|
| (c) <i>Surendro Kesh d Poy v Durgasoodery</i> (1883) 15 Cal 253 | (g) <i>Dunne v Kumar Chandra</i> (1903) 30 Cal 593 |
| (d) <i>Krusha Chandra Ghose v Krushia Sakha Ghose</i> (1909) 36 Cal. 5 11 C 40 | (h) " " " " " " |
| (e) <i>Chandulal v Manchlal</i> (1931) 55 D. m. 302 13-1 C 51 ^a (31) A B 51 | (i) " " " " " " |
| (f) <i>Suttva v Golap</i> (1900) 5 C W 2 | (j) <i>Banku Behari v Harendra Nath supra</i> |
| <i>Podger v Ishutash</i> (1901) 6 C W 8-9 | (k) <i>Moss v Abdul Hussain</i> (1925) 27 Bom L.R. 1147 90 I C 600 (25) A B 53 |
| <i>Moss v Abdul Hussain</i> (1925) 27 Bom L.R. 1147 90 I C 600 (25) A B 53 | |

O. 40,
rr. 2, 3

2. [S. 503, cl. (d).] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Remuneration

Remuneration.—See notes to r 1 above under the same head. See also notes to r 1, “Receiver’s lien”. If the remuneration fixed by the Court is 5 per cent of the gross sales, the amount is calculated on the actual sale proceeds not including trade discount (i). It has been held that the Court has inherent jurisdiction to order a plaintiff to refund to a party whom he has wrongly impleaded in a suit, the commission and charges incurred by a receiver of the property of that party when the suit as against him is dismissed and the receivership cancelled (m).

3. [S. 503, 2nd part.] Every receiver so appointed shall—

Duties

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property,
- (b) submit his accounts at such periods and in such form as the Court directs,
- (c) pay the amount due from him as the Court directs; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Security.—Under clause (a) the Court has a discretion to appoint a receiver without security but the Privy Council have said that this should be done only in the most exceptional circumstances (n).

Submit his accounts.—The accounts should be supported by vouchers which will be admitted as evidence of payment unless reasonable ground for impeaching them is shown (o). Objections to the system of management adopted by the receiver cannot be heard as exceptions to the receiver’s accounts, but may be the subject of a scheme to be submitted for the orders of the Court (p). An application to take accounts against a receiver on a footing of wilful default and neglect must be made by suit and cannot be entertained when the receiver is passing his accounts (q). See notes to r 1 above, “Receiver’s liability to account”.

Appeal.—There is no right of appeal from the orders of the Court giving directions in passing a receiver’s accounts (r).

Form.—For form of bond to be given by receiver, see App F, form no 10

(o) *Teller v. Golam* (1924) 40 Cal. L. J. 238

I C 419 (24) A C 1063
(p) *Bhari Lal v. Shankar Das* (1920) 7 Lah. L. J. 886 I C 246 (20) A 1309
(q) *Subal Chandra v. Jatindra Mohan* (1906) 53 Cal. 881 39 I C 261 (?) A C 170
Coomar Satya v. Prince Golap once (1909) 5 C W. N. 203
(r) *Keshoball v. McGregor* (1903) 35 Cal. 589

Enforcement of receiver's
duties

4. [New] Where a receiver—

- (a) fails to submit his accounts at such periods and in such form as the Court directs or
- (b) fails to pay the amount due from him as the Court directs, or
- (c) occasions loss to the property by his wilful default or gross negligence,

the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

"Loss to property"—The word "property" includes the income of property (a) If any loss is occasioned to the property by the wilful default or gross negligence of the receiver, the party on whose application the receiver was appointed is not liable (for the receiver is not his agent) but the estate bears the loss in the first instance. The party damaged may then proceed against the receiver (t)

In *Brij Indar v Jas Indar* (u), a preliminary decree was passed in an administration suit under which a scheme was framed for the payment by the respondent to the appellant of an annuity charged upon properties bequeathed to the respondent. A receiver was appointed with power to sell certain securities which were part of the estate in order to pay the arrears of the annuity. The receiver sold the securities but misappropriated the sum realized. The Privy Council held that the charge created by the decree was in no way affected by the embezzlement of the receiver. Besides the arrears the receiver also embezzled some instalments of the annuity which fell due after the decree. As to this their Lordships said: "Counsel for the respondent have been unable to point to any order of the Court under which the respondent paid or even was authorized to pay these sums to the receiver and it would be impossible to hold that he was the agent of the appellant with authority to receive payment on her behalf." The appellant was therefore entitled to enforce her charge both as to past and future annuities.

"Removal of receiver"—A receiver should not be allowed to continue in office if he fails to comply with the order of the Court to submit his accounts. Applications for removal should be made to the Court which appointed him (v)

The Court may direct his property to be attached—The property may be attached, even after the receiver's death, in the hands of his legal representatives (w)

"Wilful default."—In Calcutta, when a party seeks accounts against a receiver on the basis of wilful default and neglect, the practice is to proceed by a suit and not by an application (x)

Appeal—An appeal lies from an order under this rule [O 43, r 1, cl. (s)] But no appeal lies from an order declaring a receiver liable in respect of a sum of money (y)

(s) *Paman v Gopala* (1916) 39 Mad 584, 30 I C 343

(t) " " " "

(u) " " " " " "

(v) " " " " " "

(w) " " " " " "

(x) " " " " " "

(y) " " " " " "

L. J. 6 86 I C 246 (25) A. L. 309

(u) *Paman v Gopala* (1916) 39 Mad 584 30 I C 343

(z) *Subal v Jatindra* (1926) 53 Cal. 881, 29 I C 761 (27) A C 175

(y) *Ganesh Lal v Kumar Satya Narayan* (19) 4 Pat. L. J. 636 44 I C 207

O. 40,
rr. 4, 5

Nor does an appeal lie from an order deciding that a receiver is liable to submit accounts (a), or to pay a sum of money into Court (a), or to pay damages (b). In such cases the order is made by the Court in the exercise of its control over the receiver's administration and no appeal lies. But if after the order is passed the receiver disobeys the order and the Court enforces the order by an attachment of the receiver's property an appeal lies (c). Again if the Court finds the receiver liable for gross negligence and in default of payment by the receiver orders the plaintiff to realise the amount from the receiver's security, that is an order under this rule and an appeal lies (d).

A receiver disobeying an order of a Chartered High Court for the payment of money is liable to be committed for contempt of Court (e).

5. [S. 504.] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the

When collector may be appointed receiver

interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

ORDER XLI.

Appeals from Original Decrees.

O. 41, r. 1

1. [S. 541.] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Form of appeal memorandum
What to accompany memorandum

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Contents of memorandum

Appeal from original decree—See sec. 96 and notes thereto

Defective vakalatnama—A memorandum of appeal cannot be said to be properly presented, if it is presented by a vakil whose name does not appear in the vakalatnama even though the omission is due to an oversight. In such case the appeal should be

(2) *Samhantia Singh v Bhagwari Singh* (1920)

(a)

(b)

(c) *Gurumriti v Ramaswami* (1931) 55 Mad 120 135 I C 1, (31) A M 760

(d) 55 Mad 120, *supra*

(e) *Jayantilal v Waman* (1932) 34 Bom L R 1418 141 I C 411 (32) A F 634

dismissed though the objection to its validity is taken at a very late stage of the proceedings (f) A power of attorney expressly authorising presentation of the appeal is sufficient (g)

Signed.—If the memorandum of appeal is signed, it matters not that the grounds of appeal are set forth in an unsigned annexure (A)

Memorandum shall be accompanied by a copy of decree and of judgment.—O 41, r 1, makes it an inflexible rule that in the case of appeals from decrees the memorandum of appeal shall be accompanied by a copy of the decree. The Court cannot dispense with it, for the rule is imperative (i). A copy merely of the judgment is not sufficient even if the decree has not yet been drawn up (j), nor will a copy of a translation suffice (l). If a copy of the decree is filed after the expiration of the period

Grounds of objection.—The grounds of objection must be such as arise from the pleadings and evidence, and are necessary for the decision of the case (o). The appellant

trial (r)

supplementary proceeding, and not an appeal, is the right procedure (s).

Grounds of objection which may be taken for the first time in appeal.—There are certain points which, though not taken in the lower Court, may yet be taken for the first time before the appellate Court. Thus an objection to the jurisdiction of the lower Court to entertain the suit may be taken for the first time in appeal (t). Similarly a point of law arising out of admitted facts and which does not take the opponent by surprise (u) or an objection on the score of a defect fatal to the suit

(f)

(g)

(h)

(i) *Sunaram v Muthuramalingha* (1923) 44 Mad LJ 279, 72 IC 308 (23) A 3L

(j)

(k)

(l)

(m) *Lakshmi v Ishar* (1922) 4 Lah LJ 20, (22) A L 93 (second appeal)

(n) *Mussammat Saban v Shahabul* (1929) 10 Lah 357 115 IC 753, (29) A L 441

(o) *Nazir Ali v Ojoodharam* (1866) 10 M.L.A. 540, 55

(p)

(q)

(r)

(s)

(t) *Hamayya v Subbarayudu* (1890) 13 Mad
(u) *Ameer Singh v Indar Singh* (1924) 6
LJ 454, 76 IC 172, (24) A.L.
Secretary of State v Upendra (1922)
Cal. L. J. 336, 71 IC 849 (23) A

O 41, r. 1 may be taken for the first time in appeal (u) But the defect in each case must appear on the

property
required t

defective in some essential particulars (u) But the defect in each case must appear on the face of the proceedings otherwise the objection will not be entertained (x) Similarly the plea of *res judicata* may be taken for the first time in appeal, provided it can be decided upon the record before the Court (y) But a plea of adverse possession may not be raised for the first time in appeal (v) And where in a suit for a declaratory decree, it was contended for the first time in appeal that the Court had on the facts of the particular case no power to pass a declaratory decree, it was held that the objection should not be entertained Such an objection does not affect the *jurisdiction* of the Court (a)

Limitation—As to the period of limitation for appeals, see Limitation Act, 1908, sch I, arts. 151, 152 and 156 Sec 5 of the Limitation Act provides that an appeal may be admitted after the period of limitation, if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period Sec 12 of the same Act provides that in computing the period of limitation provided for an appeal, the time requisite for obtaining a copy of the decree appealed from should be excluded An appeal under sec 169 of the Indian Companies Act, 1882, to which the Code of Civil Procedure applies was filed as a joint appeal under the mistaken impression that the cases had been consolidated, but the Lahore High Court on the ground that the mistake was one of form, allowed the second appellant to put in a separate appeal (b) See notes to r 2 below, "Leave of Court Limitation"

When appellate Court may not interfere with findings of fact—Two conflicting view points have to be reconciled, namely, on the one hand, the undoubted duty of the Court of appeal to review the recorded evidence and to draw its own inferences and conclusions, and, on the other hand, the unquestioned weight which must be attached to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noting their looks and manner (c) Generally speaking, it is undesirable for an appellate Court to interfere with the findings of fact of the trial judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit which attaches to one or other of conflicting witnesses The view of the trial judge as to the credibility of witnesses should not be put aside on a mere calculation of probabilities by the appellate Court (d)

Consolidation of appeals—The Code contains no provisions for consolidating suits or appeals Whether or not the Court has jurisdiction to consolidate appeals, it will not do so unless *before* the hearing of the suits consolidation is asked for of the suits and unless the evidence given in the two cases is common to both of them (e) See notes to sec 151, "Inherent powers of Court" cl (a)

Form—For form of memorandum of appeal, see App G, form no 1

- (r) *Ghul i Kadir v Musta Kiri* (1898) 18 All 109
(w) *Ahsanulla v Haricharan* (1893) 20 Cal 86 101 A 191
(x) *Ib*
(y) *Kanai Lal v S raj Kun ar* (1899) 21 All 448
(z) *Lal Lal v Juglal* (1900) 11 lat 3 69 IC 185 (-2) A 1 398
(a) *Eorba v B romah Trading Corporation v Shukh* (1903) 17 Bom 19 - 0 271
(b) *Devi Dufawal v Official Liquidator* (19 0) 1 Lah 365 56 IC 63

(c) "

(d) "

(e) "

ALL INDIA

2. [S. 542.] The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule

Grounds which may be taken in appeal

Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground

Leave of Court Limitation—The appellant cannot, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. Thus if the plea that the *suit* is barred by limitation is not taken

But the leave should not be refused if the point of limitation arises on the face of the *plea* (g). Again, under the latter part of this rule, the appellate Court can of its own motion take cognizance of the question as to whether the *suit* is barred by limitation, though the plea of limitation has not been taken in the memorandum of appeal and rest its decision on that ground, provided the opposite party is given an opportunity of being heard on the point. In either case, however, the bar of limitation must be patent on the face of the proceedings (h). If it is not, and the plea involves a fresh finding of fact, the plea should not be allowed (i). The same rules apply where the plea that the *suit* is barred by limitation is raised for the first time in second appeal (j).

The case put above must be distinguished from the case contemplated by s 3 of the Limitation Act, 1908. That section provides that every *suit* instituted and every appeal preferred after the period of limitation shall be dismissed although limitation has not been set up as a defence. This means that under s 3 it is the duty of the Court of first instance to dismiss a *suit* if it is barred by limitation, *whether the plea of limitation has been taken by the defendant or not* (k). Similarly it is the duty of the appellate Court to dismiss an *appeal* before it, if the *appeal* was barred by limitation when presented,

barred. Similarly the said section does not impose any duty upon the second appellate Court to entertain the plea of limitation, if the question is not whether the second appeal is barred by limitation but whether the *first appeal* was so barred. It is the provisions of the present rule that apply to the two last mentioned cases, and not the provisions

- (f) Mad 36 29 I A 76
(g) *Wazir Chand v. Nathu Ram* (1924) 6 Lah. L. J 151, 60 I C 321 (24) A L 485
(h) *Bhadai v. Shaik Manowar* (1919) 4 Pat. L. J 645 649-650 52 I C 125
(i) *Ghulam Khan v. Muhammad Hassan* (1902) 2 J Cal 167 185 29 LA 51

- (f) *Mad 36 29 I A 76*
(g) *Wazir Chand v. Nathu Ram* (1924) 6 Lah. L. J 151, 60 I C 321 (24) A L 485
(h) *Bhadai v. Shaik Manowar* (1919) 4 Pat. L. J 645 649-650 52 I C 125
(i) *Ghulam Khan v. Muhammad Hassan* (1902) 2 J Cal 167 185 29 LA 51

O. 41,
rr. 2, 3

of s 3 of the Limitation Act. Hence in those cases the plea of limitation must be specifically taken in the memorandum of appeal or by leave of the Court under this rule.

Proviso to the rule—The appellate Court is not precluded from basing its decision upon a ground not set forth in the memorandum of appeal nor taken by leave of the Court under this rule (l), but this power is exercised by the Court alone and neither party can claim it as of right (m). A litigant who has all along maintained a position in support of one branch of his suit cannot be permitted when he fails upon this branch, to withdraw from that position and assert the contrary before the appellate Court more especially when he thereby places his opponent at a great disadvantage. In such a case, the doctrine of estoppel owing to the conduct of the litigant applies (n). Further a litigant should not be allowed to take in appeal a point in the pleadings which has been *deliberately abandoned* by a party at the trial of the suit before the lower Court (o). See notes to r 1 above, 'Grounds of objection which may be taken for the first time in appeal.'

New questions of fact—In this connection may be noted the following observations made in the course of a judgment in a Madras case. Though we may perhaps consider in appeal any *question of law* arising from facts which are either admitted or undisputed we cannot allow without any satisfactory reason new *questions of fact* to be raised for the first time in appeal (p).

Making a new case in appeal—A court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit (q).

3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner herein before prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Rejection or amendment
of memorandum

(2) Where the Court rejects any memorandum of appeal, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

Returned for amendment—When a memorandum of appeal is returned for amendment, the Court should fix a time for its return (r). See s 107.

Appeal—The Calcutta High Court has held that the rejection of a memorandum of appeal as insufficiently stamped is not a decree and that the effect of O 7 read with s 107 (2) is that an appellant may present a fresh memorandum of appeal (s). But there have been decisions allowing an appeal when a memorandum of appeal was rejected. See note under s 2 Rejection of memorandum of appeal, at p 10 above. See

(l)
(m)
(n)

(o)
(p)

- (q) *Nathu v Umelmal* (1909) 33 Bom 35 11 C 406
(r) *Jagan Nath v Lalman* (18 6) 1 All 960
(s) *Jnanas ngar v Motilal Chandra* (1937) 59 Cal 388 138 I C 643 (3) A C 48
dissenting from R 18 72, *Mukherji Singh* (1885) 7 All 837

also note under s 149 'Appeals and applications for review of judgment', at p 431 above. If the Court is of opinion that the memorandum of appeal is insufficiently stamped it may proceed under s 12 (2) of the Court Fees Act but it has no power to call upon the appellant to prove that the Court fee is correct (i). If the memorandum of appeal is dismissed as time barred, such dismissal disposes of the appeal and is appealable as a decree (u).

Appellate Court to have same power as Courts of original jurisdiction—It is important to note at this stage the provisions of s 107. That section provides that the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed on Courts of original jurisdiction in respect of suits instituted therein.

4. [S. 544.] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all

Ground common to all defendants—This rule provides that where there are more defendants than one and the decree appealed from proceeds on any ground common to all the defendants any one of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of *all* the defendants (v). The rule will not apply to different appeals on a common ground unless they have been consolidated (w). It is not necessary for the application of this rule that the decree should proceed on *every* ground common to all the plaintiffs or to all the defendants, it is quite sufficient if it proceeds on *any* ground common to all the plaintiffs or to all the defendants. *A* sues *B, C* and *D* for recovering possession of certain lands and for declaration of title thereto alleging that he was dispossessed by all the defendants together in pursuance of a conspiracy between them. *B, C* and *D* file separate written statements denying *A*'s title and also denying dispossession and each claiming to hold separate parcels of land from third parties. The Court of first instance finds in favour of the title and the possession of *A* and that *A* was dispossessed by *B, C* and *D*. *B* alone appeals from the decree. The appellate Court finds that *A* had failed to prove the title set up by him or that he was in possession of the land. Should the appellate Court reverse the decree of the lower Court in favour of *B* alone who appealed from the decree, or should it reverse the decree of the lower Court in favour also of *C* and *D* though they did not join in the appeal? The answer is that if the decree of the lower Court proceeded on a ground common to all the three defendants the decree should be reversed under this rule not only in favour of *B* but also in favour of *C* and *D*. Now the ground of defence common to all the defendants was that *A* had no title to the lands and the decree of the lower Court proceeded on the ground that *A* had a title to the lands. The decree therefore proceeded on a ground common to all the defendants. The appellate Court should therefore reverse the

(i) *Badaranesha v Panchandra* (1909) 37 Cal 369 (23) A.C. 717.

(u) *Gulab Lal v Mangil Lal* (1885) 7 All 42.
Jaykumath v Yulu (1845) 9 Bom 45.
Gunga Dass v Pamjoy (1846) 10 Cal 30.

(v) *Itchank v Sree Govinda* (1900) 22 Mad L.J. 111, 128 J.C. 523 (30) A.M. 911.

(w) *Amarsingji v Deadi Umri* (1925) 27 Bom L.J. 91 86 J.C. 31, (25) A.B. 239.

O. 41,
rr. 4, 5

decree not only in favour of *B* but also in favour of *C* and *D*. It is quite immaterial that the defendants claimed to be interested by different titles in *separate* portions of lands. It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (2). But the provisions of this rule do not apply, unless the lower Court whose decree is appealed from has proceeded upon some ground common to all the plaintiffs, or all the defendants. If the lower Court has not proceeded upon any such ground, it is not competent to the appellate Court to reverse the decree as to all the plaintiffs or all the defendants upon a ground which the appellate Court considers to be common to all the plaintiffs or all the defendants (y).

If in the case put above, the appellate Court while reversing the decree in favour of *B* refuses to reverse it in favour also of *C* and *D*—

common to all the defendants, the appellate Court may reverse the decree in favour of all the defendants even if some of the defendants suffered the decree to be passed *ex parte* against them (a).

Ground common to all the plaintiffs—*A* and his son *B* jointly sue *C* to recover Rs 2,000. A decree is passed for the plaintiffs for Rs 500 only. *A* alone appeals from the decree. *C* files cross objections under r 22 below. The appellate Court rejects the plaintiff's claim *in toto*, and reverses the decree of the lower Court. Subsequently *B*, who did not join in the appeal, applies for execution of the original decree against *C*. *B* is not entitled to take out execution, for although he was not a party to the appeal, he is bound under this rule by the decree of the appellate Court (b). *A* and *B* each claiming to be the heir of the deceased sue to set aside an alienation by his widow. The suit is dismissed. *A* alone appeals and makes *B* a *pro forma* respondent. The appellate Court finds that *B* is the heir and not *A*. The appellate Court cannot make a decree in *B*'s favour for the rights of *A* and *B* are not identical (c).

See notes to r 22 below, "A respondent may urge cross objections against the appellant but not as a rule against a co respondent."

May reverse decree in favour of all plaintiffs or defendants—The word "may" shows that the appellate Court is given a discretion in the matter. It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants. It is not bound to do so in favour of *all* of them (d).

Death of one of several appellants in cases where the decree appealed from proceeds on a ground common to all of them—See notes to O 22, r 3. This rule applies to appeals.

Stay of proceedings and of execution

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be

(2)

(y)

- (2) See notes to r 22 below, "A respondent may urge cross objections against the appellant but not as a rule against a co respondent."
- (b)
- (c) *Jang Bir v. Mast Jamind* (1930) 12 Lah 534 135 I C 593 (22) A L 3
- (d) *Nagrai v. Banik* (1914) 36 All 510 24 I C 439

stayed by reason only of an appeal having been preferred from O. the decree ; but the Appellate Court may for sufficient cause order stay of execution of such decree

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

(3) No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made ,
- (b) that the application has been made without unreasonable delay , and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(4) Notwithstanding anything contained in sub rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application

Alterations in the rule—

- 1 The first part of sub r (1) namely An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order is new The object is to make express provision for a stay of proceedings from a decree pending an appeal from the decree Thus if a preliminary decree is passed in a suit for accounts between a principal and an agent [O 20 r 16] and an appeal is preferred from the decree the Appellate Court may under this rule stay the inquiry into the accounts pending the appeal from the decree Under the Code of 1882 the Court directed a stay in cases like these in the exercise of its *inherent power*, as there was no express provision in the Code in that behalf (e)
- 2 Sub r (4) is new It authorizes an *ex parte* stay The need for such an order constantly arises in practice

* Stay of proceeding —Under this part of the rule the Bombay High Court in appeal suspended a sentence of imprisonment for an offence under s 43 of the Provincial Insolvency Act 1907 now Provincial Insolvency Act 1920, s 63, the provisions of the Code being applicable to such appeal (f) See notes above, Alterations in the rule

(e) *Balkrishna Sahu v. Khugnu* (1904) 51 Cal 70
(f) *Nagindas v. Ghelabhai* (1907) 44 Bom 63

O. 41,
rr. 4, 5

decree not only in favour of *B* but also in favour of *C* and *D*. It is quite immaterial that the defendants claimed to be interested by different titles in *separate* portions of lands. It is enough if *any one ground* on which the decree appealed from proceeds is common to all the defendants (*x*). But the provisions of this rule do not apply, unless the lower Court whose decree is appealed from has proceeded upon some ground common to all the plaintiffs, or all the defendants. If the lower Court has not proceeded upon any such ground, it is not competent to the appellate Court to reverse the decree as to all the plaintiffs or all the defendants upon a ground which the appellate Court considers to be common to all the plaintiffs or all the defendants (*y*).

If in the case put above, the appellate Court while reversing the decree in favour of *B*, refuses to reverse it in favour also of *C* and *D* on the ground that it has no power to do so, the decree of the appellate Court will be subject to revision for failure of exercise of jurisdiction (*z*). See s 115, cl (b). If the decree appealed from proceeds on a ground common to all the defendants, the appellate Court may reverse the decree in favour of all the defendants even if some of the defendants suffered the decree to be passed *ex parte* against them (*a*).

Ground common to all the plaintiffs—*A* and his son *B* jointly sue *C* to recover Rs 2 000. A decree is passed for the plaintiffs for Rs 500 only. *A* alone appeals from the decree. *C* files cross objections under r 22 below. The appellate Court rejects the plaintiff's claim *in toto*, and reverses the decree of the lower Court. Subsequently *B*, who did not join in the appeal, applies for execution of the original decree against *C*. *B* is not entitled to take out execution, for although he was not a party to the appeal, he is bound under this rule by the decree of the appellate Court (*b*). *A* and *B* each claiming to be the heir of the deceased sue to set aside an alienation by his widow. The suit is dismissed. *A* alone appeals and makes *B* a *pro forma* respondent. The appellate Court finds that *B* is the heir and not *A*. The appellate Court cannot make a decree in *B*'s favour for the rights of *A* and *B* are not identical (*c*).

See notes to r 22 below. A respondent may urge cross objections against the appellant but not as a rule against a co respondent.

May reverse decree in favour of all plaintiffs or defendants—The word *may* shows that the appellate Court is given a discretion in the matter. It may therefore reverse the decree in favour of *some* only of the plaintiffs or defendants. It is not bound to do so in favour of *all* of them (*d*).

Death of one of several appellants in cases where the decree appealed from proceeds on a ground common to all of them.—See notes to O 22, r 3. This rule applies to appeals.

Stay of proceedings and of execution

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order

Stay by appellate Court appealed from except so far as the Appellate Court may order, nor shall execution of a decree be

(x)

(y)

- (z) *Seshadri v. Krishnan* (1885) 8 Mad 139
(a) *Pam Tahel v. Sukumar* (1916) 1 Pat L J 143 3a I C 547
(b) *Babaji v. Collector of Salt Revenue* (188) 11 BomL 596
(c) *Jang B. v. West Jammu* (1939) 17 Lah 531 12a I C 593 (22) A. L. 3
(d) *Narain v. B. Nask* (1914) 36 All 510 24 I C 439

stayed by reason only of an appeal having been preferred from O. the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

(3) No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made,
- (b) that the application has been made without unreasonable delay, and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(4) Notwithstanding anything contained in sub rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application

Alterations in the rule—

- 1 The first part of sub r (1) namely, An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order is new. The object is to make express provision for a stay of proceedings from a decree pending an appeal from the decree. Thus if a preliminary decree is passed in a suit for accounts between a principal and an agent [O 20 r 16] and an appeal is preferred from the decree the Appellate Court may under this rule stay the inquiry into the accounts pending the appeal from the decree. Under the Code of 1882 the Court directed a stay in cases like these in the exercise of its *inherent power*, as there was no express provision in the Code in that behalf (e)
- 2 Sub r (4) is new. It authorizes an *ex parte* stay. The need for such an order constantly arises in practice

'Stay of proceeding'—Under this part of the rule the Bombay High Court in appeal suspended a sentence of imprisonment for an offence under s 43 of the Provincial Insolvency Act 1907 now Provincial Insolvency Act, 1920, s 69, the provisions of the Code being applicable to such appeal (f). See notes above, "Alterations in the rule"

(e) *Falkshen Sahu v. Khugnu* (1904) 31 Cal 229
 (f) *Agarwada v. Ghelabhai* (1904) 44 Bom 63

D. 41, r. 5 Stay of execution—Once an appeal is preferred from a decree, it is the Appellate Court alone that is seized of the matter, and an application for a stay of execution should be made to that Court. Where no appeal is preferred, the Appellate Court has no jurisdiction not being seized of the case and cannot stay execution even on the assurance of a pleader that an appeal will be filed (g). The application for a stay in that case should be made to the Court which passed the decree, but the application must not be entertained unless the decree is one from which an appeal lies, and the application is made before the expiry of the time allowed by law for appealing therefrom (h). The application should be made to the Judge who decided the case and without unreasonable delay (i).

Though the Appellate Court may under this rule stay proceedings in execution when an appeal is preferred from a decree, it has no power to stay execution of a decree when an appeal is preferred from an order appealable under s 104. A obtains a decree *ex parte* against B. B applies under O 9, r 13, to have the decree set aside, but the application is rejected, B appeals from the order rejecting the application under O 43 r 1, cl (d), and applies to the Appellate Court to stay execution of the *ex parte* decree against him. But as no appeal has been preferred from the decree the Appellate Court is not competent to stay execution (j). Contrast r 8 below.

Award—In an appeal from an order refusing to set aside an award under the Arbitration Act, the High Court has inherent jurisdiction to stay the execution of the award, and in exercising this jurisdiction it will see that the provisions of this rule are complied with (k).

Where no order for execution has been made—The Appellate Court may order stay of execution whether an order for execution has been made or not (l).

Where decree has been executed—An order for a stay of execution implies that the decree has not been executed. Therefore where a decree has been executed, no order can be made under this rule (m). See r 6 below.

Circumstances under which stay of execution may be granted—The Court has power under this rule to make an order for a stay of execution for "sufficient cause". But no order should be made for a stay of execution unless the Court is satisfied that substantial loss may result to the party applying for a stay of execution if the execution is not stayed (n). And even if the Court is satisfied that substantial loss may result, no order should be made unless the application has been made without unreasonable delay, and, further, unless the Court is satisfied that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him (sub r (3)). The Court should not accept a security the validity of which is not free from reasonable doubt and the enforcement of which may lead to protracted litigation (o). It has been held by the High Court of Bombay that where the decree appealed from is for the payment of money, execution should be stayed unless the respondent gives security for the repayment of the money in the event of the decree being reversed (p).

(g) *Purshotam v Hargu* (1921) 43 All. 198
60 I.C. 131 (21) A.A. 342 *Purshotam v Hargu* (1921) 43 All. 513 63 I.C. 837
(21) A.A. 214

(h) *Amir Hasan v Ahmad Ali* (1887) 9 All. 36
Ishan Chunder v Ashanollah (1884) 10 Cal. 817

(i) *Chaturbhuj v Basdeo Das* (1921) 48 Cal. 706
66 I.C. 198 (21) A.C. 541

(j) *Phagwat v Sheo Golam* (1904) 31 Cal. 1091
(k) *Mai omedalli v Dharun re J* (1931) 55 Bom.

301 133 I.C. 864 (31) A.B. 384
(l) *Lakshman v Shridhar* (1933) 57 B.M. 20
144 I.C. 990 (33) A.B. 118

(m) *Dharam Singh v Kushe Singh* (1833) 1-
C.L.R. 532

(n) *Gaukar Surkar v Ghandi* (1901) 25 Bom. 413,
Dhara Mai v Haidar Shah (1911) 2 Lah.
61 I.C. 77 (21) A.L. 24

(o) *Sr n bash Prasad v Lesho Prasad* (1911) 38
Cal. 754 775 91 C. 86

(p) *Dhanubhoy v Lisboa* (1889) 13 Bom. 211

Notice to decree holder—It has been held by the High Court of Bombay O. 4 that a final order staying execution should not be made without notice to the decree holder if it is made without notice it is illegal and it may be set aside under s 115 above (g) The High Court of Patna however differs (r) An *interim* stay, however, may be granted *ex parte* [see sub r (4)]

Application of the rule—A obtains a decree against B for the recovery of certain immovable property, and applies for execution of the decree If B has preferred an appeal from the decree B may apply to the Appellate Court for a stay of execution on the ground that if execution is not stayed and the property is delivered to A, A may do away with the property which may result in substantial loss to him If the Appellate Court is satisfied that substantial loss may result if the execution is not stayed and if the application has been made without unreasonable delay, the Appellate Court may order execution to be stayed under this rule upon security being given by B that if the decree of the lower Court is confirmed he will deliver possession of the property to A If the decree of the lower Court is confirmed and if B fails to deliver possession of the property to A A may proceed against the surety

Security for performance of decree—The nature and extent of the liability of a surety under this rule depends on the words of the security bond (s) Thus where the bond was to perform all orders and decrees passed in appeal it was held that the obligation under the bond extended to the final decree passed in second appeal (t) When immovable property is given by a judgment debtor as security for the due performance of a decree under sub r (3) (c), it can be realized in execution without attachment The provisions of O 34, r 14 do not apply to such a case, and, the matter being one relating to execution, s 47 bars a separate suit (u) As to the mode of enforcing a security bond given under this rule see notes to s 145, Security for the performance of any decree

There is a conflict of opinion whether a security bond given under this rule mortgaging immovable property exceeding Rs 100 in value requires registration under the Transfer of Property Act s 59, and the Registration Act s 17, it being held in some cases that it does (v) and in some that it does not (w)

When respondent insolvent—In an application for stay of execution for costs when the respondent was insolvent the Madras High Court directed the appellant to pay the costs to the respondent's solicitor on his personal undertaking to return them in the event of the success of the appeal (x)

Effect of uncommunicated order staying execution—It has been held by the High Court of Calcutta (y) that where an order is made by an appellate Court staying execution of a decree but before the order is communicated to the Court executing the decree the property of the judgment debtor is sold in execution the sale is *invalid and cannot stand the reason given being that when an unconditional order for stay of execution is made, the order becomes operative the moment it is made* and suspends the power of the lower Court to continue the proceedings in execution On

(g) *Multanchand v Kharsedji* (1891) 15 Bom 536

(r) *Mulchand v Tarni Prasad* (1919) 4 Pat L.J. 612 54 I C 222

(s) *An eer Ali In the matter of* (18 0) 13 W R 403

(t) *Sh elal v Apaji* (18 8) 2 Bom 654 3 Bom 104

(u) *Subramanian v Paja of Pannad* (1918) 41 Mad 3 43 I C 16 *Shyam Sundar v Lajpai* (1903) 30 Cal 1060 *Mukta Prasad v Mahadeo* (1916) 34 All 35 33 I C 95 *Ingubhar Singh v Jai Indra* (1919) 46 I A 1 *44 All 1158 55 I C 550 Jyoti Prakash v Mukti Prakash* (1924) 51 Cal 150 81

I C 34 (24) A C 455 The decision in *Tokhan Singh v G rear Singh* (1905) 3 Cal 491 is no longer law in view of the alteration in the language of s 99 of the Transfer of Property Act 1882 now O 34 r 14

(v) *Nagaruru v Tangatur* (1908) 31 Mad 330

(w) *Jeyappa v Sherrangouda* (19 8) 52 Bom 72 10 I C 710 (25) A B 4

(x) *Ramanujam (Acty) v Padmanabham* (1922) 51 Mad L T 440 O I C 784 (23) A M 9

(y) *Hukum (Andy) v Kamalanand* (1906) 33 Cal 9 *Sati Nath v Jatanmani* (1917) 15 Cal L J 335 14 I C 808

41, r. 5 the other hand it has been held by the Madras High Court (2) that such sale is valid the reason given being that the Court of first instance retains jurisdiction to execute its decree notwithstanding the appeal and that the power to execute the decree can only be taken away by some communication to it of the order of the Appellate Court. The latter view it is submitted is correct and is also taken by the Allahabad High Court in a Full Bench case (a) which however suggests that there is a distinction when the decree holder purchases the property for he takes it subject to all orders made in the suit. The Rangoon High Court has held that a sale held by a bailiff in ignorance of an order of a Court staying the sale is void (a1)

Insolvency of appellant and deposit—If a stay of execution is granted by the Appellate Court on the appellant depositing in Court to the credit of the suit the decretal amount and the appellant becomes insolvent before the hearing of the appeal and the appeal is subsequently dismissed the amount so deposited is payable to the decree holder and not to the Official Assignee (b)

Attachment of deposit—If a stay of execution of a decree for damages is granted on the appellant depositing the decretal amount into Court the sum deposited is not answerable only for damages and nothing but damages but must abide by whatever order the Court of Appeal may make. If the money deposited is attached by creditors of the appellant the creditors have no higher right than the appellant. If the amount of the decree is reduced in appeal the Court may order the balance to be applied to the payment of costs in priority to the attaching creditors (c)

Costs—The Calcutta High Court holds that as the stay of execution is an indulgence which will have the effect of interfering for the time being with the enforcement of the decree the applicant should in the absence of special circumstances pay the costs of the application in any event (d). A Full Bench of the Bombay High Court has laid it down as a rule of practice that in the absence of special circumstances the costs of the application for stay of execution should be costs in the appeal (e)

Appeal—No appeal lies from an order by the Appellate Court refusing to stay execution under this section. Such an order is not a decree within the meaning of s 2 cl 2 (f). It is now agreed by the Calcutta (g) Madras (h) and Lahore (i) High Courts that such an order is a judgment within the meaning of cl 15 of the Letters Patent and therefore appealable as such.

When the order for stay of execution is made by the Court which passed the decree there is a conflict of decisions as to whether an appeal lies. See note under s 47 Stay of execution at p 183

When an order for stay of execution on security being furnished by the judgment debtor is made and security is furnished no appeal lies on the ground that the security is insufficient. Such an order is not a decree under s 47 (j) nor is it a judgment under the Letters Patent (k).

(2)

- 1871 C 35 (3) A B 197 F B
(f) *Ra chandra v Balm kund* (1900) 9 Don
71 *Malamat v Faralappara* (1914) 27
Mad L J 171 25 I C 47
(g) *B v Coomaree v Rarick Dass* (1900) 5 C
(h) W N 781
(i) Mad

(a1) *Ma Ti v Ma Th* (1933) 11 Rang 410

(b)

(c)

(d)

(e)

(f)

- 333 N 333
(f) *Sarnasati v Moots* (1913) 41 Cal 160 20
I C
(k) *Vooljee Dharsee d Co v Molla* (1935) 3
Rang 258 I C 40 (25) A R

Review—The Court making an order under this rule may cancel or vary it at any time (l)

Form.—For form of security bond see App G, form no 2

6. [S. 546.] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

Alterations in the rule

- 1 The words "or has been taken" have been added in sub r (1) to make it clear that security may be required though the property has already been taken in execution. These words give effect to a Calcutta decision (m)
- 2 The words "of money," which occurred in the old section after the words "in the execution of a decree" have been omitted
- 3 The words "to the Court which made the order" in sub r (2) are new. These words show that an application for a stay of sale is to be made to the Court which made the order for sale

Application of the rule—This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree (n). A judgment-debtor whose application for a stay of execution is refused under r 5 may apply under this rule. The application contemplated by sub r (1) is an application by the judgment-debtor (who has appealed from the decree) for security to be given by the decree holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the lower Court is reversed in appeal. Thus if A obtains a decree against B for the recovery of certain immovable property and an order is made for execution of the decree B may, after filing an appeal from the decree apply for an order requiring A to give security for the restitution of the property to him (B) or for the payment of the value thereof, if the appeal is decided in his favour. The application may be made to the Court which passed the decree or to the appellate Court (o). If the

(l) *Amir Hasan v Ahmad* (1883) 9 All 36

(m) *Hukum Chand v Kamalanand* (1906) 53 Cal 90

(n) *Janardan v Vithankh* (1901) 25 Bom 593

(o) *Lakshmanan v Palaniappa* (1915) 41 Mad 513 45 I C 30

O. 41, r. 5 the other hand it has been held by the Madras High Court (2) that such sale is valid the reason given being that the Court of first instance retains jurisdiction to execute its decree notwithstanding the appeal, and that the power to execute the decree can only be taken away by some communication to it of the order of the Appellate Court. The latter view it is submitted, is correct, and is also taken by the Allahabad High Court in a Full Bench case (a) which however suggests that there is a distinction when the decree holder purchases the property for he takes it subject to all orders made in the suit. The Rangoon High Court has held that a sale held by a bailiff in ignorance of an order of a Court staying the sale is void (a).

Insolvency of appellant and deposit—If a stay of execution is granted by the Appellate Court on the appellant depositing in Court to the credit of the suit the decretal amount and the appellant becomes insolvent before the hearing of the appeal and the appeal is subsequently dismissed, the amount so deposited is payable to the decree holder and not to the Official Assignee (b).

Attachment of deposit—If a stay of execution of a decree for damages is granted on the appellant depositing the decretal amount into Court, the sum deposited is not answerable only for damages and nothing but damages but must abide by whatever order the Court of Appeal may make. If the money deposited is attached by creditors of the appellant the creditors have no higher right than the appellant. If the amount of the decree is reduced in appeal the Court may order the balance to be applied to the payment of costs in priority to the attaching creditors (c).

Costs—The Calcutta High Court holds that as the stay of execution is an indulgence which will have the effect of interfering for the time being with the enforcement of the decree, the applicant should, in the absence of special circumstances, pay the costs of the application in any event (d). A Full Bench of the Bombay High Court has laid it down as a rule of practice that in the absence of special circumstances the costs of the application for stay of execution should be costs in the appeal (e).

Appeal—No appeal lies from an order by the Appellate Court refusing to stay execution under this section. Such an order is not a decree within the meaning of s. 2, cl. 2 (f). It is now agreed by the Calcutta (g), Madras (h) and Lahore (i) High Courts that such an order is a judgment within the meaning of cl. 15 of the Letters Patent and therefore appealable as such.

When the order for stay of execution is made by the Court which passed the decree there is a conflict of decisions as to whether an appeal lies. See note under s. 47. Stay of execution at p. 183.

When an order for stay of execution on security being furnished by the judgment debtor is made and security is furnished no appeal lies on the ground that the security is insufficient. Such an order is not a decree under s. 47 (j) nor is it a judgment under the Letters Patent (k).

- (2) " " "
- (a)
- (a) *Mia Ti v. Mia Tit* (1933) 11 Rang. 410
- (b)
- (c)
- (d)
- (e)

- 137 I C 370 (30) A B 197 F B
- (f) *Rameshandra v. Balmukund* (1905) 29 Bon 71. *Mulamat v. Kavalappara* (1914) 27 Mad L J 171 25 I C 4
- (g) *Dr. J. Coomaraswami v. Ramrick Dass* (1900) 5 C W N 781
- (h) *Sonacholam v. Kunsaravatu* (1914) 47 Mad 316 79 I C 100 (24) A M 597. *Tuljan v. Alingappa* (1912) 30 Mad 1 81 I C 340 [F B] distinguished from *Durga Prasad v. Mallikarjuna* (1901) 24 Mad 358. *Gorintia v. T. Ruvengada* (1907) 50 Mad 380 100 I C 1-7 (7) A M 393
- (i) *Gokulchandra d. v. Sanwal Das* (1900) 1 Lah 343 55 I C 933
- (j) *Saraswati v. Mool* (1913) 41 Cal 160 20 I C
- (k) *Mooljee Dharsee & Co. v. Mollu* (1902) 3 Rang 250 88 I C 740 (23) A B 2

Review—The Court making an order under this rule may cancel or vary it at any time (l)

Form—For form of security bond see App G, form no 2

6. [S. 546.] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of

Alterations in the rule

- 1 The words "or has been taken" have been added in sub r (1) to make it clear that security may be required though the property has already been taken in execution. These words give effect to a Calcutta decision (m)
- 2 The words "of money, which occurred in the old section after the words in the execution of a decree" have been omitted
- 3 The words "to the Court which made the order" in sub r (2) are new. These words show that an application for a stay of sale is to be made to the Court which made the order for sale

Application of the rule—This rule does not apply unless (1) there is an order made for the execution of a decree and (2) there is an appeal pending from that decree (n). A judgment-debtor whose application for a stay of execution is refused under r 5 may apply under this rule. The application contemplated by sub r (1) is an application by the judgment debtor (who has appealed from the decree) for security to be given by the decree holder for the restitution of any property that may be taken in execution or for the payment of the value of such property if the decree of the lower Court is reversed in appeal. Thus if A obtains a decree against B for the recovery of certain immovable property and an order is made for execution of the decree B may, after filing an appeal from the decree apply for an order requiring A to give security for the restitution of the property to him (B) or for the payment of the value thereof if the appeal is decided in his favour. The application may be made to the Court which passed the decree or to the appellate Court (o). If the

(l) *Amir Hasan v Ahmad* (1882) 9 All 35
(m) *Hukum Chand v Kamalanani* (1906) 33 Cal 902

(n) *Jamriddin v Nulkanth* (1901) 25 Bom 553
(o) *Lakshmanan v Jaganappa* (1913) 41 Mad 613 451 C 30

O. 41,
rr. 6-9

application is made to the Court *which passed the decree*, such Court *shall* on sufficient cause being shown by *B* for requiring the security direct *A* to give the security But if the application is made to the *appellate Court*, that Court *may* in its discretion, require security to be given

Sub rule (2) —The Allahabad High Court has held that this sub rule is complementary to rule 5 and that the Court which made the order is not obliged to stay the sale merely because the property to be sold is immovable property (*p*)

Enforcement of security bond given under this rule —See notes to sec 145, Security for restitution of property taken in execution of a decree

Appeal —No appeal lies from an order under this rule

Form —For form of security bond see App G form no 3

7. [S. 547.] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity

No security to be required from the Government or a public officer in certain cases

8. [New] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree

Exercise of powers in appeal from order made in execution of decree

Scope and object of the rule —This rule is new It has been added to meet particularly the case where the litigant does not quarrel with the decree but appeals from an *order* passed in execution of that decree In such a case the rule provides that the appellant may apply for a stay of execution of the *decree* under r 5 or for security for restitution under r 6 *A* obtains a decree against *B* and applies for execution *B* objects to the execution but the objection is disallowed *B* prefers an appeal from the *order* disallowing his objection *B* may apply for a stay of execution of the *decree* under r 5 pending the disposal of the appeal from the order This is in accordance with the undermentioned decision under the Code of 1882 (*q*)

Procedure on admission of appeal

9. [S. 548.] (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose

Registry of memorandum of appeal

Register of Appeals

(2) Such book shall be called the Register of Appeals

10. [S. 549.] (1) The Appellate Court may in its O. 4

Appellate Court may require appellant to furnish security for costs

discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India other than the property (if any) to which the appeal relates

Where an appellant resides out of British India

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

Scope and object of the rule—The object of the rule is to secure the respondent in an appeal from the risk of having to incur further costs which he might never recover from the appellant. Under sub r (1) the appellate Court may, in its discretion, require security for costs. Under the proviso to that sub rule the Court shall demand security for costs. If no security is furnished, the Court should reject the appeal, whether the order for security is made under the sub rule or the proviso (r)

To what appeals the rule applies—This rule applies not only to appeals from substantive decrees but also to appeals from interlocutory orders under sec 104 and to appeals from orders in execution under sec 47 (e). The Privy Council have recently decided that it applies also to appeals under cl 15 of the Letters Patent (t). The Madras High Court has held that it was not so applicable because the Code dealt with appeals from one Court to another of higher grade, while cl. 15 of the Letters Patent dealt with a different class of appeals (u). This was a good reason for holding that the right of appeal under the Letters Patent was not excluded by the words "and from no other orders" occurring in sec 588 of the Code of 1882 corresponding to sec 104 of the present Code (t), but it does not follow that the procedure of the Court in dealing with an appeal under the Letters Patent (now expressly saved by the words "save as otherwise provided by any law" inserted in sec 104) is not regulated by the Code. Where any part of the Code does not apply to High Courts, specific provision is made to that effect. There is no such provision in respect of this rule. However a Chartered High Court is competent under sec 129 to make a rule inconsistent with O 41, r 10, and, if it does, the Code rule would not apply (w). Bombay High Court rule 736 prescribes a deposit of Rs 500 as security for respondent's costs as a condition of filing the appeal, but this is not inconsistent with the present rule (x). Nor is rule 331 of the Madras High Court rules inconsistent (y). The Bombay High Court has held that the deposit should not be increased on the ground that the costs of the appeal are likely to exceed the sum fixed by the rule (z).

- | | | |
|-----|-----------------------------|---|
| (r) | "I" = "I" = "I" = "I" = "I" | (1899) 26 Cal 361 |
| (s) | "I" = "I" = "I" = "I" = "I" | (w) <i>Narad Lehram Jung v Haji Sultanali</i> |
| (t) | "I" = "I" = "I" = "I" = "I" | (1913) 37 Bom 572 17 I 4 539 |
| (u) | "I" = "I" = "I" = "I" = "I" | (x) <i>Palanchood v Damji</i> (1913) 5 Bom L R |
| (v) | "I" = "I" = "I" = "I" = "I" | 465 3 I C 474 (23) A B 329 |
| (w) | "I" = "I" = "I" = "I" = "I" | (y) <i>Virupaksha v Pannanayak</i> (1922) 8 I C |
| (x) | "I" = "I" = "I" = "I" = "I" | 316 (25) A M 1132 |
| (y) | "I" = "I" = "I" = "I" = "I" | (z) <i>Tripathi v Panchandra</i> (1933) 33 B m |
| (z) | "I" = "I" = "I" = "I" = "I" | L R 37, 141 I C 94 (33) A B 120 |

**O. 41,
rr. 6-9**

application is made to the Court which passed the decree, such Court shall, on sufficient cause being shown by *B* for requiring the security, direct *A* to give the security. But if the application is made to the appellate Court, that Court may in its discretion, require security to be given.

Sub rule (2)—The Allahabad High Court has held that this sub rule is complementary to rule 5 and that the Court which made the order is not obliged to stay the sale merely because the property to be sold is immovable property (*p*)

Enforcement of security bond given under this rule—See notes to sec 145, Security for restitution of property taken in execution of a decree.

Appeal—No appeal lies from an order under this rule.

Form—For form of security bond, see App G, form no 3.

7. [S. 547.] No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

8. [New] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Exercise of powers in appeal from order made in execution of decree
Scope and object of the rule—This rule is new. It has been added to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree. In such a case the rule provides that the appellant may apply for a stay of execution of the decree under r 5 or for security for restitution under r 6. *A* obtains a decree against *B* and applies for execution. *B* objects to the execution but the objection is disallowed. *B* prefers an appeal from the order disallowing his objection. *B* may apply for a stay of execution of the decree under r 5 pending the disposal of the appeal from the order. This is in accordance with the undermentioned decision under the Code of 1882 (*q*)

Procedure on admission of appeal

9. [S. 548.] (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal

(2) Such book shall be called the Register of Appeals.

Register of Appeals

D. 41, r. 10

Appeals in forma pauperis—It has been held by the High Court of Madras (a) that this rule applies to pauper appeals, thus an appellant, who has presented his appeal in forma pauperis, may be called upon to give security for costs under this rule, but very special grounds must be shown to support such an application. On the other hand, it has been held by the High Courts of Calcutta (b), Bombay (c), and Lahore (d) that this rule does not apply to appeals preferred in forma pauperis.

"In its discretion."—Rankin, C J, has observed that some confusion has arisen out of the failure to realise the great distinction between an application for security for costs to be given by the plaintiff at the original trial and such an application in connection with an appeal. The learned Chief Justice referred to *Harlock v Ashberry* (e) where Jessel, M R, said "For some time past it has been the settled practice, if the respondent asks for it, to require security for costs to be given by an appellant who would be unable through poverty to pay the respondent's costs of the appeal if it should be unsuccessful." The learned Chief Justice made an order for security on the ground that the appellant had not paid the respondent's costs in the lower Court and costs awarded against her in other suits (f). But in other cases, and these are probably the cases referred to by Rankin, C J, it has been held that the mere fact that the appellant is poor or insolvent is no ground for demanding security for costs (g). Similarly mere non payment of the costs of the original suit is no ground for calling upon the appellant to furnish security under this rule, *unless his conduct be shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of the Court in respect of costs* (h). On the other hand, when the respondent had failed to recover his costs in the lower Court, Macleod, C J, made an order for security observing that the Court's discretion was absolute and could not be fettered by cases (i), and the Court will, as a general rule, demand security for costs from a poor or insolvent appellant if it is proved to the satisfaction of the Court that the appellant is not the real litigant, but a mere puppet in the hands of others who are well able to furnish security (j), or if the merits of the case are plainly in favour of the respondent (k). See notes to O 25, r 1, "Poverty of plaintiff."

At what stage respondent should apply for security—The respondent should apply promptly, or else it might be urged that he had waived his right (l).

Order for security.—When an order is made under this rule for security for costs, it is not necessary that any specific sum should be named in the order. It is sufficient if the order directs the appellant to furnish security "for the costs of the original suit" or "for the costs of the appeal" or "for the costs of the appeal and the original suit" (m). A surety for the costs of the appeal is discharged if the appeal is decided in favour of the appellant even if the appellate decree is reversed on second appeal (n). If a rule is issued for security for costs and is adjourned to the hearing, no order is necessary on the rule after the disposal of the appeal (o).

(a) See

(b) *Ansbeeroodin v Ujjul* (1871) 17 W R 68
See also *Mussamat Hafiz v Abdul Karim*
(1908) 12 C W N 163 cited in the notes to
O 25 r 1

(c) *Khemraj v Kishanlal* (1918) 42 Bom 5
42 I C 87

(d) —

(e)

(f)

(g)

Hewelson v Deas (1894) 31 Cal 576
Manekji v Goolbar (1879) 3 Bom 241
(h) *Ahmed v Shaik Laya* (1883) 13 Bom 403,
Harising v Lalubhai (1903) 5 Bom L
R 661

(i) —
(j) —
(k) —
(l) —

(m) (1887) 9 All 161
Lekha v Bhouna (1896) 18 All 101
(n) *Kedar v Chandu* (1923) 38 Cal L J 190 75
I C 510, (4) A C 5-8
(o) *Dattatraya v Lalubhai* (1932) 34 Bom
L R 1418, 136 I C 161 (32) 11 10

The taxing officer's decision as to the amount of the security is subject to revision by O 41, the High Court (n).

Extension of time for furnishing security.—The appellate Court may, under exceptional circumstances, extend the time for furnishing security [see s 148]. Thus where the appellant alleged that he was unable on account of plague in Bombay to raise the money required for security within the time fixed by the Court, the Court extended the time for giving security. The time for giving security may be extended either before or after its expiry (a).

"Court shall reject the appeal"—These words are mandatory and the Court is bound to reject the appeal if security is not furnished within the time fixed (r). But the appeal should not be rejected if the order for security has been made without notice to the appellant (s).

Restoring of appeal—An appeal, although it may have been rejected by the appellate Court under this rule upon failure of the appellant to furnish security, may be restored on sufficient grounds at the Court's discretion (t). Limitation for the application for restoration is under art. 163 of the Limitation Act (u). It is no excuse for not furnishing security in time that the appellant is a wandering fakir, for it is the duty of every litigant to keep in touch with his case (v). Where the applicant applies for extension of time, and the Court after hearing him on the application refuses to extend the time and rejects the appeal, the appeal should not subsequently be restored (w). No appeal lies from an order refusing to restore an appeal (x).

Appeal from order rejecting appeal under sub rule (2)—An order rejecting an appeal under this rule is not appealable as an order under O 43 for it is not one of the orders specified therein. Nor is it appealable as a decree, for it does not *conclusively* determine the rights of the parties with regard to any of the matters in controversy in the appeal within the meaning of the definition of decree[s 2, cl (2)] (v)

Appeal from order dismissing application to receive security for costs — An order is made under sub rule (1) directing an appellant to furnish security for costs. The order is indefinite in that it does not fix the exact date on or before which security is to be given. The appellant, believing that the time for giving security has expired, applies to the Court to receive the amount fixed by the order as security. The Court holds that the time for furnishing security has expired, and refuses the application. The appellant is entitled to appeal from the order under cl 15 of the Letters Patent, as the effect of the order would be to finally deprive the appellant of his right of prosecuting his appeal (2)

Insolvency appeal.—There is a conflict of decisions as to whether this rule applies to the case of an appeal from an order passed by a Judge of the High Court exercising

- | | | |
|-----|---|--|
| (p) | Payrajeshwarashram v Saurapattan Ratha (197) 29 Bom L R 1031 103 I C 63* | (1920) 42 All 626 60 I C 81 Srini- dasam v Rukmani (1928) 55 Mad L J 330 (24) A M 964 |
| (q) | " " " " " " " " | (u) Sirur v Mythili (1932) 61 Mad L J 638 136 I C 45 (3-) A M 170 |
| | " " " " " " " " | (v) Firma v Lam Parlash (1920) 2 Lah L J 321 63 I C 306 |
| (r) | Sab tra Thakurata v Sari (1921) 48 I A 76 48 Cal 481 60 I C 74 (-1) A P C 80 Sirur v Mythili (1932) 61 Mad L J 638 136 I C 45 (3-) A M 170 | (w) Li Tene v S & F M Firm (1929) 7 Rang 145 140 I C 110 (29) A R 289 |
| (s) | Sarayilhan v Akadim (1883) 5 All, 300 Timmav Decc (1885-) 5 Mad -63 | (x) Froz Legum v Abdul Latif (1903) 30 All. 143 |
| (t) | Lahant Singh v Dindal Singh (1886) 8 All 315 13 I C 57 Sundar v Halah Auck | (y) Leiba v Bhaura (1896) 18 All 101 Pomes v Monindra (1921) 49 Cal 355 67 I C 51 (2-) A C 246 |
| | | (z) Vidyapurana v Vijayanndhi (1902) 25 Mad 634 |

O. 41,
rr. 10, 11

jurisdiction in insolvency under the Presidency towns Insolvency Act, 1903 the High Court of Madras holding that it does not (a) while the High Court of Calcutta holds that it does (b)

Form — For form of security for costs of appeal see App G form no 4

11. [S. 551.] (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader

Power to dismiss appeal without sending notice to lower Court

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred

Alteration in the rule —

- 1 In sub r (1) the words after sending for the record if it thinks fit to do so are new These words have been added to empower the Court to send for the record if it thinks fit to do so before summarily dismissing an appeal without giving notice to the respondent
- 2 The words the Court may make an order that the appeal be dismissed have been substituted for the words the appeal shall be dismissed for default to make it clear that no appeal lies from an order of dismissal for default See sec 5 cl (2) sub-cl (b) Under the old section it was held that a decision dismissing an appeal for default was a decree and was therefore appealable (c)

Dismissal of appeal under sub rule (1) whether judgment necessary — Under the corresponding section of the Code of 1859 it was held by the High Court of Calcutta that the dismissal of an appeal under sub r (1) did not relieve the lower appellate Court from the necessity of writing a judgment in the manner prescribed by sec 574 of that Code [now r 31 of this Order] (d) The Allahabad High Court has adopted the same rule (e) The present Order is divided into distinct parts under appropriate headings an arrangement which did not appear in the corresponding Chapter of the Code of 1859 Rule 11 comes under the heading Procedure on admission of appeal The next heading of the Order is Procedure on hearing and r 31 comes under the next following heading Judgment in appeal Relying upon this classification it was held by the High Court of Bombay in *Taizy v Shankar* (f) that under the present Code it is not obligatory upon the lower appellate Court in dismissing an

(a) *Seshu Ayyar v Nagarathna* (1904) 2 Mad 121

(b) *Lakshipriya v Rameshori* (1916) 43 Cal 413

(c) *Uma Sundari v Eadu* (1897) 24 Cal 39

(d) *Rami Deka v Braya Nath* (1838) 2 Cal 9

(e) *Durga v Nara* (193) 54 All 31

A A 597 F B overruled in *Sim*

Hasan v Pran (1904) 30 All 319

(f) (1917) 36 Bom 116 1-1 C 561

appeal under this rule, to write a judgment as required by r 31. But this decision has since been overruled by a Full Bench of the same Court, on the ground that it was in conflict with the previous practice of that Court which was based on a Civil Circular being Circular 51, published in 1890 under the provisions of the High Courts Act, 1861, by which it is provided that when an appellate Court dismisses an appeal under sec. 551 [now r. 11 of this Order], a judgment should be written and a formal decree drawn up. In the course of the judgment Sir Basil Scott, C J, said: "There is nothing in the new Code of Civil Procedure which introduces any change in the law, except in so far as the rules commencing with rule 9 of Order XLI are headed 'Procedure on admission of appeal.' That change is not sufficient to abrogate the rule published under the High Courts Act which is quite consistent with the provisions of the Code" (g). The result is that, according to the Bombay High Court, when an appeal is dismissed under this rule a judgment should be written and a formal decree drawn up. The High Courts of Calcutta and Rangoon have given the same decision under the present Code (h). Even if the judgment is not pronounced in the form prescribed by rule 31 the decision is a decree (i).

Dismissal of appeal for default under sub rule (2).—Where an appeal is dismissed for default, it is the decree of the lower Court alone that can be enforced in execution (j). See notes to sec. 36, "What decrees may be executed."

Review.—Dismissal of an appeal under this rule bars a review of the judgment appealed against. see notes under O 47, r 1. The order under this rule dismissing the appeal is itself subject to review and the practice of the Calcutta High Court is to grant a review and order the rehearing of the appeal *ex parte* (l). When a second appeal is dismissed under this rule, the High Court has no power to review its judgment on the ground of the discovery of new and important matter (f). See notes to O 47, r 1, "No review allowed on a question of fact after decision of second appeal."

Re admission of appeal dismissed for default under sub rule (2).—An appeal dismissed under sub r (2) may be re admitted under r 19.

12. [S. 552.] (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

Day for hearing appeal

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

13. [S. 552.] (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Appellate Court to give notice to Court whose decree appealed from

(g) *Hanmant v Annaji* (1913) 37 Bom 610 613 20 I C 966 (F B)

(h) *Surendra Nath v Jagannath Das* (1927) 27 C W N 501, 76 I C 1012 (33 A C 554)

334 93 I C 909 (26) A C 638

(j) *Shyam Mandal v Satinath* (1917) 44 Cal 954, 38 I C 493

(k) *Official Trustee v Benode* (1924) 51 Cal 913, 84 I C 147, (25) A C 114

(l) *Basani v Kali* (1914) 41 Cal 609 26 I C 251 *Sulabala v Gadadhar* (1922) 36 Cal L J 76 70 I C 408, (22) A C 165

O. 41,
rr. 13-15

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court

Transmission of papers to
appellate Court

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made, and copies of such papers shall be made at the expense of and given to, the applicant

Copies of exhibits in
Court whose decree appeal
ed from

Alteration in the rule—In sub rule (1) the words where the appeal is not dismissed under r 11 have been substituted for the words when the memorandum of appeal is registered

Form—For form of intimation to lower Court of admission of appeal see Appendix G form no 5

14. [S. 553.] (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer, and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice

Publication and service of
notice of day for hearing
of appeal.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to

Appellate Court may itself
cause notice to be served

Form—For form of notice to respondent see Appendix G form no 6

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*

Contents of notice

Procedure on hearing.

16. [S. 555.] (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Right to begin—The mere fact that the respondent calls in question the right of the appellant to appeal does not give the respondent the right to begin (m)

trial

some

some balance in his favour to justify the alteration of the judgment as it stands (o)

17. [S. 556.] (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the

Dismissal of appeal for appellant's default

Court may make an order that the appeal be dismissed

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

Hearing appeal *ex parte*

Alterations in the rule—The words "the Court may make an order that the appeal be dismissed" have been substituted for the words "the appeal shall be dismissed for default, to make it clear that no appeal lies from the order of dismissal for default (p) See sec 2, cl. (2), sub-cl (b), and notes "Order of dismissal for default," p 11 above

"Does not appear."—See notes to O 9 r 9, "Appearance"

Dismissal of appeal on merits illegal—If the appellant does not appear, the Court may, if it thinks fit, dismiss the appeal for default of appearance, but it has no power to dismiss the appeal on the merits (q), nor can it dismiss the appeal under this rule because the appellant has not proved that the Court fee is correct (r)

Re admission of appeal dismissed under this rule.—See r 19 below

Order that the appeal be dismissed.—See notes above, "Alteration in the rule

(m) *Rustomji v Kesorji* (1884) 8 Lk m 247

(n) *Secretary of State v Tejov Kumar* (1941) 40 Cal L J 303 84 I C 722 (25) A C 224

(o) *Must Fazlunissa v Moulvi Idrus* (1941) 25 C. W. N 866 63 I C 823 (21) A PC.

(p) *Fakirunissa v Faran Chandra* (1912) 39

(q) Cal 341, 14 I C 823

(r)

O. 41,
rr. 18, 19

Dismissal of appeal where
notice not served in conse-
quence of appellant's failure
to deposit costs

18. [S. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing

The Court may make an order that the appeal be dismissed'—The language of the rule clearly shows that the order of dismissal should not be made before the day fixed for the hearing of the appeal (s). If the appellant has deposited the costs of service the appeal cannot be dismissed under this rule for the appellant's failure to prove the identity of the person served (t).

Re admission of appeal dismissed under the rule—See r 19 below

Appeal—An order under this rule is not open to appeal. The proper remedy is an application under r 19 below for re admission (u).

Effect of dismissal of appeal against one or several respondents for non service of notice—A, B and C obtain a decree for joint possession against D. D appeals from the decree. A and B are served with the notice of appeal but C is not. The appeal is thereupon dismissed as against C. Is D entitled to proceed with the appeal as against A and B? No for even if the appellate Court heard the appeal and reversed the decree of the lower Court as regards A and B, the decree of the lower Court not being reversed as regards C, C could execute the entire decree (the decree being a joint decree) so as to nullify the decree of the appellate Court (v). See notes to O 22 r 4, Cases in which suit or appeal held to abate as a whole.

19. [S. 558.] Where an appeal is dismissed under rule 11, sub rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re admission of the appeal, and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re admission of appeal
dismissed for default

(s) *Chandra Nath v Kotiprasanna* (1908) 35 Cal 535
(t) *Ram Lal v Kali Prasad* (1900) 9 Pat 409
120 I C 304 (20) A P 609

(u) *Altar Singh v Karma Chand* (1919) Punj Rec no 169 p 448 50 I C 179
(v) *Basu v Fazle* (1914) 19 C W L 290 23 I C 703

"Shall re admit the appeal."—These words have been substituted for the words "may re-admit the appeal." The word "may" in the old section was construed by the High Court of Madras to mean "shall" (1c)

"Sufficient cause"—The carelessness of an advocates clerk does not constitute sufficient cause (x) But where the appellant's pleader appeared soon after the appeal was dismissed, it was restored on the ground that the failure to appear was unintentional (y) The absence of appellant's pleader owing to an engagement in another Court has been held to be sufficient cause (z) The Allahabad High Court has restored an appeal on the ground that the Court did not send for an absent pleader (a)

Appeal.—An appeal lies from an order of *refusal to re-admit* an appeal [O 23, r 1, cl (t)]. But no appeal lies from an order *re-admitting* an appeal (b).

Dismissal of appeal for failure to deposit costs of paper book or to pay court fees—Where an appeal is dismissed under the rules of a High Court for failure to deposit the costs of preparation of the paper book as required by the rules, the decree may be set aside not by an order under this rule, but by an order on an application for a review (c). So also if it is dismissed for failure to pay Court fees (d).

Inherent power to restore appeal dismissed for default.—Although a cause may not amount to a “sufficient cause” within the meaning of this rule, the Court has inherent power to pass an order of restoration if it considers that a case for restoration has been made out (e). According to the Bombay High Court (f), the Court has inherent power to admit an application for re-admission that is time barred under art. 168 of the Limitation Act, but the Lahore (g) and Madras (h) High Courts differ following *Neelaven v. Narayana* (i). See note under O 9, r 9. Inherent power to restore suit dismissed for default.”

Other remedy—The applicant is not confined to the remedy of restoration but may file another appeal if he is still within the period of limitation (3)

20. [S. 559.] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is

Power to adjourn hearing
and direct persons appear-
ing interested to be made
respondents

interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

"Interested in the result of the appeal"—Where one of the holders of a decree has not been joined as a respondent to an appeal, and the time limited for appeal has

- (w) *Samayya v Subbamma* (1903) 26 Mad 599
601
- (x) *Mawng Than v Zainat Bibi* (19'5) 3 Rang
484 92 I C 208 (26) A K 50 See also
Ram Sukhal v Maharajah Kesko Prasad
(1918) 3 lat LJ 218 43 IC 925
- (y) *Balmukand v Hazir* (1923) 5 Lah L J 89
79 I C 279
- (z)
- (a)
- (b)
- (c) *Fahmunnissa v Deoki* (1897) 24 Cal 350
Anant Poddar v Mangal Poddar (19'3)
- (d)
- (e)
- (f)
- (g)
- (h) *Krishnasamy v Chengalraya* (19'4) 47 Mad
171 76 I C 836 (24) A M 114
- (i) (1920) 43 Mad 94, 53 I C 847
- (j) *Sarasdeo Narayan v Partap Lal* (1923) 2
lat 739 75 I C 284, (23) A I 213

O. 41,
rr. 18, 19

18. [S. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing

The Court may make an order that the appeal be dismissed—The language of the rule clearly shows that the order of dismissal should not be made before the day fixed for the hearing of the appeal (s). If the appellant has deposited the costs of service the appeal cannot be dismissed under this rule for the appellant's failure to prove the identity of the person served (t)

Re admission of appeal dismissed under the rule—See r 19 below

Appeal—An order under this rule is not open to appeal. The proper remedy is an application under r 19 below for re admission (u)

Effect of dismissal of appeal against one or several respondents for non service of notice—A B and C obtain a decree for joint possession against D D appeals from the decree A and B are served with the notice of appeal but C is not The appeal is thereupon dismissed as against C Is D entitled to proceed with the appeal as against A and B? No for even if the appellate Court heard the appeal and reversed the decree of the lower Court as regards A and B the decree of the lower Court not being reversed as regards C C could execute the entire decree (the decree being a joint decree) so as to nullify the decree of the appellate Court (v) See notes to O 22 r 4 Cases in which suit or appeal held to abate as a whole

19. [S. 558.] Where an appeal is dismissed under rule 11, sub rule (2), or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re admission of the appeal, and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re admit the appeal on such terms as to costs or otherwise as it thinks fit

Re admission of appeal dismissed for default

(s) *Chandra Nath v Kal prasanna* (1908) 35 Cal 535
(t) *Ram Lal v Kali Prasad* (1909) 9 Pat 408
120 I C 304 (20) A P 609

() *All r Singh v Karma Chand* (1919) Punj Rec no 169 p 418 52 I C 179
(v) *Basir v Fazle* (1914) 19 C W N 290 28 I C 703

O 41,
rr. 20, 21

elapsed he is not interested in the result of the appeal within the meaning of the rule. The rule therefore gives no jurisdiction to the appellate Court to join him (k). See notes to r 23 below.

Limitation—A person who was a party to the proceeding in the Court below may be added as a respondent though the time to appeal against him has expired (l). But this cannot be done if the misjoinder has rendered the appeal incompetent as when an appeal is filed against some only of several joint decree holders (m).

Adding of parties under this rule discretionary—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule (n). A party will not be added merely in order to enable a respondent to file cross objections against him (o). According to the Madras High Court its powers are not limited by this rule and it can also act under O 1 r 10 (p). But the Allahabad High Court has held that a Court of appeal cannot add a party who was not a party to the suit (q). The Appellate Court has no power under this rule to add as a respondent to the appeal a person who was not a party to the original suit (r).

The Court will not under this rule add representatives of a deceased party to save an appeal that has abated (s). Nor will it add a respondent after the appeal against him is time barred (t).

Adding of parties in second appeal—Has the High Court power in second appeal to add a party who was a party to the suit but not a party in the first appeal? No according to the Allahabad High Court (u). Yes according to the Madras (v) Calcutta (w) and Patna (x) High Courts. A second appeal is not bad for misjoinder if parties who had not appeared in the suit and who were not made parties for that reason in the first appeal are not impleaded (y).

Form—For form of notice to a party to a suit not made a party to the appeal see App G form no 7.

21. [S 560] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to rehear the appeal, and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing

Re hearing on application of respondent against whom *ex parte* decree made

(k) Chotala v. G. S. (1908) 55 I.A. 76
Ran v. 107 I.C. 237 (27) A.P.C.

(l) G

(m) Badli Narayan v. East Indian Railway
(1906) 5 Pat. 55 98 I.C. 1003 (97)
A.P. 23

(n)

(o)

(p)

(q) Sham Lal v. Dhanpat Rai (1925) 47 All. 853
88 I.C. 403 (25) A.A. 763

(r)

(s)

(t)

(u) Chunn v. Lala Ram (1894) 18 All. 5 Puch
Laur v. Ram Khelawan (1915) 37 All. 67
6 I.C. 23

(v) Paya v. Karamel (1898) 19 Mad. 151

(w) Du ga Chara v. Lakhi Narain (1918) 47
I.C. 217

(x) Padath Alakton v. Hulan Singh (1904)
8 I.C. 600 (24) A.I. 773

(y) Krishnadas v. B. S. (1930) 34 C
W.N. 64 (30) A.C. 748

when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him. O
rr.

See O 9 r 13, and notes thereto

Substituted service—If notice of appeal has been served by substituted service it is open to the respondent to show that he had no knowledge of the appeal (z) See O 5, r 20, and notes thereon

"Sufficient cause"—Where counsel for respondent was unable to appear at the hearing as the respondent's agent had taken away the papers, it was held that it was not "sufficient cause" for re-hearing the appeal (a) But when the party's agent could not appear to instruct the pleader because of his daughter's illness this was considered sufficient cause (b) A decree was passed *ex parte* against A, and after contest against B and C B and C appealed and joined A as *pro forma* respondent Notice of the appeal was not served upon A After the decision of the appeal he heard of the suit and applied to the Court of first instance to set aside the *ex parte* decree That Court refused to entertain the application as the appeal had been decided The Court of appeal then directed the Court of first instance to rehear the application (c) See note under O 9, r 13, 'Hearing of application after disposal of appeal,' at p 598

Appeal—An appeal lies from an order of refusal to re-hear an appeal [O 43, r 1, cl. (t)]

22. [S. 561.] (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-

Upon hearing respondent may object to decree as if he had preferred separate appeal

objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto

Form of objection and provisions applicable thereto

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy

(z) *Gyanammal v Abdul Hussain* (1937) 55 Mad 223 134 I C 1252 (31) A M 813
(a) *Daji Lal v Nawal Singh* (1917) 32 All 344 33 I C 636

(b) *Godhani v Sayam* (1921) 19 All L J 547 63 I C 37 (21) A A 264
(c) *Rajhundan v Bhawal Tewari* (1932) 54 All 423 140 I C 178, (32) A A 340

O. 41,
r. 20, 21

elapsed he is not "interested in the result of the appeal" within the meaning of this rule. The rule therefore gives no jurisdiction to the appellate Court to join him (k). See notes to r 23 below

Limitation—A person *who was a party* to the proceeding in the Court below may be added as a respondent, though the time to appeal against him has expired (l). But this cannot be done if the misjoinder has rendered the appeal incompetent as when an appeal is filed against some only of several joint decree holders (m).

Adding of parties under this rule discretionary—It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by this rule (n). A party will not be added merely in order to enable a respondent to file cross objections against him (o). According to the Madras High Court its powers are not limited by this rule and it can also act under O 1, r 10 (p). But the Allahabad High Court has held that a Court of appeal cannot add a party who was not a party to the suit (q). The Appellate Court has no power under this rule to add as a respondent to the appeal a person who was not a party to the original suit (r).

The Court will not under this rule add representatives of a deceased party to save an appeal that has abated (s). Nor will it add a respondent after the appeal against him is time barred (t).

Adding of parties in second appeal—Has the High Court power in second appeal to add a party who was a party to the suit but not a party in the first appeal? No, according to the Allahabad High Court (u). Yes, according to the Madras (v), Calcutta (w), and Patna (x) High Courts. A second appeal is not bad for misjoinder if parties who had not appeared in the suit and who were not made parties for that reason in the first appeal, are not impleaded (y).

Form—For form of notice to a party to a suit not made a party to the appeal, see App G form no 7.

21. [S. 560.] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal, and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing

Re hearing on application
of respondent against whom
ex parte decree made

(k)

(l)

(m) *Badri Narayan v East India Railway* (1906) 5 Pat 755 98 I C 1003 (27) A P 23

(n) *Amlool Chand v Sarat Chunder* (1911) 38 Cal 913 919 11 I C 943 *Mudnapur Zamindary Co v Amulya Nath* (1906) 53 Cal 752 95 I C 619 (26) A C 893

(o)

(p)

(q) *Shiam Lal v Dhanpal Rai* (1925) 47 All 853, 88 I C 483 (25) A A 768

(r)

(s)

(t) A C 300

(u) *Chunni v Lala Ram* (1894) 16 All 5 *Pach Lari v Ram Khiluan* (1915) 37 All 67 26 I C 25

(v) *Paya v Kowam* (1896) 19 Mad 151
(w) *Durga Charan v Lathi Narain* (1918) 47 I C 917

(x) *Padarath Mahton v Hiran Singh* (1904) 80 I C 600 (24) A P 773

(y) *Krishnaul'an v Brojendra* (1930) 34 C W N 642 (30) A C 748

not authorize the respondent to make out a case for a decree for the same amount by questioning some adjudication as to the right found against him and as to which no appeal or objection has been filed. The expression "support the decree" means support the decision and does not refer to the quantum of the decree (j)

Sub rule (4) where the appeal is withdrawn or has abated or is dismissed for default.—The old section commenced with the words, "any respondent may upon the hearing not only support the decree," etc. It was accordingly held that a respondent can be heard in support of his cross objections only upon the hearing of the appeal. If the appeal was withdrawn before the hearing, the respondent it was held, had no right to be heard in support of his cross objections (k) though the Court might in such a case allow him to prefer a regular appeal from the decree (l). But if the hearing had once commenced, the appeal, it was held, could not be withdrawn so as to prevent the cross objections being heard and determined (m). This distinction has now been done away with by the omission of the words "upon the hearing" in sub r (1) and by the addition of sub r (4). Under the present rule the withdrawal of an appeal is no bar to the hearing of cross objection filed by a respondent, whether the appeal is withdrawn before or after the hearing. Similarly the dismissal of an appeal for default is no bar to the hearing of cross objections. This was correctly admitted in *Bhimsena v Venugopal* (n), a Letters Patent appeal, but the reasoning, so far as it proceeds on the assumption that O 41 does not apply to Letters Patent appeals, seems opposed to the Privy Council decision in *Sabitu v Sati* (o). The dismissal of an appeal upon the

Under the old section the High Court of Allahabad held that the dismissal of an appeal as filed out of time was a bar to the hearing of cross objections (r). A Full Bench of the Madras High Court holds that the law is the same under the present rule (s). If heard so that a defendant in on his share, and such an appeal is a valid appeal to which cross objections may be heard (u). Cross objections cannot be heard if the appeal is dismissed for insufficiency of court fee (v).

mortgage suit has been held not to be a bar to the hearing of cross objections, the reason given being that in such a case the appeal is heard, the question of non joinder being one that arises in the appeal itself and is not extraneous to it, as would be a question as to whether it was presented in proper time or not (w).

- | | |
|--|--|
| (j) <i>Sri Ranga v Srinagara</i> (1927) 50 Mad 866 104 I C 472 (27) A M 801 | 405 <i>Mulchand v Downi & Co Ltd</i> (1909) 10 Lah 208 110 I C 910 (29) A L 596 |
| (k) <i>Jafar v Ranyt Singh</i> (1895) 17 All 518 <i>Jamjuran v Chand Mal</i> (1888) 10 All 537 <i>Maktab Dey v Hasanali</i> (1886) 8 All 551 | (r) <i>Pamjiwan v Chand Mal</i> (1888) 10 All 537 |
| (l) <i>Hargorindas v Jadarahoo</i> (1890) 23 Bom 632 | (s) <i>Alagappa v Chockal ngam</i> (1918) 41 Mad 904 917 9 0 48 I C 203 |
| (m) <i>Dhondis v The Collector of Salt Revenue</i> (1845) 9 Bom 24 | (t) <i>Jai Gopal v Muna Lal</i> (1923) 4 Lah 140 73 I C 655 (24) A L 43 |
| (n) (1905) 48 Mad 631, 88 I C 443 (25) A M 725 | (u) <i>Venkatarubhamma v Eamanadhayya</i> (193*) 55 Mad 905 139 I C 457 (32) A M 725 |
| (o) (1911) 48 I A 76 48 Cal 481 60 I C 274 (21) A L 78 | (v) <i>Dunuchand v Aris Khan</i> (1912) Punj Rec no 11 p 34 10 I C 20 I A L 514 <i>Mewng Tha Gyee</i> (1930) 8 Habb 534 122 I L 500 (31) A L 33 |
| (p) <i>Mowar Shroobakh v Mowar Thakar Deyal</i> (1919) 4 Pat L J 164 50 I C 729 | (w) <i>Kombi Achen v Kochunni</i> (1894) 21 Mad 352 |
| (q) <i>Murugappa Chetiar v Ponnuasami Pulai</i> (1921) 44 Mad 844 60 I C 75 (21) A M | |

O. 41, r. 22 thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule

Alterations in the rule—The words 'upon the hearing' which occurred in the first paragraph of sec 561 of the Code of 1882 [now sub r 1] between the words 'may' and 'not only support,' have been omitted, and sub rule (4) has been added. See notes below under the head "Sub rule (4) where the appeal is withdrawn or dismissed for default." The words 'the party who may be affected by such objection' in sub r (3) have been substituted for the words "the appellant" which occurred in sec 561

Cross objections—If in a suit brought by A against B, B sets up two defences and the Court of first instance decides both in B's favour, and A appeals there is no scope for cross objections, for cross objections cannot be filed as criticisms

of any cross objections (e) In the case put above the decree was entirely in B's (respondent's) favour. But if A's claim is decreed in part, A may appeal from the decree, alleging that the decree ought to have been for the full amount claimed by him. And B also may appeal from the decree, alleging that the decree is too small. And B missed altogether. If A appeals from the decree it is a cross appeal. But instead of filing a cross appeal under this rule. In cross objections, B may take any objection to the decree which he could have taken by way of appeal (f) If no cross objections are filed by a respondent the appellate Court has no power to grant any relief to him in a case where the granting of such relief is not necessarily incidental to the relief granted to the appellant (g) nor has it the power, in the absence of cross objections, to disturb so much of the original decree as is favourable to the appellant so as to place the appellant in a worse position (h) Appellate Court should not proceed to decide on a point not raised either by the appellant or respondent (i)

Support the decree—The respondent without filing cross objections may 'support the decree' on grounds decided against him by the lower Court. But this does

(d) *Sahdeo v Kuum* (1922) 1 Pat 258 (2^o)

(e) *A P 493*

(f) *Dalok v Kauri* (1882) 4 All 491

(g) *Rulakada v Viswanatha* (1902) 24 Mad 229
Cuppraz v Kishori Lal (1896) 23 Cal 922, 929

(h) *Cheda Lal v Bad Allah* (1889) 11 All 35.
Agulal v Dino Nath (1907) 34 Cal 906.
Shilshchandra v Bechar (19-4) 40 Cal 1 J 6^o, 84 I C 124 (25) A C 94

(i) *Sir Pradyat Kumar v Bad Goreda* (1925) 41 Cal L J 31, 86 I C 6 (-5) A C 518

against *B*, but also against *C*, in respect of that portion of his claim that was disallowed by the Court of first instance, namely, Rs 2,000 (d). According to the Madras (e) and Lahore (f) High Courts, a respondent may urge cross objections against a co-respondent in any and every case. Note in this connection the substitution in sub r (3) of the words 'the party who may be affected by such objection' for the words "the appellant" which occurred in sec 261 of the Code of 1882.

Application for leave to file cross objections in forma pauperis—An application for leave to file cross objections in forma pauperis may be received by the Court at any time (g)

"Or within such further time"—This rule requires that cross objections should be filed by the respondent within one month from the date of the service of notice of the appeal. But the time may be extended if sufficient cause is shown (h)

Application of the rule—Cross objections may be filed not only in first appeal but also in second appeal (O 42). They may also be filed in appeals from orders preferred under sec. 104 and O 43 [See O 43, r. 2].

Second appeal—A second appeal will lie from a decree of the first Appellate Court disallowing the cross objections of a respondent (i)

Letters Patent appeal.—The Allahabad and Calcutta High Courts have held that the provision for respondents filing cross objections does not apply to Letters Patent appeals (j), but it is doubtful if this is correct in view of the Privy Council decision in *Sabitra v. Sari* (l).

Form — 4a to form of memorandum of cross objections see App G, form no 8

23. [S. 562.] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, the evidence (if any) recorded during the original trial, subject to all just exceptions, be evidence during the trial after remand.

Alterations in the rule—The words, "and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand," at the end of the rule are new

- (d) Abdul Ghani v. Muhammad (1906) 24 All 95
Anulakada v. Suvannakanta (1906) 25 Mad
25, 27 1. Muhammad v. Abu (1915) 38 Mad
35, 27 1. C. 3, 3 (1) 1. Aliappa
Chokkai ngam (1915) 41 Mad 904 pp 43
1 & 23.
- (f) CAHA v. Y. Qutub Din (1923) 5 Lah. L. J 92,
64 1 C 33 (23) A. L. 32
- (g) Gobinda v. Jada (1911) 13 C W N 205
21 & 118. Musammat Chander v.

Massachusetts Docks (1944) "Lat. 42°"

- (k)

O. 41, r. 22

Who may file cross objections—Cross objections under this rule can only be filed by a party who might have appealed from the decree of the Court below, but has not done so. It is not open to the party who has appealed and whose appeal has been dismissed, subsequently to prefer cross objections under this rule. *A* sues *B* for damages. *A*'s claim is decreed in part. *A* appeals from that part of the decree which is against him. *B* also appeals from that part of the decree which is against him. *A*'s appeal is heard and dismissed. Before *B*'s appeal is heard, *A* files cross objections in *B*'s appeal setting up the same grounds upon which in his own appeal he had asked for relief. *A*'s cross objections should not be heard (x). Again *A* obtains a decree in a partnership suit which is against *B*, one of the defendants as *ex parte*. *B* does not apply under O 9, r 13, to set aside the *ex parte* decree. *B* cannot therefore file cross objections in *A*'s appeal that he should have been given a hearing (y). But in a case where *B* before the *ex parte* decree was passed presented a petition asking to be heard under the erroneous impression that the *ex parte* decree had already been passed, it was held that he was not barred from filing cross objections on the ground that he was not heard (z). Cross objections as to costs in the Courts below will not be entertained in second appeal (a).

A respondent may urge cross objections against the appellant but not as a rule against a co respondent—It has been held by the High Courts of Calcutta, Bombay and Allahabad, that as a general rule the right of a respondent to urge cross objections should be limited to his urging them only against the appellant and that it is only by way of exception to this general rule that one respondent may urge cross objections as against other respondents, the exception holding good in those cases in which the appeal opens up questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents (b). Thus in suits for dissolution of partnership and for accounts, it is open to one respondent to prefer cross objections against a co respondent on any item in dispute between them. The reason is that in such suits accounts are taken not between the plaintiff on the one hand and the defendants on the other, but between all the partners. *A*, *B* and *C* constitute a partnership firm. *A* sues *B* and *C* for dissolution of partnership and for accounts. A decree is passed in the suit declaring the amount coming to the share of each partner on the taking of accounts. *A* appeals from the decree. *B* and *C* are joined as respondents to the appeal. In such a case it is open to *B* to prefer cross objections against *C* in respect of an item in dispute between *B* and *C* (c). Similarly, when the decree appealed from proceeds on a ground common to all the parties against whom it is passed, and the appeal is preferred by some only of such parties e.g., where the suit is—*A* v *B* and *C*, and a decree is passed both against *B* and *C*, and the appeal is—*B* v *A* and *C*, *A* who is the plaintiff respondent may prefer cross objections not only against *B*, the appellant, but against *C*, the co respondent. *A* sues *B* and *C* to recover Rs 5,000, alleged to be his share of the profits of certain lands. A decree is passed for *A* for Rs 3,000 against *B* and *C*. *B* appeals from the decree. *C* does not join *B* in the appeal and he is therefore made a party respondent. The appeal thus is—*B* v *A* and *C*. In such a case it is open to *A* to prefer cross objections not only

(x) *Ramji Das v. Ajitha* (1903) 75 All 678
Parbhu v. Murti (1924) 22 All LJ 565
 78 IC 667 (24) A A 867 *Sorindra*
v. Dermal (1898) 32 CLW 863 (25)
 A C 882

(y) See Note on O 9 r 13

(z) *Bara Lerna v. Ammenamall* (1903) 45
 Mad LJ 805 79 IC 968 (24) A M.
 107

(a) *Madho v. Achlan* (1923) 5 Lah LJ 108
 70 IC 977

(b) *Rishun Churn v. Jogendra* (1899) 96 Cal 114
Shabuddin v. Deomoorat (1903) 30 Cal
 635 *Kallu v. Manni* (1901) 23 All 93,

Nursey v. Harrison (1913) 37 Bom 511
 21 IC 7 *Jadunandan v. Deo Nara*
 (1911) 16 C W N 612 614 13 IC 853
Abdul Ghani v. Muhammad (1900) 33
 All 95 *Muthura v. Ram Kumar* (1918)
 43 Cal 790 828 35 IC 305 *Mudela*
v. Ram Narain (1918) 40 All 630 61
 IC 616 *Official Trustee of Bengal v.*
Smith (1905) 11 LJ 328 56 IC 280
 See also *Laliban v. Coopers & Lysons*
 (1925) 29 C W N 784 88 IC 868 (25)

A C 93

(c) *Bulgoind v. Ram Sarai* (1914) 55 All 505,
 26 IC 83

against *B*, but also against *C*, in respect of that portion of his claim that was disallowed by the Court of first instance, namely, Rs 2 000 (*d*) According to the Madras (*e*) and Lahore (*f*) High Courts, a respondent may urge cross objections against a co respondent in any and every case Note in this connection the substitution in sub r (3) of the words "the party who may be affected by such objection" for the words "the appellant" which occurred in sec 561 of the Code of 1882

Application for leave to file cross objections in forma pauperis—An application for leave to file cross objections in forma pauperis may be received by the Court at any time (*g*)

"Or within such further time"—This rule requires that cross objections should be filed by the respondent within one month from the date of the service of notice of the appeal. But the time may be extended if sufficient cause is shown (*h*)

Application of the rule—Cross objections may be filed not only in first appeal but also in second appeal (O 42) They may also be filed in appeals from orders preferred under sec 104 and O 43 [See O 43, r 2]

Second appeal—A second appeal will lie from a decree of the first Appellate Court disallowing the cross objections of a respondent (*i*)

Letters Patent appeal.—The Allahabad and Calcutta High Courts have held that the provision for respondents filing cross objections does not apply to Letters Patent appeals (*j*), but it is doubtful if this is correct in view of the Privy Council decision in *Sabitri v Sati* (*k*)

Form—As to form of memorandum of cross objections see App G, form no 8

23. [S. 562.] Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

Alterations in the rule—The words, 'and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand' at the end of the rule are new

- (*d*) *Abdul Ghani v Muhammad* (1906) 28 All 95
 (*e*) *Auladada v Jivannatha* (1905) 28 Mad 279
Munusamy v Idan (1915) 38 Mad 705 2nd I C 3-3 [k B]
Alagappa v Chockalagani (1918) 41 Mad 904 91st 48 I C 205
 (*f*) *Channu v Qulab D* (1931) 5 Lah L J 92, 61 I C 330 (231 A L J 3)
 (*g*) *Gobinda v Jadhav* (1911) 15 C W N 205 7 I C 118
Musammatt Chander v

Musammatt Dulhan (1934) 2 Pat 82

- (*h*)
 (*i*)
 (*j*)
 (*k*)

O. 41, r. 23 Scope of the rule—It is not competent to the Appellate Court under this rule to remand the case for further evidence to the lower Court and to require that Court to pass another decree. All that the Appellate Court is empowered to do is to frame an issue and to send down that issue to the Court below for the return of a finding and it is the duty of the Appellate Court after receiving that finding to dispose of the appeal upon the evidence before it (l). The Appellate Court cannot after finding on facts remand the case to the lower Court to pass a decree in accordance with that finding (m).

Preliminary point—This rule enables the Appellate Court to remand a case to the lower Court for determination on the merits if the lower Court has disposed of the suit upon a preliminary point and the decree of that Court is reversed in appeal. The expression preliminary point is not confined to such legal points only as may be pleaded in bar of a suit but comprehends all points or issues whether of fact or of law the determination of which has precluded the necessity for determining other points or issues which have therefore been left undetermined (n). A Full Bench of the Madras High Court defined it as any point whether of fact or of law the decision of which avoids the necessity for a full hearing of the suit (o). Thus where the lower Court dismisses the plaintiff's suit on the ground that it is barred by limitation or that the Court has no jurisdiction to hear the suit or that the necessary leave has not been obtained or that the plaint does not on the face of it disclose any cause of action (p) or that it is barred by the events in an earlier suit (q) and the Appellate Court reverses the decree of the lower Court on those grounds it may remand the case to the lower Court to be proceeded with on the merits. Where several issues are raised in a suit one of which is that of undue influence and the Court dismisses the suit on a finding that there was undue influence without a finding on the other issues the decision amounts to a disposal of the suit upon a preliminary point within the meaning of this rule (r). Similarly if a sues B to recover a sum of money on the basis of an award and four issues are framed one of which is whether the award is valid and binding and the Court after recording evidence on all the issues dismisses the suit on the ground that the award is invalid leaving the other issues undecided the Appellate Court may if it finds that the decision of the lower Court on the issue as to the validity of the award is wrong remand the case to the lower Court to be disposed of on the merits. It does not matter that evidence has been recorded on all the issues (s). But where the first Court has decided a suit on the merits of the whole case as where the suit is decided on all the evidence and on all the issues the Appellate Court cannot remand the case under this rule (t). Where the first Court heard the entire suit and found all issues in favour of the plaintiff except one namely whether the suit was maintainable having regard to the provisions of O 21 r 99 and dismissed the suit on the finding that the suit was not maintainable it was held by the Patna High Court that the suit was disposed of on a preliminary point within the meaning of

(l)

(m)

(n) S

(o) R

(p) K Mad 5

(q)

(r)

(s)

165 371 C 383
(t) *Rameshwar Sengh v Sheod* n (1890) 10 All 610 *Mall Karjuna v Pathanem* (1936) 19 Mad 479 *Abdulla Khan v Muhammad* (1932) 45 All 565 741 C 820 (23) A 603 *Radhak v Kamal* (1919) 30 Cal L J 345 O I C 547 () A C 456 *Jayal* Ali v Moh ni (1923) 27 C W 15 80 I C 62 (24) A C 148 *Lekha Sengh v Babu Ram* (1935) 33 All L J 880 881 C 101 (26) A C 65 *Ganpat v Raykumar* (1919) 1 Fat 839 61 C 404 () A I 85 *Kala Dufat v Narayan* (1917) 20 Bom L R 56 100 I C 579 (7) A B 111 *Chaudhary v Madhu* (1917) 6 Lat 38 103 I C 72 (7) A 1 298 *Lanka Ichari v Renuka* (1919) 55 Cal 219 103 I C 804 (7) A C 86 *I r B Kram Kulk* v *Yf sh Tufazzal* (1933) 60 Cal 733 248 I L 671 (33) A C 63

this rule (u) This decision is in conflict with the decisions referred to above, and, it is submitted, is not good law To pass a decree in favour of the plaintiff on the strength of a plan put in by the plaintiff in a suit for possession of land is not a decision of the suit on a *preliminary* point, and no remand can be made in such a case under this rule (t) In a Bombay case, the Appellate Court was of opinion that certain findings of facts were necessary for the disposal of the appeal, and that evidence should be taken on those points, and it made an order of remand under this rule It was held that the Court had no power to make the order under this rule though such an order could be made under rule 25 below (w) When the Appellate Court after the suit had been tried on the merits allowed an amendment of the plaint and remanded the suit for trial on a different cause of action pleaded in the amendment a Madras Judge said that it was almost an abuse of language to say that the suit was disposed of on a preliminary point (x) On the other hand in another case the lower Court made an unconditional decree for redemption but the suit was remanded after the trial on the merits on the ground the decree holder was himself subject to be redeemed by a puisne mortgagee, and this was held to be a remand under this rule (y)

No order of remand can be made under this rule unless the lower Court has disposed of the *whole* suit upon a preliminary point This rule authorises a remand only where the entire suit, and not only a portion of it, has been disposed of by the Court below on a preliminary point (z) Assuming that the entire suit is decided on a preliminary point, it is further necessary, before an order of remand can be made under this rule, that the Appellate Court should also find that the decision on the preliminary point is wrong It is not a good ground, therefore, for making an order under this rule, that the preliminary issue, *e.g.*, an issue of limitation has been decided by the Court of first instance on a wrong view of the burden of proof, unless the Appellate Court finds that the issue itself has been *wrongly decided* (a) Again if the lower Court decides the suit on several preliminary points, the Appellate Court should not remand the suit without deciding all those preliminary points (b)

Inherent power of remand Remand in case of error, omission or irregularity—No order of remand can be made under the present rule except when the suit has been disposed of on a *preliminary* point There are, however, cases in which suits have not been disposed of on a *preliminary* point, and yet the Courts have claimed the power to remand the case professing to do so in the exercise of their *inherent* power [see s 151]. These are cases in which the lower Court has committed any error, omission or irregularity, by reason of which there has not been a proper trial or an effectual or complete adjudication of the suit, and the party complaining of such error, omission or irregularity has been materially prejudiced thereby Thus if a suit is defective for misjoinder of plaintiffs and causes of action, the proper course is to return the plaint to the plaintiff for amendment and not to dismiss the suit (see notes to O 2, r 3, on p 494 above) If the lower Court dismisses the suit instead of returning the plaint for amendment the Appellate Court may set aside the decree, and remand the suit with a direction to the lower Court to return the plaint to the plaintiff for amendment and to proceed with the suit after the plaint is amended (c) Similarly where a suit is brought in the name of

(u) *Bhadai v Shaikh Manowar* (1919) 4 Pat L J 645, 52 I C 125

(v) *Polani v Gangadoss* (1909) 32 Mad 83 11 I C 746

(w) *Anaji v Thakur* (1929) 53 Bom 335 118 I C 790, (3) A B 175

(x) *Gaithdingam v Kandaswami* (1930) 60 Mad L J 715 13 I C 311, (31) A M 1

(y) *Alagammal v Sadasiva* (1930) 60 Mad L J 72 129 I C 4, (3) A M 101

(z) *Banwari v Samman* (1899) 11 All 456

Majurda v Magandal (1895) 19 Bom 303 *Kanchan v Baiy Nath* (1897) 19 Cal 336

(a) *Habibullah v Latta Prasad* (1912) 34 All 612, 17 I C 94

(b) *Agent Bengal Nagpur Railway v Behari Lal* (1925) 52 Cal 783, 90 I C 426, (25) A C 716

(c) *Saima Bibi v Sheikh Muhammad* (1896) 15 All 131 *Jasjit Ram v Kalesar Nath* (1906) 15 All 326.

O. 41, r. 23 a wrong person as plaintiff, the Appellate Court may direct the plaint to be amended and remand the case for re trial (d) Where time was granted to the plaintiff to produce his evidence—but neither he nor his pleader appeared on the day to which the hearing was adjourned, and the lower Court instead of proceeding to dispose of the suit under O 17, r. 3, dismissed the suit for default under O 17, r. 2, it was held that the Appellate Court had power to remand the case to be disposed of in the manner prescribed by O 17, r. 3 (e) A case may also be remanded where the decision of the lower Court is given without taking the defendant's evidence (f) In a Bombay case (g) the lower Court had erroneously presumed the death of the mortgagor and decreed redemption by a person claiming to be his heir and the High Court reversed the decree and remanded the case for re trial after joining the mortgagor as a party

Sections 562 and 566 of the Code of 1882 [now rr 23 and 25 of this Order] were the only sections that provided for a remand. The cases cited in the preceding paragraph did not fall under either of those sections. Moreover, the Code of 1882 contained a section, (s 564) which prohibited the Appellate Court from remanding a case except as provided by s 562. This section was found in its working to be embarrassing, and to get over the difficulty presented by cases of the kind cited in the preceding paragraph, the Courts resorted to their inherent jurisdiction. That section has been omitted in this Code on the ground that it was unduly restrictive. The absolute prohibition of s 564 having been removed, the Court, it is said, is free under s 151 to make an order of remand though the case may not fall either under this rule or rule 25 (k). It has accordingly been held that as under the old Code, so under the new Code, an order of remand can be made though the suit was not disposed of on a point which can be called a preliminary point within the meaning of this rule, provided such an order is necessary for the ends of justice (s). In *Nabin Chand* v. *Stephen and Mullick, JJ*, expressed the opinion that if power to remand, that power was taken away and that under s 107 an Appellate Court can only remand a case "subject to such limitations as may be prescribed," that is, prescribed by rules 23 and 25 of O 41. The view so expressed ignores entirely the specific provisions of s 151 of the Code. In *Mani Mohan v Ramtaran (k)*, *Jenkins, C J*, after observing that the combined effect of s 107 and O 41, r 23, was to limit the power of remand to the position described in O 41, r 23, said "And this is the general rule except under special conditions which have no application in the circumstances of this case. The view taken by *Stephen and Mullick, JJ*, was dissented from by a Full Bench of the Calcutta High Court in *Ghurnani v The Allahabad Bank, Ltd (l)*, where it was held that the powers of the Appellate Court as regards remand are not restricted to the case specified in O 41, r 23, but that the Court, by reason of its inherent jurisdiction recognized and preserved in the Code [s 151], may order a remand in cases other than the case specified in O 41, r 23, if it be

(d) *Habib Bikkish v Baldeo Prasad* (1901) 23 All 167, *Jadav v Anath* (1910) 37 Cal 172 5 I C 993

(e) *Badam v Nathu* (1903) 25 All 104

(f) *Perumbra v Subramanian* (1898) 23 Mad 445

(g) *Jeshankar v Bai Doola* (1900) 22 Bom 101

(h)

(i)

(j) (1914) 41 Cal 104 111 112 20 I C 33

(k) (1916) 43 Cal 144 152 33 I C 3-9

(l) (1917) 44 Cal 994 41 I C 594 See also *Brj Indir Singh v Hanahi Lam* (1917) 44 I A 18 26 43 Cal 94 104 42 I C 43 *Mari v Bahu* (1919) 29 Cal L J 419 62 I C 094 *Diwan v Kati* (19-3) 37 Cal L J 411 41 I C 1038 (-8) A C 606 *Jandana v Prof Miran* (1919) 37 Cal L J 101 106 I C 512 (-8) A C 81-

(m) *Luzir Ali v Sarai* (1916) 43 Cal 624 32 I C 71 *Palakrishna v Venkata* (1911) 43 Mad 713 81 I C 985 (-5) A C 222

case (n) So also the High Courts of Bombay (o) and Lahore (p) The Madras High Court also follows *Ghuznavi's* case and lays stress upon a point also decided in that case that the inherent powers should not be resorted to where there is a specific provision for remand under rules 25 or 27 (q) The Allahabad High Court treats the question as unsettled, but puts a very wide construction on rule 23 (r) See notes to r 33 below, "Remand"

Remand in appeal from ex parte decree.—See notes to s 90, "Appeal from ex parte decree"

Remand in appeal from an order refusing to set aside an ex parte decree.—In an appeal from an order refusing to set aside an *ex parte* decree the only case which can be remanded is the application under O 9, r 13, and not the original suit *A* obtains a decree *ex parte* against *B* *B* applies under O 9, r 13, for an order to set aside the decree on the ground that he was prevented by sufficient cause from appearing at the hearing, but the application is refused *B* appeals from the order rejecting the application [O 43, r 1, cl (d)] If the order is reversed by the appellate Court, the proper course for that Court is to remand the application to the lower Court to dispose of that application with due regard to the conditions of O 9, r 13, but not to remand the original suit for re trial (s)

Appeal.—An appeal lies under O 43, r 1, cl (u), from an order remanding a case, where an appeal would lie from the decree of the appellate Court (t) This means that the order of remand is appealable only in cases in which an appeal would lie from the decree, which would have been passed by the appellate Court had that Court decided the case without a remand (u) No appeal lies from a remand order in an appeal from an execution proceeding if the suit is of such a nature that by reason of s 102 no second appeal lies (v) If no appeal is preferred from the order of remand, the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree, see s 105, sub s (2), and notes thereto But though an appeal lies from an order of remand it must be preferred according to the Calcutta High Court *before* the final disposal of the remanded suit, otherwise it cannot be entertained The reason given is that the right of appeal given by s 104 and O 43 from orders specified therein ceases with the disposal of the suit (w) This decision has been adversely criticised in a subsequent Full Bench decision of the same High Court (x) and the Allahabad High Court has held that the appeal may be preferred even after the decision of the remanded suit, provided it is within the period of limitation The Allahabad Court proceeds on the ground that there is no provision in the Code imposing any such restriction on the right of appeal (y) The period of limitation for an appeal from an order of remand is 90 days from the date of the order [Limitation Act, art 156]

| {n} | <i>Pankh. Pandan v. Ind. Pandan</i> | 1914 10 35 1 | {s} | " " " " |
|-----|-------------------------------------|--------------|-----|---------|
| | " " " " | " " " " | (t) | " " " " |
| (o) | " " " " | " " " " | (u) | " " " " |
| (p) | " " " " | " " " " | | " " " " |
| | " " " " | " " " " | (r) | " " " " |
| (q) | " " " " | " " " " | | " " " " |
| | " " " " | " " " " | | " " " " |
| (r) | " " " " | " " " " | | " " " " |

849 (221 A L 178)
 (w) *Mathu Sudan v. Kamini Kania* (1905) 32 Cal 1023
 (x) *Talib Ali v. Abdul Aziz* (1922) 57 Cal. 1013 1231 C 315 (22) A C 653
 (y) *Uman Kulkarni v. Jorbandhan* (1924) 50 All 479

O. 41, r. 23

Though an appeal lies under rule 1 of Order 43 from an order of remand, no appeal will lie from the order when the order is itself made in an appeal preferred under any other clause of that rule. Thus if an appeal is preferred under O 43, r 1, cl. (a), from an order under O 7, r 10, or under O 43, r 1, cl. (j), from an order under O 21, r 92 or under O 43, r 1, cl. (q), from an order under O 38, r 6, or under any other clause of Order 43 r 1, and the appellate Court allows the appeal and makes an order of remand, no appeal will lie from the order of remand under O 43, r 1, cl. (u). The reason is that cl. (u) of r 1 of O 43 is subject to s 104, sub s (2), which provides that no appeal shall lie from any order passed in appeal [it may be an order of remand] under that section (z).

Appeal from remand under the inherent power—When the order of remand is made under the inherent jurisdiction recognized in *Ghuzna v The Allahabad Bank* (a) is it appealable? There are several decisions against such an appeal (b). Mukerji, J., says an appeal lies because the order of remand is itself a decree (c), but if that were so, the provisions of O 43, r 1, cl. (u) would be superfluous. The correct answer seems to be that rule 23 should be construed as widely as possible and that the right of appeal should not be curtailed except on very clear proof of circumstances justifying such curtailment. Therefore, even if the order of remand cannot be justified under the rule yet if it is in substance an order under that rule, an appeal will lie (d). This is, of course subject to the same condition that an appeal would lie from the decree of the appellate Court. The Madras High Court has held that an order of remand in the inherent jurisdiction is not subject to revision (e). The Calcutta High Court says that if the order cannot be justified either under rule 23 or the inherent jurisdiction, the proper remedy is to challenge its validity by revision (f).

Powers of High Court in appeal from order of remand—In an appeal from an order of remand preferred under O 43, r 1, cl. (u), the High Court is not confined to the question whether the order satisfies the requirements of the present rule, but may also determine the correctness of the lower appellate Court's decision on the "preliminary point" on which the Court of first instance disposed of the case. Thus if the Court of first instance dismisses a suit as barred by limitation and the appellate Court reverses the decree and remands the case under this rule, and an appeal is preferred to the High Court from the order of remand the High Court has the power to determine whether the point of limitation was correctly decided by the lower appellate Court (g).

Letters Patent appeal—An order of remand made by a single Judge of the High Court in second appeal is a "judgment" within the meaning of cl. 15 of the Letters Patent, and is appealable as such (h).

(z)

Radhakrishna v Kama Kamini (1921)
25 Cal 113 315 203 F 517 (22) A.C.

(a) (1917) 44 Cal 929 41 I C 598

(b) *Raghunandan v Jadunandan* (1918) 3 Pat L J 253 43 I C 909 *Sheik Muhammad*

(c)

(d)

(e)

(f)

(g)

(h)

(c)

(d)

Chief Court of Oudh—Under the Oudh Courts Act, 1925, no appeal lies from an order of remand passed by a single Judge of the Chief Court of Oudh in the exercise of his appellate jurisdiction (i)

Privy Council appeal—See notes to s 109

Improper order of remand—Under the Code of 1882 an order under s 562 was appealable and a party might impeach the order of remand on appeal from the final decree. When no appeal was preferred from the order of remand, but the order was impeached on appeal from the final decree, and the Court found that the order was improperly made, the question arose as to whether the order should be treated as illegal, or merely irregular. The High Court of Allahabad held that if a remand was ordered in a case in which it ought not to have been ordered, both the order of remand, and all the proceedings subsequent thereto are void and illegal (j). On the other hand, the Calcutta High Court held that the remand order and the subsequent proceedings are not illegal but merely irregular, and the subsequent proceedings should not be set aside unless the remand had substantially affected the decision of the remanded suit on the merits and the party complaining of the irregularity was materially prejudiced thereby (k) [see s 99]. The Madras High Court held that though an order of remand made in contravention of the provisions of s 562 is illegal, yet the error may be cured by the consent of parties or by waiver (l). The whole difficulty has been got over in the present Code by enacting that a party who does not appeal from an order of remand in the first instance cannot afterwards dispute the correctness of the order on appeal from the final decree (m) see s 105, sub s (2).

Remand of case by consent for trial on issues not raised in appeal—The effect of an appeal is to re-open the decree of the lower Court and it is competent to the appellate Court on the agreement of parties to remand the case to the lower Court for trial on issues not raised in the memorandum of appeal (n).

Trial Court—Jurisdiction to try the case remanded depends entirely upon the order of the appellate Court (o).

24. [S. 565.] Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after settling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Scope of the rule—The scope of this rule is limited to cases in which the evidence upon the record is sufficient to enable the appellate Court to determine the suit (p).

(i) *Mahabir v. Mast. Mahan* (1930) 5 Luck. 164 123 I. C. 853 (30) A. O. 195

(j) *Pameshwar v. Shroddin* (1900) 12 All. 510

(k) *Mohesh Chandra v. Jamiruddn* (1901) 24 Cal. 324 foll. wtd in *Nabin Chandra v. Pyan Krishna* (1914) 41 Cal. 108 20 I. C. 39

(l) *Manager of the Court of Wards v. Pamasami* (1905) 24 Mad. 437 See also *Bankimtha Nath v. Nambal munda* (1904) 12 C. W. N. 500

(m) *Munshi Lal v. Pamasami* (1904) 11 Pat. 246 65 I. C. 175 (20) A. I. 394 *Masit un-nisa v. Gov. Kanu* (1913) 43 All. 377 60 I. C. 95 (21) A. A. 276

(n) *Nares v. Venkatarama* (1907) 30 Mad. 510

(o) *Uthman v. Naima* (1907) 41 Mad. L. J. 238 72 I. C. 314 (23) A. I. 301 *Indra Lal Kati v. Gopi Nath* (1907) 44 All. 211 62 I. C. 813 (22) A. A. 20

(p) *Randi v. Madalapati* (1900) 3 Mad. 90

Where evidence on record sufficient Appellate Court may determine case finally

O. 41,
rr. 24, 25

This rule does not enable an appellate Court to declare a right in favour of one of the parties, where no issue has been framed on the point, and the right has not been set up in the lower Court (q)

Second appeal—See s 103 and notes thereto

25. [S. 566.] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required,

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

The words "and the reasons therefor" in paragraph 2 are new

Scope of the rule—This rule refers to cases in which the evidence upon the record is *not sufficient* to enable the appellate Court to determine the suit

"May, if necessary, frame issues"—In framing issues under this rule the Appellate Court should have regard to the provisions of O 14, r 3, which indicate the materials from which issues are to be framed. The issues may be on points not taken in the grounds of appeal (r). See notes to O 14, rr 1 to 5

Power of Court to which issues are referred for trial under this rule—The Court to which issues are referred for trial under this rule has no power to try and decide the case, but to try issues only. It should then return the evidence to the Appellate Court together with its findings thereon and the reasons therefor (s). Nor has it the power to make an order of reference under schedule II, para 3 of the Code (t)

Court by which issues should be tried—Where issues are referred for trial under this rule, they are triable only by the Court which was originally seized of the case, and by no other Court (u)

New issue raised before High Court.—"Even if it be competent to the High Court [in second appeal] to remit a case for re-hearing on an issue not raised in the pleadings or even suggested in the Courts below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs thrown away" (v)

Appeal—No appeal lies under the Code from an order referring issues for trial under this rule (w). But the Court may treat the memorandum of appeal as an

(q) *Official Trustee v. Krishna* (1886) 12 Cal 239
121 A 166

(r) " " " " " " " " " " " "

(s) " " " " " " " " " " " "

(t) " " " " " " " " " " " "

(u) " " " " " " " " " " " "

(v)

(w) *Kali Krishna v. Ram Chander* (1881) 9 C.L.R. 401

application for revision and give the applicant the relief he is entitled to (x) Nor does an appeal lie under the Letters Patent (y) When a High Court remands an appeal under this rule it does not lose seizin of the case The order of remand is therefore not a final order under s 109 (a) and no appeal lies to the Privy Council (z).

26. [S. 567.] (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

Findings and evidence to be put on record
Objections to finding

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of appeal

Where no memorandum of objection is filed.—This rule provides that either party may file a memorandum of objection to the findings by the lower Court on the issues referred to it by the appellate Court It is not to be supposed, however, that if no objections are filed by either party, the appellate Court is absolved from hearing the appeal (a) But the Lahore High Court has held that the Court may in its discretion decline to hear objections if none have been filed (b). Sub r (2) clearly indicates that even if no objections are filed, the appellate Court "shall proceed to determine the appeal" That is to say, even if no objections are filed to the findings, the Appellate Court is bound to examine the correctness of the findings and to state in its judgment the reasons (r 31) for which it either accepts or rejects the findings (c) It should not accept the findings blindly without examining the evidence on which they are based (d) See notes to r. 31, "Shall state the reasons for the decision"

Where the appellate Court has heard arguments on some of the issues and has expressed its views thereon and remitted other issues under r 25, it is not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings (e)

Court fee.—No Court fee is payable on a memorandum of objections (f)

The appellate Court shall proceed to determine the appeal—When an Appellate Court has made an order referring issues for trial under r 25, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal to another Court (g)

Unnecessary reference—In the case of a unnecessary reference under r 25, can the Court disregard the findings returned? It can, if the reference order is of a single Judge and the appeal is heard ultimately by a Bench of two Judges (h) But not otherwise

- | | | |
|-----|------------|--|
| (x) | 19 Bom 551 | Bom 429 <i>Jamchandra v Sono</i> (1895) |
| (y) | | |
| (z) | | (e) <i>Lachman v Jamna</i> (1898) 10 All 162 |
| (a) | | (f) |
| (b) | | (g) |
| (c) | | (h) <i>Maharaj v Jhark</i> (1926) 16 All 274, <i>Jaganendra Nath v Surjya Kant</i> (1912) 17 C W N 467 151 C 22, <i>East Indian Railway Co v Champsai Khan</i> (1918) 42 Cal 284 291 C 245 |
| (d) | | |

O. 41,
rr. 26, 27

for it is an interlocutory order made with jurisdiction and operative in law until set aside in review (i) If the findings conflict with other findings of fact in the judgment, this will not embarrass a Court of first appeal where the entire evidence is examined. A Court of second appeal may, however, be embarrassed and it is therefore preferable not to resort to the rule in second appeal (j) but to remand under the inherent jurisdiction (k)

Second appeal—The provisions of this and the preceding rule apply so far as may be by virtue of O 42 to second appeals. Hence the High Court may in second appeal refer issues of fact for trial to the lower Appellate Court, but when the finding and evidence upon such issues are returned to the High Court, the finding is conclusive and it cannot be challenged upon the evidence before the High Court as in first appeal. The reason is that second appeal is not allowed on questions of fact. The only grounds on which a second appeal is allowed are those mentioned in sec 100, and these relate to errors of law or usage having the force of law or a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. The objections to the findings must, therefore, be restricted to the limits within which the original pleas in second appeal are confined (l)

Sending back case for revised finding—An Appellate Court has no power to send back a case to the lower Court to submit a revised finding on the fact on evidence already recorded. Such a course is not warranted by any one of the rules 23 to 26 of this Order (m). But if it does so it is a mere irregularity within the meaning of sec 99 and if the Appellate Court, on the revised finding returned to it, itself considers the evidence on which it is based, the decree will not be set aside in appeal (n)

27. [S. 598.] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

Production of additional
evidence in Appellate Court

- (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
- (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Appellate Court may allow such evidence or document to be produced, or witness to be examined

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission

(i)

(j)

(k)

(l)

(m)

(n) *Mallikarjuna v. Pathaneni* (1896) 19 Mad 49

When additional evidence may be admitted—Under this rule the admissibility of additional evidence is made to depend not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause (o). Additional evidence under this rule shall not be taken until the appellate Court has examined the evidence on the record and has after such examination come to the conclusion that the evidence as it stands is inherently defective, as, for instance, when the lower Court has omitted to take the evidence of an attesting witness to a mortgage deed (p). Until this is done the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. As observed by their Lordships of the Privy Council in *Kessourji Issur v. G. P. I. Py* (q), "the legitimate occasion for the application of the present rule is when, on examining the evidence as it stands some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it." In the subsequent case of *Parsootim v. Lal Mohan* (r) the Privy Council emphasized the construction put upon the rule in *Kessourji's* case and said that the rule is not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak points in his case and to fill up omissions in the Court of Appeal. It is only when the appellate Court "requires it" (i.e., finds it needful) that additional evidence can be admitted. Their Lordships distinguished the case of *Indrajit v. Amar Singh* (s) as one in which the Privy Council had exercised a power not governed or restricted by the Code to admit documents which had been rejected by the High Court. Their Lordships also said that incidental remarks made by Mr. Ameer Ali in that case should not be regarded as affecting the meaning of the rule. In a case where additional evidence had been improperly admitted by the High Court the Privy Council left it out of consideration in their judgment (t). On the other hand when additional evidence has been taken with the consent of both parties it is not open to either party to complain of it (u).

Even before *Kessourji's* case the Privy Council and the Courts in India had said that the power given by this rule should be exercised very sparingly and that great caution should be exercised in admitting new evidence (v). Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. If cases were remanded for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence, there would be no end to litigation (w). The Appellate Court should not admit a document which a party omitted to tender in the lower Court (x), nor allow additional evidence to prove the genuineness of a document held by the lower Court to be a forgery (y). An appellant who has ample opportunity of giving evidence in the lower Court and elects not to do so, but rests his case on the evidence as it stood ought not to be allowed to give evidence which he could have given below (z). For if the party could have applied to the lower Court for an adjournment to call further evidence,

- (o) *In the goods of Premchand* (1894) 21 Cal 484 486
- (p) *Bank of Bengal v. Lucas* (1924) 54 Cal 180, 81 I C 471 (24) A C 578
- (q) (1907) 31 Bom 381 34 I A 115 122 *Krishnamma v. Narasimha* (1908) 31 Mad 114 *Garden Reach Spg. & Wg. Co. v. Secretary of State* (1913) 42 Cal 6 5 28 I C 885
- (r) (1931) 58 I A 254 10 Pat 654 132 I C 721 (31) A PC 143
- (s) (1923) 50 I A 183 2 Pat 676 74 I C 747, (23) A PC 128
- (t) *Mahomed Khaleel v. Les Tanneries Lyonnaises*

- (1926) 53 I A 84 49 Mad 430 (26) A PC 34
- (u) *Jagannath v. Hanuman* (1909) 36 I A 221, 36 Cal 833 3 I C 465
- (v) *Sreemanchunder v. Gopalchunder* (1866) 11 M I A 28 7 W R 10 *Ram Pershad v. Rajunder* (1866) 6 W R 26
- (w) *Hurpurshad v. Sheo Dyal* (1876) 26 W R 55 3 I A 259
- (x) *Zahrah v. Bhagwan* (1871) 16 W R 211
- (y) *Nadiar Chand v. Chunder* (1888) 15 Cal. 765
- (z) *Ramdas v. Official Liquidator* (1867) 9 All 366

for it is an interlocutory order made with jurisdiction and operative in law until set aside in review (4). If the findings conflict with other findings of fact in the judgment this will not embarrass a Court of first appeal where the entire evidence is examined. A Court of second appeal may, however, be embarrassed, and it is therefore preferable not to resort to the rule in second appeal (5) but to remand under the inherent jurisdiction (6).

Second appeal—The provisions of this and the preceding rule apply so far as may be, by virtue of O 42, to second appeals. Hence the High Court may in second appeal refer issues of fact for trial to the lower Appellate Court, but when the finding and evidence upon such issues are returned to the High Court, the finding is conclusive, and it cannot be challenged upon the evidence before the High Court as in first appeal. The reason is that second appeal is not allowed on questions of fact. The only grounds on which a second appeal is allowed are those mentioned in sec 100, and these relate to errors of law or usage having the force of law or a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. The objections to the findings must, therefore, be restricted to the limits within which the original pleas in second appeal are confined (1)

Sending back case for revised finding—An Appellate Court has no power to send back a case to the lower Court to submit a *revised* finding on the fact on evidence already recorded. Such a course is not warranted by any one of the rules 23 to 26 of this Order (m). But if it does so, it is a mere irregularity within the meaning of sec 99 and if the Appellate Court, on the revised finding returned to it, itself considers the evidence on which it is based, the decree will not be set aside in appeal (n).

27. [s. 598.] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

the Appellate Court may allow such evidence or document to be produced, or witness to be examined

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

(4)

(n) $\frac{Mallikarjuna \text{ Pathaneni}}{470}$ (1896) IV 2

When additional evidence may be admitted—Under this rule 'the admissibility of additional evidence is made to depend, not upon the relevancy or materiality to the issue before the Court of the evidence sought to be admitted, or upon the fact whether or not the applicants had an opportunity of adducing evidence at some earlier stage, but upon whether or not the Appellate Court requires the evidence to enable it to pronounce judgment or for any other substantial cause' (o). Additional evidence under this rule should not be taken until the appellate Court has examined the evidence on the record and has after such examination come to the conclusion that the evidence as it stands is inherently defective, as, for instance, when the lower Court has omitted to take the evidence of an attesting witness to a mortgage deed (p). Until this is done, the appellate Court has no power to admit additional evidence, not even if the evidence offered be the evidence of new matter discovered after the Court of first instance had pronounced its judgment. As observed by their Lordships of the Privy Council in *Kessowji Isur v. G. P. I. Ey* (q), "the legitimate occasion for the application of the present rule is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. In the subsequent case of *Parotim v. Lal Mohan* (r) the Privy Council emphasized the construction put upon the rule in *Kessowji's* case and said that the rule is not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak points in his case and to fill up omissions in the Court of Appeal. It is only when the appellate Court 'requires it' (i.e., finds it needful) that additional evidence can be admitted. Their Lordships distinguished the case of *Indrajit v. Amar Singh* (s) as one in which the Privy Council had exercised a power not governed or restricted by the Code to admit documents which had been rejected by the High Court. Their Lordships also said that incidental remarks made by Mr. Ameer Ali in that case should not be regarded as affecting the meaning of the rule. In a case where additional evidence had been improperly admitted by the High Court the Privy Council left it out of consideration in their judgment (t). On the other hand when additional evidence has been taken with the consent of both parties it is not open to either party to complain of it (u).

Even before *Kessowji's* case the Privy Council and the Courts in India had said that the power given by this rule should be exercised very sparingly and that great caution should be exercised in admitting new evidence (v). Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. If cases were remanded for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence, there would be no end to litigation (w). The Appellate Court should not admit a document which a party omitted to tender in the lower Court (x), nor allow additional evidence to prove the genuineness of a document held by the lower Court to be a forgery (y). An appellant who has ample opportunity of giving evidence in the lower Court and elects not to do so, but rests his case on the evidence as it stood ought not to be allowed to give evidence which he could have given below (z). For if the party could have applied to the lower Court for an adjournment to call further evidence,

(o) *In the goods of Fremchand* (1894) 21 Cal 451 486

(p) *Bank of Bengal v. Lucas* (1924) 54 Cal 185, 81 I C 471, (24) A C 578

(q) (1907) 31 Bom 381 31 I A 115 122, *Krishnamma v. Narasimha* (1908) 31 Mad 114 *Gardner Reach Spg. & Wg. Co. v. Secretary of State* (1915) 42 Cal 65, 28 I C 865

(r) (1931) 58 I A 234 10 Lat 65; 132 I C 721 (31) A PC 143

(s) (1923) 50 I A 183 2 Pat 676 74 I C 747, (23) A PC 128

(t) *Mahomed Khaleel v. Les Tanneries Lyonnaises*

(1926) 53 I A 84, 49 Mad 435 (26) A IC 34

(u) *Jagannath v. Hanuman* (1909) 36 I A 221, 36 Cal 833, 3 I C 465

(v) *Sreemanchunder v. Gopalchunder* (1866) 11 M I A 28 7 W R 10, *Ram Pershad v. Rajunder* (1866) 6 W R 262

(w) *Hurpurshad v. Sheo Dyal* (1876) 26 W R 55, 3 I A 259

(x) *Zuhra v. Bhagwan* (1871) 16 W R 211

(y) *Nadair Chand v. Chunder* (1888) 15 Cal 765

(z) *Ramdas v. Official Liquidator* (1887) 9 All 300

O. 41, r. 27 but does not do so, and takes the chance of a judgment in his favour on the evidence at his disposal he will not be allowed to call it in the appellate Court (a)

Where the lower Court has refused to admit evidence—An appellate Court should not reverse the decree of the first Court without allowing the decree holder to give evidence which he offered in the first Court, and which that Court declined to take (b) But it has been suggested that this practice should be reviewed, for it is the duty of counsel to prove his case and if counsel acts in deference to an observation of the Court he runs the risk of the Court of Appeal taking a different view of the evidence (c) The improper rejection of evidence does not justify the reversal of the decree and the appellate Court should in that case act under this rule (d) But if the lower Court has rejected evidence which was tendered after the case was closed, the appellate Court should not admit it (e)

Where the appellate Court requires any document to be produced—An appellate Court has no power under this rule to require a document to be produced unless it is required to enable it to pronounce judgment Where judgment could be pronounced in the absence of the document, the appellate Court should not allow the document to be produced (f) The word 'requires' means nothing more than "needs" or 'finds needful' (g) It may be required to enable the Court to pronounce judgment or for other substantial cause, but in either case it must be the Court that requires it (h)

Where the appellate Court requires a witness to be examined—The appellate Court should not under cl. (b) of this rule take additional evidence which impeaches the testimony of a witness called in the Court below, unless that witness is also called and given an opportunity to contradict or explain the additional evidence so given otherwise no witness, whatever his standing, would be safe from adverse judicial comment (i) Where a witness was examined and cross examined in the Court of first instance, and there was no gap in the evidence nor any new matter about which it was necessary to examine him, and the appellate Judge merely cross examined him on his previous evidence 'in order to enable him to pronounce judgment' it was held that the examination of the witness by the Court was not warranted by the provisions of this rule (j)

"Or for any other substantial cause"—These words refer to the requirement of the Court This is made clear in the judgment of the Privy Council in *Parseolis* case for it is the Court that must require the additional evidence for some substantial cause In *Radhakrishnan v Khurshed Hussain* (k) the Privy Council refused to allow the record of a previous suit to be admitted when its omission was due to the negligence of the party and their Lordships were able to pronounce judgment without it. If the evidence could have been tendered in the lower Court it is not a substantial cause for producing it in appeal that its omission was due to ignorance of law (l), or to the neglect of the party or his pleader (m) But if the evidence is evidence which it was impossible for the party to produce in the lower Court there may be substantial cause for its

(a) . . .
(b) . . .
(c) *1 elappa v Fakira* (1933) 35 Bom L. P.
(d)

(e) *1 ashoo v Hemraj* (1924) 4 Lah L. J 31
(21) A I 20
(f) *1 al ka v Tulai* (1916) 1 Pat L. J 43, 37
I C 1008
(g) *1 esoo c/o J. S. v G I P Ry* (1907) 31 Bom
341 341 A 115

(h) . . .
(i) . . .
(j) . . .
(k) . . .
(l) . . .

(m) . . .
J. 1001 L. 1 005 J. 3
A B 27 C. 1 v. Name (19) 5 1st
L J 263 561 C 983

O 41,
rr. 27-30

No appeal lies from a *refusal* by the lower Appellate Court to admit fresh evidence under this rule (c). Hence if the lower Appellate Court refuses to admit a document as additional evidence in appeal under this rule the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court (d). But in *Jethalal v Parajlal* (e) a case was remanded under the inherent jurisdiction to the first Appellate Court with a direction to admit additional evidence.

Privy Council appeal—The rejection of an application under this rule does not give a right of appeal to the Privy Council (f).

28. [s. 560] Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

It need hardly be stated that where the additional evidence taken by the Court consists of documents they should be exhibited in the case (g). The lower Appellate Court resumes its functions as a Court of first appeal and can appoint under s. 73 a commissioner for the examination of witnesses (h).

29. [s. 570] Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Judgment in Appeal.

30. [s. 571.] The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

After hearing the parties or their pleaders—This rule authorizes the Court to pronounce judgment after hearing the parties or their pleaders. Hence a judgment pronounced without hearing the parties or their representatives if they are lead

- | | |
|---|---|
| <p>(c) <i>Mode of taking additional evidence</i></p> <p>(d) <i>Judgment when and where pronounced</i></p> | <p>(f) <i>67 Pre-nchand in the goods of (1894) 21 Cal 434</i></p> <p>(g) <i>Daji v Sakharam (1914) 38 Bom 665 C 33</i></p> <p>(h) <i>Lalji Singh v Ram Lal (1924) 5 Lah 257 18 I C 569 (3) A L 39</i></p> |
|---|---|
- (e) *Fazlunath v Kupp (1910) 4 Mad 737 53 I C 274 [F B]*
- (e) (1927) 46 Bom 184 63 I C 48 (21) A B

is unauthorized by the Code. Thus where an Appellate Court heard and decided an appeal without being aware of the death of the appellant the decree was held to be a nullity (i)

Contents, date and signature of judgment

31. [S. 574.] The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision , and,
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ,

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein

Shall state the reasons for the decision—The judgment of the Appellate Court should state the *reasons* for the decision. The reason of the rule has been stated to be to afford the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise if they see fit and are so advised the right of second appeal conferred by s. 100. If an Appellate Court could dispose of appeals simply by giving it in a judgment which does not state the reasons for the decision the right of second appeal might altogether be neutralized (j). The reason for the decision should be stated not only when the decree of the first Court is varied or set aside but also when it is confirmed (k). If this rule is not observed, the proper form of the order to be made by the High Court in second appeal is to set aside the decree of the lower Appellate Court and send back the case to that Court in order that the appeal may be disposed of according to law (l). This course was adopted where the judgment was appeal dismissed with costs (m) and in another case where the judgment was appeal rejected under s. 501 (now O 41 r 11) of the Civil Procedure Code (n). Even when an appeal is dismissed under r 11 a judgment is necessary.—See note under that rule at p. 1036. Where the decree of the first Court is confirmed in appeal the Judge of the Appellate Court should state *his own reasons* and should not confine himself to approving of the reasons of the Court of first instance (o). This is because the judgment should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised *his own discrimination* in deciding them (p). Thus where the judgment was— To deal with the grounds of appeal would be simply to repeat the judgment of the District Munsif. I concur in the decision the District Munsif has given on each point. The judgment of the lower Court is confirmed, *for the reasons therein set forth* and this appeal is dismissed with costs the judgment was set aside (q). In the last mentioned case the Court observed. Such a general and

(i) *Janardhan v. Ramchandra* (1901) 26 Bom 317. *Nara v. Kals* (1900) 1 Lah. L.J. 144

(j)

(k)

(l) *Saravanan Iyer v. Seshu Reddy* (1908) 31 Mad 409

(m) *Srikant v. Huri Dass* (1859) 11 C.L.R. 131

(n) *Ram Deka v. Brojo Nath* (1898) 5 Cal 97

(o)

(p)

(q)

Privy Council appeal—Non-compliance with the requirements of this rule is not a ground of appeal to the Privy Council (2)

32. [S. 577.] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

33. [Nec.] The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Provided that the Appellate Court shall not make any order under sec 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order (a)

Illustration

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. A appeals and A and Y are respondents. The appellate Court decides in favour of X. It has power to pass a decree against Y.

Cases to which rule applies—This rule is new. It is taken for the most part from O 58, r 4, of the Rules of the Supreme Court of Judicature in England. The object of the rule is to empower the appellate Court to do complete justice between the parties. O 41, r 4, and this rule give the Court ample power to make the order appropriate to the ends of justice. Under the former rule upon an appeal by one of the parties on a ground common to all, the decree may be varied in favour of all, under the latter rule the Court has power to make the proper decree notwithstanding that the appeal is as to part only of the decree and such power may be exercised in favour of all or any of the parties even though they may not have filed an appeal or objection (b). The illustration to the rule indicates a type of case for which provision is intended to be made. The following are further instances.—

(1) A sues B and C for contribution. A decree is passed against B, but as against C the suit is dismissed. B appeals making A alone respondent to the appeal. A does not appeal from the decree dismissing the suit as against C. If the appellate Court is of opinion that C is liable, and not B, it may under r 20 direct that C be added as a respondent as being a person "interested in the result of the appeal" and may under the present rule alter the decree so as to make C liable though no appeal

(2) *Sunder Bibi v Bisheshwar Nath* (1887) 9 All

(b) *Dehendra v Narendra* (1919) 24 C W N 97, 54 I C 636

(a) The proviso was added by Act 9 of 1922

O. 41, r. 33 was preferred by *A* from the dismissal of the suit against *C*. This is in accordance with the Calcutta ruling under the Code of 1892 (c). According to the Allahabad rulings under that Code *C* could neither be added as a respondent nor even if he were joined as a respondent from the first could any decree be passed against him, no appeal having been preferred against him (d). The Allahabad ruling that *C* could not be added as a respondent (under r. 20) was followed by the Madras High Court (e). The present rule gives effect to the Calcutta rulings and supersedes the Allahabad and Madras ruling. The undernoted case is a Calcutta decision on all fours with the illustration (f).

(2) A suit is brought on behalf of the public for (1) a declaration that the public are entitled to use certain locks on a certain river without payment of tolls, and (2) a declaration that the defendant is under an obligation to keep the locks in repair. A decree is passed for the plaintiff awarding the relief as to the use of the locks without payment of tolls, but declaring that the defendant is under no obligation to repair the locks. The defendant appeals. The plaintiff neither files a cross appeal nor objections. The Appellate Court finds that the public are not entitled to use the locks without payment of tolls to the defendant. At the same time it finds that the defendant is under an obligation to keep the locks in repair. The appellate Court has power, while declaring by its decree that the public are liable to pay tolls, also to declare that the defendant is liable to keep the locks in repair, notwithstanding that no appeal or objection was taken to that part of the decree by the plaintiff (g).

(3) Plaintiff sued for ejectment of tenants in possession of land that he had purchased and in the alternative for compensation against his vendor. The first Court dismissed the suit against the tenants and awarded compensation against the vendor. The plaintiff did not appeal, but the vendor appealed and established that he had conveyed a good title to the plaintiff. The Court of appeal reversed the decree for compensation and gave the plaintiff a decree for possession and mesne profits against the tenants (h).

The cases referred to in illustration (1) shew that a person against whom a suit has been dismissed may be made a party to the appeal of a co defendant under rule 20 and a decree may be passed against him under rule 33. But after time for filing an appeal against him has expired the Rangoon High Court has held that he is not a party interested in the result of the appeal and that he cannot be added as a respondent (i). The Privy Council affirmed this decision but seem to have suggested the possibility of such a person being added as a party under rule 33. Their Lordships said "In these circumstances the Appellate Court, in the exercise of their discretion, refused to take action under the rule so as to deprive the defendants of the very valuable right they had acquired in consequence of the plaintiff's failure to appeal against the decrees in so far as they affected them. Assuming that under this rule the Court in a proper case might add a defendant as respondent for the purpose of passing a decree against him their Lordships see no sufficient reason for interfering with the refusal of the Appellate Court to do so in this instance (j).

It does constantly occur where some persons appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders. Accordingly it has been given power to make a decree in favour of persons who have not

— approached. The power may be exercised by the Court in favour of any of the

(g) *Attorney-General v. Simpson* (1901) 2 Ch. 671.
 (h) *Charu Bala v. Nihar Kinnari* (19) 48 Cal. L. J. 247 105 I. C. 600 (2) A. C. 331.
 (i) *Chokai ngam v. Singaram* (1921) 2 Rang. 541 84 I. C. 909 (—) A. R. 104.
 (j) *Chockilnam v. Verhai* (19—) 55 I. A. 7 13 6 Rang. 29 30 C. W. N. 51, 107 I. C. 27* (27) A. I. C. 33, *Mas'ruti n v. Mast. Ravanti n* (193—) 8 Luck. 115 140 I. C. 483 (32) A. O. 238.

(f) *Majar v. Nabin* (1931) 35 C. W. N. 1079

parties who may not have filed any appeal or objection (1). The Appellate Court may under this rule vary the decree of the lower Court though the variation may benefit a defendant who has not appealed from the decree (2). Thus when plaintiff's claim was decreed partly against A and partly against B, and A appealed and B did not, the Appellate Court under this rule made a decree exempting B and making A liable for the whole amount (a). Again in a case where A obtained a decree for redemption against B and appealed on the ground that the amount he was decreed to pay was too large, the Court of appeal finding that A was not entitled to redeem, not only dismissed the appeal but dismissed the suit although B had not appealed (b). The power is however discretionary and Sir Lawrence Jenkins said 'the rules are widely expressed but they must be applied with discretion (c)'. In a recent Allahabad case (p), a mother and son sued as legal representatives of a reversionary heir to recover property, and the suit was decreed in favour of the son, but dismissed as regards the mother. The mother did not appeal as she was satisfied with a decree in favour of the son. On appeal to the High Court the son's suit was dismissed on the ground that he was a son by a former marriage. The effect of the decision was that the mother was entitled, but the Court refused to exercise its power under this rule. The Allahabad High Court has held that when there is a common defence a Court of appeal may dismiss a suit as against a defendant who has not appealed (q), but not if there is no common ground of defence (r). In a Patna Case (s) the plaintiff obtained a decree in the first Court against A, B and C for contribution. A alone appealed and the High Court under this rule dismissed the suit not only against A but against B and C as well. The plaintiff appealed and the Privy Council restored the decree of the first Court. In execution proceedings it was contended that this had not the effect of reviving the decree against B and C which had become time barred. But it was held that as O 11, r 31 enables an Appellate Court to deal with the entire decree although the appeal may be as to part only, the entire decree becomes the subject matter of the appeal even when the appeal is from part of the decree and by some only of the parties, so that the final decree for purposes of limitation under art 182 (2) was the decree of the Privy Council, and that the application for execution was therefore within time. Similarly the Appellate Court has power under this rule to make an order for extension of time for making an award in a matter governed by the Indian Arbitration Act, 1899 (t).

Cases to which rule does not apply.—*A* sues *B* to recover rent, Rs 205. A decree is passed in favour of *A* for Rs 95 only. *A* appeals against the disallowance of the balance of the amount claimed. *B* neither files a cross appeal nor objections against the decree. The appellate Court finds that nothing is due to *A* from *B*. The Appellate Court has no power to dismiss *A*'s claim in toto. If *B* was aggrieved by the decree against him for Rs 95, he ought to have appealed or filed objections (u). But the limitation

- (k) 575 116 I C 436 (29) A A 243
(l) *Mohammed Ali v Jafu* (1926) 48 All 551,
94 I C 317, (27) A A 37
(m) *Rangan Lal v Jhandu* (1912) 34 All 32 11
I C 610 *Ilahi v Jawindi* (1920) 1 Lah
396 54 I C 971 *Kesho Prasad Singh v*
Narayan Dayal (1925) A Pat 37 82 I C
944 (25) A P 285 *Surayya v Surya*
Rao (1925) 48 Mad L J 577, 88 I C 99,
(25) A M 771 *Mukund v Shantaram*
(1926) 23 Bom L R 627, 98 I C 243 (27)
A B 128 *Ramalingam v Subrahmanya*
(1927) 50 Mad 614 103 I C 394, (27)
A M 630 *Punjab National Bank v Uma*
Dutt (1929) 9 Lah 291 112 I C 425, (28)
A I 599

O. 41, r. 33 against interference in favour of a person who has not appealed is not always observed, at any rate by the Madras High Court, *A* obtained an ex parte decree against *B* and *C*. *B* applied to set aside the ex parte decree and it was set aside against both *B* and *C*. In appeal the High Court confirmed the order as to *B*, but reversed the order setting aside the ex parte decree against *C*. When the suit against *B* was tried, it was found that the document on which the suit was filed was not genuine, and the High Court then dismissed the suit not only against *B* but also against *C* (v). Again it has been held that the rule does not apply when the decree is really a combination of several decrees against several defendants (w). But the Madras High Court has not observed this rule in a suit by reversioners to set aside a number of alienations to different alienees. The suit was decreed against all the alienees. Some only of the alienees appealed yet the suit was dismissed against all the alienees including those who had not appealed (x). *A* a minor and her mother were the heirs of a mortgagee. The mother for herself and as guardian of *A* assigned the mortgage to *B*. *B* realized the mortgage debt by execution of a decree for sale, the auction purchaser being *C*. The assignment was not binding on the minor, and *A* on attaining majority sued to recover her share of the mortgage debt from the hypotheca in *C*'s hands, and in the alternative from *B* personally. The suit was decreed as against the hypotheca, but was dismissed as against *B*. *A* did not appeal against the dismissal of the suit against *B*. *C* however appealed and in that appeal the Madras High Court joined *B* as a party in order to see whether a decree could be made against him in case the decree against the hypotheca should be set aside. The Court then reversed the decree against the hypotheca and decreed the suit as against *B* (z1). The Court distinguished the Privy Council decision in *Choralingham v. See'hai* (z2) that, when a person has acquired a valuable right, by reason of an appeal against him being time barred he cannot be added as a respondent. This decision was held not to be applicable as *A* was not to blame for not appealing against the dismissal of his suit against *B* so long as the decree against the hypotheca was not set aside. This case answers for the Madras High Court the point raised but not decided the Privy Council in the case cited as to whether a respondent can be added for the purpose of having a decree made against him under O. 41, r. 33. Mukerji, J., on a review of all the cases said the rule should be cautiously applied and only in cases where but for recourse to it the ends of justice would be defeated (y). The High Court of Allahabad has held that the Court has no power under this rule to pass a decree against a person who is not

C for costs only. A does not appeal, but B and C each appeal. C's appeal is allowed. To B's appeal A files cross objections directed against C, but does not make C a party. The Court cannot in B's appeal make an order under this rule against C, for C was not a party to that appeal (a). Again if the whole appeal has abated owing to the death of a necessary party it is impossible to invoke this rule for the benefit of the survivors (b).

to the wife for the maintenance and education of the children under this rule to hold that complete justice cannot be done to the wife for alimony is increased (c)

Privy Council appeal—In an appeal to Privy Council from a High Court under the rule to a party who has not appealed to the High Court, the agent C for damages for breach of two contracts. The first Court found B liable in respect of both contracts and as against C made an order for costs. On appeal against the dismissal of the suit as against C but by the High Court modified the decree making B liable only as to one contract. On appeal A appealed to Privy Council making both B and C respondents. The Privy Council found that C was liable as regards the contract as to which the High Court had found in favour of B. But the Lordships said that the appeal against C was an appeal from a judgment of a Judge who was not all-wise (f).

Such other decree as the case may require.—The power of the court is not limited to determining the question whether the original Court was competent to the law in force at the date of its judgment. It may pass a decree in accordance with any later enactment which came into operation subsequent to the judgment.

Remand — I sue *B* for three sums of money λ , γ and z . *A* claims a verdict as to items λ and γ but disallows as to item z . *A* appeals from the lower court as to z . *B* appeals from the decree as to items λ and γ . The appellate court disallows *A*'s appeal and allows *B*'s appeal as to item λ only with the result that item γ is decreed in *A*'s favour. *A* then appeals to the High Court as to items λ and z . The High Court has power under this rule to remand the whole case for determination on the merits. The effect of such an order is to empower the lower Court to re-argue the case even as to item γ which was decided by the lower appellate Court in favour of *A* and from which decision *B* had not referred an appeal to the High Court.

Proviso—The proviso was added by Act 9 of 1937. Its effect is that the appellate Court cannot allow a claim for compensatory costs which has been allowed by the original Court.

34. [S 576] Where the appeal is heard by more than one Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be made on the appeal and he may state his reasons for the same.

Decree in Appeal

35. [S 579] (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

- (c) *B. Isca* *guya* v. *Swarnam* (1931) 58 I A
350 54 Mad 774 133 I C 716 (31) A
I C 234
- (d) *Mahomed Khaleel* v. *Les Tanneries Lyon*
na ses (19 6) 53 I A 84 49 Mad 430 94
I C 767 (26) A I C 34
- (e) *Cosinda* v. *Dandras* (1910) 70 Mad 1 J

- 5 8 7 I C 4 Kanakayya v Janardhana (1913) 36 Mad 439 444 8 I C 734
[F B] Muthuramiam v Alagappa (1917)
40 Mad 818 8 38 I C 3
- (f) Sada Sundari v Gangahari (1919) 46 Cal
33 5 I C 201

O. 41, - rr. 35-37 (3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Costs—Where a decree is confirmed in appeal upon grounds wholly different from those relied on in the lower Court, the proper course is, to dismiss the appeal without costs (g)

Review—If after the appeal is filed the decree is modified in review the appeal becomes incompetent (h)

Chartered High Courts—This rule does not apply to Chartered High Courts in the exercise of their appellate jurisdiction [O 49, r 3]

Form—For form of decree in appeal, see App B, form no 9

36. [S. 580.] Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

37. [S. 581.] A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits

ORDER XLII.

Appeals from Appellate Decrees.

O. 42, r. 1 1. [S. 587.] The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

Procedure

See s 108, cl (a)

Rules relating to first appeals to apply, so far as may be, to second appeals—The same rules have been applied in the reported decisions Br 1 and 2 of Order 41.

(g) *Fischer v*

170

(h) *Aditya Kumar v Abinash* (1931) 34 C. 1

11 A C 8-2
75 C 11-1

5-8

apply to second appeal.
 apply to second appeal.
 to frame and refer issues.
 return of findings on issues.
 notes to r 26 under the local rules.
 evidence in first appeal, apply to r 27, under the local rules.
 the Court cannot on second appeal.
 first instance (1). But evidence may be taken by reference in the judgment may be taken.
 appeals of r 31, which relates to the first instance.
 see notes to that rule under the local rules.

ending a

Inherent power of High Court. The Court of first instance declined to set aside the decree on the ground that the documentary evidence was in favour of the plaintiff. The plaintiff was allowed to produce oral evidence in second appeal, that though there was no evidence to the case, the High Court was warranted in setting aside the proceedings of both the Courts below and in directing a new trial. See notes to r 33, "Remand".

ORDER XLIII

Appeals from Orders

1. [S. 588.] An appeal shall lie from the following orders under the provisions of section 101, namely—

Appeal from orders

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court,
- (b) an order under rule 10 of Order VIII pronouncing judgment against a party,
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit,
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*,
- (e) an order under rule 4 of Order X pronouncing judgment against a party,

(i) *Ahmad Ali v. Harna Hussain* (1893) 15 All 123 127
 (j) *Kansal v. Gulab Kaur* (1899) 21 All 217
 (k) *Bhatnagar v. Puri* (1911) 47 All 100
 63 L C 534 (21) A 1
 (l) *Lakshmi v. Ishar* (1900) 4 Ind 1 2 20 (20)

(m) *A 1 97*
Durga Dutt v. Anwarali (1905) 17 All 93
 See also *Keshav v. Puri* (1911) 47 All 11
 61, 81 L C 903 (1) A 1 98
Puri v. Puri (1900) 23 Ind 1 R 171
 57 L C 523

O. 43. r. 1

- (f) an order under rule 21 of Order XI;
- (g) an order under rule 10 of Order XVI for the
return of property;
- (h) an order under rule 20 of Order XVII for the
judgment against a party;
- (i) an order under rule 34 of Order XVII for the
objection to the draft of a document or
endorsement;
- (j) an order under rule 72 or rule 92 of Order XVIII
setting aside or refusing to set aside a sale;
- (k) an order under rule 9 of Order XXII for the
set aside the abatement or dismissal of a suit;
- (l) an order under rule 10 of Order XXI for
refusing to give leave,
- (m) an order under rule 3 of Order XXI for
or refusing to record an agreement
or satisfaction;
- (n) an order under rule 2 of Order XXI for
application (in a case open to appeal) or
order to set aside the dismissal of a suit;
- (o) an order under rule 2, rule 4 or rule 5 of Order
XXXIV refusing to extend the
payment of mortgage-money,
- (p) orders in interpleader-suits under rule 1
or rule 6 of Order XXXV,
- (q) an order under rule 2, rule 3 or rule 4 of Order
XXXVIII;
- (r) an order under rule 1, rule 2, rule 3 or rule 4 of
Order XXXIX;
- (s) an order under rule 1 or rule 4 of Order XL

(4) — as first appeals, have been held to
be validly made under rule 1 of Order XL
in *1002 131 I C 518 (31) A C 323*
Southam v. Ashford (1941) 35 C W N
250 133 I C 571, (31) A C 5-9

- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

Section 104.—This rule forms part of s 104 [see s 104, sub s. (1), cl (i)]. The result is that no second appeal lies from an order passed in an appeal preferred under this rule (n)

Clause (a): Order returning plaint to be presented to the proper Court.—Where an order is made by the first Court of appeal returning a *plaint* under O 7, r 10, with s. 107 justify the interpolation of the words " memorandum of

reading of O. 7, r 10, with s. 107 justify the interpolation of the words " memorandum of the word "plaint" in cl. (a) of the present rule (q)

—An appeal lies under this clause from an order refusing to add a party in a partition suit (r)

1. [S. 590.] —An appeal from an order under O 23, r 3, recording a compromise at if the consent decree is passed before the appeal (s) But in a Bombay Appeal from orders that once a consent decree is passed the order merges in the decree and it was held that no appeal lies from order under O 23, r. 3, if there had in the lower Court as to the agreement of compromise (t)

(a) an appeal —This clause is amended by the Transfer of Property (Amendment) Act, 1930, by substituting the word and figures "2, 4 or 7" for "4 or 7"

(b) an order of remand —Under s 104 and O 43 an appeal lies only if an judgment has been passed under O 41, r 23, above (u)

(c) an appeal —This clause has been repealed by the Bombay High Court See under O 47, r 4, at p 1152

(d) an order —These have already been considered in their proper places

(e) an appeal 2. [S. 590.] The rules of Order XLI shall apply, so far as may be, to appeals from orders.

(f) an appeal cl (b)

AC v. Baldeo Singh (1911) 37 All.

(i) *Ahmad Ali v. Haris Hussain* (1893) 15 All

123 127

(j) *Kanania v. Gulab Kaur* (1899) 21 All 297 (m)

(k) *Bharon v. Rama Aular* (1921) 43 All 660

63 I C 334 (21) A A 23

(l) *Lakshmi v. Ishar* (1922) 4 Lah L J 20 (22)

O. 43, r. 1

- (f) an order under rule 21 of Order XI ,
- (g) an order under rule 10 of Order XVI for the attachment of property ,
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ,
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ,
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ,
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ,
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ,
- (m) an order under rule 3 of Order XXI or refusing to record an agreement (and decree the parties Court and or satisfaction ,
- (n) an order under rule 2 of Order XXV application (in a case open to appeal) or such order to set aside the dismissal of a suit or such the decree
- (o) an order under rule 2, rule 4 or rule XXXIV refusing to extend the payment of mortgage money , half shall passed the the original
- (p) orders in interpleader suits under rule 5 or rule 6 of Order XXXV , (v) suits
- (q) an order under rule 2, rule 3 or rule XXXVIII ,
- (r) an order under rule 1, rule 2 rule 4 apply so Order XXXIX , in appellate
- (s) an order under rule 1 or rule 4 of Order
- (t) ... have been applied in the reported decisions may so far as may be to second

- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

Section 104—This rule forms part of s 104 [see s 104, sub s (1), cl (i)] The result is that no second appeal lies from an order passed in an appeal preferred under this rule (n)

Clause (a): Order returning plaint to be presented to the proper Court.—Where an order is made by the first Court of appeal returning a *plaint* under O 7, r 10, by virtue of the powers conferred on it by s 107, the order is appealable under this clause (a), and an appeal will lie to the High Court under s. 106 (p) But no appeal lies from an order of an appellate Court returning a *memorandum of appeal* to be presented to the proper Court The terms of cl (a) of this rule do not cover such a case nor can the reading of O 7, r 10, with s 107 justify the interpolation of the words “ memorandum of the word “ plaint ” in cl (a) of the present rule (g)

—An appeal lies under this clause from an order refusing to add a party in a partition suit (r)

1. [S. 590.] —An appeal from an order under O 23, r 3, recording a compromise at if the consent decree is passed before the appeal (s) But in a Bombay Appeal from orders that once a consent decree is passed the order merges in the decree and it was held that no appeal lies from order under O 23, r 3, if there had been in the lower Court as to the agreement of compromise (t)

(a) an appeal from an order of remand —This clause is amended by the Transfer of Property (Amendment) Act, 1930, by substituting the word and figures ‘ 2, 4 or 7 ’ for ‘ 4 or 7 ’

(b) an appeal from an order of remand —Under s 104 and O 43 an appeal lies only if an order has been passed under O 41, r 23, above (u)

(c) an appeal from an order —This clause has been repealed by the Bombay High Court See under O 47, r 4, at p 1152

—These have already been considered in their proper places

(d) an appeal from an order 2. [S. 590.] The rules of Order XLI shall apply, so far as may be, to appeals from orders.

(e) an appeal from an order cl (b)

See *Daloo Singh* (1911) 33 All 100 (r) *Jadunath v Murari* (1931) 35 C W. N 296 134 I C 307, (31) A C 594

(i) *Ahmad Ali v Haris Hussain* (1903) 15 All 103 12

(j) *Kausalia v Gulab Kur* (1899) 21 All 23

(k) *Bha Ron v Rima Awar* (19-1) 43 All 660

63 I C 374 (21) A A 3

(l) *Lalshmi v Ishar* (19-2) 4 Lah L J 20 (22)

(m)

ORDER XLIV.

Pauper Appeals.

O. 44, r. 1 1. [S. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable

Who may appeal as
pauper

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust

Procedure on application
for admission of appeal

Alteration in the rule.—The words in all matters including the presentation of such application in the first paragraph are new See notes below under those words

Unable to pay the fee.—In a Madras case (v) the petitioner had obtained a decree for maintenance and sought to appeal in *forma pauperis* for higher maintenance but the defendant paid Rs 571 arrears of maintenance into Court to her credit and the petition was dismissed on the ground that she had sufficient means to pay the Court fee on the memorandum of appeal. See however note under O 33 r 1, Subject matter of the suit

* In all matters including the presentation of such application.—The present rule provides that the provisions relating to suits by paupers shall apply so far as may be to appeals by paupers. Therefore the application referred to in this rule for leave to appeal as a pauper must be presented by the applicant in person just as an application for leave to sue as a pauper [See O 33 r 3]. This is now made clear by the addition of the words in all matters including the presentation of such application. In the absence of these words in the old section it was held by the Madras High Court that the rule as to the presentation of a pauper's petition (now contained in O 33 r 3) did not apply to pauper appeals (x). The Madras decision is no longer law.

* Subject to the provision relating to suits by paupers.—A sues B to recover certain properties as the heir of her deceased husband. The suit is dismissed. A applies for leave to appeal as a pauper. It is found on inquiry that A had before instituting the suit entered into an agreement falling within the terms of O 33 r 5(d) which would have disentitled A to sue to as a pauper. The appellate Court should under these circumstances refuse leave to A to appeal as a pauper (x).

(c) *Mahalakshmi In re* (1906) 50 Mad L J 114 94 J C 33 (26) A 31 567
(e) *Mulathi v Somappa* (1903) 28 Mad 369

(x) *Hanfa Bai v Haji Sidi* (1903) 30 Mad 54

Application and memorandum of appeal.—This rule requires two separate documents to be presented,—a memorandum of appeal and an application for leave to appeal as a pauper. When the Judge disposes of the pauper application, he does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to pay the full court fees on the appeal and to continue it as an ordinary appeal. The Judge is under no legal obligation to dismiss the appeal when he refuses the appellant leave to appeal as a pauper (y). Following this reasoning, it has been held by the High Court of Madras that where an application for leave to sue as a pauper is rejected owing to the memorandum of appeal which accompanied it being unstamped, the rejection of the application does not carry with it the rejection of the memorandum of appeal. The result is that if the pauper applies for time to pay the court fee, and time is granted to him [a 149], and the court fee is paid within the time fixed by the Court, the appeal must be held to be in time, though the court fee may have been paid after the expiration of the period of limitation prescribed for filing the appeal (z).

Proviso to the rule.—The proviso is mandatory (a) and is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers. To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should express and record briefly the reasons on which the leave proceeds (b). Leave to appeal in forma pauperis was refused against a judgment which held that the Secretary of State was not liable for an alleged tort committed by the police (c). The Madras High Court has held that it is sufficient that the appellant has a good prima facie case and that it is not necessary for the Court to arrive at a definite conclusion that the decree complained of is contrary to law or is otherwise unjust or erroneous (d), but this decision has been disapproved of by another Bench of the same High Court (e).

The Patna and Lahore High Courts hold that if the Court does not reject the application under the proviso and issues notice to the Government pleader and the opposite party, they are entitled on the analogy of rules 5 and 7 of O 33 to show not only that the applicant is not a pauper but also that the application should be rejected under the proviso (f). The Madras High Court differs and holds that the analogy of rules 5 and 7 of O 33 does not apply. Therefore according to the Madras High Court the opposite party is not entitled as of right to be heard on the question as to whether the application should be rejected under the proviso and after the issue of notice for the inquiry into pauperism it is not open to the respondent to object that the application should have been rejected (g). The Allahabad High Court takes the same view but following an overruled Patna decision (h).

The proviso is of course not applicable unless the appeal is in forma pauperis (1).

- (9)

- (c) *Aekant Pamechantra v. Vayappa* (1914) 54 Bm 41 21 I C 33- N Hiral et al
Subramani (1917) 41 Mal 65- S 4 L 1
81 Mahant D. pol v Mahant Sankar
(1922) 3 Lah 33 63 L - 41 (22) A 1
225 *Sujat Uv v Jyoti Kiri* (10 6) 1
I C 3 L (20) A O 19
- (d) *Piyendri v. pol* (19 5) 4 Lat 6° 04 L
814 (25) A 1 442 *Vishwanath v. Jai*
D. R. (1905) - 1ah 1 J 214 83 L (102
(25) A 1 31
- (e) *Sakubha v. Vinod* (1914) 8 16 431
- (f) *Mati Prasad v. Secretary of State* 11 1 5
Luck 15° 1 4 L 17 (30) A 11 4
- (1) *In re Perum Chennamma* (1930) 53 Mat
245 122 L C 337 (31) A M 104
- (g) *Narasimha v. Veerappa* (1931) 63 Mad 321
144 L C 640 (33) A M 519, *Narasimham*
vs. Veerappa (1933) 63 Mad L.J 3
145 L C 851 (33) A M 658
- (f) *Tilak v. Tilak* (1931) 10 Pat 890 132 L C
361 (31) A 1 143 3 R Overruling
J. Ramiah v. M. T. Sompura (1927) 10
Pat 657 109 L C 615 (25) A 1 114
and *Mist. 25 Noya* (A. K. & Son)
(19 1) 7 Pat 82- 114 L C 210, (20
A 1 27 *Rasaj Kumar v. Chandu* (16 1)
114 L C 342 (21) A 1 574
- (g) *Somnanda vs. v. Trambhachari* (1922) 93
Nik 165 181 L C 2 4 3 A M 5 L
- (h) *Mast Hindu v. Subramaniam* (1914) 54 All
4 1 144 L C 321 (31) A 1
- (i) *Kalyan v. Jai* (11 4) 6 Lah 1 J 203 8
4 61 L C 401 1 331

Application and memorandum of appeal.—This rule requires two separate documents to be presented,—a memorandum of appeal, and an application for leave to appeal as a pauper. When the Judge disposes of the pauper application, he does not thereby necessarily dispose of the appeal. He may still treat it as an existing

as a pauper is rejected owing to the memorandum of appeal which accompanied it being unstamped, the rejection of the application does not carry with it the rejection of the memorandum of appeal. The result is that if the pauper applies for time to pay the court fee, and time is granted to him [s 149] and the court fee is paid within the time fixed by the Court, the appeal must be held to be in time, though the court fee may have been paid after the expiration of the period of limitation prescribed for filing the appeal (-)

Proviso to the rule.—The proviso is mandatory (a) and is a necessary safeguard introduced by the legislature for the benefit of litigants who find themselves opposed by paupers. To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should express and record briefly the reasons on which the leave proceeds (b). Leave to appeal in forma pauperis was refused against a judgment which held that the Secretary of State was not liable for an alleged tort committed by the police (c). The Madras High Court has held that it is sufficient that the appellant has a good prima facie case and that it is not necessary for the Court to arrive at a definite conclusion that the decree complained of is contrary to law or is otherwise unjust or erroneous (d), but this decision has been disapproved of by another Bench of the same High Court (e).

The Patna and Lahore High Courts hold that if the Court does not reject the application under the proviso and issues notice to the Government pleader and the opposite party, they are entitled on the analogy of rules 5 and 7 of O 33 to show not only that the applicant is not a pauper but also that the application should be rejected under the

pauperism it is not open to the respondent to object that the application should have been rejected (g) The Allahabad High Court takes the same view but following an overruled Patna decision (h)

The proviso is of course not applicable unless the appeal is in forma pauperis (1)

(v) 20/01/2020 10:00

(2) .

(a) *Rajendra v. Gopal* (1975) 4 Pat. 87, 94 I. C.

614 (25) A 1 44° Indyaranti y Jat

(5) A. L. 391

(b) *Sakibai & Ganpat* (1904) 28 Bom 451

(c) *Mata Prasad v. Secretary of State* (1930) 5 Luck. 157, 128 L.C. 77, (31) A.O. 20.

judgments were very nearly identical (i) It need hardly be observed that suits that can be consolidated for the purposes of pecuniary valuation must be suits actually instituted and not merely suits *in gremio futuris* (j)

Judgment—The judgment referred to in this rule is the judgment appealed against and not the judgment of the lower Court (k)

Inherent power to consolidate cases—This rule provides for consolidation of cases "for the purposes of pecuniary valuation" The High Court of Patna has held that the High Court has inherent powers to permit consolidation of cases on grounds other than those specified in this rule Accordingly where two appeals to His Majesty on Council were in substance one, the two were ordered to be consolidated and tried together, the Court observing that 'in the interests of justice and to save unnecessary expense the appeals ought to be consolidated' (l)

5. [New.] In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

Dispute as to value of subject matter—This rule is new It gives legislative recognition to the practice followed under the Code of 1882 in cases where there was a dispute as to the value of the subject matter of the suit This practice is referred to in the undermentioned Calcutta case (m) where it was held that a plaintiff in a suit for damages cannot ensure an appeal to the Privy Council by merely placing his damages at a sufficiently high figure A claims Rs 10,000 as damages for an alleged defamation The suit is dismissed on the ground that the libel was privileged, and the decision is affirmed in appeal A applies for leave to appeal to the Privy Council The mere fact that A claimed Rs 10,000 as damages is not sufficient proof that the amount of the matter in dispute is Rs 10,000 Therefore if the other party dispute the correctness of the amount A must show that the amount of the matter in dispute is Rs 10,000 When there is a contest as to the true value of the matter in dispute it has been the invariable practice—a practice sanctioned by the Judicial Committee—to ascertain by evidence and enquiry what the true value is But where an inquiry has already been made at the trial of the suit by the Court of first instance as to the value of the subject matter of the suit, and the finding as to the value has been acquiesced in by the applicant, the High Court need not direct a fresh inquiry under this rule (n) In this connection it may be noted that a defendant who has adopted a value given by the plaintiff in an appeal to the High Court cannot when applying for leave to appeal

(i) *Van Kells v. Secretary of State* (1932) 55 Mad 196, 135 I C 449 (32) A N 125

(j) *Hannum Prasad v. Bhajrati* (1902) 24 All 238 *Abul Karim v. Allah Bakh* (1913) P 2^o no 99, p 320 211 C 624

(k) *Deokanlan v. Narayan* (1921) 6 Pat L.J. 97, 60 I C 517, (21) A P 97

(l) *Chautry Har Prasad v. Brij Kishor Das* (1918) 31 Pt 1 J 446 45 I C 551

(m) *Rai Arunda Nath v. Abhoj Charan* (1905) 9 C W N 30

(n) *Imint v. Imchandra* (1918) 42 Bom 609, 46 I C 4 *Jameshwar v. Sulleshwar* (1927) 45 Cal L J 225, 101 I C 901, (27) A C. 418

O. 45,
rr. 5-7

to the Privy Council, contest the plaintiff's valuation for he cannot both approve and reprobate (o) Where a reference is made under this rule to the Court of first instance the inquiry should be held by that Court the Court of first instance has no power to remit the investigation to some other officer (p)

Report as to the value of the subject matter -The Privy Council have directed that when a report as to the value is made under this rule the fullest information as to the proceedings should be included in the record (p1)

Effect of refusal of
certificates

6. [S. 601.] Where such certificate is refused, the petition shall be dismissed

Costs—Where the petition is made to the High Court and it is dismissed with costs the proper Court to execute the order is the lower Court (*q*)

Appeal—An appeal lies from an order made by any Court other than a High Court refusing the grant of a certificate under this rule [O 43, r 1, cl (v)]

7. [S. 602.] (1) Where the certificate is granted the applicant shall, within *ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow*, from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date.—

(a) furnish security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating transcribing indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being,

(2) papers which the parties agree to exclude ,

(3) accounts or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished

| | |
|--|---|
| (p) <i>M. bertrani</i> <i>tr.</i> <i>Janak</i> <i>th</i> (131) 58 (al 60 13 1 01 (31) 4 417 | (t) <i>t. p. v. M. tr.</i> (1939) 60 14 3 1 1 st lat c 9 146 1 81 (33) A 14 |
| (r) <i>H. n. n. v. Berkuji</i> (1916) 43 (al - 34 1 3 | (q) <i>J. olentra</i> <i>W. a. l. n. n. v.</i> (190) 34 (1 86 |

Provided further, that no adjournment shall be granted to O. an opposite party to contest the nature of such security.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1) deposit the amount required to defray the expense of printing such copy.

Rule amended—The italicized words were added into this rule by Act 26 of 1920. In sub-rule (1), the words originally were "within six months". The period is now reduced to 90 days. See notes below "Extension of time". The provisions were also added by the same Act.

Date of the decree—This means the date on which the decree is pronounced not that on which it is signed (r).

Extension of time—It has been held by the Judicial Committee of the Privy Council that the High Court may extend the time allowed for giving the security and making the deposit provided there are "cogent reasons" for doing so (s). According to the Madras High Court the "cogent reasons" must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to the absence and difficulty of getting funds, but owing to some circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence (t). On the other hand, it has been held by the Chief Court of the Punjab that poverty is a cogent reason for extending the time if the amount required is large and the applicant has deposited a substantial portion of the amount within the time originally allowed (u). Prior to Act 26 of 1920 it was the uniform practice to extend time on good cause shown. But the object of the amending Act was to expedite Privy Council appeals and the restrictive words used limit the Court's discretion so that the Court can in no case grant an extension of more than sixty days (v). The Allahabad High Court has held that the shorter period allowed by the amending Act does not apply when the decree was passed before the Act came into force (w). The Bombay High Court has however held that under rule 9 of the Privy Council Rules, 1920, an extension can be granted (x). But the Madras High Court and the Oudh Chief Court differ and hold that the Privy Council rule does not empower the Court to extend time beyond that specified in this rule (y).

Change of security—The Bombay High Court has held that if the appellant fails to furnish the security required the High Court may under rule 9 of the Privy Council rules change the form of the security (z).

Security in case of consolidated appeal—Where two or more appeals are consolidated for purposes of pecuniary valuation, the security required by this rule is the whole security which the appellants together have to furnish and not only a part

(r) *Harenta v. Hirs Dai* (1909) 14 C. W. N. 420 51 C. 844 (1 O. 20 r. 7)

(s) *Burjore v. Ilaga* (1883) 11 I. A. 7 10 10 C. 11 557 *Fuz il un Nissa v. Mula* (1834) 6 All. 250

(t) *Pingawari v. Mahalakshamma* (1890) 14 Mal. 331

(u) *Egypt v. Salihon* (1910) Punj. Rec. n. 44 p. 133 61 C. 723

(v) *Pram Dhan v. Pray Narain* (1922) 44 All. 216 65 I. C. 249 (22) A. A. 43 *Naray v. P. N. Chettiar* (1926) 4 Rang. 265 93 I. C. 417

(w)

(x)

(y)

(z)

O. 45,
rr. 7-9

of it. Therefore if two or more appeals are consolidated, and some sets of appellants furnish the security required from them, but others do not, the consolidated appeals cannot be admitted under r. 8 below (a).

Costs in England paid out of deposit—The High Court may order the amounts deposited as security to be paid to the respondent's solicitors in England in satisfaction of their bill of costs taxed before the Privy Council (*b*)

Records.—The Privy Council have strongly condemned the inclusion in the record of unnecessary papers and disallowed the costs occasioned thereby (c)

Delay—If delay in the preparation of the record is due to the inaction of the appellant it seems that the appeal may be certified as not effectually prosecuted (*d*)

Compromise Inadmissible—After the grant of the certificate the High Court has no jurisdiction to pass a decree in terms of a compromise in supersession of the decree appealed against (e)

Appeal—No appeal lies under cl 15 of the Charter from an order refusing to extend the time for furnishing security for costs and directing the appeal to be struck off (f)

8. [S. 603.] Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them

' Such security —See notes to r 7 above ' Security in case of consolidated appeal.

Notice—For form of notice under cl (b) of this rule see App G form no 10. The accidental omission of notice is not a sufficient ground for rehearing provided the respondents knew that the appeal had been admitted (g).

9. [S. 604.] At any time before the admission of the
 appeal the Court may, upon cause shown
 revoke the acceptance of any such security,
 and make further directions thereon

Revocation of acceptance
of security

[illegible]

(e) G r e g o r I m e l a n i t r a (1937) 5^m B n
300 14 x 11 26 (73) A H 244

(f) J o h n I e r o b i n T r i c k l e r (1811) 14 Cal
H

(g) H u i s s e n h y C r e n d h S u p h (19^m)
J m 1 R 200 2014 144

9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court.

Power to dispense with notices in case of deceased parties

O.
rr.

Provided that notices under sub rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct

This rule was added by Act 26 of 1920

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate

Power to order further security or payment

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment

11. [S. 605.] Where the appellant fails to comply with such order, the proceedings shall be stayed,

Effect of failure to comply with order

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed

12. [S. 607.] When the copy of the record except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7

Refund of balance deposited

O. 45, r. 13

13. [S. 608.] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Lower of Court pending
appeal

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

- (a) impound any movable property in dispute or any part thereof, or
- (b) allow the decree appealed from to be executed, taking such security from the respondent as *the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or*
- (c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal or
- (d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

Alterations in the rule —

1 The words "admitting the appeal" which occurred in the first paragraph of the old section after the word "Court" have been omitted. Those words gave rise to a conflict of decisions on the question whether the Court had power under the old section to stay the execution of the decree appealed from after a petition had been presented for leave to appeal but before the appeal was admitted. It was held by the High Court of Bombay that the Court had the power (h). On other hand, it was held by the High Court of Calcutta that the Court had no such power, the decision being based on the ground that the words "the Court admitting the appeal" indicated that no stay could be granted *until the appeal was admitted* (i). The words "admitting the appeal" have been omitted to make it clear that the power conferred by this rule may be exercised at any time after the presenting of the petition, and even before the grant of a certificate for the admission of the appeal.

Another result of the omission of the words "admitting the appeal" after the word "Court" is to invest the High Court with power to stay execution, notwithstanding that an appeal has been admitted by special leave of His Majesty in Council (j). Under

(h) *Dine Jinhav v. S. le Michael* (1872) 11 Ind. 10

(i) *J. Rao Kinnari v. Capi Chant* (1900) 2 C.W.N.

(j) 362
14, 2001 D. 11 v. Malhu S. 1001 (1911) 34
Cal. 330 341 V. 74 111 C. 344

the Code of 1882 it was held that since the powers conferred by the corresponding s 608 O. could only be exercised by the Court admitting the appeal the High Court had no power to stay execution where the appeal was admitted by special leave of His Majesty in Council (l)

It seems unnecessary to add that a District Court cannot stay execution and that the provisions of O 41, r 6, have no application (l)

2 The words 'by the appointment of a receiver or otherwise' at the end of cl. (d) are new

"The Court.—The Court referred to in this rule and r 14 is the High Court (m)

Stay of execution before grant of certificate—See notes above Alterations in the rule, no 1

Stay of execution in view of an application for special leave to appeal—The High Court has an inherent power to make an order for stay of execution in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council (n)

Stay of hearing of the suit—The High Court reversed an ex parte decree on a mortgage and directed the suit to be reheard The mortgagee's appeal to the Privy Council was admitted and the Calcutta High Court held that the Court had power either under this rule or in its inherent jurisdiction to stay the hearing of the suit pending the appeal (o)

Clause (b)—The respondent decree holder's failure to give security will not deprive him of the benefit of sec 15 of the Limitation Act (p)

Clause (c)—If the Court fixes a time for furnishing security as a condition of stay of execution it is advisable that the time for tender of security should be specified with further directions for the inquiry as to its sufficiency (q) Proceedings for final decree for partition after a preliminary decree has been passed are not execution proceedings which can be stayed under this rule (r)

Security after execution—The Court has power to require security to be given under this rule even after the decree has been executed wholly or in part (s) It has also the power to stay further execution after the decree has been partially executed (t)

Stay of execution where appeal admitted by special leave—See notes above Alterations in the rule No 1 second paragraph

Appointment of receiver where appeal admitted by special leave—The High Court has power to appoint a receiver under cl. (d) notwithstanding that the appeal was admitted by special leave of His Majesty in Council (u)

Practice—Applications of the character mentioned in this rule ought always to be made in the first instance at any rate to the Court in India which has ample power

- | | |
|---|--|
| <p>(l) <i>Mohrsehchandra v. S. tr. ghan</i> (1900) 2 Cal 1 96 I A 81</p> <p>(i) <i>Ma ng Lo Sha n v. Maung Po Kin</i> (1905) 3 Rang 158 88 I C 90 (25) A R 204</p> <p>(m) <i>Pam. Bishadur v. Padma Krishna</i> (1918) 3 Pat L J 40 421 C 83</p> <p>(n) <i>Nanda Kishore v. Pam. Golam</i> (1913) 40 Cal 955 18 I C 20</p> <p>(o) <i>Sarat C. ar v. Official Ass. nce</i> (1931) 34 C W N 631 1 I C 833 (31) A C 9</p> <p>(p) <i>Pandaj S. thea v. Srimati Padhey</i> (1920) 5 Pat L J 39 53 I C 9</p> <p>(q) <i>Kedarnath v. Matlal</i> (10) 4 C W N 265</p> | <p>57 I C 38</p> <p>(r) <i>Ram Narayan v. Hernam Das</i> (1900) 40 All 10 54 I C 561</p> <p>(s) <i>Jar utool Butool v. Hoseinea Beg m</i> (1865) 10 M I A 196 <i>Inter Kunars v. Ja pat Kumar</i> (188) 14 Cal 290 30 14 I A 1</p> <p><i>Narayanan v. Arunachellam</i> (1896) 13 Mad 140 11- <i>Khushaldas v. Ch manlal</i> (19 6) 50 Bon 453 96 I C 232 (6) A B 4 5</p> <p>(t) <i>Ashan Ha v. Iaroonaoy</i> (18 9) 4 C L R 125</p> <p>(u) <i>Pa a Bag v. Pan. Jagadamba</i> (1919) 4 Pat L J 48 5 I C 40</p> |
|---|--|

O. 45,
rr. 13-15

to deal with the matter according to the circumstances of the particular case, and his knowledge of details which the Judicial Committee cannot possess on an interlocutory application (i) If the application is refused by the High Court, and the Judicial Committee is of opinion that the application ought to have been granted, it may grant a stay of execution, and will give leave to the respondent to apply to the High Court for an order as to security or any other relief. As the order is that of the King in Council, the High Court is bound to take notice of it and to govern itself accordingly (ii)

Appeal.—No appeal lies under cl. 15 of the Letters Patent from an order refusing to stay execution pending appeal to the Privy Council (x)

14. [S. 609.] Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

In the use of security found inadequate

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

"The Court."—See notes under the same head to r. 13 above

15. [S. 610.] (1) Whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order

Procedure to ent. rec. orders of King in Council

(c) *Isaiah v. Shri Jagat* (1906) 23 Mat. 371

(d) 311 A 132

(e) "

"

"

"

"

the Judges of the High Court had differed in opinion as to the propriety of staying execution of *Isaiah v. Shri Jagat* (1906) 23 Mat. 371 A 132 (where the application was made by the respondent for a stay of execution and the High Court granted a stay for three months only, holding it had no power to grant a stay until the disposal of the appeal to the Privy Council)

(x) *Mohd. I. I. I. v. I. I. I.* (1904) 21 Cal. 473

made in appeal and sought to be executed, to the Court from O. 4 which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.

Alterations in the rule—Paragraphs 3 and 4 of the old section which related to the enforcement of the liability of a surety for the costs of the respondents have been omitted in view of the general rule now laid down in sec 145. Para 4 was added by Act 26 of 1920 in order to prevent delays in the disposal of Privy Council appeals.

Jurisdiction of Patna High Court—The Patna High Court has no jurisdiction

“Whoever desires to obtain execution”—The Patna High Court has held that when a decree is passed in favour of a number of persons jointly an application by any one of them under this rule is sufficient to entitle all of them to apply in execution to the Court below. But that when several persons are entitled to separate shares, an

O. 45, r. 15 order for transmission passed at the instance of one of them would not entitle the others to apply for execution to the lower Court (z) But according to the Madras High Court an order for transmission passed at the instance of any one decree holder enures in all cases for the benefit of the others and that it is not necessary that each person interested should obtain a separate transmission order (a)

Functions of the High Court under this rule—The act of the High Court in receiving and filing orders of His Majesty in Council under this rule is a purely ministerial function. The High Court, therefore, has no power, under this rule to discuss the effect of the order of His Majesty in Council on an application to file the order. If the order is impeached as erroneous, the proper course for the party aggrieved by the order is to apply to His Majesty in Council to make the necessary alteration or modification in the order (b). But whether the order is ministerial or not, if the Judge makes an order under a misapprehension of his jurisdiction an appeal lies (c).

"Execution"—The word "execution" includes restitution as described in sec 144. A person, therefore, who desires to obtain execution, though it be by way of restitution, must apply in the first instance to the Court indicated by this rule (d). The provisions of this rule are mandatory so that if the petition is presented to a different Court the execution application is liable to be dismissed (e).

Application for execution of order of His Majesty in Council by assignee of order—Where an order of His Majesty in Council is transmitted by the High Court for execution under sub r (2) to the Court which passed the first decree appealed from, the latter Court is not in the position of a Court to which a decree is transferred for execution, and it is not therefore precluded from entertaining an application for execution of the order by an assignee of the order (f). See O 21, r 16, and notes thereto, "Application for execution by a transferee should be made to the Court which passed the decree."

Enforcement of liability of surety—A obtains a decree against B in a High Court for possession of certain immovable property. B appeals to the Privy Council, and C stands surety for A's costs of the appeal [r 7, sub r 1, cl (a)]. If the appeal is dismissed with costs A may proceed against C for costs by an application for execution [s 145].

Assuming in the case put above that A applies for execution of the decree, and that possession of the property is delivered to him on D standing surety for re delivery of the property to B, and for the payment of mesne profits in the event of B's appeal being successful [r 13, sub r (2), cl (b)] and that the Privy Council allows B's appeal and reverses the decree of the High Court, in that event if A fails to re deliver the property or to pay the mesne profits to B, B may proceed against D by an application for execution [s 145] (g).

Restitution—A obtains a decree against B for possession of certain immovable property. Possession of the property is delivered to him in execution. The decree is then set aside in appeal to the Privy Council. Pending the appeal to the Privy Council the property is sold in execution of a decree obtained by C against A, and it is purchased by P. B is entitled on reversal of the decree by the Privy Council to restitution of the property as against P, the latter being a "representative" of A within the meaning

(t)

(a)

(b)

(c) *Herrish & Under v. Kala Sun Tsi* (1882) 10 J.A. 404 at 482. *Idid Rim v. Dhannop* 1st (1901) 11 Lah. 365 133 I.C. 7

(30) A.I. 674
(d) *Damodar Das v. I. J. Lal* (1915) 37 All. 567, 30 I.A. 77
(e) *Chaitanya v. Zairi* (1924) 31 at 536 75 I.C. 766 (24) A.I. 50
(f) *Jeeva v. Bhanupathi* 1st of 31 Jan 1924 (1915) 14 M.L. 852 23 I.C. 23
(g) *Tranchellum v. Tranchellum* (1922) 15 M.L. 13 14 M.L. 13

of sec 47 (h) The Patna High Court considers that proceedings for restitution are not proceedings in execution and so in Patna applications for restitution consequent on a Privy Council decree are not made under this rule to the High Court but to the trial Court (i) The Allahabad High Court treats such an application as one to enforce an Order in Council and as subject as regards limitation to art 183 of the Limitation Act (j) See note under s. 144 Against whom restitution may be claimed and whether a proceeding under this section is a proceeding in execution

Mesne profits—Where a party is dispossessed of land in pursuance of a decree of the High Court and the decree is reversed in appeal to the Privy Council he is entitled not only to restoration of the land, but to mesne profits during the period of dispossession though the order of His Majesty in Council may be silent as to such profits (k) See sec 144

Rate of exchange—The Courts have differed on the question whether the words for the time being refer to the rate of exchange at the date of the passing of the order or to that current when the amount is realised The former view is held by the Calcutta High Court (l), the latter by the Allahabad High Court (m)

Interest on costs—Where interest on costs is not allowed in the order of His Majesty in Council, such interest cannot be given by any Court in this country (n)

Letters Patent appeal—An appeal lies under cl 15 of the Letters Patent from an order of a single Judge of a High Court *refusing* to transmit for execution the order of His Majesty in Council as provided by sub rule (2) of this rule (o), or giving directions in modification of the order of His Majesty in Council (p)

Limitation.—An application for execution under this rule is governed by art 183 of the Limitation Act, 1903 (q)

Dismissal of appeal for want of prosecution—Where an appeal is pre-

ally with the matter of the suit, but merely recognizes authoritatively that the appellant had not complied with the conditions under which the appeal was open to him, and that therefore he is in the same position as if he had not appealed at all (r)

16. [S. 611.] The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution

Appeal—See notes to r 15 above, Letters Patent appeal."

- (h) *Garudhuj Prasad v. Lajpat Mal* (1906) 23 All 337
- (i) *Jugal Kishore v. Honneshwar Singh* (1907) 61 at 552 1021 C 614 (2) A 1 408
- (j) *Soban v. Bijnath* (1904) 50 All 67 112 1 C 876 (8) A A 13
- (k) *Arinacellam v. Arunachellam* (1892) 15 Mat 403
- (l) *Dakhna v. Saroda* (1896) 23 Cal 357
- (m) *Mahomed v. Guyra* (1894) 5 Cal 33
- (n) *Param Sukh v. Ram Dyal* (1896) 8 All 60
- (o) *Dakhna v. Saroda* (1896) 23 Cal 357
- (p) *Forester v. Secretary of State* (1897) 41 A 157 3 Cal 161

- (o) *Hurrah Chander v. Kali Sunders* (1882) 9 Cal 482 10 A 4 in appeal from *Kali Soonders Dibia in re* (1881) 6 Cal 594 See also *Lalanand v. Luckmpur* (1870) 5 Beng L.R. 605 608 13 M.A. 400
- (p)
- (q)
- (r)

ORDER XLVI.

Reference.

O. 46, r. 1

1. [S. 617.] Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Reference of question to
High Court

Alterations in the rule—

- 1 The words "is not subject to appeal" have been substituted for the word 'final,' as the expression "final decree" is now used in this Code in contradistinction to a "preliminary decree"
- 2 The words, "or the construction of a document, which construction may affect the merits," which occurred in the old section after the words, "having the force of law," have been omitted, as they are sufficiently covered by the power to refer any question of law

Hearing of a suit or appeal—A reference can be made to the High Court under this rule only in a *suit* or an *appeal in a suit*, and not in every matter before the Court in which a point arises on which the Court entertains reasonable doubt (s) Thus where a pleader was fined Rs 25 by a Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee, and on appeal the District Judge referred the matter to the High Court under this rule, it was held that an reference could properly be made under this rule as there was *suit* or *appeal in a suit* (t) Nor can any reference be made in a proceeding other than a *suit* or an *appeal in a suit* even by virtue of the provisions of sec 141 above (u) See notes to sec 141, "The procedure provided in this Code," etc

Decree not subject to appeal—This rule does not authorize a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal Therefore no reference can be made to the High Court in a matter in which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal It is only when a decree is not subject to appeal that a reference can be made under this rule (t) In *Rampkul v Durga* (u), a Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, returned the plaint to be presented to the proper Court On appeal, the District Judge referred the matter to the High Court The High Court

(s) *Muhammad v Ahmadkhal* (1901) 25 Bom 32

(t) *Saheer v De Souza* (1888) 12 B m 78

(u) *Damodara v Attappa* (1911) 36 Mal 16
1911 C 89 *Tancred v Muller* (1911) 1 C 391
1 W 531 841 C 513 (25) 1 C 391

(v) *Purja v Purnji Chari* (1931) 10 Pat 471
133 J C "6" (31) A 1 353, *Jagj*

Bhaya (1887) B m 57, *Krishna v Ramkumar* (1880) 7 L R 144 *Secretary of State v Fazil* (1891) 18 L 234
Oriental Loan Assn Ltd v Hatch (1893) 17 B m 735 *Mahant v Chudamma* (1893) 12 B m 57 *Arag Ali v Muhammad* (1910) Punj 1 C n 130 p 417 57 I C

(w) (1884) 7 All 815

held that the order of the Munsif returning the plaint being an appealable order [O 43, r 1, cl. (a)], the High Court had no jurisdiction to entertain the reference. On the same ground it is held that there could be no reference under this rule in a matter of probate, and that an order made by a District Judge on an application for probate being appealable, it cannot be referred for the opinion of the High Court under this rule though, when referred the High Court may deal with the case as a Court of concurrent jurisdiction under sec 264 of the Indian Succession Act (z)

Jurisdiction—It has been said that a Judge who has no jurisdiction to hear a suit or an appeal has no jurisdiction to make a reference before or at the hearing of such suit or appeal (y). But in a case where a Small Cause Court Judge doubted if he had jurisdiction to entertain a suit, the Calcutta High Court accepted a reference and directed him to return the plaint for presentation to the proper Court (z)

Reasonable doubt.—A reference under this rule can only be made when a Judge entertains a reasonable doubt on a question of law or usage having the force of law. A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court to which he is subordinate, unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council (a). If the Court has no reasonable doubt it should not make a reference merely because it is asked to make one (b)

Reference by Presidency Small Cause Court.—See Presidency Small Cause Court, 1882, s 69

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred ;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made ; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

“Such Court shall proceed to dispose of the case in conformity with the decision of the High Court.”—In *Yule & Co v Mahomed Hossein* (c) the Calcutta Small Cause Court passed a decree for the plaintiffs contingent on the opinion of the

| | |
|-----|-------|
| (x) | C 91. |
| (y) | (a) |
| (z) | (b) |
| | (c) |

High Court The High Court held that upon the case presented by the plaintiffs they could not re over The judgment of the High Court was transmitted to the Small Cause Court and the Small Cause Court Judge, instead of entering judgment for the defendants allowed the suit to be withdrawn by the plaintiffs with liberty to them to bring a fresh suit [O 23 r 1] Upon a petition for revision it was held by the High Court that the Small Cause Court was bound on receipt of the decision of the High Court to dispose of the case in conformity with that decision and to enter judgment for the defendants and that the order allowing the plaintiffs to withdraw from the suit was illegal

4. [S. 620.] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case

5. [S. 621.] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order making the reference has passed or made the case out of which the reference arose, and make such order as it thinks fit

6. [S. 646A.] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable it may submit the record to the High Court with a statement of its reasons for the doubts as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

At any time before judgment — A reference under this rule can only be made before judgment (1)

7. [S. 646B.] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable failed to exercise jurisdiction vested in it by law, or exercised a jurisdiction so vested, the District Court may, and if required by a

party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstances appears to it to be just and proper

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

Provincial Small Cause Courts Act 9 of 1887, sec 16.—Section 16 of the Provincial Small Cause Courts Act runs as follows: 'Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes *shall not be tried* by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable'

"If required by a party shall"—It has been held by the High Courts of Madras and Calcutta that a District Court is bound to make a reference under this rule if one of the parties requires it to do so (e). On the other hand the Allahabad High Court has held that the word 'shall' is not mandatory, but merely directory and that a District Court should not make a reference under this rule, unless it is satisfied that a Court subordinate thereto has come to an erroneous finding on a point of jurisdiction in regard to the particular suit before it (f).

Statement of reasons—Where a reference is made to the High Courts under this rule, the District Court which makes the reference should state its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous (g).

Powers of High Court under this rule—There is a conflict of decisions as to the powers of the High Court under this rule as will be seen from the cases considered below—

Illustration

A suit cognizable by a Small Cause Court is tried by a District Munsif on the original side without objection to his jurisdiction, and a decree is passed for the plaintiffs. The

decision of the District Court. It is clear that the suit being one of a nature cognizable by a Small Cause Court the District Munsif had no jurisdiction to entertain it under his ordinary jurisdiction having regard to the provisions of section 16 of the Provincial Small Cause Courts Act set forth above. Nor had the District Court jurisdiction to

(e) *Samson v. McMaster* (1890) 13 M.L.J. 244
resh Chatter v. Kristo Panjani (1894)
 21 Cal. 240 251

(f) *Malan Copal v. Bhagwan Dass* (1899) 11
 All. 314
 (g) *Chhotu v. Jawahar* (1906) 23 All. 293

O. 45, r. 7 entertain the appeal from the decree in such a suit. What order should the High Court make, assuming, of course, that the suit was one of a nature cognizable by a Small Cause Court and which of the following courses should it adopt?—

- (1) Should the High Court set aside the decrees of both the Courts below and return the plaint for presentation to the proper Court?
- (2) Or has it power to consider the case on the merits and to decline to interfere in the matter even though in strict law the suit should have been tried under a different procedure?
- (3) Or should it not set aside the decree of the District Court as having been made without jurisdiction and then dispose of the case on its merits leaving the decree passed by the Munsif to stand or not as may in its discretion appear best?

The first course was adopted by White, C J., in a Madras case where the learned Judge observed that there was no alternative but to adopt that course (a).

The second course was adopted by the High Courts of Calcutta and Patna in the under mentioned cases (i), where the Court declined to interfere on the ground that they had a complete discretion in the matter.

The third course was adopted in a recent case by a Full Bench of the Madras High Court (j). The full Bench held, dissenting from the Calcutta decisions cited above and overruling an earlier Madras case (k) in which the Calcutta decision was followed that the decree of the District Judge should be set aside as having been passed without jurisdiction. That decree was accordingly set aside, and the decree passed by the Munsif was restored. The same course was adopted in a Bombay case (l).

As regards the Allahabad High Court, it declined to interfere in one case on the ground that the present rule did not apply unless there was an *erroneous holding* as to jurisdiction, and that could not occur if no objection to jurisdiction was taken by either party in the Courts below (m). In a later case, it followed the Full Bench ruling of the Madras Courts, and set aside the decree of the District Court and restored the decree passed by the Munsif (n).

ORDER XLVII.

Review

O. 47, r. 1

Application for review of judgment

1. [s. 623.] (1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
 - (b) by a decree or order from which no appeal is allowed,
- or

| | |
|-------|--|
| (b) " | 11 C 512 |
| (i) | (1) <i>Pind Besh Karan v. Mahant</i> (1894) 27 M.D. 478 |
| " | (2) <i>Shri Karbhay v. Sonpal</i> (1901) 25 B.L. 417 |
| " | (3) <i>Jan Lal v. J. D. N. Singh</i> (1903) 25 All. 133 |
| (j) | (n) <i>All India M. J. v. Jodhpur</i> (1917) 25 All. 101, 27 f. 82 |

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent, he can present to the Appellate Court the case on which he applies for the review.

Review under the Code of 1859, and the Code of 1877—Under the Code of 1859, s 376, an application for review could be entertained on the ground of "discovery, of new matter or evidence which was not within his [applicant's] knowledge, or could not be adduced by him at the time when such decree was passed, or for any other good and sufficient reason." Under the Code of 1877, s 623, an application for review could be entertained on the ground of "discovery of new and important matter or evidence which, after the exercise of due diligence was not within his [applicant's] knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason." See 623 of the Code of 1882 is in this respect the same as s 623 of the Code of 1877. The present rule is a reproduction of s 623 of the Code of 1882.

In what cases a party may apply for a review—A party aggrieved by a decree or a decision specified in clause (a), (b) or (c) of sub rule (1) [see s 114] may apply for a review in any of the following cases—

I on the ground of the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the party or could not be produced by him at the time when the decree was passed or order made, or

II on account of some mistake or error apparent on the face of the record,

III for any other sufficient reason

Ex parte decree or order—It is competent to a party against whom an ex parte decree or order is passed to apply for a review, if the circumstances bring the case within O 47, r 1 (c). But since the decision in *Chayju Ram's case* (ol) limiting the words "other sufficient reason" to a reason analogous to those specified in the rule it has been held that a party, whose appeal has been dismissed for want of appearance,

), r 13, and O 41, r 19

(ol) (1922) 49 I A 141 3 Lah 127 2 I C

Jalalmanan (1925) 49
90 I C 610 (2) A B 521
Hakim (1923) 1 All 12
416 74 I C 5-4 (23) A A 5-6 *Jwanis*
Sundari v. Iramulassunlari (1932) 60
Cal 331 (34) A C 110

against *I* to recover another sum of money alleged to have become due under the same agreement and obtained a decree on the strength of the former decree. Their Lordships of the Privy Council reversed the first decree. *B* then applies for a review of the second decree and the application was allowed on the ground that in the circumstances of the case the Privy Council decision was a new and important matter on which to apply for a review of the second decree (c). This decision stands on the special facts of the case. In *Anant Lal v. Malho Das* (d) it was held that where a decree is based upon a decision of a Divisional Bench of the High Court and that decision is subsequently overruled by the Full Bench the reversal is no ground for a review of the decree. Nor is the production of a new ruling or authority which is brought to the notice of the Judge at the first hearing might have altered the judgment a new and important matter within the meaning of this rule (e). An alteration of the law by subsequent legislation is not discovery of new matter justifying a review (f).

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would alter or cancel the decree. Thus if a suit is dismissed on two grounds namely (1) that no notice of suit was given and (2) that the plaintiff was illegitimate

not lead to the modification or setting aside of the original decree as the want of notice was fatal to the suit (g).

II Mistake or error apparent on the face of the record—A review may be granted whether on any ground urged at the original hearing of the suit or not whenever the Court considers that it is necessary to correct an evident error or omission (h). Thus a review was granted where an error on a point of law was apparent on the face of the judgment (i) e.g. failure to apply the law of limitation to the facts found by the Court (j). Again there was an error patent on the face of the record when on an

were wrongly applied (l). A review may also be granted where there is an error of procedure apparent on the face of the record e.g. where judgment is delivered without previous notice to the parties (m). A revision application was dismissed on the ground that the error was one of law and did not justify interference in revision but when it was discovered that at a second appeal lay the Judge granted a review and set aside the order dismissing the application for revision and heard the case as a second appeal (n). But

(c) *Hagghela v. Masudan* (1889) 13 Bom 330
Haman v. Hara (1907) 31 Bom 128 *I am Lal v. I alkha Prasad* (1911) 33 All 566 10 I C 244 *Maung Kun v. Ho Aye* (1915) 5 Rang 61 103 I C 258 (7) A R 189

(d) (1884) 6 All 99

(e) *Filen v. Fashoor* (1886) 1 Cal 184 *Abd I Sal q v. Abd I Aziz* (1899) 91 All 15 153

(f) *Gyanaj v. Nangappa* (1908) 5 Bom 434 111 I C 633 (8) A B 304

(g) *Malabar v. Collector of Allabad* (1914) 36 All 1 11 I C 514

(h) *Fatu v. Ghosh* (1881) 1 Bom 543 *Chandra v. Jais* (1880) 6 B L R 16 *Jattee Shree Lal v. Lappu Kuar* (1883) 5 All 14

(i) *Shrawan Chand v. Pat Dasree* (1881) 14 Cal 6 *Jatra Mohun v. Ankh Chandra* (1891) 91 Cal 334 336 *Murari Rao v.*

Balcanth D. Ish t (1931) 46 Mad 900 76 I C 34 (4) A M 98 *Probas Kumar v. Nihar Lal* (1941) 23 C W N 98 84 I C 28 (4) A C 1054 (Suit dismissed though part of claim admitted) *Surtay v. T. S. Chettiar Firm* (1906) 4 Rang 965 98 I C 417 (27) A R 90 *Ma Hia v. Ma Pua Hui* (1915) 5 Rang 510 105 I C 710 (28) A R 19

(j) *Debi Sahas v. Fashashar Lal* (1909) 10 Lah 184 110 I C 540 (8) A L 919

(k) *Chana Venkatapayya v. Punnayya* (1933) 63 Mad L J 13 145 I C 316 (33) A M 631

(l) *Huan v. Begum v. Collector of Muzaffarnagar* (1889) 11 All 16

(m) *Maung Sen v. Maung Tun* (1904) 6 Pan 94 114 I C 6 (9) A L 70

(n) *Gujar Mal v. Nankh Chand* (1933) 14 Lah 453 14 I C 610 (33) A L 46

against *B* to recover another sum of money alleged to have become due under the same agreement and obtained a decree on the strength of the former decree. Their Lordships of the Privy Council reversed the first decree. *B* then applies for a review of the second decree, and the application was allowed on the ground that in the circumstances of the case the Privy Council decision was 'new and important matter' on which to apply for a review of the second decree (c). This decision stands on the special facts of the case. In *Amrit Lal v. Valho Das* (d) it was held that where a decree is based upon a decision of a Divisional Bench of the High Court, and that decision is subsequently overruled by the Full Bench the reversal is no ground for a review of the decree. Nor is the production of a new ruling or authority, which if brought to the notice of the Judge at the first hearing might have altered the judgment, 'new and important matter' within the meaning of this rule (c). An alteration of the law by subsequent legislation is not discovery of new matter justifying a review (f).

It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would *alter or cancel the decree*. Thus if a suit is dismissed on two grounds namely, (1) that no notice of suit was given, and (2) that the plaintiff was illegitimate, and the plaintiff applies for a review on the ground of discovery of new evidence on the question of legitimacy, it is a good ground for rejecting the application that even if the Court held on the reception of new evidence that the plaintiff was legitimate, it would not lead to the modification or setting aside of the original decree, as the want of notice was fatal to the suit (g).

II Mistake or error apparent on the face of the record—A review may be granted, whether on any ground urged at the original hearing of the suit or not, whenever the Court considers that it is necessary to correct an *evident* error or omission (h). Thus a review was granted where an error on a point of law was apparent on the face of the judgment (i), e.g., failure to apply the law of limitation to the facts found by the Court (j). Again there was an error patent on the face of the record when on an appeal by a creditor from an order rejecting his proof the Judge not only dismissed the appeal but annulled the adjudication (k). Similarly a review was granted when the provisions of the second paragraph of s. 575 of the Code of 1882 [now s. 98, sub s. (2)] were wrongly applied (l). A review may also be granted where there is an error of procedure apparent on the face of the record, e.g., where judgment is delivered without previous notice to the parties (m). A revision application was dismissed on the ground that the error was one of law and did not justify interference in revision, but when it was discovered that a second appeal lay, the Judge granted a review and set aside the order dismissing the application for revision and heard the case as a second appeal (n). But,

(c) *Washela v. Masludin* (1880) 13 Bom 330
Waman v. Hari (1907) 31 Bom 128
Itam Lal v. Kalka Prasad (1911) 33 All 566 10
 1 C 244
Maring Kyne v. Koo Aye (1927)
 5 Rang 261 103 I C 254 (27) A R 189

(d) (1884) 6 All 292

(e) *Ellen v. Fashier* (1876) 1 Cal 184
Abdul Salik v. Abdul Aziz (1899) 21 All 152
 153

(f) *Cyanaji v. Vingsappa* (1929) 52 Bom 434,
 111 I C 633 (-8) A B 304

(g) *Mahabir v. Collector of Allahabad* (1914) 36
 All 217 211 I C 514

(h) *Kalu v. Vasram* (1877) 1 Bom 543
Chintamani v. Jyari (1870) 6 B L R 1.6
 But see *Shroff v. Lappi* (1883)
 5 All 14

(i) *Shenup Chaw v. Pat Dasree* (1887) 14 Cal
 62
Jatra Mohun v. Kuthil Chandra
 (1897) 24 Cal 334 336
Mutari Rao v.

Jalcanth Dikshit (1923) 46 Mad 955
 761 C 342 (24) A M 98
Probhas Kumar v. Nihar Lal (1924) 28 C W N 928 84
 1 C 248 (24) A C 1054 (Suit dismissed if
 though part of claim admitted)
Surya T. S. Chettyar Firm (1976) 4 Rang 265
 98 I C 417 (27) A R 20, *Ma Hla Jai v.*
Ma Pwa Hnit (1927) 5 Rang 510 103 I C
 710 (28) A R 12

(j) *Debi Sahai v. Baleshar Lal* (1909) 10 Lah.
 184 112 I C 540 (28) A L 919

(k) *China Venkatapayya v. Punnapayya* (1933)
 65 Mad L J 173 145 I C 316 (33)
 A M 631

(l) *Hassani Begum v. Collector of Muzaffarnagar*
 (1880) 11 All 176

(m) *Mauzy Sen v. Mauzy Tun* (1923) 6 Rang
 794 114 I C 67 (29) A J 70

(n) *Gujar Mal v. Nanak Chand* (1933) 14 Lah
 453 142 I C 610 (33) A L 476

O. 47, r. 1 it is no ground for review that the judgment proceeds on an incorrect exposition of the law (o), or on a ruling which has subsequently been modified (p) or reversed (q) See s 102

III "For any other sufficient reason."—These words mean that the reason must be one sufficient to the Court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record (r) Thus in *Ghansham v Lal Singh* (s), a reference to a Full Bench was disposed of in the absence of the respondent. The respondent proved that his absence at the hearing was due to the fact that notice of the reference was not served upon him. It was held that this constituted a "sufficient reason" for granting a review. In *Suleman v The New Oriental Bank Corporation, Ltd* (t), a review was granted on the ground that the question that had arisen at the hearing was one of great general commercial importance. In *Gopal v Solomon* (u), all the parties, counsel on both sides, and the Judge were at the trial of the suit under a misapprehension as to the contents of a document. It was held that this was a "sufficient reason" for granting a review. In a Patna case, where an auction purchaser applied for an order for delivery of possession and the order was made, it was held that it was sufficient ground for reviewing the order that the application was on the face of it barred by limitation (v). But a party who not only had an opportunity of raising a question but who did raise it and on argument abandoned it, cannot under ordinary circumstances be allowed to agitate the question in review (w). Nor is it a sufficient reason for granting a review that if another opportunity was given to the applicant, he would satisfy the Court that its previous order was wrong (x). Omission to raise a point of law is not sufficient (y).

The ground of review must be something which existed at the date of the decree and the rule does not authorize the review of a decree which was right when it was made, on the ground of the happening of some subsequent event (z). But when a decree fixed a period for the performance of a condition and a railway strike made timely performance impossible, the High Court of Allahabad held that it had jurisdiction to extend the time in review (a).

In 1922 the Privy Council reviewed the case law in the case of *Chhajju Ram v Delhi* (b) in which their Lordships said there was no little inconsistency (due partly to the fact that prior to the Code of 1877 the ground for review was not so restrictive), and laid down the rule that "any other sufficient reason" means a reason sufficient on grounds at least analogous to those specified immediately previously. The case was one in which the Punjab Chief Court had granted a review on the ground that the judgment had "proceeded on an incorrect exposition of the law." This was held by the Privy Council not to be analogous and therefore not a sufficient reason. The actual decision of the Privy Council is not open to criticism, but the general rule laid down by their Lordships has not escaped criticism. Mukerjee, J., in *Gopika Ram v*

(o) *Chhajju Ram v Delhi* (1921) 49 I A 144,
3 Lah 127, 72 I C 566 (22) A I C 11.

(p)

(q)

(r)

131 I A 221

(s) (188) 9 All 61

(t) (1891) 15 Bom 267

(u) (1886) 13 Cal 62

(v) *Dhaninder Das v Balshi* (1918) 3 Pat L J
571 48 I C 129

(w) *Sabapathi v Subraya* (1878) 2 Mad 54

(x) *Bunda Prasad v Raghubar* (1916) 37 All 440
29 I C 994

(y) *Kamla Prasad v Kunj Behari* (1920) 5 Pat.
L J 344 57 I C 11

(z) *Kotphire Verka v Bellink, Velilarama*
(1901) 24 Mad 1 27 I A 197

(a) *Narain Das v Chiranj Lal* (1925) 47 All
301 86 I C 163 (25) A A 361

(b) (1922) 49 I A 144, 3 Lah 127, 72 I C 566,
(22) A I C 112

Mahar Illi (c), referring to *Chhayu* case said : ' Whether any analogy can be discovered between the two grounds specified, namely, ' the discovery of new and important matter or evidence ' and ' some mistake or error apparent on the face of the record ' need not be discussed. But whether a particular reason is analogous to either one or other of these two grounds may obviously lead to very refined if not subtle arguments. ' Again in *Narain Das v. Chiranjil Lal (d)* the Allahabad High Court described the rule in *Chhayu* case as ' technical ' and said : in our opinion the words in O 47, r 1, for any other sufficient reason ' are not only very wide in themselves, but were intentionally so made by the Legislature because of the possibility of exceptional cases arising in which obvious injustice would be worked by strict adherence to the terms of the decree as originally passed ' There is much force in these criticisms for as Mukerjee J, pointed out in *Prohas Kumar v. Nithur Lal (e)* the powers exercisable under s 151 and under O 47, r 1, are not mutually exclusive and there are several cases where it was held to be immaterial whether the review was granted under O 47 or under the inherent jurisdiction, e.g., where a suit was by mistake dismissed for default though a plaintiff was present in person (f), or where a suit was dismissed for failure to make up the deficit of Court fee and it was found that the Court fee had been embezzled by a pleader's clerk (g) or where important evidence was produced just after judgment was signed (h) Mukerjee, J's anticipation of refined and subtle arguments was realized in a Rangoon case (i) where a Judge held that a reason that was not *res inter alios acta* might still be a reason that was at least analogous.

Chhajju s case, however, is the law, and has been followed (j) But there are some inconsistencies in the cases which follow it and these serve to illustrate the difficulty of applying the rule Thus though *Chhajju* s case decided that an incorrect exposition of the law was not a sufficient reason yet in *Murari Rao v Bilwant Dikshit* (k) an error as to the Hindu law of succession was held to be an error patent on the face of the record and again in *Brindaban v Damodar* (l) the Calcutta High Court reviewed its judgment because it construed a leading case in Hindu law in a sense different to that adopted in a subsequent Privy Council decision Another similar case is *Garibani v Suroja* (m) In that case a landlord had obtained a decree for rent against tenants of a 12 anna share of a holding and advertised the whole holding for sale The tenants of the 4 anna share sued to restrain the sale alleging fraud and collusion The Judge dismissed the suit and then granted a review as a case on which he had relied had been subsequently overruled In appeal Dawson Miller, C J, admitted that if review was on the ground of error patent on the face of the record no appeal lay under rule 7, but said that in view of *Chhajju* s case it could not be contended that review had proceeded on this ground He held that the review was on the ground of discovery of new matter and that in this view the condition of rule 4 (2) (b) was not fulfilled as the subsequent overruling decision had been published before the trial and accordingly reversed the order for review Of the other cases decided on the rule in *Chhajju* s case to deserve special notice *Bindubashini v Secretary of State* (n) arose out of a motion by the Collector to hold an inquiry under s 19 H of the Court Fees Act into the value of an estate The Government pleader applied for an adjournment to call his evidence but the Judge refused and gave judgment The Judge then granted a review as the Government pleader

- (c) (19⁰⁴) 39 Cal L J 247 250 811 C *38
(24) A C 8*2
(d) (19 5) 47 All 361 363 86 I C 168 (25)
A A 361
(e) (19 4) *8 C W \ 908 841 C 2 8 (24) A
1 1034
(f) *Panania Kinnar v. Abhay* (19⁰³) 37 Cal
I J 92 *31 C 306 (-3) A C 45)
(g) *Ad i Prasad v. Ramharakh* (19 5) 41 at 180
91 I C 213 (25) A 1 433
(h) *Pameshwar v. Dinka Prasad* (1924) 3 Pat
778 841 C 230 (-5) A 1 36

- (i) $P = P^* P^* C$; $n = 2$; $m = 2$
- (j)
- (k) $(19^{\circ} 7) 46 \text{ Mad } 955 \text{ } ^{\circ} 6 \text{ I C } 342 \text{ (24) A } 3 \text{ L}$
- (l) $(19^{\circ} 3) 29 \text{ C W } 148 \text{ } 85 \text{ I C } 65 \text{ (25) A C}$
- (m) $(19^{\circ} 4) 3 \text{ Pat } 134 \text{ } ^{\circ} 5 \text{ I C } 177 \text{ (24) A P } 250$
- (n) $(19^{\circ} 4) 51 \text{ Cal } 70 \text{ } 91 \text{ I C } 745 \text{ (24) A C } 774$

O. 47, r. 1 was under the impression that the case would not be taken up. This was reversed in revision by Rankin, J., as the case was not analogous to excusable failure to bring before the Court new and important matter or evidence and as there was an element of negligence in the case, for the Judge had not found that there was any justification for the Government pleader's erroneous impression. The other case *Mahadeo v. Lakshmi Narayan* (o) decides that since *Chhajju* is a case a plaintiff whose suit has been dismissed under O. 9, r. 8, has no remedy by way of review.

An execution application that has been dismissed cannot be restored by way of review (p).

When a compromise has been entered into a decree, the Court cannot review its order on the sole ground that the compromise has been entered into under undue influence or coercion (q). Nor is review a minor's remedy for setting aside a decree passed through the negligence of his guardian (r). Where a suit is contested by the defendant but on the date fixed for the last hearing his agent admits the plaintiff's claim in collusion with the plaintiff, the case is not one of a review of judgment, the remedy of the aggrieved party lies in filing a suit to set aside the decree (s). Where the Court dismissed a suit for default of appearance of the plaintiff on a date which the Court under a mistake supposed to have been fixed for the hearing of the suit, and also under a mistake that notice of the hearing on that date was given to the plaintiff it was held by the Rangoon High Court that an application for review would lie (t).

The power of review under this rule is not as wide as that under sec. 8 (1) of the Presidency towns Insolvency Act, 1909 (u).

Review granted on particular ground—Where a review is granted on a particular ground, it is in the discretion of the Court to rehear the whole case or only the particular point on which the review has been granted (v). If the review was granted for additional evidence to be taken, that evidence should be taken and any relevant evidence in rebuttal, and also any other evidence which the party tendering was prevented from adducing by some cause for which he was not responsible or which it was not reasonable or necessary to call in the absence of that additional evidence. Otherwise neither party will be allowed to adduce evidence which was available and which with reasonable diligence could have been produced at the trial (w).

Where an appeal dismissed summarily under O. 35, r. 11, is admitted on an application for review, the appeal is not restricted to the single ground which was made the basis of the application for review (x).

From which an appeal is allowed—An application for review is competent in cases where an appeal is provided for. The fact that an appeal lies is no ground for rejecting an application for review (y).

Order—An order under O. 33, r. 7, refusing leave to sue as a pauper, is open to review under this rule (z). And so is an order as to costs (a) and an order rejecting

(o) (19-5) 49 Bom. 839, 90 I. C. 610 (5).

(p) " "

(q)

(r)

(s)

(t)

(u)

(v) *A. T. K. P. L. M. Muthu v. Lakshminarayana*

(1924) 6 Rang. 254, 111 I. C. 80 (24) A. R.

(u) *In re Marjary* (1917) 34 Bom. L. R. 115

139 I. C. 537 (32) A. R. 569

(r) *Harbans v. Thakoor Purshad* (1923) 9 Cal. 203

(s) *Bhainram v. Ambika Chavra* (1916) 53 Cal. 806, 97 I. C. 731 (22) A. C. 31

(t) *Janaki Nath v. Prabhakari* (1916) 43 Cal. 174

140, 30 I. C. 398

(y) *Mohammad Baksh v. Purshad Chavra*

(1933) 14 Lah. 50, 143 I. C. 64 (33)

A. L. 2-6

(z) *Adarji v. Manikji* (1940) 4 Bom. 414

(a) *Braya v. Jagannath* (1911) 6 Pat. L. J. 224

63 I. C. 762 (22) A. L. 1

an application for leave to appeal to His Majesty in Council (b) But an order under O.
s. 39 (h) of the Guardians and Wards Act, 1890, is not open to review (c)

Where an appeal has been preferred before application for review — After an appeal has been preferred from a decree, no application can be made for a review of that decree. This clearly appears from cl (a) of sub r (1). An appeal is not the less "preferred" within the meaning of this rule though it may be dismissed summarily under O 41, r 11. Hence a party against whom a decree has been passed is precluded, after dismissal of his appeal under O 41, r 11, from applying for a review (d). If an appeal is dismissed for default and an application under O 41, r 19, has become time barred, review is incompetent (e). The rule that a review is incompetent after an appeal has been dismissed was applied by the Bombay High Court in a case where an appeal to the Privy Council was dismissed for want of prosecution (f). The Calcutta High Court, however, doubted if the rule would apply when an appeal to the Privy Council was not heard on the merits but was dismissed as incompetent (g). If after an appeal is filed, fresh evidence is discovered, the appellant may withdraw the appeal and apply for a review (h). If after an appeal is filed, fresh evidence is discovered, the

been preferred (2)

O. 47,
rr. 1, 2

appeal, it may be a ground for allowing the appellant to withdraw the appeal to enable him to apply to the lower appellate Court for a review of its judgment on the ground of discovery of new evidence (o)

Application to set aside order made by another Judge—One Judge of a High Court cannot set aside an order made by another Judge of that Court even though the order be wrong. The remedy lies in review on the grounds mentioned in this rule (p)

Review of judgment passed in appeals preferred under cl 15 of the Letters Patent—The Madras and Bombay High Courts have held that the High Court is competent to review judgments in appeals under cl 15 of the Letters Patent (q). But a Full Bench of the Allahabad High Court has held that such a review is not competent being excluded by the words 'allowed by the Code' in section 114 (r)

Commissioner—A commissioner for taking accounts has no power of review under this order, but before his report is submitted he may reopen the inquiry into any item on grounds analogous to those of this rule (s)

2. [S. 624.] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or

To whom applications for review may be made

evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed, but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub rule (2), proviso (a), be disposed of by his successor.

To whom application for review may be made—This is s 624 recast with proviso (c) to s 626 superadded to it. The alteration of language does not involve any alteration of law.

Rule 1, sub r (1) provides that the application for review of a decree or order should be made to the Court which passed the decree or order sought to be reviewed. That rule read with the present rule leads to the following propositions—

I. Where a decree is passed by a High Court Judge, the application for review of the decree may be made to that Judge or to his successor in office, whatever be the ground on which the review is sought

(o)

- 541
(p) *Basant Kumar v Kusum Kumari* (1917) 44 Cal 28 321 C 584
(q) *Tevajala Subbarayudu v Sri Rajah Krishna* (1917) 40 Mad 651 321 C 83 *Ramesh Chandra v Damsi* (1927) 29 Bom L R 331 1011 C 700 (27) A B 28
(r) *Abhilakhi v Sada Nand* (1931) 53 All 53 1371 C 24 (31) A A 244 F B
(s) *Fernandez v Rodrigues* (1933) 47 Bom 503 821 C 503 (24) A B 231

II. (1) Where a decree is passed by a *Judge other than a High Court Judge*, the application for review of the decree may be made to the Judge who delivered the judgment or to his successor in office, provided the review is sought on the ground of—

(a) the discovery of new and important matter or evidence, or

(b) some clerical or arithmetical mistake or error apparent on the face of the decree

(2) Where a decree is passed by a *Judge other than a High Court Judge*, and the review is sought, not upon the grounds mentioned above, but upon other grounds, the application shall be made to the very Judge who passed the decree, it cannot be made to his successor in office (i). Thus if a review is sought of a decree passed by a Judge other than a High Court Judge on the ground of a supposed error of judgment (u), or if a review is sought of an order made by such a Judge on the ground that the order was made in the absence of the applicant and without giving him notice of the hearing (v), the application for review shall be made only to the Judge who passed the decree or made the order. Such an application, however, may be disposed of by the successor of the Judge who passed the decree, provided that the Judge who passed the decree has ordered notice to issue under rule 4, sub rule (2), proviso (a). It is not necessary that the application should also be disposed of by the Judge who passed the decree (w).

Rule 5 provides for the *hearing* of applications for review

3. [S. 625.] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review.

Form of applications for review

This rule relates to form and does not enlarge the right. It does not make O 43, r 1 (t) applicable to a refusal to restore an application for review (z).

4. [S. 626.] (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application where rejected

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same :

Application where granted

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for : and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge,

(i) *Sarangpanti v. Narayanasami* (18-5) 8 Mad 567, *Mohesar Singh v. Lungal Government* (1859) 7 M A 1 243 *Ram Barran Chaudh v. Bhagwati* (10-5) 47 All 751 89 I C 295 (25) A A 804
(w) *Echari Lall v. Mungolnath* (18-0) 5 Cal 110

(v) *Khemu v. Dhanji* (1890) 14 Bom 101

(u) *Ganpat v. Jivan* (1892) 16 Bom 603

(x) *Girdharilal v. Zorawar Singh* (1925) 47 All 1, 80 I C 649 (25) A A 57

O 47, r. 4

or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Alterations in the rule—The words "and the Judge shall record with his order his reason for such opinion," which occurred in the old section after the words "it shall grant the same" in sub r (2), have been omitted. Those words were construed by the Privy Council as being no more than a direction to the Judge how to act when he had decided to grant the application (y)

"No such application shall be granted without previous notice to the opposite party"—The expression "opposite party" means the party interested to support the order sought to be vacated or modified upon the application for review. When an appeal is summarily dismissed under O 41, r 11, the order of dismissal may be set aside on an ex parte application for review without notice to the respondent. The respondent in such a case cannot be said to be "the opposite party" within the meaning of cl (a) of this rule (z)

New matter or evidence—The effect of this expression is the same as if the words were "new and important matter or evidence" as in rule 1 above (a)

"Strict proof"—As to the meaning of the words "strict proof" in sub r (2), cl (b), see notes to r 7 below, "Sub rule (1), cl (b) application in contravention of provisions of rule (4)

Form—As to form of notice required by sub r 2 (a), see App G, form no 14

Second application for review.—See notes under the same head to r 7 below

Death of party pending review—The order granting a review only holds the judgment in suspense. The death of a party does not therefore cause the suit or appeal to abate (b)

Appeal.—It is provided in general terms by O 43, r 1, cl (w), that an appeal lies from an order under this rule granting an application for review. The High Courts of Calcutta, Patna, Rangoon and Lahore have held that cl (w) is to be read with and subject to rule 7 (1) below so that an appeal lies only on the grounds mentioned in that rule (c). The Bombay High Court held in one case (d) that the appeal is against the order granting the review quite irrespective of the limitation contained in rule 7. Subsequent to this decision the Bombay High Court deleted cl (w) from the rule so that there is no appeal now except on the ground mentioned in rule 7 below (e). See notes to r 7 under the head "Appeal"

(y) *Shankar Balish v. Pulwant Singh* (1900) 27 Cal 373 271 & 79

(z)

(a)

(b)

(c)

(1916) 111 at I J 193 3-1 C 15 A T K
I L M Muthu v. Lakshminarayan (1920)
6 Rang 254 111 I C 80 (24) A R 177
Jan Jin v. Ma Ma (1929) 7 Rang 18
118 I C 100 (29) A R 105 Nant r v
Balant (1927) 8 Lah 61 (27) 1 L 435
Jankey Behari v. Abdul Rahman (1932)
7 Luck 350 135 I C 695 (3-1) A O
63 Forman v. Nasir (1933) 37 C W
N 705 146 I C 530 (33) A C
(d) Das v. Karbasappa (1925) 27 Bom L R
1446 94 I C 53 (28) A R 121
(e) Kunyasi v. Pulamterdas (1927) 29 Bom
1 R 1355 (27) A R 593 Shitramayya
v. ruskantappa (1929) 31 Bom 1 R
137 116 I C 2-7 (20) A R 1-3
Vijayan v. Jaiso (1933) 35 Bom L R
290 144 I C 7-8 (33) A R 183

5. [S. 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same

6. [S. 628.] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected

(2) Where there is a majority, the decision shall be according to the opinion of the majority

7. [S. 629.] (1) An order of the Court rejecting the application shall not be appealable, but an order granting an application may be objected to on the ground that the application was—

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4, or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same

O. 47, r. 7

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party

Alteration in the rule —

- 1 The words 'shall not be appealable' have been substituted for the word 'final' This is merely a verbal alteration
- 2 The words 'the Court shall order it to be restored' in sub r (2) have been substituted for the words "the Court may order it to be restored"
- 3 The last paragraph of the old section has been transferred to r 9

Appeal—

(i) *Order "rejecting" application for review*—No appeal lies under the Code from an order *rejecting* an application for review Nor does an appeal lie from such an order under cl 15 of the Letters Patent for that clause is controlled by the express provisions of this rule which says that such an order 'shall not be appealable,' and even if it is not so controlled an order rejecting an application for review is not a 'judgment' within the meaning of that clause (f) Nor is the order open to revision under sec 11a of the Code for even if it is wrong it is no more than an erroneous exercise of discretion (g) But where there is no exercise of discretion at all, as where the Court rejects the application not after considering whether there are sufficient grounds for review [r 4, sub r 1] but on the erroneous view that it has no jurisdiction to entertain the application the order is open to revision, for it is then a case of failure to exercise a jurisdiction vested in the Court by law (h)

(ii) *Order granting application for review*—An appeal lies from an order *granting* an application for review, O 43, r 1, cl (w) But as provided by sub r 1, it lies only in the three cases mentioned therein, for otherwise the provisions of sub r (1) so far as they relate to appeal, would be quite superfluous [see notes to r 4 above, "Appeal"]. In cases other than those specified in the rule, no appeal lies from an order granting a review either under this rule or under cl 15 of the Letters Patent (i) Thus if an appeal is preferred from an order admitting an application for review on the ground that the alleged sufficient reason for which the application was admitted did not constitute sufficient reason within the meaning of r 1 of this Order, the appeal should not be entertained (j) Nor is the order appealable solely on the ground that the application for review was time barred (k) There must be an error both as to limitation and in the application of the rule as to sufficient reason". If the appeal is entertained, the order of the appellate Court will be set aside in revision under sec 115 on the ground of 'material irregularity' (l)

(iii) *Second appeal from order passed in appeal under this rule*—No second appeal lies from an order passed in appeal from an order granting an application for review

- (f) *Achaya v Ratnarelu* (1886) 9 Mad 253
Tirmal v Kanharua (1973) 45 All 535
 84 I C 595 (23) A A 356
- (g) *Ram Lal v Ratan Lal* (1904) 26 All 572
Lakshman v Marvi (1924) 26 Bom L R 284 80 I C 267 (24) A B 344
- (h) *Akbar Khan v Muhammad Ali Khan* (1909)
 31 All 610 41 C 23
- (i) B

(f)

(g)

(h)

This is now sufficiently clear from the provisions of O 43, r 1, cl (w), read with sec 101, sub s. (2). *A* applies for a review, and the application is granted. *B* appeals from the order granting the application. Whether the appellate Court confirms or sets aside the order of the lower Court, no second appeal lies to the High Court from the order of the appellate Court (m).

Sub-rule (1) (b): "In contravention of the provision of rule 4".—It is provided by r. 4 above that no application for review should be granted on the ground of discovery of new matter without *strict proof* of the allegation as to such discovery. The words "strict proof" mean proof according to the formalities of law. Where an order therefore is made granting a review on proof of discovery of new matter according to the formalities of law, no appeal lies from the order on the ground that the evidence adduced in proof of the allegation as to discovery of new matter was *not sufficient to prove* the allegation. The words "strict proof" do not refer to *sufficiency of proof* in securing the conviction of the judicial mind on the fact in dispute (o).

Grounds of objection in appeal.—An order granting an application for review can only be objected to upon the three grounds specified in the rule and no other, whether the objection is taken by an appeal from the order (p) or in an appeal from the final decree passed in the suit (q). The appellate Court will interfere if the review has been granted on grounds which do not fall within rule 1 (r). But if a review has been granted on the ground of the discovery of new evidence, the appellate Court will not consider whether the new evidence is important for that is a matter which must be left to the judgment of the Court which granted the review (s). If the order granting a review is reversed on appeal all subsequent proceedings under the order, including the final decree, fall to the ground (t).

Second application for review.—Though no appeal lies from an order rejecting an application for review, it does not preclude a second application for review on ground *different* from those taken in the first application (u).

Where application for review is time barred.—The period for an application for review of judgment by a Provincial Court of Small Causes is 15 days from the date of the decree, by the High Court in the exercise of its original jurisdiction 20 days,

if the applicant satisfies the Court that he had sufficient cause for not making the application, within the prescribed period [Limitation Act, 1908, s 5]. Where a second application for review is made after the period of limitation, the mere fact that the second application was not made because the first was pending does not constitute "sufficient cause" for admitting the second (v). If an application for review is admitted after the period of

- (m) See *Than Singh v Chundan Singh* (1845) 11 Cal 298. *Gopal Das v Alaf Khan* (1889) 11 All 343. *Papayya v Chellamayya* (1843) 12 Mad 125. *Kanti Chunder v Saligram* (1897) 24 Cal 319. See also *Bala v Phira* (1889) 13 Bm 498.
(n) *Basrat Ali v Maung Aung* (1927) 5 Rang 121 102 I C 706 (27) A R 204.
(o) *Ahad v Mahendra* (1915) 42 Cal 830 29 I C 282. *Bai Nemathbu v Bai Nematul Bibu* (1918) 42 Bom 235 46 I C 14. *Nan Lalai Mullick v Panchanan Mullick* (1918) 45 Cal 60 42 I C 484. *Chiranjilal v Tularam* (1920) 47 Cal 564 56 I C 734 [F R].
(p) *Kharahet v Rikmet Allah* (1918) 40 All 68, 43 I C 490.

- (q) *Birodi Churn v Gobind Proshad* (1895) 22 Cal 934.
(r)
(s)
(t)
(u)
Muhammad (1927) 8 Lah 54, 102 I C 523, (27) A L 280.
(v) *Fazal v Umar* (1925) 7 Lah L J 129, 88 I C 1029 (25) A L 377.
(w) *Faman v Malbari* (1902) 26 Bom 485.

O. 47,
rr. 7-9

limitation on the ground that the applicant has shown sufficient cause, the order granting the application may be appealed from as provided by cl. (c) of sub r (1), and the order may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (x)

Review granted without jurisdiction.—If a review is granted in a case where the Court has no jurisdiction to grant it, it is not clear whether an appeal lies from the order granting the review. But the order being one made without jurisdiction, it comes within the purview of sec 115, and is therefore open to revision (y). The High Court will not interfere in revision solely on the ground that the Judge granting the review had omitted to record that the additional evidence was important (z). It has been held that no appeal lies if the review is granted in the inherent jurisdiction (a).

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

Registry of application
granted and order for
re hearing

9. [S. 629, Last para.] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

Bar of certain applications.

See notes to r 7 above, "Second application for review"

ORDER XLVIII.

Miscellaneous.

O. 48,
rr. 1-3

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Process to be served at
expense of party issuing

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

Costs of service

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons

Orders and notices how
served

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in
appendices

(x) *Mahto Das v. Balam* (1880) 2 All. 28
(y) *L. J. v. N. v. N. v. N.* (1904) 2 All. 28
(z) *602, 607, Chundil v. Bombay* (1907) 21
1000 37
(a) *Srinivas v. Official Assistant* (1927) 50 All. 1
33 103 1 C. 327 (27) A. 611
(a) *Laxmi v. Adhav* (1923) 37 All. L. J. 99,
73 L. C. 306 (11) A. C. 450

ORDER XLIX.

Chartered High Courts.

1. [S 636] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule on order, directs.

Who may serve processes of High Court
 Persons employed by them—These are persons in the regular service of the attorney. Notice cannot be served by a village headman specially employed for the purpose (b)

2. [New] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Saving in respect of Chartered High Courts
3. [Cf S. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely—

- (1) rule 10 and rule 11, clauses (b) and (c), of Order VII,
- (2) rule 3 of Order X,
- (3) rule 2 of Order XVI;
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
- (5) rules 1 to 8 of Order XX; and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bomlay High Court under s 122—See Appendix III below

O. 47,
rr. 7-9

limitation on the ground that the applicant has shown sufficient cause the order granting the application may be appealed from as provided by cl (c) of sub r (1) and the order may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (z)

Review granted without jurisdiction.—If a review is granted in a case where the Court has no *jurisdiction* to grant it it is not clear whether an appeal lies from the order granting the review. But the order being one made without jurisdiction it comes within the purview of sec 115 and is therefore open to revision (y). The High Court will not interfere in revision solely on the ground that the Judge granting the review had omitted to record that the additional evidence was important (). It has been held that no appeal lies if the review is granted in the inherent jurisdiction (a).

8. [S. 630.] When an application for review is granted a note thereof shall be made in the register and the Court may at once rehear the case or make such order in regard to the rehearing as it thinks fit

Register of application
granted and order for
re-hearing

9. [S. 629, Last para.] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained

Bar of certain applications.

See notes to r 7 above Second application for review

ORDER XLVIII

Miscellaneous

O. 48,
rr. 1-3

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs

Process to be served at
expense of party issuing

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued

Costs of service

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons

Orders and notices how
served

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require shall be used for the purposes therein mentioned

Use of forms in
appendices

| | |
|---|---|
| (r) <i>Ma tho De v R k n n n</i> (18 0) All 4 | (z) <i>S r n e s t v O f f e n t l e r j n c</i> (19) 50 M s i |
| (b) <i>I t h a n v V n r n n</i> (1) 4 5 M a l | 6 J I 103 I C S () 4 M 8 1 1 |
| <i>c e C h n l n t v S o i</i> (1-9) 1 | (a) <i>L v t v A b b o</i> (19 2) 37 C 1 L J 99 |
| <i>h v 3 3</i> | 3 I C 306 () B A C 150 |

ORDER XLIX.

Chartered High Courts

1. [S 636] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule on order, directs.

Who may serve processes of High Court
 Persons employed by them—These are persons in the regular service of the attorney. Notice cannot be served by a village headman specially employed for the purpose (1)

2. [New] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Says in respect of Chartered High Courts
3. [Cf S. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely —

- (1) rule 10 and rule 11, clauses (b) and (c), of Order VII,
- (2) rule 3 of Order X,
- (3) rule 2 of Order XVI,
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII,
- (5) rules 1 to 8 of Order XX, and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bombay High Court under s 122.—See Appendix III below

O. 47,
rr. 7-9

limitation on the ground that the applicant has shown sufficient cause, the order granting the application may be appealed from as provided by cl (c) of sub r. (1), and the order may be set aside in appeal if the appellate Court holds that there was not sufficient cause for admitting the application after the period of limitation (z)

Review granted without jurisdiction.—If a review is granted in a case where the Court has no jurisdiction to grant it, it is not clear whether an appeal lies from the order granting the review. But the order being one made without jurisdiction, it comes within the purview of sec 115, and is therefore open to revision (y). The High Court will not interfere in revision solely on the ground that the Judge granting the review had omitted to record that the additional evidence was important (z). It has been held that no appeal lies if the review is granted in the inherent jurisdiction (a)

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

Registry of application
granted, and order for
re hearing

9. [S. 629, Last para.] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

Bar of certain applications

See notes to r 7 above, "Second application for review"

ORDER XLVIII.

Miscellaneous.

O. 48,
rr. 1-3

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs

Process to be served at
expense of party issuing

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

Costs of service

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

Orders and notices how
served

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in
appendices

(x) *Madho Das v. Bishan* (1880) 2 All 287
(y) *Immanji in v. Narayana* (1904) 27 M.L.J. 417.
Criminal v. Sonbati (1887) 21 M.L.J. 323

(z)
(a)

ORDER XLIX

Chartered High Courts

1. [S 636] Notice to produce documents summonses to witnesses and every other judicial process issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them or by such other persons as the High Court, by any rule or order, directs

Who may serve processes
in High Court

Persons employed by them—These are persons in the regular service of the attorney. Notice cannot be served by a village headman specially employed for the purpose (b)

2. [New] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Saving in respect of Chartered High Courts

3. [Cf S 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely —

Application of rules

- (1) rule 10 and rule 11, clauses (b) and (c), of Order VII,
- (2) rule 3 of Order X,
- (3) rule 2 of Order XVI,
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII,
- (5) rules 1 to 8 of Order XX, and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bombay High Court under s 122—See Appendix III below

O. 47,
rr. 7-9

Review granted without jurisdiction.—If a review is granted in a case where the Court has no jurisdiction to grant it, it is not clear whether an appeal lies from the order granting the review. But the order being one made without jurisdiction, it comes within the purview of sec 113, and is therefore open to revision (y). The High Court will not interfere in revision solely on the ground that the Judge granting the review had omitted to record that the additional evidence was important (z). It has been held that no appeal lies if the review is granted in the inherent jurisdiction (a).

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

9. [S. 629, Last para.] No application to review an order made on an application for a review of certain applications, or a decree or order passed or made on a review shall be entertained.

See notes to r. 7 above. "Second application for review."

ORDER XLVIII.

Miscellaneous.

O. 48,
rr. 1-3

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Process to be served at expense of party issuing.

(2) The Court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

(x) $\forall x \{ \text{the } x \text{ is a } \Gamma \text{ number} \} \Rightarrow \forall x \{ x \in \omega \}$
 (y) $\exists x \{ \text{the } x \text{ is a } \Gamma \text{ number} \} \Rightarrow \exists x \{ x \in \omega \}$
 (z) $\exists x \{ \text{the } x \text{ is a } \Gamma \text{ number} \} \Rightarrow \exists x \{ x \in \omega \}$

(2) Inventory of Official Gas price (1927) 50 31st
801 1031 & 377 (27) & M 611
(a) Inventory of Official Gas price (1925) 377 31st L. J. 92,
751 & 390 (21) & 4 1

ORDER XLIX

Chartered High Courts

1. [S 636] Notice to produce documents summonses to witnesses, and every other judicial process issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them or by such other persons as the High Court, by any rule or order, directs

Who may serve processes
(Ct. H. C. art)

Persons employed by them—These are persons in the regular service of the attorney. Notice cannot be served by a village headman specially employed for the purpose (b)

2. [New] Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

Saving in respect of Char-
tered High Courts

3. [Cf S 633.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely —

App'l of rules

- (1) rule 10 and rule 11, clauses (b) and (c), of Order VII,
- (2) rule 3 of Order X,
- (3) rule 2 of Order XVI,
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII,
- (5) rules 1 to 8 of Order XX, and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction

Additional rule made by the Bombay High Court under s 122—See Appendix III below

ORDER L

Provincial Small Cause Courts

O. 50, r. 1 1. [New] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Cause Courts' Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

(a) so much of this schedule as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits,
- (ii) the execution of decrees against immovable property or the interest of a partner in partnership property,
- (iii) the settlement of issues, and

(b) the following rules and orders—

Order II, r 1 (frame of suit),

Order X, r 3 (record of examination of parties),

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment,

Order XVIII, rules 5 to 12 (evidence),

Orders XLI to XLV (appeals),

Order XLVII, rules 2, 3, 5, 6, 7 (review),

Order LI

See sec 7 and notes thereto

ORDER LI

Presidency Small Cause Courts

O. 51 1. [New] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts' Act, 1882, this schedule shall extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and

APPENDIX A.

PLEADINGS.

(1) TITLES OF SUITS

IN THE COURT OF

A B (add description and residence)

Plaintiff

against

C D (add description and residence)

Defendant

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES

The Secretary of State for India in Council

The Advocate General of

The Collector of

The State of

The *A B* Company, Limited, having its registered office at

A B a public officer of the *C D* Company

A B (add description and residence, on behalf of himself and all other creditors of C D late of (add description and residence)

A B (add description and residence), on behalf of himself and all other holders of debentures issued by the Company, Limited

The Official Receiver

A B a minor *(add description and residence)*, by *C D* [or by the Court of Wards] his next friend

A B (add description and residence) a person of unsound mind [or of weak mind] by *C D*, his next friend

A B, a firm carrying on business in partnership at

A B (add description and residence), by his constituted attorney *C D (add description and residence)*

A B (add description and residence) Shebait of Thakur

A B (add description and residence), executor of *C D* deceased

A B (add description and residence) heir of *C D* deceased

Forms of Pleadings.

App. A.

(3) PLAINTS

No 1

MONEY LENT

(Title)

A. B., the above named plaintiff, states as follows —

- 1 On the day of 19 , he lent the defendant
 rupees repayable on the day of
- 2 The defendant has not paid the same, except rupees paid
on the day of 19
- [If the plaintiff claims exemption from any law of limitation, say —]
- 3 The plaintiff was a minor (or insane) from the day of
till the day of
- 4 [Facts showing when the cause of action arose and that the Court has jurisdiction]
- 5 The value of the subject matter of the suit for the purpose of jurisdiction is
rupees and for the purpose of Court fees is rupees
- 6 The plaintiff claims rupees, with interest at per
cent from the day of 19

No 2

MONEY OVERPAID

(Title)

A. B., the above named plaintiff, states as follows —

- 1 On the day of 19 , the plaintiff
agreed to buy and the defendant agreed to sell bars of silver
at annas per tola of fine silver
 - 2 The plaintiff procured the said bars to be assayed by *E. F.*, who was paid by
the defendant for such assay, and *E. F.* declared each of the bars to contain 1,500 tolas
of fine silver, and the plaintiff accordingly paid the defendant rupees
 - 3 Each of the said bars contained only 1,200 tolas of fine silver, of which fact
the plaintiff was ignorant when he made the payment
 - 4 The defendant has not repaid the sum so overpaid
- [As in paras 4 and 5 of Form No 1, and Relief claimed]

No 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED

(Title)

A. B., the above named plaintiff, states as follows —

- 1 On the day of 19 , *E. F.* sold and
delivered to the defendant [one hundred barrels of flour, or the goods mentioned in
the schedule hereto annexed or sundry goods]
- 2 The defendant promised to pay rupees for the said
goods on delivery [or on the day of some day before
the plaint was filed]
- 3 He has not paid the same
- 4 *E. F.* died on the day of 19 By
his last will he appointed his brother, the plaintiff, his executor
[As in paras 4 and 5 of Form No 1]
- 7 The plaintiff as executor of *E. F.* claims [Relief claimed]

No. 4

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED

(Title)

4 B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, I plaintiff sold and delivered to the defendant [sundry articles of house furniture], but no express agreement was made as to the price

2 The goods were reasonably worth _____ rupees

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No. 1, and Relief claimed]

No. 5

GOODS MADE AT DEFENDANT'S REQUEST AND NOT ACCEPTED

(Title)

4 B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, E F, agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs], and that E F should pay for the goods on delivery _____ rupees

2 The plaintiff made the goods, and on the _____ day of _____ 19____, offered to deliver them to E F, and has ever since been ready and willing so to do

3 E F has not accepted the goods or paid for them

[As in paras 4 and 5 of Form No. 1, and Relief claimed]

No. 6

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION]

(Title)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, the plaintiff put up at auction sundry [goods] subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account of which condition the defendant had notice

2 The defendant purchased [one crate of crockery] at the auction at the price of _____ rupees

3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after

4 The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards

5 On the _____ day of _____ 19____, the plaintiff resold the [crate of crockery] on account of the defendant, by public auction, for _____ rupees

6 The expenses attendant upon such re-sale amounted to _____ rupees

7 The defendant has not paid the deficiency thus arising amounting to _____ rupees

[As in paras 4 and 5 of Form No. 1 and Relief claimed]

App. A.

SERVICES AT A REASONABLE RATE

A B, the above named plaintiff, states as follows —

2 The services were reasonably worth rupees

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

SERVICES AND MATERIALS AT A REASONABLE COST

(Title)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____, 19____, at _____, the plaintiff built a house [known as No _____, in _____] and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials

2 The work done and materials supplied were reasonably worth rupees

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

USE AND OCCUPATION

(Title)

A B, the above named plaintiff, executor of the will of V I, deceased, states as follows:—

1 That the defendant occupied the [house No
Streets] by permission of the said X 1, from the day of
19 , until the day of
19 , and no agreement was made as to payment for the use
of the said premises

2 That the use of the said premises for the said period was reasonably worth
rupees

3 The defendant has not paid the money

(As in paras 4 and 5 of Form No 1)

6 The plaintiff as executor of A's estate, claims [Relief claimed]

ON AN AWARD

(Tille)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____, 19____, the plaintiff and
defendant, having a difference between them concerning [a demand of the plaintiff for

Forms of P

the price of ten barrels of oil, which the defendant refused to pay] agreed in writing to submit the difference to the arbitration of F F and G H, and the original document is annexed hereto

2 On the _____ day of _____ 19____, the arbitrator awarded that the defendant should [pay the plaintiff _____ rupees]

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 11

ON A FOREIGN JUDGMENT

(Title)

4 B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, at _____ in the State [or Kingdom] of _____, the _____ Court of that State [or Kingdom] in a suit therein pending between the plaintiff and the defendant duly adjudged that the defendant should pay to the plaintiff _____ rupees with interest from the said date

2 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 12

AGAINST SURETY FOR PAYMENT OF RENT

(Title)

A B the above named plaintiff states as follows —

1 On the _____ day of _____ 19____, E F, hired from the plaintiff for the term of _____ years, the [house No _____ Street], at the annual rent of _____ rupees, payable [monthly]

2 The defendant agreed, in consideration of the letting of the premises to E F, to guarantee the punctual payment of the rent

3 The rent for the month of _____ 19____, amounting to _____ rupees, has not been paid

[If, by the terms of the Agreement, notice is required to be given to the surety, add —]

4 On the _____ day of _____ 19____, the plaintiff gave notice to the defendant of the non payment of the rent, and demanded payment thereof

5 The defendant has not paid the same

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 13

BREACH OF AGREEMENT TO PURCHASE LAND

(Title)

A B, the above named plaintiff, states as follows, —

1 On the _____ day of _____ 19____, the defendant entered into an agreement and the original document [is annexed hereto] [Or On the _____ day of _____ 19____, the plaintiff and the defendant mutually agreed that the plaintiff should sell to the defendant _____ should purchase from the plaintiff forty bighas of land in _____ rupees]

Forms of Pleadings.

App. A. 2 On the _____ day of _____ 19____, the plaintiff being then the absolute owner of the property [and the same being free from all incumbrances] as was made to appear to the defendant, tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and will and is still ready and willing and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money

[As in parts 4 and 5 of Form No. 1, and *Piluse's model*]

No. 14

NOT DELIVERING GOODS SOLD.

(To be)

4 B., the above-named plaintiff states as follows—

1 On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour to the plaintiff on the _____ day of _____ 19____, and that the plaintiff should pay therefor _____ rupees on delivery

2. On the [said] day the plaintiff was ready and willing and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[As in parts 4 and 5 of Form No. 1, and *Piluse's model*]

No. 15

WRONGFUL DISMISSAL.

(To be)

4 B., the above-named plaintiff states as follows—

1 On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services _____ rupees monthly].

2 On the _____ day of _____ 19____ the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice

3. On the _____ day of _____ 19____ the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in parts 4 and 5 of Form No. 1 and *Piluse's model*]

No. 16

BREACH OF CONTRACT TO SERVE.

(To be)

4 B., the above-named plaintiff states as follows—

1 On the _____ day of _____ 19____, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant as an [annual] salary of _____ rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year]

Forms of P

2 The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered as to do]

3 The defendant (entered upon) the service of the plaintiff on the above mentioned day, but afterwards, on the day of 19 , he refused to serve the plaintiff as aforesaid

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed [Or state the tenor of the contract]

2 The plaintiff duly performed all the conditions of the agreement on his part

3 The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner]

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 18

ON A BOND FOR THE FIDELITY OF A CLERK

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 the plaintiff took E F into his employment as a clerk

2 In consideration thereof on the day of 19 the defendant agreed with the plaintiff that if E F should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all money evidences of debt or other property received by him for the use of the plaintiff the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof not exceeding rupees

[Or, 2 In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if E F should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void]

[Or, 2 In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed]

3 Between the day of 19 , and the day of 19 E F received money and other property, amounting to the value of rupees for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid

[As in paras 4 and 5 of Form No 1, and Relief claimed]

Forms of Pleadings.

App. A.

No 19

BY TENANT AGAINST LANDLORD WITH SPECIAL DAMAGE

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant by a registered instrument, let to the plaintiff (the house No , Street for the term of years, contracting with the plaintiff, that he the plaintiff and his legal representatives should quietly enjoy possession thereof for the said term

2 All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain his suit

3 On the day of during the said term, *E F*, who was the lawful owner of the said house, unlawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him

4 The plaintiff was thereby (prevented from continuing the business of a trader at the said place was compelled to expend rupees in moving and lost the custom of *G H* and *I F* by such removal)

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 20

ON AN AGREEMENT OF INDEMNITY

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant, being partners in trade under the style of *A B* and *C D* dissolved the partnership and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

3 On the day of 19 , [a judgment was recovered against the plaintiff and defendant by *E F*, in the High Court of Judicature at upon a debt due from the firm to *E F*, and on the day of 19] the plaintiff paid rupees [in satisfaction of the same]

4 The defendant has not paid the same to the plaintiff

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 21

PROCURING PROPERTY BY FRAUD

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities]

2 The plaintiff was thereby induced to sell [and deliver] to the defendant [div goods] of the value of rupees

3 The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so

Forms of 1

4 The defendant has not paid for the goods [or, if the goods were not delivered] The plaintiff in preparing and shipping the goods and procuring their restoration, expended _____ rupees.

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 22

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON

(Title)

A B, the above named plaintiff, states as follows —

1 On the _____ day of _____ 19____, the defendant represented to the plaintiff that E F was solvent and in good credit, and worth _____ rupees over all his liabilities [or, that E F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit]

2 The plaintiff was thereby induced to sell to E F. [rice] of the value of _____ rupees [on _____ months' credit]

3 The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or, to deceive and injure the plaintiff]

4 E F [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND

(Title)

A B, the above named plaintiff, states as follows —

1 [The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ and situate in _____ and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted]

2 On the _____ day of _____ 19____, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 24

CARRYING ON A NOXIOUS MANUFACTURE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called _____, situate in _____

Forms of Pleadings.

App. A. 2 Ever since the day of 19, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands.

3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died

4 The plaintiff was unable to graze the lands with cattle and sheep as the otherwise might have done, and was obliged to move his cattle, sheep and farming stock there from, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had. •

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 25

OBSTRUCTING A RIGHT OF WAY

(Title)

A B, the above named plaintiff states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of]

2 He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year

3 On the day of 19, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles or on foot, or in any manner] along the way [and has ever since wrongfully obstructed the same]

4 (State special damage if any)

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 26

OBSTRUCTING A HIGHWAY

(Title)

1 The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it

2 Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm and suffered great pain and was prevented from attending to his business for a long time, and incurred expense for medical attendance

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 27

DIVERTING A WATER COURSE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the , the village of district of

Forms of P

2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3 On the day of 19 , the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill

4 By reason thereof the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 28

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION

(Title)

4 B, the above named plaintiff, states as follows —

1 Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands

2 On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid by wrongfully obstructing and diverting the said stream

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 29

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD

(Title)

A B, the above named plaintiff states as follows —

1 On the day of 19 , the defendants were common carriers of passengers by railway between and

2 On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3 While he was such passenger, at [or near the station] of or between the station of and a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage if any as] and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman]

[As in paras 4 and 5 of Form No 1, and Relief claimed]

[Or thus — 2 On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in paras 3]

Forms of Pleadings.

App. A.

No 30

INJURIES CAUSED BY NEGLIGENT DRIVING

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is a shoe maker carrying on business at . The defendant is a merchant of

2 On the day of 19 , the plaintiff was walking southwards along Chowringhee, in the city of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant drawn by two horses under the charge and control of the defendants' servants was negligently, suddenly, and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down and he was much trampled by the horses.

3 By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 31.

FOR MALICIOUS PROSECUTION

(Title)

A B, the above named plaintiff, states as follows —

1 On the day of 19 , the defendant obtained a warrant of arrest from [a Magistrate of the said city, or as the case may be] on a charge of , and the plaintiff was arrested thereon, and imprisoned for [days, or hour and gave bail in the sum of rupees to obtain his release]

2 In so doing the defendant acted maliciously and without reasonable or probable cause

3 On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff

4 Many persons, whose names are unknown to the plaintiff, hearing of the arrest and supposing the plaintiff to be a criminal have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E F*, or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras 4 and 5 of Form No 1, and Relief claimed]

Forms of Pl

Ln 12

MOVABLES UPON FULLY RETAINED

(T, \cdot)

4. *P.*, the above named plaintiff, states as follows: —

1. On the _____ day of _____ 19____ plaintiff owned (or she
here showing a right the property a) the goods mentioned in the schedule hereto annexed
 (or *describe the goods*), the estimated value of which is _____ rupees

2. From that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3 Before the commencement of the suit to wit on the _____ day of _____ 19____, the plaintiff demanded the same from the defendant, but he refused to deliver them.

[Is in parts 4 and 7 of Form No. 1]

c The plaintiff claims—

(1) delivery of the said goods or
be had rupees in case delivery cannot

(2) rupees compensation for the detention thereof

The Schedule

31

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE

(Title)

And the above named plaintiff states as follows —

1 On the _____ day of _____ 19____ the defendant C. D. _____
for the purpose of inducing the plaintiff to sell him certain goods represented to the
plaintiff that he was solvent and worth _____ rupees over all
his liabilities.

2. The plaintiff was thereby induced to sell and deliver to the Defendant one hundred boxes of tea, the estimated value of which is _____ rupees.

3 The said representations were false and were then known by (D) to be so [or at the time of making the said representations (D) was insolvent and knew his self to be so].

4. C D afterwards transferred the said goods to the defendant E F with ut
consideration [x w] had notice of the falsity of the representation.

(As in paras 4 and 5 of Ltr + No. 1)

7 The plaintiff claims—

(1) delivery of the said goods or rules in case delivery cannot
be made

(2) rupees compensation for the detention thereof

34

1298 (1995) N. OF A CONTRACT ON THE GROUND OF MISTAKE.

(7 + 1e)

A // the above named plaintiff states as follows —

1 On the day of 19 the defendant repre-
sented to the plaintiff that a certain piece of ground belonging to the defendant
situated at contained ten lathas.

situated at

Forms of Pleadings.**App. A.**

2 The plaintiff was thereby induced to purchase the same at the price of _____ rupees in the belief that the said representation was true and signed an agreement of which the original is hereto annexed But the land has not been transferred to him

3 On the _____ day of _____ 19____, the plaintiff paid the defendant _____ rupees as part of the purchase money

4 That the said piece of ground contained in fact only [five lighas]
[As in paras 4 and 5 of Form No 1]

7 Plaintiff claims—

- (1) _____ rupees, with interest from the _____ day of 19____
- (2) that the said agreement be delivered up and cancelled

No 35

AN INJUNCTION RESTRAINING WASTE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is the absolute owner of [describe the property]

2 The defendant is in possession of the same under a lease from the plaintiff

3 The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff
[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[Pecuniary compensation may also be claimed]

No 36

INJUNCTION RESTRAINING NUISANCE

(Title)

A B, the above named plaintiff, states as follows —

1 Plaintiff is and at all the times hereinafter mentioned was the absolute owner of the [house No _____ Street, Calcutta]

2 The defendant, is and at all the said times was the absolute owner of [a plot of ground in the same street _____]

3 On the _____ day of _____ 19____, the defendant erected upon his said plot a slaughter house and still maintains the same, and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff]

4 In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same

[As in paras 4 and 5 of Form No 1]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance

Forms of

No. 37

PUBLIC NUISANCE

(Title)

A B, the above named plaintiff, states as follows —

1 The defendant has wrongfully heaped up earth and stones on a public road known as _____ as to obstruct the passage of the public along the same and threatens and intends unless restrained from so doing to continue and repeat the said wrongful act.

2 The plaintiff has obtained the consent in writing of the Attorney General (or of the Collector or other officer appointed in this behalf) to the institution of this suit. [As in parts 4 and 5 of Form No. 1.]

The plaintiff claims —

- (1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road,
- (2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title)

A B, the above named plaintiff, states as follows —

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION
AND FOR AN INJUNCTION

(Title)

A B, the above named plaintiff, states as follows —

1 Plaintiff is and at all times hereinafter mentioned was, the owner of a portrait of his grand father [which was executed by an eminent painter] and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

2 On the _____ day of _____ 19____, he deposited the same for safe keeping with the defendant.

3 On the _____ day of _____ 19____, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4 The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in parts 4 and 5 of Form No. 1.]

Forms of Pleadings.

App. A.

2 The plaintiff was thereby induced to purchase the same at the price of _____ rupees in the belief that the said representation was true and signed an agreement of which the original is hereto annexed But the land has not been transferred to him

3 On the _____ day of _____ 19____, the plaintiff paid the defendant _____ rupees as part of the purchase money

4 That the said piece of ground contained in fact only [five lighas]
[As in paras 4 and 5 of Form No 1]

7 Plaintiff claims—

- (1) _____ rupees with interest from the _____ day of _____ 19____
(2) that the said agreement be delivered up and cancelled

No 35

AN INJUNCTION RESTRAINING WASTE
(Title)

A B, the above named plaintiff, states as follows —

- 1 The plaintiff is the absolute owner of [describe the property]
2 The defendant is in possession of the same under a lease from the plaintiff
3 The defendant has [cut down a number of valuable trees and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff
[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises

[Pecuniary compensation may also be claimed]

No 36

INJUNCTION RESTRAINING NUISANCE
(Title)

A B, the above named plaintiff states as follows —

1 Plaintiff is and at all the times hereinafter mentioned was the absolute owner of the [house No _____ Street Calcutta]

2 The defendant, on and at all the said times was the absolute owner of [a plot of ground in the same street _____]

3 On the _____ day of _____ 19____ the defendant erected upon his said plot a slaughter house and still maintains the same and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff]

4 In consequence the plaintiff has been compelled to abandon the said house and has been unable to rent the same

[As in paras 4 and 5 of Form No 1]

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance

No. 37

PUBLIC NUISANCE

(Title)

A B, the above named plaintiff, states as follows —

1 The defendant has wrongly heaped up earth and stones on a public road known as _____ Street at _____ so as to obstruct the passage of the public along the same and threatens and intends, unless restraining from so doing, to continue and repeat the said wrongful act

2 The plaintiff has obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf] to the institution of this suit
[As in paras 4 and 5 of Form No 1]

The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road,

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE

(Title)

A B, the above named plaintiff, states as follows —

[As in Form No 27]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid

No. 39

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION
AND FOR AN INJUNCTION

(Title)

A B, the above named plaintiff, states as follows —

1 Plaintiff is, and at all times hereinafter mentioned was, the owner of a portrait of his grand father [which was executed by an eminent painter], and of which no duplicate exist [or state any facts showing that the property is of a kind that cannot be replaced by money]

2 On the _____ day of _____ 19____, he deposited the same for safe keeping with the defendant

3 On the _____ day of _____ 19____, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same

4 The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up

5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting]

[As in paras 4 and 5 of Form No 1.]

Forms of Pleadings.

App. A.

8 The plaintiff claims—

- (1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting],
- (2) that he be compelled to deliver the same to the plaintiff

No 40

INTERLEADER

(Title)

A B, the above named plaintiff, states as follows —

1 Before the date of the claims hereinafter mentioned G H deposited with the Plaintiff [describe the property] for [safe keeping]

2 The defendant C D claims the same [under an alleged assignment thereof to him from G H]

3 The defendant E F also claims the same [under an order of G H transferring the same to him]

4 The plaintiff is ignorant of the respective rights of the defendants

5 He has no claim upon the said property other than for charges and costs and is ready and willing to deliver it to such persons as the Court shall direct

6 The suit is not brought by collusion with either of the defendants

[As in paras 4 and 5 of Form No 1]

9 The plaintiff claims—

- (1) That the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto,
- (2) That they be required to interplead together concerning their claims to the said property,
- (3) That some person be authorised to receive the said property pending such litigation,
- (4) That upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto

No 41

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS

(Title)

A B, the above named plaintiff, states as follows —

1 E F, late of _____, was at the time of his death and his estate still is, indebted to the plaintiff in the sum of _____ [here insert nature of debt and security, if any]

2 E F died on or about the _____ day of _____, By his last will, dated the _____ day of _____, he appointed C D his executor [or revised his estate in trust, etc., or died intestate as the case may be]

3 The will was proved by C D [or letters of administration were granted, etc.]

4 The defendant has possessed himself of the movable [and immovable or the proceeds of the immovable] property of E F, and has not paid the plaintiff his debt

[As in paras 4 and 5 of Form No 1]

Forms of

7 The plaintiff claims that an account may be taken of the movable [and immovable] property of *F. F.* deceased, and that the same may be administered under the decree of the Court.

No 42

ADMINISTRATION BY SPECIFIC LEGATEE

(Title)

[After Form No 41 thus]—

[Omit paragraph 1 and commence paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C. D.* his executor, and bequeathed to the plaintiff [here state the specific legacy]

For paragraph 4 substitute—

The defendant is in possession of the movable property of *E. F.* and, amongst other things, of the said [here name the subject of the specific bequest].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest], or that, etc.

No 43

ADMINISTRATION BY PECUNIARY LEGATEE

(Title)

[After Form No 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E. F.*, late of _____, died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C. D.* his executor and bequeathed to the plaintiff a legacy of _____ rupees

In paragraph 4 substitute "legacy" for "debt"

Another Form

(Title)

E. F., the above named plaintiff, states as follows —

1 *A. B.* of *K.* in the _____ died on the _____ day of _____. By his last will, dated the _____ day of _____, he appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors and bequeathed his property, whether movable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life, and after his decease, and in default of his having a son who should attain twenty one, or a daughter who should attain that age or marry, upon trust

issue as aforesaid

2 The will was proved by the defendant on the _____ day of _____. The plaintiff has not been married

3 The testator was at his death entitled to movable and immovable property the defendant entered into the receipt of the rents of the immovable property and got in the movable property, he has sold some part of the immovable property

[As in paras 4 and 5 of Form No 1]

Forms of Pleadings.

App. A.

6 The plaintiff claims—

- (1) to have the movable and immovable property of *A B* administered in this Court, and for that purpose to have all proper directions given and accounts taken,
- (2) such further or other relief as the nature of the case may require.

No 44

EXECUTION OF TRUSTS

(Title)

A B, the above named plaintiff, states as follows —

1 He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E F* and *G H*, the father and mother of the defendant [or an instrument of transfer of the estate and effects of *E F* for the benefit of *C D*, the defendant, and the other creditors of *E F*]

2 *A B* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the movable and immovable property transferred by the said instrument

3 *C D* claims to be entitled of a beneficial interest under the instrument

[As in paras 4 and 5 of Form No 1]

6 The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, or of part of the said immovable property, or movable or the proceeds of the sale of, or of part of, the said immovable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust], and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C D*, the defendant, and all other persons who may be interested in such administration, in the presence of *C D*, and such other persons so interested as the Court may direct or that *C D* may show good cause to the contrary

[NB—If here the suit is by a beneficiary the plaint may be modelled *mutatis mutandis* on the plaint by a legatee]

No 45

FORECLOSURE OR SALE

(Title)

A B, the above named plaintiff, states as follows —

1 The plaintiff is mortgagee of lands belonging to the defendant

2 The following are the particulars of the mortgage —

(a) (date),

(b) (names of mortgagor and mortgagee),

(c) (sum secured),

(d) (rate of interest),

(e) (property subject to mortgage),

(f) (amount now due),

(g) (if the plaintiff's title is derivative state shortly the transfers or devolution under which he claims)

(If the plaintiff is mortgagee in possession, add)

Forms of P

- 3 The plaintiff took possession of the mortgaged property on the _____ day of _____ and is ready to account as mortgagee in possession from that time
- 4 The plaintiff claims—
- (1) Payment, or in default [sale or] foreclosure [and possession];
[If here Order 34, rule 6 applies]
 - (2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance

No 46

REDEMPTION

(Title)

A B, the above named plaintiff, states as follows —

- 1 The plaintiff is mortgagor of lands of which the defendant is mortgagee
- 2 The following are the particulars of the mortgage —
 - (a) (date);
 - (b) (names of mortgagor and mortgagee);
 - (c) (sum secured);
 - (d) (rate of interest);
 - (e) (property subject to mortgage);
 - (f) (If the plaintiff's title is derivative state shortly the transfers or devolution under which he claims)

(If the defendant is mortgagee in possession, add)
- 3 The defendant has taken possession [or has received the rents] of the mortgaged property

[As in paras 4 and 5 of Form No 1]

- 4 The plaintiff claims to redeem the said property and to have the same re-conveyed to him [and to have possession thereof]

No 47

SPECIFIC PERFORMANCE (No 1)

(Title)

A B, the above named plaintiff states as follows —

- 1 By an agreement, dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff a certain *immovable* property therein described and referred to, for the sum of _____ rupees
- 2 The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so
- 3 The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice

[As in paras 4 and 5 of Form No 1]

- 4 The plaintiff claims that the Court will order the defendant to perform the agreement and to do all acts necessary to put the plaintiff in possession of the said property [or to accept a transfer and possession of the said property] and pay the costs of the suit

Forms of Pleadings.

App. A.

No. 48

SPECIFIC PERFORMANCE (No. 2)

(T. c.)

1. *P.*, the above-named plaintiff, states as follows—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement in writing and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer [or the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

[It is paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [if contrary to the terms of the agreement],
- (2) rupees compensation for withholding the same.

No. 49

PARTNERSHIP

(T. c.)

1. *P.*, the above-named plaintiff, states as follows—

1. He and *C. D.*, the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. [Or the defendant has committed the following breaches of the partnership articles—

- (1)
- (2)
- (3)

[It is paras. 4 and 5 of Form No. 1.]

3. The plaintiff claims—

- (1) dissolution of the partnership,
- (2) that accounts be taken,
- (3) that a receiver be appointed.

N.B.—In suits for the winding-up of any partnership, omit the claim for dissolution and instead insert a paragraph stating the facts of the partnership having been dissolved.]

(4) WRITTEN STATEMENTS

General defences

| | |
|---|---|
| Denial | The defendant denies that (<i>set out facts</i>) The defendant does not admit that (<i>set out facts</i>) The defendant admits that but says that |
| Protest | The defendant denies that he is a partner in the defendant firm of The defendant denies that he made the contract alleged or any contract with the plaintiff The defendant denies that he contracted with the plaintiff as alleged or at all The defendant admits assets but not the plaintiff's claim The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them |
| Limitation | The suit is barred by article or article of the second schedule to the Indian Limitation Act, 1908 |
| Jurisdiction | The Court has no jurisdiction to hear the suit on the ground that (<i>set forth the grounds</i>) On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action |
| Insolvency | The defendant has been adjudged an insolvent The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver |
| Minority | The defendant was a minor at the time of making the alleged contract |
| Payment into Court | The defendant as to the whole claim (or as to its part of the money claimed, or as the case may be) has paid into Court Rs and says that this sum is enough to satisfy the plaintiff (or the first aforesaid) |
| Performance remitted | The performance of the promise alleged was performed on the (date) |
| Rescission | The contract was rescinded by agreement between the plaintiff and defendant |
| Res judicata | The plaintiff's claim is barred by the decision in (the reference) |
| Estoppel | The plaintiff is estopped from denying statement as to which estoppel is the next state the facts relied on as creating the estoppel |
| Ground of defence subsequent to institution of suit | Since the institution of the suit day of |

App. A.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

1. The defendant did not order the goods
2. The goods were not delivered to the defendant
3. The price was not Rs
4 } Except as to Rs [or]
5 } , same as { 1
6 } { 2
7 } { 3
7. The defendant [for A B, the defendant's agent] satisfied the claim by pay-
ment before suit to the plaintiff [or to C D, the plaintiff's agent] on the
day of 19 .
8. The defendant satisfied the claim by payment after suit to the plaintiff on
the day of 19 .

DEFENCE IN SUITS ON BONDS

- 1 The bond is not the defendant's bond
- 2 The defendant made payment to the plaintiff on the day according to the condition of the bond
- 3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

DEFENCE IN SUITS ON GUARANTEES

- 1 The principal satisfied the claim by payment before suit
- 2 The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement

DEFENCE IN A SUIT FOR DEBT.

- 1 As to Rs 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff

Particulars are as follows —

| | |
|------------------------------|-----------|
| | Rs |
| 1907, January 20th | 150 |
| " February 1st | 50 |
| Total. | <hr/> 200 |

- 2 As to the whole [or as to Rs _____, part of the money claimed] the
defendant made tender before suit of Rs _____, and has paid the same into Court

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

- 1 The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street Calcutta. Livery stable keepers employed by the defendant to supply him with carriages and horses, and the person under whose charge and control the said carriage was was the servant of the said

Forms of P

2 The defendant does not admit that the said carriage was turned out of Middleton Street, either negligently, and lenly or without warning, or at a rapid or dangerous pace

3 The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it

4 The defendant does not admit the statements contained in the third paragraph of the plaint

No 6

DEFENCE IN ALL SUITS FOR WRONGS

1 Denial of the several acts (or matters) complained of

No 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1 The goods were not the property of the plaintiff

2 The goods were detained for a lien to which the defendant was entitled

Particulars are as follows —

1907, May 3rd To carriage of the goods claimed from Delhi to Calcutta —
45 maunds at Rs 2 per maund Ps

No 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1 The plaintiff is not the author (*engraver etc*)

2 The book was not registered

3 The defendant did not infringe

No 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

1 The trade mark is not the plaintiff's

2 The alleged trade mark is not a trade mark

3 The defendant did not infringe

No 10

DEFENCE IN SUITS RELATING TO NUISANCES

1 The plaintiff's rights are not ancient (*or deny his other alleged prescriptive rights*)

2 The plaintiff's rights will not be materially interfered with by the defendant's buildings

3 The defendant denies that he or his servants pollute the water (*or the water complained of*)

[If the defendant claims the right by prescription or otherwise to do what he is alleged to do, he must say so, and must state the grounds of the claim, i.e., whether it is prescriptive or what]

4 The plaintiff has been guilty of laches of which the defendant complains

1870 Plaintiff's mill began to work

1871 Plaintiff came into possession

1883 First complaint

Forms of Pleadings.

App. A.

5 As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damage.*]

No 11

DEFENCE TO SUIT FOR FORECLOSURE.

- 1 The defendant did not execute the mortgage
- 2 The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*)
- 3 The suit is barred by article _____ of the second schedule to the Indian Limitation Act, 1877
- 4 The following payments have been made, viz. —

| | | | |
|------------------------------|---|---|-------|
| (<i>Insert date</i>) _____ | . | . | Rs. |
| | | | 1,000 |
| (<i>Insert date</i>) _____ | | | 500 |
5. The plaintiff took possession on the _____ of _____
and has received the rents ever since _____ of _____
- 6 The plaintiff released the debt on the _____ of _____
- 7 The defendant transferred all his interest to A B by a document, dated _____

No 12

DEFENCE TO SUIT FOR REDEMPTION

- 1 The plaintiff's right to redeem is barred by article _____ of the second schedule to the Indian Limitation Act, 1877
 - 2 The plaintiff transferred all interest in the property to A B
 - 3 The defendant, by a document dated the _____ day of _____ transferred all his interest in the mortgage debt and property comprised in the mortgage to A B
 - 4 The defendant never took possession of the mortgage property, or received the rents thereof
- (*If the defendant admits possession for a time only, he should state the time and deny possession beyond what he admits*)

No 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

- 1 The defendant did not enter into the agreement
- 2 A B was not the agent of the defendant (*if alleged by plaintiff*)
- 3 The plaintiff has not performed the following conditions—(*Conditions*)
- 4 The defendants did not—(*alleged acts of part performance*)
5. The plaintiff's title to the property agreed to be sold is not such as the defendant bound to accept by reasons of the following matter—(*State why*)
- 6 The agreement is uncertain in the following respects—(*State them*)
- 7 (*or*) The plaintiff has been guilty of delay,
- 8 (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*)
- 9 (*or*) The agreement is unfair
- 10 (*or*) the agreement was entered into by mistake
- 11 The following are particulars of (7), (8), (9), (10) (*or as the case may be*)
- 12 The agreement was rescinded under Conditions of Sale, No 11 (*or by mutual agreement*)

Forms of P

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No 14

DEFENCE IN ADMINISTRATION SUITS BY PECUNIARY LEGATEE

1 A B's will contained a charge of debts, he died insolvent, he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs , and the testator had some movable property which the defendant got in, and which produced the net sum of Rs

2 The defendant applied the whole of the said sums and the sum of Rs which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator

3 The defendant made up his accounts, and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer

4 The defendant submits that the plaintiff ought to pay the costs of this suit

No 15

PROBATE OF WILL IN SOLEMN FORM

1 The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 [or of the Hindu Wills Act, 1870]

2 The deceased at the time the said will and codicil respectively purport to have been executed was not of sound mind, memory and understanding

3 The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant]

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [state the nature of the fraud]

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will, as the case may be]

6 The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof

The defendant claims —

- (1) that the Court will pronounce against the said will and codicil propounded by the plaintiff,
- (2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law

No 16

PARTICULARS (O 6, r 5)

(Title of suit)

The following are the particulars of (here state the matters in respect of which particulars have been ordered) delivered pursuant to the order

Particulars of the of
(Here set out the particulars ordered in paragraph if necessary)

APPENDIX B.

PROCESS.

No 1

SUMMONS FOR DISPOSAL OF SUITS (O 5, rr 1, 5)

(Title)

[Name, description and place of residence]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19, at o'clock in the noon, to answer the claim, and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this
day of 19

Judge

NOTICE—1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses

2 If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No 2

SUMMONS FOR SETTLEMENT OF ISSUES (O 5, rr 1 5)

(Title)

To

[Name, description and place of residence]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in the Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions on the day of 19, at o'clock in the noon to answer the claim and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this
day of 19

Judge

Forms o

- NOTICE—1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses
- 2 If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property or both

No 3

SUMMONS TO APPEAR IN PERSON (O 5 r 3)

(Title)

To

[Name, description and place of residence]

WHEREAS

has instituted a suit against you for

you are hereby summoned to appear in this Court in person on the

day of 19, at o'clock in the noon

to answer the claim, and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court this

day of 19

Judge.

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O 37 r 2)

(Title)

To

[Name, description and place of residence]

WHEREAS

has instituted a suit against you under Order XXVII of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the

of a of which a copy is hereto annexed you are hereby summoned

to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you

In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs and

the sum of Rs for costs together with such interest, if any from the date of the institution of the suit as the Court may order

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits or that it is reasonable that you should be allowed to appear in the suit

GIVEN under my hand and the seal of the Court, this

of 19 day

Judge

Forms of Process.**App. B.**

No 5

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED
AS CO PLAINTIFF (O 1, r 10)
(Title)

To

[Name, description and place of residence]

WHEREAS _____ has
instituted the above suit against _____ for
and whereas it appears necessary that you should be
added as a plaintiff in the said suit in order to enable the Court effectually and completely
to adjudicate upon and settle all the questions involved

Take notice that you should on or before _____ day of
19 , signify to this Court whether you consent to be so added

GIVEN under my hand and the seal of the Court, this
day of _____ 19

Judge

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT
(O 22, r 4)
(Title)

To

WHEREAS the plaintiff _____ instituted a suit in this Court on the
day of _____ 19 , against the defendant
who has since deceased and whereas the said plaintiff has made an application to this
Court, alleging that you are the legal representative of the said
deceased, and desiring that you be made the defendant in his stead

You are hereby summoned to attend in this Court on the _____ day of
19 , at _____ AM to defend the said suit and, in
default of your appearance on the day specified, the said suit will be heard and deter-
mined in your absence

GIVEN under my hand and the seal of the Court, this
day of _____ 19

Judge

No 7

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE
JURISDICTION OF ANOTHER COURT (O 5, r 21)
(Title)

WHEREAS it is stated that
defendant witness in the above suit is at present residing in _____ It is
ordered that a summons returnable on the _____ day of
19 , be forwarded to the _____ Court of
for service on the said defendant witness with a duplicate of this
proceeding

The Court fee of _____ chargeable in respect to the summons
has been realized in this Court in stamps
Dated _____ 19

Judge.

No. 8

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED
ON A PRISONER. (O 5, r 24)

(Title)

To

The Superintendent of the Jail at

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to the Court signed by the said defendant, with a statement of service endorsed thereon by you

Judge

No 9

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC
SERVANT OR SOLDIER. (O 5, r 27, 28)

To

UNDER the provisions of Order V rule 27 (28 or as the case may be) of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you

Judge

No 10

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT (O 5 r 23)

(Title)

Read proceeding from the

forwarding

of that Court

in suit No

for service on

of 19

Read Serving Officer's endorsement stating that the and proof of the above having been duly taken by me on the oath of and it is ordered that the be returned to the with a copy of this proceeding

Judge

Note—This form will be applicable to process other than summons the service of which may have to be effected in the same manner

Alterations made in this form by the High Court of Bombay—see Appendix III below, rule 4

Forms of Process.

App. B.

No 11

AFFIDAVIT OF PROCESS SERVER TO ACCOMPANY RETURN
OF A SUMMONS OR NOTICE. (O 5, r 18)

(Title)

The affidavit of _____ son of _____
 and say as follows — I _____ make oath
affirm

(1) I am a process server of this Court
 (2) On the _____ day of _____ 19____

I received a summons issued by the Court of _____
notice _____ in Suit No _____
 of 19____ in the said Court, dated the _____
 day of _____ 19____ for service on _____

(3) The said _____ was at the time
 personally known to me, and I served the said summons on him on the _____
notice _____ day of _____ 19____, at about _____ o'clock
 in the _____ noon at _____ by tendering a copy thereof to him
her and requiring his signature to the original summons
her notice

(a)
 (b)

(a) Here state whether the persons served, signed or refused to sign the process, and
 in whose presence
 (b) Signature of process server

or,

(3) The said _____ not being personally known to me
 accompanied me to _____
 and pointed out to me a person whom he stated to be the said _____
 _____, and I served the said summons on him on the day of _____
notice _____ 19____, at about _____ o'clock in the noon at _____ by
 tendering a copy thereof to him and requiring his signature to the original summons
her her notice

(a)
 (b)

(a) Here state whether the person served, signed or refused to sign the process, and
 in whose presence
 (b) Signature of process server

or,

(3) The said _____ and the house in which he ordinarily resides being
 personally known to me, I went to the said house in _____
 _____ and there on the _____ day of _____ 19____ at
 about _____ o'clock in the _____ noon, I did not find the said _____

(a)
 (b)

Forms of

(a) Enter fully and exactly the manner in which process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process server.

or,

(3) One _____ accompanied me to _____
and there pointed out to me _____ which he said was the
house in which _____ ordinarily resides I did not find the said _____ there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process server.

or,

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

^{sworn}
Affirmed by the said _____ before me this _____ day
of _____ 19____

Empowered under section 139 of the
Code of Civil Procedure, 1908, to admin-
ister the oath to deponents

Alterations made in this form by the Chief Court of the Punjab
under Section 122.—See Appendix V below

No 12

NOTICE TO DEFENDANT (O 9, r 6)

(Title)

To

[Name, description and place of residence]

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the _____ day of _____ 19____ is now fixed for the hearing of the same, in default of your appearance on the day last mentioned the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this _____ day of
19 .

Judge.

No 13

SUMMONS TO WITNESS (O 16, rr 1, 5)

(Title)

To

WHEREAS your attendance is required to
on behalf of the _____ in the above suit, you are hereby required
[personally] to appear before this Court on the _____ day of
19____, at _____ o'clock in the forenoon, and
to bring with you [or to send to this _____ Court]

Forms of Process.**App. B.**

A sum of Rs _____, being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

NOTICE —(1) If you are summoned only to produce a document and not to give evidence you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid

(2) If you are detained beyond the day aforesaid, a sum of Rs _____ will be tendered to you for each day's attendance beyond the day specified

No 14

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16 r 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law, and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons. This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the _____ day of _____ 19____, at _____ o'clock in the forenoon and from day to day until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

No 15

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16 r 10)

(Title)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons. This proclamation is, therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the _____ day of _____ 19____, at _____ o'clock in the forenoon and from day to day until he shall have leave to depart and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

Forms of
A

No 16

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS (O 16, r 10)

(Title)

To

The Bailiff of the Court

WHEREAS the witness cited
 by has not, after the
 expiration of the period limited in the proclamation issued for his attendance, appeared
 in Court, You are hereby directed to hold under attachment
 property belonging to the said witness to the value of and to
 submit a return, accompanied with an inventory thereof, within days

GIVEN under my hand and the seal of the Court, this day of
 19 Judge

No 17

WARRANT OF ARREST OF WITNESS (O 16, r 10)

(Title)

To

The Bailiff of the Court

WHEREAS has been duly served with a summons but has failed to
 attend [absconds and keeps out of the way for the purpose of avoiding service of a sum-
 mons] You are hereby ordered to arrest and bring the said before the Court

You are further ordered to return this warrant on or before the
 day of 19, with an endorsement certifying the day on and
 the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19
Judge

No 18

WARRANT OF COMMITTAL (O 16, r 18)

(Title)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the abovenamed suit has made application
 to this Court that security be taken for the appearance of to give
 evidence (or to produce a document) on the day of
 19 , and whereas the Court has called upon the said to furnish
 such security, which he has failed to do, This is to require you to receive the said
 into your custody in the civil prison and to produce him before this Court at
 on the said day and on such other day or days as may be hereafter ordered

GIVEN under my hand and the seal of the Court this day of 19
Judge

Forms of Process.**App. B**

No 10

WARRANT OF COMMITTAL. (O 16, r 18)

(Title)

To

The Officer in charge of the Jail at

WHEREAS _____, whose attendance is required before this Court in the abovenamed case to give evidence (or to produce a document) has been arrested and brought before the Court in custody, and whereas owing to the absence of the plaintiff (or defendant), the said _____ cannot give such evidence (or produce such document), and whereas the Court has called upon the said

_____ to give security for his appearance on the _____ day of _____ 19____, at _____ which he has failed to do, This is to require you to receive the said _____ into your custody in the civil prison and produce him before this Court at _____ on the _____ day of _____ 19____.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No 1

ORDER FOR DELIVERY OF INTERROGATORIES (O 11, r 1)

In the Court of _____ of _____ 19 _____
 Civil Suit No _____
 A B _____ *Plaintiff*
 C D, E F and G H _____ *Defendants*
 Upon hearing _____ and upon reading the affidavit of _____ filed
 the _____ day of _____ 19 _____, It is ordered that the _____ be at
 liberty to deliver to the _____ interrogatories in writing and that the
 said _____ do answer the interrogatories as prescribed by Order XI, rule 8, and
 that the costs of this application be _____

No 2

INTERROGATORIES (O 11, r 4)

(Title as in No 1, *supra*)

Interrogatories on behalf of the above named [plaintiff or defendant C D] for the
 examination of the above named [defendants E F and G H or plaintiff]

1 Did not, etc

2 Has not etc

etc

etc

etc

[The defendant E F is required to answer the interrogatories numbered]

[The defendant G H is required to answer the interrogatories numbered]

No 3

ANSWER TO INTERROGATORIES (O 11 r 9)

(Title as in No 1, *supra*)

The answer of the above named defendant E F to the interrogatories for his
 examination by the above named plaintiff

In answer to the said interrogatories I the above named E F make oath and say
 as follows —

$\left. \begin{array}{l} 1 \\ 2 \end{array} \right\}$ Enter answers to interrogatories in paragraphs numbered consecutively

3 I object to answer the interrogatories numbered _____ on the
 ground that [*state grounds of objection*]

No 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O 11 r 10)

(Title as in No 1 *supra*)

Upon hearing _____
 It is ordered that the _____ do within _____ days from the date of
 this order answer on affidavit stating which documents are or have been in his posses-
 sion or power relating to the matter in question in this suit and that the costs of this
 application be _____

Forms of Discovery

App. C.

No 5

AFFIDAVIT AS TO DOCUMENTS (O 11, r 13)

(Title as in No 1, *supra*)

I, the above named defendant, C D, make oath and say as follows —

1 I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2 I object to produce the said documents set forth in the second part of the first schedule hereto [*state grounds of objection*]

3 I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto

4 The last mentioned documents were last in my possession or power on [*state when and what has become of them, and in whose possession they now are*]

5 According to the best of my knowledge information and belief I have not now and never had, in my possession custody or power, or in the possession, custody or power of my pleader or agent, or in the possession custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto

No 6

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O 11, r 14)

(Title as in No 1, *supra*)

Upon bearing and upon reading the affidavit filed
the day of 19 , It is ordered that the do, at all
seasonable times on reasonable notice, produce at , situate
at , the following documents, namely, , and that
the be at liberty to inspect and peruse the documents
so produced, and to make notes of their contents In the meantime it is ordered that
all further proceedings be stayed and that the costs of this application be

No 7

NOTICE TO PRODUCE DOCUMENTS (O 11, r 16)

(Title as in No 1, *supra*)

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*plaint or written statement or affidavit*] dated the day of 19 .

[*Describe documents required*] X.Y, Pleader for the
To Z, Pleader for the

No 8

NOTICE TO INSPECT DOCUMENTS (O 11, r 17)

(Title as in No 1, *supra*)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [*except the documents numbered*

in that notice] at [insert place of inspection] on Thursday next, the instant, between the hours of 12 and 4 o'clock

Or, that the [plaintiff or defendant] objects to giving you inspection of documents mentioned in your notice of the _____ day of _____ 19____
on the ground that [state the ground] —

No 9

NOTICE TO ADMIT DOCUMENTS (O 12, r 3)

(Title as in No 1, supra)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at _____
on _____ between the hours of _____, and the defendant [or plaintiff] is hereby required, within forty eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be original, were respectively written, signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated, to have been served, sent or delivered were so served, sent or delivered, respectively saving all just exceptions to the admissibility of all such documents as evidence in this suit

G H, pleader [or agent] for plaintiff [or defendant]

To E F, pleader [or agent] for defendant [or plaintiff]

[Here describe the documents and specify as to each document whether it is original or a copy]

No 10

NOTICE TO ADMIT FACTS (O 12, r 5)

(Title as in No 1, supra)

Take notice that the plaintiff [or defendant] in this suit, for the purposes of this suit requires defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified, and the defendant [or plaintiff] is hereby required within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit

G H, pleader [or agent] for plaintiff [or defendant]

To E F, pleader [or agent] for defendant [or plaintiff]

The facts, the admission of which is required, are—

- 1 That M died on the 1st January, 1890
- 2 That he died intestate
- 3 That N was his only lawful son
- 4 That O died on the 1st April, 1896
- 5 That O was never married.

No 11

ADMISSION OF FACTS PURSUANT TO NOTICE (O 12, r 5)

(Title as in No 1, supra)

The defendant [or plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit

Forms of Discovery.**App. C.**

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

E F, *pleader* [or *agent*] for defendant [or plaintiff]

To G H, *pleader* [or *agent*] for plaintiff [or defendant]

| Facts admitted | Qualifications or limitation, if any subject to which they are admitted |
|---------------------------------------|---|
| 1 That M died on the 1st January 1890 | 1 |
| 2 That he died intestate | 2 |
| 3 That N was his lawful son | 3 But not that he was his only lawful son |
| 4 That O died | 4 But not that he died on the 1st April 1896 |
| 5 That O was never married | 5 |

No 12**NOTICE TO PRODUCE (GENERAL FORM) (O 12, r 8)**

(Title as in No 1, *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit and particularly

G H, *pleader* [or *agent*] for plaintiff [or defendant]

To E F, *pleader* [or *agent*] for defendant [or plaintiff]

APPENDIX D.

DECREES.

No 1 DECREE IN ORIGINAL SUIT (O 20, rr 6, 7) (Title)

Claim for

This suit coming on this day for final disposal before
presence of for the plaintiff and of in the
defendant, it is ordered and decreed that for the
sum of Rs be paid by the and that the
on account of the costs of this suit, with interest thereon at the rate of to the
cent per annum from this date to date of realization per

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge

Costs of suits

| Plaintiff | | | Defendant | | |
|-----------------------------|----|---|---------------------------|----|---|
| Rs | A. | P | Rs | A. | P |
| 1 Stamp for plaint | | | Stamp for power | | |
| 2 Do for power | | | Do for petition | | |
| 3 Do for exhibits | | | Pleader's fee | | |
| 4 Pleader's fee on Rs | | | Subsistence for witnesses | | |
| 5 Subsistence for witnesses | | | Service of process | | |
| 6 Commissioner's fee | | | Commissioner's fee | | |
| 7 Service of process | | | | | |
| Total | | | Total | | |

No 2 SIMPLE MONEY DECREE (Section 34) (Title)

Claim for

This suit coming on this day for final disposal before in the
presence of for the plaintiff and of for the
defendant, it is ordered that the do pay to the the
sum of Rs with interest thereon at the rate of per cent
per annum from to the date of realization of the said sum and do also
pay Rs , the costs of this suit with interest thereon at the rate
of per cent per annum from this date to the date of realization

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge

Forms of Discovery.**App. C.**

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission]

D F pleader [or agent] for defendant [or plaintiff]

To G H, pleader [or agent] for plaintiff [or defendant]

| Facts admitted | Qualifications or limitation, if any subject to which they are admitted |
|---------------------------------------|---|
| 1 That M died on the 1st January 1890 | 1 |
| 2 That he died intestate | 2 |
| 3 That N was his lawful son | 3 But not that he was his only lawful son |
| 4 That O died | 4 But not that he died on the 1st April 1896 |
| 5 That O was never married | 5 |

No 12

NOTICE TO PRODUCE (GENERAL FORM) (O 12 r 8)

(Title as in No 1 *supra*)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books papers letters copies of letters and other writings and documents in your custody possession or power containing any entry, memorandum or minute relating to the matters in question in this suit and particularly

G H pleader [or agent] for plaintiff [or defendant]

To E F pleader [or agent] for defendant [or plaintiff]

APPENDIX D.

DECREES.

No 1

DECREE IN ORIGINAL SUIT (O 20, rr 6, 7)

(Title)

Claim for

This suit coming on this day for final disposal before
 presence of _____ for the plaintiff and of _____ in the
 defendant, it is ordered and decreed that _____ for the
 and that the
 sum of Rs _____ be paid by the _____ to the
 on account of the costs of this suit, with interest thereon at the rate of _____ per
 cent per annum from this date to date of realization

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____
Judge

Costs of suits

| Plaintiff | | | Defendant | | |
|-----------------------------|----|---|-----------|---------------------------|---|
| | Rs | A | P | | P |
| 1 Stamp for plaint | | | | Stamp for power | |
| 2 Do for power | | | | Do for petition | |
| 3 Do for exhibits | | | | Pleader's fee | |
| 4 Pleader's fee on Rs | | | | Subsistence for witnesses | |
| 5 Subsistence for witnesses | | | | Service of process | |
| 6 Commissioner's fee | | | | Commissioner's fee | |
| 7 Service of process | | | | | |
| Total | | | | Total | |

No 2

SIMPLE MONEY DECREE (Section 34)

(Title)

Claim for

This suit coming on this day for final disposal before
 presence of _____ for the plaintiff and of _____ in the
 defendant, it is ordered that the _____ do pay to the _____ for the
 the
 sum of Rs _____ with interest thereon at the rate of _____ per cent.
 per annum from _____ to the date of realization of the said sum and do also
 pay Rs _____, the costs of this suit, with interest thereon at the rate
 of _____ per cent per annum from this date to the date of realization

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____
Judge.

Forms of Decrees.

App. D.

Costs of suit

| Plaintiff | | | | Defendant | | | | |
|-----------|-------------------------------|----|---|-----------|---------------------------|----|---|---|
| 1 | Stamp for plaints | Rs | A | 1 | Stamp for power | Rs | A | P |
| 2 | Do for power | | | | Do for petition | | | |
| 3 | Do for exhibit | | | | Pleader s fee | | | |
| | Pleader s fee on Rs | | | | Subsistence for witnesses | | | |
| | Subsistence for wit nesses | | | | Service of process | | | |
| | Commissioner s fee | | | | Commissioner s fee | | | |
| | Service of process | | | | | | | |
| Total | | | | Total | | | | |

NB—These forms have been substituted for old Forms Nos. 3 to 11 by sec. 8 of the Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April 1930.

FORM No 3

Preliminary decree for foreclosure

(Order XXXIV, rule 2 —Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received,
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum),
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed.

2 And it is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (iv) above together with interest thereon shall

Forms of

first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money or, as the case may be, debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs for the costs of the suit awarded to the plaintiff,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 3A.

Preliminary decree for foreclosure

(Order XXIV, rule 2—Where the Court declares the amount due)

(Title)

This suit coming on this day, etc., It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and

Forms of Decrees.

App. D.

Costs of suit

| Plaintiff | | | | Defendant | | | |
|---------------------------|----|---|---|---------------------------|----|---|---|
| | Rs | A | P | | Rs | A | P |
| 1 Stamp for plaints | | | | Stamp for power | | | |
| 2 Do for power | | | | Do for petition | | | |
| 3 Do for exhibit | | | | Pleader's fee | | | |
| Pleader's fee on Rs | | | | Subsistence for witnesses | | | |
| Subsistence for witnesses | | | | Service of process | | | |
| Commissioner's fee | | | | Commissioner's fee | | | |
| Service of process | | | | | | | |
| Total | | | | Total | | | |

NB—These forms have been substituted for old Forms Nos. 3 to 11 by sec. 8 of the Transfer of Property (Amendment) Supplementary Act, 1929, which came into force on 1st April 1930.

FORM No 3

Preliminary decree for foreclosure

(Order XXIV, rule 2—Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc., that it be referred to following —

It is hereby ordered and decreed as the Commissioner to take the accounts

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable)
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or, failing both such rates, at nine per cent per annum)
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed.

2 And it is hereby further ordered and decreed that any amount received under clause (iv) or adjudged due under clause (iv) above, together with interest thereon shall

Forms of

first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money or, as the case may be, debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs for the costs of the suit awarded to the plaintiff,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant or to such person as he appoints and the plaintiff shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 3A

Preliminary decree for foreclosure.

(Order XXXIV, rule 2 —Where the Court declares the amount due)

(Title.)

This suit coming on this day, etc , It is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and

Forms of Decrees.

App. D. expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs _____ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs _____.

2 And it is hereby ordered and decreed as follows —

- (i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court of the said sum of Rs _____,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required, deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff, quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE
Description of the mortgaged property

FORM NO 4 *
Final decree for foreclosure
(Order XXIV, rule 3)
(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned,† [and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgage property]

* The usual form of decree in the original side of the High Court is not exactly in conformity with this form—*Laiguns d'amar v. Copenda* (1933) 60 Cal 19 143 I C 679 (33) A C 251

† Words not required to be added

Forms of

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

FORM No 5

Preliminary decree for sale

(Order XXXIV, rule 4 —Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc , It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable) ,
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ,
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date of costs, charges and expenses other than the costs of the suit in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable on the principal or failing both such rates at nine per cent per annum)
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (ii) above, together with interest thereon shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the plaintiff ,

Forms of Decrees.

App. D.

expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs for the costs of this suit awarded to the plaintiff, making in all the sum of Rs

2 And it is hereby ordered and decreed as follows —

- (i) that the defendant do pay unto Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court of the said sum of Rs _____,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required reconvey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required, deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that in default of payment as aforesaid the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver up to the plaintiff, quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 4 *

Final decree for foreclosure

(Order XXXIV, rule 3)

(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage

It is hereby ordered and decreed that the defendant and all persons claiming through

property]

* The usual form of decree in the High Court is in exactly in conformity with this form—*First Annual Report Copeland* (1933) 60 Cal 19 143 I C 679 (33) A C 251

† Where it is required to be filled

Forms of

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished

FORM No 5

Preliminary decree for sale

(Order XXIV, rule 4 — Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc , It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable) ,
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ,
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date of costs, charges and expenses other than the costs of the suit in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties or failing such rate at the same rate as is payable in the principal or failing both such rates at nine per cent per annum)
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of or permanently injurious to the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (ii) above together with interest thereon shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon and the balance if any shall be added to the mortgage money or as the case may be be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the plaintiff ,

App. D.

7 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

Description of the mortgaged property

Preliminary decree for sale

(Order XXXIV, rule 4 —When the Court declares the amount due)

(Title)

This suit coming on this _____ day, etc., It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of _____ is the sum of Rs _____ for principal, the sum of Rs _____ for interest on the said principal, the sum of Rs _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs _____ for the costs of the suit awarded to the plaintiff, making in all the sum of Rs _____

Forms of

2 And it is hereby ordered and decreed as follows —

- (i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs _____
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as afore said, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

4 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same

5 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM NO 6

Final decree for sale
(Order XXXIV, rule 5)
(Title)

| | |
|---|--------------------|
| Upon reading the preliminary decree passed in this suit on the _____ day of _____ | _____ day of _____ |
| and further orders (if any) dated the _____ day of _____ | _____ day of _____ |
| application of the plaintiff dated the _____ day of _____ | _____ day of _____ |

_____ and the
for a final decree

Forms of Decrees.

App. D. and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage •

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges, and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1909, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same

FORM No 7

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed

(Order XXXIV, rule 7—Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc., It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following —

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received,
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal or, failing both such rates, at nine per cent per annum),
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or, as the case

Forms of

may be, debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant ,
- (ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall if so required re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage of this suit and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 7A

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV, rule 7—Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc , It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable) ,

Forms of Decrees.

App. D. and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges, and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any, shall be paid to the defendant or other persons entitled to receive the same

FORM No 7

Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed

(Order XXXIV, rule 7—Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc. It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent per annum or at such rate as the Court deems reasonable),
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received,
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing, such rate at the same rate as is payable on the principal or failing both such rates, at nine per cent per annum),
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or, as the case

Forms of 1

may be, debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant,
- (ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall if so required re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage of this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 7A

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV, rule 7—Where accounts are directed to be taken)

(Title)

This suit coming on this day, etc., It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

Forms of Decrees.**App. D.**

- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received ,
- (iii) an account of all sums of money properly incurred by the defendant up to the date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent per annum),
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (ii) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal

3 And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make

4 And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs for the costs of the suit awarded to the defendant ,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or retransfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property , and on such application being made, the mortgaged property or a

Forms of Decrees.

App. D.

all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 7C

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXXIV, rule 7—Where the Court declares the amount due)

(Title)

This suit coming on this day, etc., It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage security together with interest thereon, and the sum of Rs for the costs of this suit awarded to the defendant, making in all the sum of Rs

2 And it is hereby ordered and decreed as follows —

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time the payment may be extended by the Court the said sum of Rs ,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1909, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person, as he appoints and the defendant shall if so required, re convey or re transfer

to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

Forms of

4 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same

5 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property

FORM No 7D

Final decree for foreclosure in a redemption suit on default of payment by mortgagor

(Order XXXIV rule 8)

(Title.)

Upon reading the preliminary decree in the suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned * (and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property]

2 And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint of from the suit is hereby discharged and extinguished

FORM No 7E

Final decree for sale in a redemption suit on default of payment by mortgagor

(Order XXXIV rule 8)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____ for a final decree

* Words not required to be deleted

Forms of Decrees.

App. D.

all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

FORM No 7C

Preliminary decree for redemption where on default of payment by mortgagor a decree for sale is passed

(Order XXIV, rule 7—Where the Court declares the amount due)

(Title)

This suit coming on this day etc., It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage security together with interest thereon, and the sum of Rs for the costs of this suit awarded to the defendant, making in all the sum of Rs

2 And it is hereby ordered and decreed as follows—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time the payment may be extended by the Court the said sum of Rs ,
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person, as he appoints, and the defendant shall if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property

Forms of I

4 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

FORM No. 7D

Final decree for foreclosure in a redemption suit on default of payment by mortgagor

(Order XXXIV, rule 5)

(Title)

Upon reading the preliminary decree in the suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____ for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed (if and in so far as they are entitled to the right of redemption of and in the property in the aforesaid preliminary decree mentioned) * [and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property]

2 And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint of from the suit is hereby discharged and extinguished

FORM No. 7E

Final decree for sale in a redemption suit on default of payment by mortgagor

(Order XXXIV, rule 8)

(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____ for a final decree

* Where the plaintiff is entitled to

Forms of Decrees.

App. D. and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage;

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

FORM NO 7F

Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree

(Order XXXIV, rules 3, 5 and 8)

(Title)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagees under the preliminary decree dated day of , It is hereby ordered and decreed that —

(i) the mortgagee do execute a deed of re conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor* [or as the case may be, who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour,

(ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re conveyance or acknowledgment in the manner aforesaid —

(i) the said sum of Rs be paid out of Court to the mortgagee,

(ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor* [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor* [or other person making the payment], the said deed of re conveyance or the acknowledgment in the office of the Sub Registrar of , and

(iii) [if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor* [or such person as aforesaid who has made the payment]

* Words not required to be d 1 ted

Forms of D
A

FORM No 8†

Decree against mortgagor personally for balance after the sale of the mortgaged property
(Order XXXIV, rules 6 and 8A)
(Title)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the _____ day of _____ and the Court being satisfied that the net proceeds of the sale held under the afore said final decree amounted to Rs _____ and have been paid to the applicant out of the Court on the _____ day of _____ and that the balance now due to him under the aforesaid decree is Rs _____.

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally,

It is ordered hereby and decreed as follows —

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs _____ with further interest at the rate of six per cent per annum from the _____ day of _____ (the date or payment out of Court referred to above) up to the date of realization of the said sum and the costs of this application

FORM No 9

Preliminary decree for foreclosure or sale

| | |
|------------------------------|-----------------|
| [Plaintiff | 1st Mortgagee |
| Defendant No 1 | Mortgagor |
| Defendant No 2 | 2nd Mortgagee] |
| (Order XXXIV rules 2 and 4) | |
| (Title) | |

The suit coming on this _____ day etc It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs _____ for principal the sum of Rs _____ for interest on the said principal the sum of Rs _____ for costs charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage security with interest thereon and the sum of Rs _____ for the costs of this suit awarded to the plaintiff making in all the sum of of Rs _____

(Similar declarations to be introduced with regard to the amount due to defendant No 2 in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit)

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2* [or (if there are several subsequent mortgagees that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows

(1) (a) that defendants or one of them do pay into Court on or before the _____ day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs _____ due to the plaintiff and

† This form is provided for use and adoption according to the circumstances of the case and a personal decree may be passed although the decree holder's costs have not been taxed—*Praiyumnakumar v Gopendra* (1933) 60 Cal 19 1431 C 69 (33) A C 251

* Words not required to be deleted

Forms of Decrees.

App. D. and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage,

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property

2 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

FORM NO 7F

Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree

(Order XXXIV, rules 3, 5 and 8)

(Title)

This suit coming on this day for further consideration and it appearing that on the day of the mortgagor or , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated day of , It is hereby ordered and decreed that —

- (i) the mortgagee do execute a deed of re conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor* [or as the case may be, who has redeemed the property] or an acknowledgment of the payment of the amount due in his favour,
- (ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re conveyance or acknowledgment in the manner aforesaid —

- (i) the said sum of Rs be paid out of Court to the mortgagee,
- (ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor* [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor* [or other person making the payment] the said deed of re conveyance or the acknowledgment in the office of the Sub Registrar of , and
- (iii) * [if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor* [or such person as aforesaid who has made the payment]

* Words not required to be dect ted

Forms of

FORM No 8 †

Decree against mortgagor personally for balance after the sale of the mortgaged property
(Order XXXIV, rules 6 and 8A)

(Title)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the _____ day of _____ and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs _____ and have been paid to the applicant out of the Court on the _____ day of _____ and that the balance now due to him under the aforesaid decree is Rs _____.

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally,

It is ordered hereby and decreed as follows —

That the mortgagor (plaintiff or defendant as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs _____ with further interest at the rate of six per cent per annum from the _____ day of _____ (the date of payment out of Court referred to above) up to the date of realization of the said sum and the costs of this application

FORM No 9

Preliminary decree for foreclosure or sale

[Plaintiff _____ 1st Mortgagee _____]

Defendant No 1 _____ Mortgagee
Defendant No 2 _____ 2nd Mortgagee]

(Order XXXIV rules 2 and 4)

(Title)

The suit coming on this _____ day etc. It is hereby declared that _____ the plaintiff on the mortgage mentioned in the _____ is the sum of Rs _____ interest on the said principal the sum of Rs _____ for costs charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage security with interest thereon and the sum of Rs _____ for the costs of this suit awarded to the plaintiff making in all the sum of Rs _____

(Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit)

2 It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2* [or (if there are several subsequent mortgages) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows

(i) (a) that defendants or one of them do pay into Court on or before _____ day of _____ up to which time for payment has been extended by the Court the said sum of Rs _____

† This form is provided for use and adoption according to the circumstances of the case and a personal decree may be passed although the mortgagor's costs have not been realized.
v. Gopendra (1933) 60 Cal 19 1431 C. 69 (33) A. C. 251

* Words not required to be deleted

Forms of Decrees.

App. D.

- (i) that defendant No. 1 do pay into Court on or before the _____ day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to defendant No. 2, and
- (ii) that, on payment of the sum declared to be due to the plaintiff by defendant or either of them in the manner prescribed in clause (i) (c) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in suit mentioned, and all such documents shall be delivered over to the defendant No. _____ (who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, recover or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. _____ (who has made the payment) quiet and peaceable possession of the said property.

(Similar declaration to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No. 2 with such variation as may be necessary having regard to the nature of his mortgage.)

4 And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

- (i) * *in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale*] that the defendant jointly and severally shall thenceforth stand absolutely debared and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property, or
- (ii) * *in the case of any other mortgage*] that the mortgaged property or a sufficient part thereof shall be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property, and
- (iii) * *in the case where a sale is ordered under clause 4 (ii) above*] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any shall be applied in payment of the amount due to

Forms of

defendant No 2, and that if any balance be left, it shall be paid to the defendant No 1 or other persons entitled to receive the same, and

- (iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No 2, the plaintiff or defendant No 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

5 And it is hereby further ordered and decreed—

- (a) that if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No 1 makes default in the payment of the said amount, defendant No 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree (in the same manner as the plaintiff might have done under clause 4 above)—

- *(i) [that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver up to defendant No 2 quiet and peaceable possession of the said property,] or

- *(ii) [that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property and (b) (if on the application of defendant

discharged and extinguished

6 And it is hereby further ordered and decreed **[in the case where a sale is ordered under clause 5 above]*—

- (i) that the money realised by such sale shall be paid into Court and be duly

- (ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No 2's mortgage defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amount of the balance

Forms of Decrees.

App. D. 7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE*Description of the mortgaged property***FORM No 10**

Preliminary decree for redemption of prior mortgage and foreclosure or sale on subsequent mortgage

[Plaintiff

2nd Mortgagee

is

Defendant No 1

Mortgagor,

Defendant No 2

1st Mortgagee]

(Order XXXIV, rules 2, 4 and 7)

(Title)

The suit coming on this day etc It is hereby declared that the amount due to defendant No 2 on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs for principal the sum of Rs for interest on the said principal the sum of Rs for costs charges and expenses (other than the costs of the suit) properly incurred by defendant No 2 in respect of the mortgage security with interest thereon and the sum of Rs for the costs of the suit awarded to defendant No 2 making in all the sum of Rs

(Similar declarations to be introduced with regard to the amount due from defendant No 1 to the plaintiff in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit)

2 It is further declared that defendant No 2 is entitled to payment of the amount due to him in priority to the plaintiff* [or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively —]

3 And it is hereby ordered and decreed as follows —

- (i) (a) that the plaintiff or defendant No 1 or one of them do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs due to defendant No 2 and
- (b) that defendant No 1 do pay into Court on or before the day of or any later date up to which time for payment has been extended by the Court the said sum of Rs due to the plaintiff and
- (ii) that on payment of the sum declared due to defendant No 2 by the plaintiff and defendant No 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 defendant

* Words not required to be deleted

Forms of

No 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No 1 (whoever has made the payment), or to such person as he appoints, and defendant No 2 shall, if so required, re convey or re transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No 1 (whoever has made the payment) quiet and peaceable possession of the said property

(Similar declaration to be introduced, if defendant No 1 pays the amount found or declared due to the plaintiff which such variations as may be necessary having regard to the nature of his mortgage)

4 And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

- (i) **[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage deed is foreclosure and not sale]* that the plaintiff and defendant No 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required deliver to the defendant No 2 quiet and peaceable possession of the said property, or
- (ii) **[in the case of any other mortgage]* that the mortgaged property or a sufficient part thereof shall be sold, and that for the purposes of such sale defendant No 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property, and
- (iii) **[in the case where a sale is ordered under clause 4 (ii) above]* that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No 2 in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No 1 or other persons entitled to receive the same, and
- (iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No 2 and the plaintiff, defendant No 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 1 for the amounts remaining due to them respectively

Forms of Decrees

App D.

5 And it is hereby further ordered and decreed,—

(a) that if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No 2 but defendant No 1 makes default in the payment of the said amount the plaintiff shall be at liberty to apply to the Court to keep defendant No 2's mortgage alive for his benefit and to apply for a final decree (in the same manner as the defendant No. 2 might have done under clause 4 above)—

*[(i) that defendant No 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property] or

*[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property]

and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed) that the whole of the liability of defendant No 1 arising from the plaintiff's mortgage or from the mortgage of defendant No 2 or from this suit shall be deemed to have been discharged and extinguished.

6 And it is hereby further ordered and decreed (in the case where a sale is ordered under clause 5 above)—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount and that the balance if any shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10 together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure 1908 and that the balance if any shall be paid to defendant No. 1 or other persons entitled to receive the same and

(i) that if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No 2's mortgage or the plaintiff's mortgage defendant No 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance

7 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE

Description of the mortgaged property

* Words not required to be deleted

Forms of D

FORM No 11.

Preliminary decree for sale.

[Plaintiff—Sub or derivative mortgage]

13

Defendant No 1—Mortgagor.

[Defendant No 2—Original mortgagee]

(Order XXXIV, rule 4)

(Title)

This suit coming on this day, etc It is hereby declared that the amount due to defendant No 2 on his mortgage calculated up to this day of is the sum of Rs for principal, the sum of Rs for interest on the said principal, the sum of Rs for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon and the sum of Rs for the costs of the suit awarded to defendant No 2, making in all the sum of Rs

(Similar declarations to be introduced with regard to the amount due from defendant No 2 to the plaintiff in respect of his mortgage)

2 And it is hereby ordered and decreed as follows —

- (i) that defendant No 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs due to defendant No 2.

(Similar declarations to be introduced with regard to the amount due to the plaintiff defendant No 2 being at liberty to pay such amount)

- (ii) that, on payment of the sum declared due to defendant No 2 by defendant No 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub mortgage) shall be delivered over to defendant No 1 or to such persons as he appoints and defendant No 2 shall if so required, re-convey or re transfer the property to defendant No 1 free from the said mortgage clear of and from all incumbrances created by defendant No 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No 1 quiet and peaceable possession of the said property, and

- (iii) that, upon payment into the Court by defendant No 1 of the amount due to defendant No 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall then be paid to defendant No 2 and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 2 for the amount of the balance

Forms of Decrees.**App. D.**

3 And it is further ordered and decreed that if defendant No 2 pays into Court, to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc [as in sub clauses (11) of clause 2]

4 And it is hereby further ordered and decreed that, in default of payment by defendants Nos 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and that for the purposes of such sale the plaintiff and defendant No 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property

5 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No 2, and that, if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same

6 And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No 2, the plaintiff or defendant No 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 2 or defendant No 1 (as the case may be) for the amount of the balance

7 And it is hereby further ordered and decreed that, if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No 1 makes default in payment of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—*declarations in the ordinary form to be introduced according to the nature of defendant No 2's mortgage and the remedies open to him thereunder*

8 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE*Description of the mortgaged property***No 12****DECREE FOR RECTIFICATION OF INSTRUMENT***(Title)*

It is hereby declared that the _____, dated the _____ day of _____ 19____, does not truly express the intention of the parties to such

And it is decreed that the said _____ be rectified by

No 13**DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS***(Title)*

It is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____ is void as against the plaintiff and all other the creditors, if any, of the defendant

No 14.

INJUNCTION AGAINST PRIVATE NUISANCE

(Title)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL

(Title)

Let the defendant _____, his contractors, agents and workmen be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant _____, his agents, servants, and workmen be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No 17

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made, that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all other the creditors of the deceased

In suits by legatees—

2 That an account be taken of the legacies given by the testator's will

In suits by next-of kin—

3 That an inquiry be made and account taken of what, or of what share if any, the plaintiff is entitled to as next-of kin (or one of the next-of kin) of the intestate

[After the first paragraph the decree will where necessary, order in a creditor's suit, inquiry and accounts for legatees, heirs at law and next-of kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor's suit.]

Forms of Decrees.**App. D.**

3 And it is further ordered and decreed that if defendant No 2 pays into Court, to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc [as in sub clauses (u) of clause 2]

4 And it is hereby further ordered and decreed that, in default of payment by defendants Nos 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and that for the purposes of such sale the plaintiff and defendant No 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property

5 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No 2, and that if any balance be left it shall be paid to defendant No 1 or other persons entitled to receive the same

6 And it is hereby further ordered and decreed that if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No 2, the plaintiff or defendant No 2 or both of them as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No 2 or defendant No 1 (as the case may be) for the amount of the balance

7 And it is hereby further ordered and decreed that, if defendant No 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No 1 makes default in payment of the amount due to defendant No 2, defendant No 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—*declarations in the ordinary form to be introduced according to the nature of defendant No 2's mortgage and the remedies open to him thereunder*

8 And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit

SCHEDULE*Description of the mortgaged property***No 12****DECREE FOR RECTIFICATION OF INSTRUMENT***(Title)*

It is hereby declared that the _____, dated the _____ day of 19____, does not truly express the intention of the parties to such

And it is decreed that the said _____ be rectified by

No 13**DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS***(Title)*

It is hereby declared that the _____, dated the _____ day of 19____, and made between _____ and _____ is void as against the plaintiff and all other the creditors if any, of the defendant

No 14

INJUNCTION AGAINST PRIVATE NUISANCE

(Title)

Let the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No 15

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL

(Title)

Let the defendant _____, his contractors, agents and workmen be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD

(Title)

Let the defendant _____, his agents, servants, and workmen be perpetually restrained from using or permitting to be used any part of the lane at the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No 17

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT

(Title)

It is ordered that the following accounts and inquiries be taken and made, that is to say —

In creditor's suit—

1 That an account be taken of what is due to the plaintiff and all other the creditors of the deceased

In suits by legatees—

2 That an account be taken of the legacies given by the testator's will

In suits by next of kin—

3 That an inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of kin (or one of the next-of kin) of the intestate

[After the first paragraph the decree will, where necessary, order in a creditor's suit, inquiry and accounts for legatees, heirs at law and next-of kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor's suit.]

Forms of Decrees.

App. D.

- 4 An account of the funeral and testamentary expenses
- 5 An account of the movable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use
- 6 An inquiry what part (if any) of the movable property of the deceased is outstanding and undisposed of
- 7 And it is further ordered that the defendant do, on or before the _____ day of _____ next, pay into Court, all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use
- 8 And that if the _____ * shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court
- 9 And that Mr *E F* be receiver in the suit [or proceeding] and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hand of the _____ * (and shall give security by bond for the due performance of his duties to the amount of _____ rupees)
- 10 And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—
- (a) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death,
 - (b) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof
 - (c) an account, so far as possible of what is due to the several incumbrancers and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed
- 11 And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent
- 12 And it is ordered that *G H* shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of sale subject to the approval of the _____ * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle
- 13 And it is further ordered that, for the purpose of the inquiries hereinbefore directed the _____ * shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the _____ * to give the most useful publicity to such enquiries
- 14 And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed, before the _____ day of _____ and that the _____ * do certify the result of the inquiries, and the accounts and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of _____
- 15 And, lastly, it is ordered that this suit [or proceeding] stand adjourned for [making final decree to the _____ day of _____
Such part only of this decree is to be used as is applicable to the particular case]

No 18

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

(Title)

1 It is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs for interest at the rate of Rs per cent per annum, from the day of to the day of amounting together to the sum of Rs

2 Let the * of the said Court tax the costs of the plaintiff any defendant in this suit, and let the amount of the said costs, when so taxed be paid out of the said sum of Rs order to be paid into Court as aforesaid as follows —

(a) The costs of the plaintiff to Mr , his attorney [or pleader] and the costs of the defendant to Mr , his attorney [or pleader]

(b) And (if any debts are due) with the residue of the said sum of Rs after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate of the * together with subsequent interest on such of the debts as bear interest, be paid, and after making such payments let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid) be paid to them

3 And if there should then be any residue, let the same be paid to the residuary legatee

No 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE

WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE
PAYMENT OF LEGACIES

(Title)

1 It is declared that the defendant is personally liable to pay the legacy of Rs bequeathed to the plaintiff,

2 And it is ordered that an account be taken of what is due for principal and interest on the said legacy,

3 And it is also ordered that the defendant do, within weeks after the date of the certificate of the * pay to the plaintiff the amount of what the * shall certify to be due for principal and interest,

4 And it is ordered that the defendant do pay the plaintiff his costs of the suit, the same to be taxed in case the parties differ

Forms of Decrees.

App. D.

No 20

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT OF KIN
(Title)

1 Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed be paid by the defendant to the plaintiff out of the sum of Rs the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E F*, the intestate, within one week after the taxation of the said costs by the said * and let the defendant return for her own use out of such sum her costs, when taxed

2 And it is ordered that the residue of the said sum of Rs after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows —

- (a) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one third share of the said residue to the plaintiff's *A B*, and *C D* his wife, in her right as the sister and one of the next of kin of the said *E F*, the intestate
- (b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next of kin of the said *E F*, the intestate
- (c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid pay the remaining one third share of the said residue to *G H*, as the brother and the other next of kin of the said *E F*, the intestate

No 21

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS
(Title)

It is declared that the proportionate shares of the parties in the partnership are as follows —

It is declared that this partnership shall stand dissolved [or shall deemed to have been dissolved] as from the day of , and it is ordered that the dissolution thereof as from that date be advertised in the Gazette, etc

And it is ordered that be the receiver of the partnership estate and effects in this suit and to get in all the outstanding book debts and claims of the partnership

And it is ordered that the following accounts be taken —

- 1 An account of the credits property and effects now belonging to the said partnership,
- 2 An account of the debts and liabilities of the said partnership,
- 3 An account of all dealings and transactions between the plaintiff and defendant from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts

Forms of

And it is ordered that the good will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock in trade, be sold on the premises, and that the * may, on the application of any of the parties fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the _____ day of _____ and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the _____ day of _____

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the _____ day of _____

No 22

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND
THE TAKING OF PARTNERSHIP ACCOUNTS

(Title)

It is ordered that the fund now in Court, amounting to the sum of Rs _____ be applied as follows —

1 In payment of the debts due by the partnership set forth in the certificate of the * amounting on the whole to Rs _____

2 In payment of the costs of all parties in this suit, amounting to Rs _____

[These costs must be ascertained before the decree is drawn up]

3 In payment of the sum of Rs _____ to the plaintiff as his share of the partnership assets, of the sum of Rs _____, being the residue of the said sum of Rs _____ now in Court to the defendant as his share of the partnership assets

[Or and that the remainder of the said sum of Rs _____ be paid to the said plaintiff [or defendant] in part payment of the sum of Rs _____ certified to be due to him in respect of the partnership accounts]

4 And that the defendant [or plaintiff] do on or before the _____ day of _____ pay to the plaintiff [or defendant] the sum of Rs _____ being the balance of the said sum of Rs _____ due to him which will then remain due

No 23

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS

(Title)

It is hereby decreed as follows —

(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed

(2) That the defendant do pay to the plaintiff the sum of Rs _____ with interest thereon at the rate of _____ per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

(2) That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit

(3) That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree holder] [the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court] [the expiration of three years from the date of the decree].

APPENDIX E.

EXECUTION.

No 1
NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE
RECORDED AS CERTIFIED (O 21, r 2)
(Title)

To _____
WHEREAS in execution of the decree in the above named suit _____ has
applied to this Court that the sum of Rs _____ recoverable under the
decree has been ^{paid} _{adjusted} and should be recorded as certified, this is to give you notice
that you are to appear before this Court on the _____ day of _____ 19____,
to show cause why the ^{payment} _{adjustment} aforesaid should not be recorded as certified.
GIVEN under my hand and the seal of the Court, this _____ day of _____
19____ Judge

No 2
PRECEPT (Section 46)
(Title)

UPON hearing the decree holder it is ordered that this precept be sent to the Court
of _____ at _____ under section 46 of the Code of
Civil Procedure, 1908, with directions to attach the property specified in the annexed
schedule and to hold the same pending an application which may be made by the
decree holder for execution of the decree

Schedule
Dated the _____ day of _____ 19____
Judge

No 3
ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT (O 21, r 6)
(Title)

WHEREAS the decree holder in the above suit has applied to this Court for a certifi-
cate to be sent to the Court of _____ at _____
for execution of the decree in the above suit by the said Court, alleging that
the judgment debtor resides or has property within the local limits of the jurisdiction
of the said Court, and it is deemed necessary and proper to send a certificate to the said
Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

Ordered

That a copy of this order be sent to _____ with a copy of the decree
and of any order which may have been made for execution of the same and a certificate
of non satisfaction

Dated the _____ day of _____ 19____
Judge

No 4
CERTIFICATE OF NON SATISFACTION OF DECREE. (O 21, r 6)
(Title)

Certified that no (1) satisfaction of the decree of this Court in Suit No
of 19____, a copy of which is herunto attached, has been obtained by execution within
the jurisdiction of this Court

Dated the _____ day of _____ 19____
Judge

(1) If partial, strike out "no" and state to what extent

Forms of Execution.
App. E.

No 6

APPLICATION FOR EXECUTION OF DECREE (O 21, r 11)

In the Court of

, decree holder, hereby apply for execution of the decree herein
below set forth —

| No of suit | Names of parties | Date of decree | Whether any appeal preferred from decree | Payment or adjustment made if any | Previous application if any, with date and result | Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree | Am. amt of costs if any, awarded | Against whom to be executed | Mode in which the assistance of the Court is required |
|-------------|------------------------------------|-------------------|--|-----------------------------------|---|--|---|-----------------------------|--|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 780 of 1897 | A B — Plaintiff C D — Defendant | October 11th 1897 | No | None | Rs 72 4 recorded on application dated the 4th March, 1899 | Rs 314 8 2 principal [interest at 6 per cent per annum, from date of decree till payment] | Rs a p 47 10 4 8 2 0 Total 55 12 4 | Against the defendant C D | [When attachment and sale of movable property is sought] I pray that the total amount of Rs [Together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's movable property as per annexed list and paid to me [When attachment and sale of immovable property is sought] I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me |

I declare that what is stated herein is true to the best of my knowledge and belief

Dated the

Signed

day of

, Decree holder.

19

Forms of 1

[When attachment and sale of immovable property is sought]

Description and Specification of Property

The undivided one third share of the judgment-debtor in a house situated in the village of _____ value Rs 40 and bounded as follows —

East by G's house, west by H's house, south by the public road, north by private lane and J's house

I _____ declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

*Signed**Decree holder*No 7

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE (O 21, r 16)

(Title)

To

WHEREAS

_____ has made application to this Court for execution of decree in Suit No _____ of _____ 19 _____ on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court _____ on the _____ day of _____ 19 _____, to show cause why execution should not be granted

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge

No 8

WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION
OF A DECREE FOR MONEY (O 21, r 30)

(Title)

To The Bailiff of the Court

WHEREAS

_____ was ordered by decree of this Court passed on the _____ day of _____

| DECREE | | | 19 _____, in Suit No _____ of _____ |
|--------------------|-------|-------|--|
| Principal | _____ | _____ | 19 _____, to pay to the plaintiff the sum of _____ |
| Interest | _____ | _____ | Rs _____ as noted in the margin, |
| Costs | _____ | _____ | and whereas the said sum of Rs _____ |
| Costs of execution | _____ | _____ | has not been paid These are to |
| Further Interest | _____ | _____ | command you to attach the movable |
| | _____ | _____ | property of the said _____ |
| | _____ | _____ | as set forth in the schedule |
| Total | _____ | _____ | hereunto annexed, or which shall be |
| | _____ | _____ | pointed out to you by the said _____ |
| | _____ | _____ | , and unless the said _____ |

shall pay to you the said sum of Rs _____ together with

Rs _____ the costs of this attachment, to hold the same until further orders from this Court

You are further commanded to return this warrant on or before the _____ day of _____ 19 _____, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed

GIVEN under my hand and the seal of the Court this _____ day of _____ 19 _____

*Schedule**Judge*

Forms of Execution.

App. E.

No 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED BY DECREE

(O 21, r 31)

(Title)

To

The Bailiff of the Court

WHEREAS _____ was ordered by decree of this Court passed on the _____ day of _____ 19____, in Suit No _____ of 19____, to deliver to the plaintiff the movable property (or a share in the movable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered

These are to command you to seize the said movable property (or a share of the said movable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Schedule

No 10

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT (O 21, r 34)

(Title)

To

TAKE notice that on the _____ day of _____ 19____, the decree holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of _____, where of a draft is hereunto annexed of the immovable property specified hereunder and that the _____ of _____

Description of Property

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge

No 11

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC (O 21, r 35)

(Title)

To

The Bailiff of the Court

WHEREAS the undermentioned property in the occupancy of _____ has been decreed to _____, the plaintiff in this suit, You are hereby directed to put the said _____ in possession of the same and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Schedule

Judge

Forms of Ex

No 12

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE

(O 21, r 37)

(Title)

To

WHEREAS _____ has made
 application to this Court for execution of decree in Suit No _____ of 19
 by arrest and imprisonment of your person you are hereby required to appear before
 this Court on the _____ day of _____ 19____, to show
 cause why you should not be committed to the civil prison, in execution of the said decree

GIVEN under my hand and the seal of the Court, this _____ day of
 19____

No 13

WARRANT OF ARREST IN EXECUTION (O 21, r 38)

(Title)

To

The Bailiff of the Court

WHEREAS _____ was adjudged by a decree of the
 Court in Suit No _____ of 19____, dated the
 day of _____ 19____, to pay to the decree holder the sum of

| | | | | |
|-----------|--|--|--|--|
| | | | | Rs _____ as noted in the margin |
| Principal | | | | and whereas the said sum of Rs _____ |
| Interest | | | | has not been paid to the said decree |
| Costs | | | | holder in satisfaction of the said de |
| Execution | | | | crec these are to command you to |
| | | | | arrest the said judgment debtor and |
| | | | | unless the said judgment-debtor shall |
| | | | | pay to you the said sum of Rs _____ |
| | | | | together with Rs _____ for the costs |
| | | | | of executing this process to bring the |
| | | | | said defendant before the Court with |
| | | | | all convenient speed You are fur |
| | | | | ther commanded to return this warrant on |
| | | | | or before the _____ day of _____ |
| | | | | 19____, with an endorsement certifying the day on which and manner in which it has |
| | | | | been executed or the reason why it has not been executed |

19____, with an endorsement certifying the day on which and manner in which it has
 been executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this _____ day of
 19____ Judge

No 14

WARRANT OF COMMITTAL OF JUDGMENT DEBTOR TO JAIL (O 21 r 40)

(Title)

To

The Officer in charge of the Jail at _____

WHEREAS _____
 who has been brought before this Court this _____ day of _____ 19____
 under a warrant in execution of a decree which was made and pronounced by the said

Forms of Execution.

App. E. Court on the _____ day of _____ 19____, and by which decree it was ordered that the said _____ should pay,
 And whereas the said _____ has not obeyed the decree, nor satisfied the Court that he is entitled to be discharged from custody, you are hereby, in the name of the King Emperor of India commanded and required to take and receive the said _____ into the civil prison and keep him imprisoned therein _____ or until the said _____ for a period not exceeding _____
 decree shall be fully satisfied, or the said _____ shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908, and the Court does hereby fix _____ annas per diem as the rate of the monthly allowance for the subsistence of the said _____ during his confinement under this warrant of committal.
 GIVEN under my signature and the seal of this Court, this _____ day of _____ 19____

Judge

No 15

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE
 (Sections 58, 59)
 (Title)

To

The Officer in charge of the Jail at

UNDER orders passed this day, you are hereby directed to set free judgment debtor now in your custody

Dated

Judge

No 16

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF (O 21, r 16)

(Title)

To

WHEREAS

has failed to satisfy a decree passed against _____ on the _____ day of _____ 19____, in suit No _____ of 19____, in favour of _____, for Rs _____, It is ordered that the defendant be and is hereby prohibited and restrained, until the further order of this Court, from receiving from _____ the following property in the possession of the said _____, that is to say _____, to which the defendant is entitled, subject to any claim of the said _____, and the said _____ is hereby prohibited and restrained until the further order of this Court, from delivering the said property to any person or persons whomsoever

GIVEN under my hand and the seal of the Court, this

day of

19____.

Judge

Form 6-2

No 17

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS, &c. &c. &c.
BY NEGOTIABLE INSTRUMENT (O 21, r 46)

To

WHEREAS

has failed to satisfy a decree passed against
of 19 , in Suit No

, for Rs

be, and is hereby prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said debtor, namely, and that you, the said , be and you are hereby prohibited and restrained, until the further order of this Court, from making any payment of the said debt, or any part thereof, to any person whomsoever or in any manner than into this Court

GIVEN under my hand and the seal of the Court, this

day of

Judge

No 18

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE
CAPITAL OF A CORPORATION (O 21, r 46)
(Title)

To

Defendant, and to,

, Secretary of

Corporation

WHEREAS

has failed to satisfy a decree passed against
on the day of 19 , in Suit No
19 , in favour of , for Rs
ordered that you, the defendant, be, and you are hereby prohibited and restrained until the further order of this Court, from making any transfer of the aforesaid Corporation, namely, , or from receiving payment of any dividends thereon, and you, the Secretary, are hereby prohibited and restrained from permitting any such transfer or making any such payment

GIVEN under my hand and the seal of the Court, this

day of

Judge

No 19

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY
COMPANY OR LOCAL AUTHORITY (O 21, r 48)
(Title)

To

WHEREAS

, judgment debtor in the above named case, is a (describe office of judgment debtor) receiving his salary (or allowance) at your hands, and whereas , decree holder in the said case, has applied in this Court for the attachment of the salary (or allowance) of the said to the extent of due to him under the decree, You are hereby required to withhold the said sum of from the salary of the said in monthly instalments of and to remit the said sum in monthly instalments to this Court

GIVEN under my hand and the seal of the Court this

day of

Judge

Forms of Execution.

App. E.

No 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (O 21, r 51)

(Title)

To

The Bailiff of the Court

WHEREAS an order has been passed by this Court on the day of

19 , for the attachment of

You are hereby directed to seize the said and bring the same into Court

GIVEN under my hand and the seal of the Court, this day of

19

Judge

No 21

ATTACHMENT

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY

SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF

GOVERNMENT (O 21 r 52)

(Title)

To

SIR

The plaintiff having applied under rule 22 of Order XXI of the Code of Civil Procedure, 1908 for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed on what account, etc*), I request that you will hold the said money subject to the further order of this Court

I have the honour to be

Sir,

Your most obedient Servant,

Judge

Dated

day of

19

No 22

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT

(O 21, r 53)

(Title)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19 , by in Suit No of 19 , in which he was and

was

has been attached by this Court on the application of

the in the suit specified above You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment debtor

I have the honour, etc ,

Judge

Dated the

day of

19 .

Forms of

No. 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE.

(O 21, r. 53)

(Title)

To

WHEREAS an application has been made in this Court by the decree holder in the above suit for the attachment of a decree obtained by you on the _____ day of _____ 19____, in the Court of _____ in Suit No. _____

of 19____, in which _____ was _____ and _____ was _____.

It is ordered that you, the said _____, be, and you are hereby prohibited and restrained until the further order of this Court from transferring or charging the same in any way

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____. Judge.

No. 24

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVABLE PROPERTY

(O 21, r. 54)

(Title)

To

Defendant

WHEREAS you have failed to satisfy a decree passed against you on the _____ day of _____ 19____, in Suit No. _____ of 19____ in favour of _____, for Rs _____, It is ordered that you, the said _____, be, and you are hereby prohibited and restrained until, the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are hereby prohibited from receiving the same by purchase, gift or otherwise

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____. Judge

Schedule.

No. 25

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC., IN THE HANDS OF A THIRD PARTY (O 21, r. 56)

(Title)

To

WHEREAS the following property _____ has been attached in execution of a decree in Suit No. _____ of _____ 19____, passed on the _____ day of _____ 19____, in favour of _____ for Rs _____. It is ordered that the property so attached, consisting of Rs _____ in money and Rs _____ in currency notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by you, the said _____, to _____.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____. Judge.

No. 26

NOTICE TO ATTACHING CREDITOR. (O 21, r. 58)

(Title)

To

WHEREAS _____ has made application to this Court for the removal of attachment on _____ placed at your instance

Forms of Execution.

App. E. in execution of the decree in Suit No _____ of 19 _____,
 this is to give you notice to appear before this Court on _____, the
 day of _____ 19 _____, either in person or by a
 pleader of the Court duly instructed to support your claim, as attaching creditor
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
 Judge

 No 27
WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY

• (O 21, r 66)

(Title)

To

The Bailiff of the Court

THESE are to command you to sell by auction after giving
 days previous notice, by affixing the same in this Court house, and after making due
 proclamation, the
 property attached under a warrant from this Court, dated the
 day of _____ 19 _____, in execution of a decree in favour of
 in Suit No _____ of 19 _____ or _____ so much of the said
 property as shall realize the sum of Rs _____, being the
 of the said decree and costs still remaining unsatisfied

You are further commanded to return this warrant on or before the
 day of _____ 19 _____, with an endorsement certifying the manner in which it has
 been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
 Judge

 No 28
NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION

(O 21, r 66)

(Title)

To

Judgment debtor

WHEREAS in the above named suit _____ the decree
 holder has applied for the sale of _____ you are
 hereby informed that the _____ day of _____ 19 _____
 has been fixed for settling the terms of the proclamation of sale

GIVEN under my hand and the seal of the Court this _____ day of _____ 19 _____
 Judge

 No 29
PROCLAMATION OF SALE (O 21, r 66)

(Title)

NOTICE is hereby given that, under rule 64 of Order XXI of the Code of Civil
 Procedure, 1908 an order has been passed by this Court for the sale of the attached pro

Suit No _____ of 19 _____
 decided by the
 of _____ in which
 was plaintiff and
 was defendant

perty mentioned in the annexed schedule in satis
 faction of the claim of the decree holder in the suit
 (1) mentioned in the margin, amounting with costs
 and interest up to date of sale to the sum of

Forms of

The sale will be by public auction, and the property will be put up for sale in lots specified in the schedule. The sale will be of the property of the judgment debtor abovenamed as mentioned in the schedule below, and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by _____ at the monthly sale commencing at _____ o'clock on the _____ at _____. In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid either personally or by duly authorised agent. No bid by, or on behalf of, the judgment-creditors above mentioned, however, will be accepted nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

Conditions of Sale

1 The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, misstatement or omission in this proclamation.

2 The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid or as to the bidder the lot shall at once be again put up to auction.

3 The highest bidder shall be declared to be the purchaser of any lot provided always that he is legally qualified to bid and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4 For reasons recorded it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.

5 In the case of movable property the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs and in default of payment the property shall forthwith be again put up and re sold.

6 In the case of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent on the amount of his purchase money to the officer conducting the sale and in default of such deposit the property shall forthwith be put up again and re sold.

7 The full amount of the purchase money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day or if the fifteenth day be a Sunday or other holiday then on the first office day after the fifteenth day.

8 In default of payment of the balance of purchase money within the period allowed the property shall be re sold after the issue of a fresh notification of sale. The deposit after defraying the expenses of the sale may if the Court thinks fit be referred to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court this _____

day of _____
Judge

Forms of Execution.

APP. E

Σύμβαση c' Προσφ-

| Number of lots. | Description of property to be sold with the name of each owner where there are more judgment debtors than one | The revenue assessed upon the estate or part of the estate if the property to be sold is an lot or lots in an estate or a part of an estate a portion reference to Government | Detail of any encumbrances to which the property is liable | Claims if any which have been put forward to the property and any other known particulars bearing on its nature and value. |
|--------------------|--|--|--|--|
| | | | | |

29 30

ORDER ON THE PETITION FOR CAUSING SERVICE OF PROCLAMATION OF SALE.

(O 21, r 6.)

(T₁'s)

To

The Name of the Court

WHEREAS an order has been made for the sale of the property of the Judgment debtor specified in the schedule hereunder annexed, and whereas the day of 19 has been fixed for the sale of the said property copies of the proclamation of sale are by this warrant made over to you and you are hereby ordered to have the proclamations published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published

Dated the

day of

19

$$J_{\alpha}^{\beta} x$$

Секретно

Ve 31

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE

ON A PRE-SALE OF PROPERTY BY REASON OF THE

PURCHASER'S DEFAULT (0 21, r 71)

(T, 'e)

Certified that a* the re-sale of the property in execution of the decree in the above named s* in consequence of default on the part of _____ purchaser- there was a deference in the price of the said property amounting to Rs _____ and that the expenses attending such re-sale amounted to Rs _____ making a total of Rs _____, which sum is recoverable from the defaulter

Dated the

div of

19 -

Officer holding the rifle

Forms of E

No 32

NOTICE TO PERSON IN POSSESSION OF MOVABLE PROPERTY
SOLD IN EXECUTION (O 21, r 79)
(Title)

To

WHEREAS

has become the purchaser at a public sale in execution of the decree in the above suit of now in your possession, you are hereby prohibited from delivering possession of the said to any person except the said

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No 33

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION
TO ANY OTHER THAN THE PURCHASER (O 21, r 79)
(Title)

To and to

WHEREAS

became the purchaser at a public sale in execution of the decree in the above suit has of being debts due from you to you

It is ordered that you be and you are hereby prohibited from receiving and you from making payment of, the said debt to any person or persons except the said

GIVEN under my hand and the seal of the Court this day of 19 .
Judge

No 34

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN
EXECUTION (O 21 r 79)
(Title)

To

and, Secretary of Corporation

WHEREAS has become the purchaser at a public sale in execution of the decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you, It is ordered that you

be and you are hereby prohibited from making any transfer of the said shares to any person except the said, the purchaser aforesaid, or from receiving any dividends thereon and you

Secretary of the said Corporation, from permitting any such transfer or making any such payment to any person except the said, the purchaser aforesaid

GIVEN under my hand and the seal of the Court, this day of 19
Judge

Forms of Execution.

App. E.

No 35

CERTIFICATE TO JUDGMENT DEBTOR AUTHORIZING HIM TO MORTGAGE,

LEASE OR SELL PROPERTY (O 21, r 83)

(Title)

WHEREAS in execution of the decree passed in the above suit an order was made on the _____ day of _____ 19____, for the sale of the undermentioned property of the judgment debtor _____, and whereas the Court has, on the application of the said judgment debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof

This is to certify that the Court doth hereby authorize the said judgment debtor to make the proposed mortgage, lease or sale within a period of _____ from the date of this certificate, provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment debtor

Description of Property

GIVEN under my hand and the seal of the Court, this _____

day of _____ 19____.

Judge

No 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21, rr 90, 92)

(Title)

To

WHEREAS the undermentioned property was sold on the _____ day of _____ 19____, in execution of the decree passed in the above named suit, and whereas _____ the decree holder [or judgment debtor] has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19____ when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this _____

day of _____ 19____

*Description of Property**Judge*

No 37

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE

(O 21, rr 91, 92)

(Title)

To

WHEREAS _____, the purchaser of the undermentioned property sold on the _____ day of _____ 19____, in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that the judgment debtor, had no saleable interest therein

Forms of E.

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the day of 19 , when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this day of 19

Description of Property

Judge

No 38

CERTIFICATE OF SALE OF LAND (O 21, r 94)

(Title)

THIS is to certify that has been declared the purchaser at a sale by public auction on the day of 19 of in execution of decree in this suit, and that the said sale has been duly confirmed by this Court

GIVEN under my hand and the seal of the Court, this day of 19

Judge

No 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SALE IN EXECUTION (O 21 r 95)

(Title)

To

The Bailiff of the Court

WHEREAS has become the certified purchaser of at a sale in execution of decree in Suit No of 19

You are hereby ordered to put the said , the certified purchaser as aforesaid in possession of the same

GIVEN under my hand and the seal of the Court this day of 19

Judge

No 40

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION OF DECREE (O 21 r 97)

(Title)

To

WHEREAS the decree holder in the above suit has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession

You are hereby summoned to appear in this Court on the day of 19 at AM, to answer the said complaint

GIVEN under my hand and the seal of the Court this day of 19

Judge

Forms of Execution.

App. E.

No 41

WARRANT OF COMMITTAL (O 21, r 98)

(Title.)

To

The Officer in Charge of the Jail at

WHEREAS the undermentioned property has been decreed to
 , the plaintiff in this suit, and whereas the Court
 is satisfied that without any just cause resisted [or obstructed
 and is still resisting [or obstructing] the said
 obtaining possession of the property, and whereas the said
 has made application to this Court that the said
 be committed to the civil prison,

You are hereby commanded and required to take and receive the said
 into the civil prison and to keep him imprisoned therein
 for the period of days

GIVEN under my hand and the seal of the Court, this day of 19
 Judge.

No 42

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND (Section 72)

(Title.)

To

Collector of

Sir,

In answer to your communication No , dated
 representing that the sale in execution of the decree in this suit of
 land situate within your district is objectionable,
 I have the honour to inform you that you are authorized to make provision for the
 satisfaction of the said decree in the manner recommended by you

I have the honour to be,

Sir,

Your Obedient Servant,
 Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No 1

WARRANT OF ARREST BEFORE JUDGMENT (O 38, r 1)

(Title)

To

The Bailiff of the Court

| | | | | | |
|--------------------------------|---------|---|--|--|--|
| Rs | WHEREAS | , the plaintiff in the above suit, claims the sum of as noted in the margin and has proved to the satisfac | | | tion of the Court that there is probable cause for believing that the defendant |
| Principal Interest Costs | Total | | | | |
| | | | | | |
| | | | | | |

is about to

These are to command
you to demand and re-
ceive from the said

the sum of Rs as sufficient to satisfy the plaintiff's claim,
and unless the said sum of Rs is forthwith delivered to you by or
on behalf of the said , to take the said

into custody and to bring him before this Court in order
that he may show cause why he should not furnish security to the amount of Rs
for his personal appearance before the Court, until such time as the said suit shall be
fully and finally disposed of, and until satisfaction of any decree that may be passed
against him in the suit

GIVEN under my hand and the seal of the Court, this day of 19
Judge

No 2

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE
JUDGMENT (O 38 r 2)

(Title)

WHEREAS at the instance of , the plaintiff in the above suit
the defendant, has been arrested and brought before
the Court, And whereas on the failure of the said defendant to show cause why he
should not furnish security for his appearance, the Court has ordered him to furnish
such security

Therefore I have voluntarily become surety and do hereby
bind myself, my heirs and executors, to the said Court, that the said defendant shall
appear at any time when called upon while the suit is pending and until satisfaction
of any decree that may be passed against him in the said suit, and in default of such
appearance I bind myself, my heirs and executors, to pay to the said Court, at its order
any sum of money that may be adjudged against the said defendant in the said suit

Witness my hand at this day of

19 .

Witnesses (Signed)

1

2

Forms of Supplemental Proceedings.

App. F.

No 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR
DISCHARGE (O 38, r 3)

(Title)

To

WHEREAS _____ who became surety on the
day of _____ 19 _____ for your appearance in the above suit
has applied to this Court to be discharged from his obligation

You are hereby summoned to appear in this Court in person on the
day of _____ 19 _____, at _____ A M, when the said application will be heard
and determined

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge

No 4

ORDER FOR COMMITTAL (O 38, r 4)

(Title)

To

WHEREAS _____, plaintiff in this suit, has made application to the
Court that security be taken for the appearance of _____ the defend
ant to answer any judgment that may be passed against him in the suit and whereas
the Court has called upon the defendant to furnish such security, or to offer a sufficient
deposit in lieu of security, which he has failed to do It is ordered that the said defendant
be committed to the civil prison until the decision of the suit,
or, if judgment be pronounced against him, until satisfaction of the decree

GIVEN under my hand and the seal of the Court this _____ day of _____ 19 _____
Judge

No 5

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR
FULFILMENT OF DECREE (O 38, r 5)

(Title)

To

The Bailiff of the Court

WHEREAS _____ has proved to the satisfaction of the
Court that the defendant in the above suit
These are to command you to call upon the said defendant
on or before the _____ day of _____ 19 _____
either to furnish security for the sum of Rupees _____ to produce
and place at the disposal of this Court when required

or the value thereof, or such portion of the value as may be
sufficient to satisfy any decree that may be passed against him, or to appear and show
cause why he should not furnish security, and you are further ordered to attach the
said _____ and keep the same under sale and secure custody until
the further order of the Court, and you are further commanded to return this warrant
on or before the _____ day of _____ 19 _____
with an endorsement certifying the date on which and the manner in which it has been
executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
Judge

Forms of Supplemental Pro

No 6

SECURITY FOR THE PRODUCTION OF PROPERTY (O 38, r 5)

(Title)

WHEREAS at the instance of _____ the plaintiff in the above suit
the defendant, has been directed by the Court to furnish
security in the sum of Rs _____ to produce and place at the disposal of the
Court the property specified in the schedule hereunto annexed,

Therefore I _____ have voluntarily become surety and do hereby
bind myself, my heirs and executors, to the said Court, that the said defendant shall
produce, and place at the disposal of the Court, when required, the property specified
in the said schedule, or the value of the same, or such portion thereof as may be suffi-
cient to satisfy the decree, and in default of his so doing I bind myself, my heirs and
executors, to pay to the said Court, at its order, the said sum of Rs _____ or
such sum not exceeding the said sum as the said Court may adjudge

Schedule

Witness my hand at _____ this _____ day of _____ 19 _____ .

Witnesses

1 _____ (Signed)

2

No 7

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY

(O 38 r 6)

(Title)

To

The Bailiff of the Court

WHEREAS _____, the plaintiff in this suit, has applied to
the Court to call upon _____, the defendant, to furnish security to fulfil
any decree that may be passed against him in the suit, and whereas the Court has call-
ed upon the said _____ to furnish such security, which he has
failed to do, These are to command you to attach
the property of the said _____ and keep the same under safe
and secure custody until the further order of the Court, and you are further commanded
to return this warrant on or before the _____ day of _____ 19 _____, with an endorsement certifying the
date on which and the manner in which it has been executed, or the reason why it has
not been executed

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
Judge

No 8

TEMPORARY INJUNCTIONS (O 39, r 1)

(Title)

Upon motion made unto this Court by _____, Pleader of
[or Counsel for] the plaintiff *A B* and upon reading the petition of the said plaintiff
in this matter filed [this day] [or the plaint filed in this suit on the
day of _____, or the written statement of the said plaintiff]
filed on the _____ day of _____
and upon hearing the evidence of _____ and
_____ in support thereof [if after notice and defendant
not appearing], add, and also the evidence of _____

Forms of Supplemental Proceedings.

App. F. as to service of notice of this motion upon the defendant *C D*] This Court doth order that an injunction be awarded to restrain the defendant *C D*, his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plant in the said suit of the plaintiff mentioned [or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No 9, Oilmongers Street Hindupur, in the Taluk of _____, and from selling the materials whereof the said house is composed until the hearing of this suit or until the further order of this Court

Dated this _____ day of _____ 19 ____
Judge

[Where the injunction is sought to restrain the negotiation of a note or bill, the order ing part of the order may run thus —

restrain the defendants _____ day of _____ 19 ____
parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the _____, etc, mentioned in the plaintiff's plant [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court

[In Copyright cases] _____ to restrain the defendant *C D*, his servants, agents or workmen, from printing publishing or vending a book, called _____, or any part thereof until the, etc

[Where part only of a book is to be restrained] _____ to restrain the defendant *C D*, his servants, agents, or workmen from printing, publishing, selling or otherwise disposing of such parts of the book in the plant [or petition and evidence, etc] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____ and also that part which is entitled _____ [or which is continued in page _____ both inclusive] until _____, etc

[In Patent cases] _____ to restrain the defendant *C D*, his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plant [or petition, etc, or written statement, etc] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plant [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc

[In cases of Trade marks] _____ to restrain the defendant *C D*, his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff *A B* in bottles having affixed thereto such labels as in plaintiff's plant or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff *A B*, and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff *A B*, until the, etc

[To restrain a partner from in any way interfering in the business] _____ to restrain the defendant *C D*, his servants and agents from entering into any contract, and from accepting drawing endorsing or negotiating

Forms of Supplemental Pro

any bill of exchange, note or written security in the name of the partnership firm of B and D and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership firm of B and D, or whereby the said partnership firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for performance of any contract, promise or undertaking until the etc

No 9

APPOINTMENT OF A RECEIVER (O 40, r 1)

(Title)

To

WHEREAS _____ has been attached in execution of a decree passed in the above suit on the _____ day of 19____, in favour of _____, You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL, of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on _____

You will be entitled to remuneration at the rate of _____ per cent upon your receipts under the authority of this appointment

GIVEN under my hand and the seal of the Court, this _____ day of 19____.
Judge

No 10

BOND TO BE GIVEN BY RECEIVER (O 40 r 3)

(Title)

KNOW all men by these presents that we _____ and _____ are jointly and severally bound to _____ of the Court of _____ in Rs _____ to be paid to the said _____ or his successor in office for the time being For which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators jointly and severally, by these presents

Dated this _____ day of _____ 19____

Whereas a plaint has been filed in this Court by _____ against _____ for the purpose of [here insert the object of suit]

And whereas the said _____ has been appointed, by order of the above mentioned Court, to receive the rents and profits of the immovable property and to get in the outstanding movable property of _____ in the said plaint named _____

Now the condition of this obligation is such, that if the above bounden _____ shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovable property and in respect of the movable property of the said _____ at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void otherwise it shall remain in full force

Signed and delivered by the above bounden in the presence of _____

Note—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL (O. 41, r. 1.)

(Title)

The _____ above named appeals to the _____ Court at from the decree of _____ in suit No _____ of 19 _____, dated the _____ day of _____ 19 _____, and sets forth the following ground of objection to the decree appealed from, namely —

No 2

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE
(O 41, r 5)

(Title)

To

This security bond on stay of execution of decree executed by witnesseth —

That _____, the plaintiff in Suit No _____ of 19 _____ having sued _____, the defendant, in this Court and decree having been passed on the _____ day of _____ 19 _____, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree, in the _____ Court the said appeal is still pending

Now the plaintiff decree holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. _____ mortgaging the properties specified in the schedule hereunto annexed and covenant that if the decree of the first Court be confirmed or varied by the appellate Court the said defendant shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this _____ day of _____ 19 _____.

Schedule.

Witnessed by

(Signed)

J
2

No 3

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL (O 41, r. 6)

(Title)

To

This security bond on stay of execution of decree executed by witnesseth —

That _____, the plaintiff in Suit No _____ of 19 _____, having sued _____, the defendant, in this Court, and a decree having been passed on the _____ day of _____ 19 _____, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the _____ Court the said appeal is still pending

Forms

Now the plaintiff decree holder has applied for execution of the said decree and had been called upon to furnish security Accordingly, I, of my own free will stand security to the extent of Rs

mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of

19

Schedule

Witnessed by

(Signed)

1

2

No 4

SECURITY FOR COSTS OF APPEAL (O 41, r 10)

(Title)

To

This security bond for costs of appeal executed by
witnesseth —

This appellant has preferred an appeal from the decree in Suit No of 19 against the respondent and has been called upon to furnish security Accordingly I of my own free will stand security for the costs of the appeal mortgaging the properties specified in the schedule hereunto annexed I shall not transfer the said properties or any part thereof and in the event of any default on the part of the appellant I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal Any amount so payable shall be realized from the properties hereby mortgaged and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance To this effect I execute this security bond this day of

19

Schedule

Witnessed by

(Signed)

1

2

No 5

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL (O 41 r 13)

(Title)

To

You are hereby directed to take notice that the
in the above suit has preferred an appeal to this Court from the decree passed by you
therein on the day of 19

You are requested to send with all practicable despatch all material papers in the
suit

Dated the

day of

19

Judge

Forms of Appeal. App. G.

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL
(O 41, r 14)

(Title)

APPEAL from the _____ of the Court of _____ dated the _____
day of _____ 19 ____
To _____ Respondent.

TAKE notice that an appeal from the decree of _____ in this
case has been presented by _____ and registered in this
Court, and that the _____ day of _____ 19 ____ has been
fixed by this Court for the hearing of this appeal

If no appearance is made on your behalf by yourself, your pleader, or by some one
by law authorised to act for you in this appeal, it will be heard and decided in
your absence

GIVEN under my hand and the seal of the Court, this _____ day of _____
19 ____
Judge

[NOTE —If a stay of execution has been ordered, intimation should be given of the
fact on this notice]

No 7

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL BUT
JOINED BY THE COURT AS A RESPONDENT (O 41, r 20)

(Title)

WHEREAS you were a party in Suit No _____ of 19 ____, in the Court
of _____, and whereas the _____ has
preferred an appeal to this Court from the decree passed against him in the said suit
and it appears to this Court that you are interested in the result of this said appeal

This is to give you notice that this Court has directed you to be made a respon-
dent in the said appeal and has adjourned the hearing thereof till the

_____ day of _____ 19 ____, at
A.M. If no appearance is made on your behalf on the said day
and at the said hour, the appeal will be heard and decided in your absence

GIVEN under my hand and the seal of the Court, this _____ day of _____
19 ____

Judge

No 8

MEMORANDUM OF CROSS OBJECTION (O 41, r 22)

(Title)

WHEREAS the _____ Court at _____ has preferred an appeal to the
_____ in Suit No _____ from the decree of _____
_____ day of _____ 19 ____, dated the _____
for hearing the appeal was served on the _____ 19 ____, and whereas notice of the day fixed
day of _____ 19 ____, the _____ files this memorandum of cross objec-
tion under rule 22 of Order XLII of the Code of Civil Procedure, 1909, and set forth the
following grounds of objection to the decree appealed from namely —

No 9
DECREE IN APPEAL (O 41, r 35)
(Title)

Appeal No _____ of 19 _____ from the decree of the Court of _____
dated the _____ day of _____ 19 _____
Memorandum of Appeal

Plaintiff
Defendant

The above named appeals to the _____ Court at _____
from the decree of _____, in the above suit, dated the _____
day of _____ 19 _____, for the following reasons, namely:—

This appeal coming on for hearing on the _____ day of _____
19 _____, before _____ in the presence of _____ for
the appellant and of _____ for the respondent, it is ordered:—
The costs of this appeal as detailed below, amounting to Rs _____, are to be
paid by _____. The costs of the original suit are to be paid by _____.

GIVEN under my hand this _____ day of _____ 19 _____
Judge

Costs of Appeal

| Appellant. | | Amount | | Respondent | | Amount | | |
|------------|--------------------------------|--------|---|------------|----------------------|--------|---|---|
| | | Rs | a | p | | Rs | a | p |
| 1 | Stamp for memorandum of appeal | | | | Stamp for power | | | |
| 2 | Do for power | | | | Do for petition | | | |
| 3 | Service of processes | | | | Service of processes | | | |
| 4 | Pleader s fee on Rs | | | | Pleader s fee on Rs | | | |
| Total | | | | | Total | | | |

No 10

APPLICATION TO APPEAL IN FORMA PAUPERIS (O 44, r 1)

I _____ the _____ above named
present the accompanying memorandum of appeal from the decree in the above suit
and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the movable and immovable property
belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19 _____
(Signed)

Note.—Where the application is by the plaintiff he should state whether he applied
and was allowed to sue in the Court of first instance as a pauper.

No 11

NOTICE OF APPEAL IN FORMA PAUPERIS (O 44, r 1)

(Title)

WHEREAS the above named _____ has applied to be allowed to appeal as a
pauper from the decree in the above suit dated the _____ day of _____
19 _____ and whereas the _____ day of _____ 19 _____

Forms of Appeal.

App. G. been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore mentioned date

Given under my hand and the seal of the Court this _____ day of _____ 19____

Judge

No 12

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN
COUNCIL SHOULD NOT BE GRANTED (O 45, r 3)

(Title)

To

TAKE notice that
has applied to this Court for a certificate that as regards amount or value and nature
the above case fulfils the requirements of Section 110 of the Code of Civil Procedure,
1908 or that it is otherwise a fit one for appeal to His Majesty in Council

The _____ day of _____ 19____ is fixed for you to show cause why the Court should not grant the certificate asked for

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Registrar

No 13

NOTICE TO RESPONDENT OF ADMISSION OF THE APPEAL TO THE KING IN COUNCIL
(O 45, r 8)

(Title)

To

WHEREAS

in the above case, has furnished the security and made the deposit required by Order XLV, rule 7 of the Code of Civil Procedure, 1908

Take notice that the appeal of the said _____ to His Majesty in Council
has been admitted on the _____ day of _____ 19 ____.

GIVEN under my hand and the seal of the Court this _____ day of _____ 19____
Registrar

Registrar

No 14

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED (O 47, r 4)
(Title)

(Title)

To

TAKE notice that _____ has applied to this Court for a review of its decree passed on the _____ day of _____ 19____ in the above case. The _____ day of _____ 19____ is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____

Judge

APPENDIX H.

MISCELLANEOUS.

No. 1

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED (O 14, r 6)

(Title)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the _____ day of _____ 19____

and filed as Exhibit _____ in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be)

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, _____ will pay to the said _____

the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon) and I, the said _____ will accept the said sum of Rupees _____

(or such sum as the Court shall hold to be due) in full satisfaction of my claim, on the bond aforesaid [or, that upon such finding I, the said _____ will do or abstain from doing, etc., etc.]

Plaintiff
Defendant

Witnesses,

1

2

Dated the _____ day of _____ 19____

No. 2

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL

(Section 24)

In the Court of the District Judge of _____ No. _____ of 19____

To _____ WHEREAS an application dated the _____ day of _____ 19____ has been made to this Court by _____ the _____ in Suit No. _____ of 19____ now pending in the Court of the _____ at _____ in which _____ is plaintiff and _____ is defendant, for the transfer of the suit for trial to the Court of the _____ at _____

You are hereby informed that the _____ day of _____ 19____ has been fixed for the hearing of the application when you will be heard if you desire to offer any objection to it

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
Judge

No. 3

NOTICE OF PAYMENT INTO COURT (O 24, r 2)

(Title)

Take notice that the defendant has paid into Court Rs. _____ and says that that sum is sufficient to satisfy the plaintiff's claim in full

X Y, P'ceder for the Defendant

To Z, p'ceder for the plaintiff

Forms—Miscellaneous.

App. H.

No 4

NOTICE TO SHOW CAUSE (GENERAL FORM)

(Title)

To

WHEREAS the above named
has made application to this Court that
You are hereby warned to appear in this Court in person or by a pleader duly instructed
on the _____ day of _____ 19____ at _____ o'clock
in the forenoon to show cause against the application failing wherein the said application
will be heard and determined *ex parte*

GIVEN under my hand and the seal of the Court this _____ day of _____ 19____
Judge

No 5

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF
DEFENDANT

(O 13 r 1)

(Title)

| No | Description of document | Date, if any which the document bears | Signature of party or pleader |
|----|-------------------------|---|----------------------------------|
| 1 | 2 | 3 | 4 |
| | | | |
| | | | |

No 6

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS
ABOUT TO LEAVE THE JURISDICTION (O 18 r 16)

(Title)

To

WHEREAS in the above suit application has been made to the Court by _____ plaintiff (or defendant)
that the examination of _____, a witness
required by the said _____ in the said suit may be
taken immediately and it has been shown to the Court's satisfaction that the said
witness is about to leave the Court's jurisdiction (or any other good and sufficient cause,
to be stated)

Take notice that the examination of the said witness _____ will
be taken by the Court on the _____ day of _____ 19____
Dated the _____ day of _____ 19____
Judge.

Forms—Miscel

No 7

COMMISSION TO EXAMINE ABJECT WITNESS (O 26, r 4, 18)

(Title)

To

WHEREAS the evidence of _____ if required by the _____, you are requested to take the evidence on interrogatories [or viva voce] of such witness _____ in the above suit, and whereas _____, you are and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance who will be at liberty to question the witness on the points specified, and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs _____, being your fee in the above, is herewith forwarded

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Judge

No 8

LETTER OF REQUEST (O 26, r 5)

(Title)

(Heading —To the President and Judges of, etc etc, or as the case may be)

WHEREAS a suit is now pending in the _____ in which A B is plaintiff and C D is defendant And in the said suit the plaintiff claims _____

(abstract of claims)

And whereas it has been represented to the said Court that it is necessary for the purpose of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching

F F, of _____

G H, of _____

and

I J, of _____

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court

Now I _____ as the _____ of the said Court, have the honour to request and do hereby request that for the reasons aforesaid and for the assistance of the said Court you as the President and Judges of the said _____, or some one or more of you will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or viva voce) touching the said matters in question in the presence of the agents of the plaintiff and defendant or such of them as shall on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same together with such request in writing if any, for the examination of other witnesses to the said Court.

Forms—Miscellaneous.**App. H.**

Note—If the request is directed to a foreign Court, the words " through His Majesty's Secretary of State for Foreign Affairs for transmission " should be inserted after the words " other witnesses " in the penultimate line of this form)

No 9

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS

(O 26, r 9, 11)

(Title)

To

WHEREAS it is deemed requisite, for the purpose of the suit, that a commission or should be issued, You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

A sum of Rs , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge

No 10

COMMISSION TO MAKE A PARTITION (O 26, r 13)

(Title)

To

WHEREAS it is deemed requisite, for the purpose of this suit, that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the day of 19 , You are hereby appointed Commissioner

for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application

A sum of Rs , being your fee in the above is herewith forwarded

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge

No 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN (O 32, r 3)

(Title)

Minor Defendant

Natural Guardian

To

WHEREAS an application has been presented on the part of the Plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you *

* Here insert the name of guardian

Forms—Miscellaneous

are hereby required
to take notice that unless within _____ days from the service upon you of
this notice, an application is made to this Court for the appointment of you *
or of some friend of you, the minor, to act as guardian for the suit, the
Court will proceed to appoint some other person to act as a guardian to the minor for
the purposes of the said suit

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____
Judge

No 12

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE
OF PAUPERISM (O 33, r 6)
(Title)

To _____
WHEREAS _____ has
applied to this Court for permission to institute a suit against _____ in forma pauperis
under Order XXXIII of the Code of Civil Procedure, 1908, and whereas the Court sees
no reason to reject the application, and whereas the
day of _____ 19 __, has been fixed for receiving such evidence as the
applicant may adduce in proof of this pauperism and for hearing any evidence which may
be adduced in disproof thereof

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may
wish to offer any evidence to disprove the pauperism of the applicant you may do so
on appearing in this Court on the said _____ day of _____
19 ____

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____
Judge

No 13

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145)
(Title)

To _____
WHEREAS you _____ did on _____ become
liable as surety for the performance of any decree which might be passed against the
said _____ defendant in the above suit, and whereas a decree was passed
on the _____ day of _____ 19 __, against
the said defendant for the payment of _____, and whereas application
has been made for execution of the said decree against you,
Take notice that you are hereby required on or before the
day of _____ 19 __, to show cause why the said decree should not
be executed against you, and if no sufficient cause shall be, within the time specified
shown to the satisfaction of the Court an order for its execution will be forthwith
issued in the terms of the said application

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____
Judge

* Here insert the name of guardian.

Forms—Miscellaneous.
App. H.No. 14.
REGISTER OF CIVIL SUITS (O 4, r 2)Court of the _____ of _____ at _____
Register of Civil Suits in the year 19 _____.

| PLAINTIFF | | | DEFENDANT | | CLAIM | | APPEARANCE | | | JUDGMENT | | | APPEAL | | EXECUTION | | | | RETURN OF EXECUTION | | | | |
|---------------------------------|-------------|--------------------|-----------|-------------|--------------------|-------------|-----------------|----------------------------------|---------------------------|-----------|-----------|------|----------|---------------------|----------------------------|--------------------|---------------|--------------|-------------------------------|-----------------|------------------------|----------|--|
| Name | Description | Place of residence | Name | Description | Place of residence | Particulars | Amount or value | When the cause of action accrued | Day for parties to appear | Plaintiff | Defendant | Date | For whom | For what, or amount | Date of decision of appeal | Judgment in appeal | Date of order | Against whom | For what, and amount of money | Amount of costs | Amount paid into Court | Arrested | Minute of other Return than Payment or arrest and date of every Return |
| No of suit | | | | | | | | | | | | | | | | | | | | | | | |
| Date of presentation of plaint. | | | | | | | | | | | | | | | | | | | | | | | |

Note.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

THE SECOND SCHEDULE.

ARBITRATION

Arbitration in Suits

1. [S. 506.] (1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference

Parties to suit may apply for order of reference

(2) Every such application shall be in writing and shall state the matter sought to be referred

Alterations in the Rule —

- 1 The word interested in clause (1) has been added after the word parties
See notes below under the head All the parties interested must join in the application
- 2 The words in person or by their respective pleaders specially authorized in writing in this behalf which occurred in the old section after the word apply and before the words to the Court have been omitted

Scope of the Schedule—The present Schedule deals with arbitration under three heads (c) —

I Where a suit has been instituted and all the parties interested agree to refer to arbitration any matter in difference between them in the suit In that case all proceedings from first to last are under the supervision of the Court and they are governed by the provisions of paras 1 to 16 of this Schedule The first step is to apply to the Court for an order of reference under para 1 If all the parties interested have joined in the application an order of reference will be made under para 3

II Where parties without having recourse to litigation agree to refer their differences to arbitration and it is desired that the agreement of reference should have the sanction of the Court In that case the parties to the agreement or any of them may apply to the Court under para 17 to have the agreement filed in Court and to make an order of reference thereon If an order of reference is made all further proceedings will be under the supervision of the Court and they will be governed by the provisions of paras 3 to 16 so far as they are consistent with the agreement (para 19) See paras 17 to 19

III Where the agreement of reference is made and the arbitration itself takes place without the intervention of the Court and the assistance of the Court is only sought in order to give effect to the award In that case any person interested in the award may apply to the Court under para 20 to have the award filed in Court See paras 20 21

All the parties interested must join in the application—In order to give jurisdiction to the Court to make an order of reference under this and para 3 it is necessary that all the parties interested must apply to the Court (d) An attorney cannot apply unless expressly authorized (e) and if one of the parties is a firm all partners

(c) *Ghulam Khan v. Muhammad Hassan* (190)
9 Cal 167 201 A 51
(d) *Ghulam Khan v. Muhammad Hassan* (190)

(e) *Hajend v. Janna Lal* (1927) 58 C W N
5 135 I C 386 (5) A C 313

must join in the reference (f), but a reference by a father who is the manager of a joint Hindu family consisting of himself and his sons will bind the sons (g). If all the parties interested do not apply, and an order of reference is made, the order is illegal, and if an award is made on such reference, the award also is illegal (h), and is liable to be set aside in revision (i). Thus where in a suit for partnership accounts brought by A against B and C, A and B alone applied to the Court to refer the matters in dispute to arbitration, and an order of reference was made, it was held, on an objection raised by B to the validity of the award, that C not having joined in the application, the order of reference as well as the award made in pursuance thereof were illegal (j). But when the part not referred can be separated from the part referred, para 12 (a) would apply. So in a suit where some of the defendants were adults and some were minors for whom no guardian ad litem was appointed, and the minors were not interested in the dispute of the plaintiff with the adult defendants, it was held that the Court was not justified in refusing to file the award made on a reference by all parties, for the part which related to the minors and which was invalid could be separated from the other part. The proper procedure was to modify or correct the award under para 12 (a) of this Schedule (k).

The word "interested" is new. It has been added to give effect to a recent Allahabad decision (l). It refers to the succeeding words "any matter in difference between them". A party to a suit who is not interested in a matter in difference between the other parties to the suit need not join in an application under this paragraph for an order of reference. A sues B and C, praying as against B for a declaration of his title to certain property and as against C for possession of the property. A and B alone apply to the Court to refer to arbitration the question as to the ownership of the property. The Court has jurisdiction to make an order of reference, though C has not joined in the application, for the question of ownership is not in issue between A and C. But C not being a party to the reference, the award is not binding upon him, though it is binding as between A and B (m). A in execution of a decree against B and C attaches property alleging that it belongs to B. D sues for a declaration that the property belongs to her, and does not implead C who claims no interest in the property. The matter in difference between D on the one hand and A and B on the other hand may be referred to arbitration although C does not join in the reference (n).

The fact that a defendant has not put in an appearance or has not contested the suit is no reason for holding that he is not a party interested (o), although there are some decisions to the contrary (p). The question whether a party is "interested" within the meaning of this paragraph is one to be decided on all the facts of each case (q). A party may be interested although no relief is claimed against him, and when a usufructuary mortgagee sued in ejectment of persons who claimed title adversely to the

| | |
|-----|-------|
| (f) | |
| (g) | |
| (h) | |
| (i) | |
| (j) | |

- (k) *Pathunath Sukul v. Pannup* (1923) 2 Pat 777 61 C 2 (24) A P 33
 (l) *Pilam Mal v. Sadiq Ali* (1902) 24 All 229
 (m) *Bishoka v. Ananta* (1897) 4 C. L. R. 65
Pilam Mal v. Sadiq Ali (1902) 24 All 229
Raghunath v. Nathuram Ramani (1923) 44 Mad L J 359 73 I C 202 (23) A M 502
Saroyv. Jatindra (1927) 45 Cal L J 458, 103 I C 625 (27) A C 619

| | |
|-----|-------|
| (n) | |
| (o) | |
| (p) | |
| (q) | |

Arbitration.**Sch. II,
para. 1**

mortgagor, the latter was a party interested although no relief was claimed against him (r) It has been held that if two defendants are jointly and severally liable to the plaintiff the matter in difference between the plaintiff and one defendant may be validly referred to arbitration although the other defendant does not join in the reference (s) A person, however, who is not a necessary party to a suit is not a party "interested" within the meaning of this para (t) See O 1, r 10 (2) The question whether a party is interested within the meaning of this paragraph must be decided on the facts of each particular case (u)

"Apply."—This section requires that all the parties interested should not only agree to a reference, but that they should all *apply* to the Court for an order of reference (v) Therefore if one of the parties interested agree to a reference, but he changes his mind subsequently and does not join in the application, the application for an order of reference should be refused (w)

Matter in difference.—This must be a matter in difference in the suit itself (x) Where an award comprises matters which are not in dispute in the suit, and adjudicates upon the rights of a person who was not a party to the suit and who was interested in some of them and the findings with reference to the matters in question in the suit could be "otherwise invalid" within the meaning of this para so far as it deals

The provision requiring the application to be made to the Court for an order of reference, hence an award is not invalid merely because it was not made in writing (x) In a recent case before the Judicial Committee where the agreement was in writing but it was not signed by one of the parties, it was held that para 1 of this Schedule did not require that the writing should of necessity be signed (a); and it has also been held that the record made by the Court of an oral application is sufficient (b) But where a pardamshin lady was a party and the application was signed by her pleader who was not authorized by his vakalatnama to do so, the award was held to be invalid (c) For form of application for an order of reference, see the Appendix to this Schedule, form No 1.

Before judgment—A suit may be referred to arbitration after a reference is made to the High Court (d)

"Court."—Section 107 of the Code provides that an appellate Court shall have the same powers as a Court of original jurisdiction It follows therefore that an appellate Court can act under this paragraph, and refer matters in dispute in the appeal to arbitration if all the parties interested agree to a reference (e) But a Court to which certain issues have been referred for trial under O 41, r 25, cannot act under this paragraph,

- | | | |
|-----|--|---|
| (r) | | (y) <i>Chamria v. Chamria</i> (1926) 53 I.A. 1, 63 Cal 258, 92 I.C. 833 (25) A.P.C. 293 |
| (s) | | (z) <i>Shama Sundram v. Abdul Latif</i> (1908) 27 Cal 61, <i>Abdul Hamid v. Riaz ud-din</i> (1908) 30 All 32 |
| (t) | | (a) <i>Umed Singh v. Subhag Mal</i> (1916) 43 I.A. 1, 43 Cal 290, 32 I.C. 161, <i>Sharfat Ali v. Bhajurats</i> (1920) 52 All 84 (20) A.A. 763 |
| | | (b) <i>Mahabir v. Manohar</i> (1924) 40 All 200, 79 I.C. 816, (24) A.A. 540 |
| (u) | | (c) <i>Ranindra Nath v. Dwarka Nath</i> (1920) 25 C.W.N. 832 |
| (v) | | (d) <i>I am Lal v. Deoraj</i> (1921) 44 All 91, 64 I.C. 601, (22) A.A. 173 |
| (w) | | (e) <i>Dutta v. Khorda</i> (1911) 33 All 645, 11 I.C. 935, <i>Suresh Chander v. Ambica Churn</i> (1891) 18 Cal 507. |
| (x) | | |

as the duty of such Court is to try the issues as directed by the appellate Court and to return to the appellate Court its findings thereon together with the evidence (f) Similarly a Court dealing with petitions under the Provincial Insolvency Act, 1907, has no power to refer the proceedings to arbitrators to decide whether the petitioner should or should not be declared an insolvent (g)

Revocation of arbitrator's authority—When a matter is referred to arbitration by an agreement between the parties *without the intervention of a Court of Justice*, the agreement to refer to arbitration cannot be revoked by any party without good cause and a mere arbitrary revocation will not be permitted by the Court (h) Where a claimant did not proceed with the reference for a period of nine months without any just cause, it was held that it amounted to a good cause sufficient to entitle the other party to revoke the submission (i) Similarly if the arbitrator is indebted to one of the parties at the time of the reference or becomes so indebted after the reference, and this fact is not disclosed to the other party, the non disclosure is a sufficient cause for revoking the submission upon discovery of the fact (j)

But when a matter is referred to arbitration *by an order of the Court*, the Court alone can revoke the authority of the arbitrator, and only in the cases specified in paras 5, 8 and 15 The Court has no power to revoke the authority of an arbitrator in any other case Thus where after an order of reference was made under para 3, the defendant applied to the Court for an order to revoke the authority of the arbitrator and to appoint a new arbitrator in his place on the ground that he had come to know of certain facts which showed that the arbitrator was not worthy of the confidence reposed in him it was held that the Court had no power to make the order, as the case did not come either under paras 5 8 or 15 It was further held that the objection raised by the defendant could only be considered *after* the award was made and filed in Court, and only to the extent permitted by para 15 (k) Note the words "or being otherwise invalid" in para 15, cl. (c)

Where a party dies after application but before order of reference—The death of a party to an application made under this rule for a reference to arbitration before the order of reference is made does not operate as a revocation of the authority of the proposed arbitrator, therefore, if the right to sue survives, it is competent to the Court to make an order of reference after substitution of the representative of the deceased party (l) All that is necessary is substantial representation without strict adherence to the rules of the Civil Procedure Code as to legal representatives and guardians ad litem (m)

Withdrawing from suit pending arbitration—See note to O 23, r 1, under the same head

Probate proceedings—This Schedule does not apply to probate proceedings A Judge has no jurisdiction to refer to arbitration a dispute about the genuineness of a will for an order granting probate is a judgment in rem (n)

Execution proceedings—This Schedule does not apply to execution proceedings and a reference to arbitration by an execution Court is without jurisdiction (o)

(f) *Nand Ram v Fakir Chand* (1885) 7 All 523

(g) *Ladha Singh v Bhag Singh* (1916) Punj Rec no 50 p 143 34 I.C. 549

(h) *Preston v Menzies* (1868) 12 M.L.R. 110
113 Sultan Muhammad v Shro Prasad (1908) 20 All 145
Perumalla v Perumalla (1904) 2 Mad 112
Kunj Lal v Panwar Lal (1919) 4 Pat L.J. 394 399 48 I.C. 711

(i) *Colry v Da Costa* (1890) 17 Cal 200

(j) *Mohamed v Haliman* (1902) 29 Cal 278

(k) *Halimkhas v Shankar* (1886) 10 Bom 381,
Chatterhuj v Jaghnar (1914) 36 All 354,
23 I.C. 758

(l) *Dutta v Akru* (1911) 33 All 645 11 I.C. 935

(m) *Buvardas v Sati Ekman* (1921) 26 C.W.N. 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000

(n)

(o)

Arbitration.

Sch. II, Revision—It has been held that the validity of an order of reference may be
paras. 1-3 impeached in revision (p)

Form—For form or application for an order of reference see the Appendix to this Schedule, form No 1

Appointment of arbitrator **2. [S. 507, 1st para.]** The arbitrator shall be appointed in such manner as may be agreed upon between the parties

Order of reference **3. [S. 508.]** (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit

The word 'making' has been substituted for the word 'delivery'. In fact the word 'delivery' was construed as meaning 'making'. See notes below under the head "making of award"

Fixing of time or the making of award—The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award. Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory, but imperative. Hence this provision should be strictly followed. At the same time it has been held that if no time is fixed for delivery of the award in the order of reference but the Court subsequently makes an order for enlarging the time (para. 8) and fixes in that order the time within which the award should be made, the omission to fix the time in the order of reference is not fatal to the award (q). Rankin, J., has described the provisions as to reasonable time as the main pillar of the scheme of the Schedule. By the reference the Court parts with control of the suit temporarily, for the time limit will bring the matter back to the Court and enable it to resume control and either to grant further time or to supersede the arbitration under para. 8. If the Court fixes no time limit, it surrenders control and jurisdiction is involved because such an order professes to abrogate jurisdiction. Accordingly a reference which gave the arbitrators leave to extend for such further time as they may allow themselves was held to be invalid and the arbitration was superseded (r). See para. 15, cl (1) (c) and notes thereto.

(p) *Mahammad Ali v. Basant Das* (1932) 54 All. 297 (32) A.A. 665. *Amur Hali v. Abdul Samad* (1931) 54 Cal. 64. 13; 1 L. 279 (31) A.C. 251. *Mahadeo Prasad v. Bala Das* (1924) 50 All. 915. 110; 1 L. 841 (24) A.A. 740. *Taj Singh v. Ghani Ram* (1927) 49 All. 812. 10; 1 L. 230 (27) A.A. 561.

(q) *Papa Har Narain v. Chaudhrai Bhagant*

Awor (1901) 13 All. 230. 18 I.A. 55. *Lachman Das v. Bhari Lal* (1904) 7 All. 189. See 1; this connection. *Samir Awaku v. Anwar Ad eye* (1926) A.C. 55.

(r) *Isbindra v. Jogendra* (1923) 27 (W.N.) 400. 80 I.L. 400 (23) A.C. 410. See also *Nasserwanjee v. Meer Mynooddeen* (1925) 63 I.L. 151.

Making of award—An award is said to be made when it is completed and signed by the arbitrator. Hence it is sufficient if the award is made that is completed and signed by the arbitrator within the period limited under it is paragraph 1 it is not necessary that the making of the award that it should actually reach the hands of the Court within such period. The validity of the award depends upon the making of it within the period allowed and it is immaterial what late it is actually delivered to the Court. This was where the time fixed by the Court for the delivery of an award in a suit pending before it was 16th April 1900 and the award was completed and signed on the 16th April but did not reach the hands of the Court until the 17th of April. It was held that the award was within time (a).

Clause (2)—Where a matter is referred to arbitration the Court shall not deal with it in the same suit except in the manner provided in this Schedule. If the whole suit is referred to arbitration and the plaintiff includes a prayer for costs the Court cannot make an order for costs (b). Hence the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit for there is no paragraph in this Schedule corresponding to Order 1 (u). Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph 1 (c). Nor is it open to the Court to hear the suit on the merits unless the arbitration has been superseded under paragraph 8 (r) (c). Similarly the Court has no power to confirm an order passed by the arbitrator making payment of their fees a condition precedent to the hearing of the reference there being no paragraph in this Schedule empowering the Court to make an order in that behalf (x). On the same principle where an award is once set aside in any given instance that one of the parties to the reference shall be free to the termination of the arbitration proceeding the Court has no power to send back the case to the arbitrator for decision (y).

Form—1. Form of order of reference see Form No. 1. The Appendix to this Schedule.

4. [S 509] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

We refer to reference is to two or more arbitrators to provide for difference of opinion

- (a) by the appointment of an umpire, or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail, or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine

(1) *Arumugam v Arumugam* (1909) 11 M.L.J. 119
 (2) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (3) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (4) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (5) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (6) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (7) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (8) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (9) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (10) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (11) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (12) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (13) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (14) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (15) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (16) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (17) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (18) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (19) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (20) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (21) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (22) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (23) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (24) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (25) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (26) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (27) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (28) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (29) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (30) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (31) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (32) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (33) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (34) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (35) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (36) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (37) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (38) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (39) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (40) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (41) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (42) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (43) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (44) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (45) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (46) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (47) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (48) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (49) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (50) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (51) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (52) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (53) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (54) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (55) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (56) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (57) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (58) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (59) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (60) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (61) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (62) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (63) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (64) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (65) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (66) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (67) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (68) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (69) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (70) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (71) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (72) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (73) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (74) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (75) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (76) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (77) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (78) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (79) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (80) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (81) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (82) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (83) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (84) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (85) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (86) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (87) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (88) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (89) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (90) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (91) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (92) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (93) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (94) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (95) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (96) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (97) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (98) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (99) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (100) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119

(a) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (b) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (c) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (d) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (e) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (f) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (g) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (h) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (i) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (j) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (k) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (l) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (m) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (n) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (o) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (p) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (q) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (r) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (s) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (t) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (u) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (v) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (w) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (x) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (y) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119
 (z) *Chandrasekhar v. Chandra* (1909) 12 M.L.J. 119

Arbitration.

Sch. II, paras. 1-3 Revision—It has been held that the validity of an order of reference may be impeached in revision (p)

Form—For form or application for an order of reference see the Appendix to this Schedule, form No 1

Appointment of arbitrator 2. [S. 507, 1st para.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties

Or let of reference 3. [S. 508.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Schedule, deal with such matter in the same suit

The word 'making' has been substituted for the word 'delivery'. In fact the word 'delivery' was construed as meaning 'making'. See notes below under the head 'making of award'

Fixing of time or the making of award—The present paragraph provides that the Court shall fix a reasonable time for the making of the award and specify such time in the order of reference. Paragraph 8 enables the Court from time to time to enlarge the period for the making of the award. Paragraph 15 provides that an award made after the expiration of the period allowed by the Court may be set aside by the Court. The provision contained in this paragraph requiring the Court to fix a reasonable time for the making of the award is not merely directory, but imperative. Hence this provision should be strictly followed. At the same time it has been held that if no time is fixed for delivery of the award in the order of reference, but the Court subsequently makes an order for enlarging the time (para. 8) and fixes in that order the time within which the award should be made, the omission to fix the time in the order of reference is not fatal to the award (q). Rankin, J. has described the provisions as to reasonable time as the main pillar of the scheme of the Schedule. By the reference the Court parts with control of the suit temporarily, for the time limit will bring the matter back to the Court and enable it to resume control and either to grant further time or to supersede the arbitration under para. 8. If the Court fixes no time limit, it surrenders control and jurisdiction is involved because such an order professes to abrogate jurisdiction. Accordingly a reference which gave the arbitrators leave to extend for such further time as they may allow themselves was held to be invalid and the arbitration was superseded (r). See para. 15, cl. (1) (c) and notes thereto.

(p) *See* *...*

Kar (1891) 13 All 300 18 I A 55
Lachman Das v Abparlash (1908) 30 All
169 See in this connection *Jamke*
Kurku v Annor Adjaye [1926] A C 55

(r) *Robindra v Jogendra* (1903) 27 C W N 420
80 I C 459 (23) A C 410 See also
Nasirwanjee v Meer Mynodden (1855)
6 M I A 134

(q)

Making of award—An award is said to be “made” when it is completed and signed by the arbitrators. Hence it is sufficient if the award is *made*, that is completed and signed by the arbitrators, within the period limited under this paragraph, it is not necessary to the “making” of the award that it should actually reach the hands of the Court within such period. The validity of the award depends upon the *making* of it within the period allowed, and it is immaterial on what date it is actually delivered to the Court. Thus where the time fixed by the Court for the delivery of an award in a suit pending before it was 16th April 1900, and the award was completed and signed on the 16th April, but did not reach the hands of the Court until the 17th of April, it was held that the award was within time (s).

Clause (2)—Where a matter is referred to arbitration, the Court should not deal with it in the same suit except in the manner provided in this Schedule. If the whole suit is referred to arbitration and the plaint includes a prayer for costs, the Court cannot make an order for costs (t). Hence the Court has no power to grant permission to the plaintiff to withdraw from the suit with liberty to bring a fresh suit, for there is no paragraph in this Schedule corresponding to O 23, r 1 (u). Nor can the Court revoke the authority of the arbitrator and appoint a new arbitrator except in the cases specified in paragraph 5 (v). Nor is it open to the Court to hear the suit on the merits, unless the arbitration has been superseded under paras 5, 8 or 15 (w). Similarly, the Court has no power to confirm an order passed by the arbitrators making payment of their fees a condition precedent to the hearing of the reference, there being no paragraph in this Schedule empowering the Court to make an order in that behalf (x). On the same principle where an award is once set aside on any ground as for instance the one of the parties to the reference had died before the termination of the arbitration proceeding the Court has no power to send back the case to the arbitrators for decision (y).

Form—For form of order of reference, see form No. 2 to the Appendix to this Schedule.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

Where reference is to two or more order to provide for difference of opinion

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(s) *Arunachalam v. Arunachalam* (1899) 22 Mad 22 (*Merrett v. Namsi* (1894) 15 Bom 119, *Sita Ram v. Bhawanji* (1904) 26 All 105, *And-ul-lah v. Muhammad* (1905) 27 All 459).
(t) *Hira v. Goya* (1932) 54 All 122, 136 L.C. 7-9, (32) A.A. 183.

(u) *Shroombur v. Doodat* (1887) 9 All 169, *Debi Churn v. Bipra* (1907) 7 C.W.N. 186.
(v) *Halimbhai v. Shanker* (1886) 10 Bom 381.
(w) *Jamun v. Nand* (1902) 24 All 312.
(x) *Steel v. Roberts* (1881) 6 Cal 809.
(y) *Lachkauri Ram v. Sand Pal* (1906) 30 All 505.

Arbitration.

Sch. II, paras. 4, 5 (2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act

Decision of majority—Where the order of reference did not provide that the decision of the majority of arbitrators should prevail and two of the five arbitrators refused to act, it was held that an award by the remaining three who constituted the majority was not valid (*)

Empowering arbitrators to appoint an umpire—The arbitrators have no power to appoint an umpire, unless they are authorized in that behalf (a)

Arbitrator cannot be appointed umpire—The Court cannot appoint an arbitrator to be umpire for an arbitrator cannot be arbitrator as well as umpire (b)

Delegation of duty by arbitrator—An arbitrator cannot delegate his duties to a third person (c). But he may delegate to a third person the performance of acts of a ministerial character. Thus where an arbitrator employed his son to take some measurements instead of taking them himself it was held that the award was not for that reason invalid (d)

Lower of Court to appoint arbitrator in certain cases

5. [Ss. 507 (2), 510, 511.] (1) In any of the following cases, namely —

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire.—
 - (i) dies, or
 - (ii) refuses or neglects to act or becomes incapable of acting, or
 - (iii) leaves British India in circumstances showing that he will probably not return at an early date, or
- (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire

(c) *Gerupathappa v Narayana Gappa* (1884) 7 Mad 174
 (a) *Smit v Luthra* (1893) 17 Bom 129
 (b) *Isapurchand v Jeuraj* (1913) 38 C W N

(c) 332 138 IC 651 (37) AC 491
Jamna v Namb (1902) 24 All 319
 (d) *Buda v Municipal Committee of Lahore* (1902) 29 Cal 854 49 IA 183

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit

Notice to appoint arbitrator—Where an order of reference is made on the joint application of *A* and *B*, and the arbitrator refuses to act, and *A* serves *B* with notice to appoint a new arbitrator, the appointment of the new arbitrator must be made both by *A* and *B*, and not by *B* alone (c)

Duty of Court under this paragraph—In the event of the happening of any of the events mentioned in this paragraph the Court must adopt one of the two courses pointed out in the paragraph, namely, appoint a new arbitrator, or make an order superseding the arbitration. Thus where one of three arbitrators refused to act, and the Court neither appointed a new arbitrator nor made an order superseding the arbitration, it was held that the award made by the other two was invalid (f)

Appointment of new arbitrator or umpire—Under the Code of 1882, the Court had no power, on the happening of either of the events referred to in cl (a) of this paragraph to appoint a new arbitrator without the consent of all the parties to the reference the reason being that the corresponding section 507 of that Code contained the words 'and [if] the parties desire that the nomination shall be made by the Court' (g). But these words have been omitted in cl (a), and the Court has power under this paragraph to appoint a new arbitrator without the consent of all the parties even in the cases mentioned in cl (a). In cases covered by cl (b), it is open to the Court to appoint only one new arbitrator in place of several old arbitrators (h). But the Court has no power to appoint an arbitrator or umpire under sub para (2) unless notice is given as required by sub para (1) and the party served with the notice has been given an opportunity of being heard (i)

The power of the Court to appoint a new arbitrator or umpire may be limited by agreement. *A* and *B* submitted to arbitration on the terms that the umpire should be selected from seven persons named. The umpire first selected refused to act, and the Court appointed a new umpire who was not one of the seven persons named. It was held that the umpire not being one of the seven named in the agreement, the award of the umpire was invalid (j)

An irregularity of procedure in the appointment of a new arbitrator is cured by consent of parties. So when one of three arbitrators refused to act and the two remaining arbitrators co-opted a third and the parties consented, the award was held to be valid (k)

(c) *Charla Pam v. Sejan Mal* (1918) 1 Punj Rec no 112 p 359 48 I C 395

(f) *Nand Pam v. Fakir Chand* (1885) 7 All 503
Thammiraju v. Raperaju (1889) 12 Mad 113
Thakur Das v. Varma (1900) 2 Lah L J 63 56 I C 644

(g) *See Pogardin v. Moudina* (1883) 6 Mad 414
Ripin Bihari v. Anoda (1891) 15 Cal 324

(h) *Pampersed v. Juppennath* (1880) 6 C L R 1

(i) *Abdul Chany v. Din Dayal* (1919) 41 All 578, 50 I C 635
Thakar Das v. Pam Das (1925) 7 Lah L J 163 84 I C 975 (25) A L 374
Puran Lal v. Puchand (1931) 53 All. 778 15 I C 514 (31) A A 761

(j) *Barracko v. Souza* (1872) 7 Mad H C 72

(k) *Mahmud Sheikh v. Messrs Kankinara & Co* (1924) 25 C.W.N. 634 81 I C 574 (24) A C. 665

Arbitration.

Sch. II.
paras. 5-7

Where the arbitrator named by the parties refuses to act, the Court though it has the power to appoint another arbitrator, has no power to direct the parties to pay any remuneration to him (l)

Where arbitrator refuses to act—If an arbitrator refuses to act the Court cannot compel him to act. Thus where an arbitrator refused to act, and the Court instead of accepting his refusal directed him to proceed and make an award it was held that the award was invalid. The finality of an award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves and that such judges are *willing* to settle the disputes between them (m). But an arbitrator has full power to retract his resignation before it is accepted. The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not direct him of the character of arbitrator (n). When arbitrators refuse to act and the Court proceeds to try the suit an order superseding arbitration may be implied (o).

Order superseding arbitration—When once a matter is referred to arbitration by an order of the Court the Court has no power to hear the suit on the merits unless the arbitration has been superseded by an order under this paragraph (p) or under paragraph 8 or 15. An order superseding arbitration under paragraph 8 may be made by the Court *suo motu* but an order superseding arbitration under this paragraph can only be made on an application by the party giving notice and after giving the other party an opportunity of being heard (q).

Revision—An order of the Court deciding the question whether the arbitration should be superseded or a new arbitrator should be appointed is a case decided within the meaning of sec. 115 and is subject to revision (r).

Form—For form of order for appointment of new arbitrator, see the Appendix to this Schedule form no. 3.

6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or umpire appointed under paragraph 4 or 5

7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

S in monitoring witnesses and default

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator

(l) *Jaganath v. Chhedi* (1929) 51 All 501

(m) 115 I C 611 (9) A A 144

(n)

(o)

(p) *Mangar v. Bhatia* (1905) 5 Pat. L. J. 672

57 I C 473 *

(q) *Jamna v. Nasib Ali* (1907) 54 All 31*

(r) *Budh Sen v. Nank* (1913) 6 Luck 393

199 I C 182 (3-) A O 151

(r) *Jaganath v. Chhedi* (1929) 51 All 501

115 I C 611 (29) A A 144 *J. ran Lal v. Ruchani* (1193) 53 All 78 137 I C 614 (31) A A 761

Arbi
ts
p

Extension of time for
making award

Extension of time for making award—If the time originally fixed for making an award has expired, and no award is made, the Court may extend the time for making the award. It is not necessary that the application to extend the time should be made *before* the expiry of the period originally fixed for making the award. The application may be made even *after* the expiry of the time originally fixed (t). But it must be made *before* the award is made. The Court has no power to enlarge the time for the making of an award after the time for making it has expired *and after the award has been made* (u). Sec. 148 of this Code does not alter the law laid down in this respect (x). An award made after the expiration of the period allowed by the Court may be set aside under paragraph 13 (1) (c). The application for extension of time need not necessarily be in writing (y).

Estoppel—The parties to a reference may be *estopped* by their conduct from impeaching the validity of an award on the ground that it was made after time (a)

Appeal—An appeal lies from an order superseding an arbitration where the award has not been completed within the period allowed by the Court [s 104, sub s (1), cl. (a) 1].

Where umpire may substitute in lieu of arbitrators

(a) if they have allowed the appointed time to expire without making an award, or

| | |
|--------------------------------------|--|
| (x) Jamna v Nandhi (1912) 21 All 312 | (z) Shri Arunachal v Atchander (1911) 34 Cal 572 12 I C 13 doubted in Patta Kumari v Pendra Nath (1919) 4 Pat L J 265. |
| (y) (1881) 13 All 300 18 I A 55 | (y) Sakelchand v Ambareem (1924) 26 Bom L R 280 80 I C 260 (24) A R 340 |
| (w) " " " " | (z) Co-operative Hindustan Bank v Bhola Nath (1914) 19 C W N 165 31 I C 59* |
| (r) " " " " | (e) Patta Kumari v Pendra Nath (1919) 4 Pat L J 263, 270 50 I C 52. |
| (u) " " " " | |

Arbitration.

Sch. II,
paras. 9-11

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

10. [S. 516.] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

Award to be signed and
filed

Award need not be signed by arbitrators in each others presence.—It is sufficient if all the arbitrators agree to the terms of the award and sign it. There is no provision of law requiring them to sign in the presence of each other (b). But the award must be signed by all the arbitrators before it is filed (c), but not necessarily at the same time and place (d). An award signed by one of the arbitrators while it is on the file of the Court is invalid (e).

Necessity of arbitrator's presence at meetings.—When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award (f).

"Together with any depositions and documents".—The Court has jurisdiction to compel arbitrators to give up documents that may have been filed before them as exhibits during the course of the arbitration. Also if the original records of the suit are handed to the arbitrators to enable them to proceed with the arbitration, and they fail to return them, the Court can compel them to return the records (g). The arbitrator's omission to file with his award the depositions and documents may lead to the inference that he has been guilty of legal misconduct (h).

Notice of the filing shall be given.—It is a material irregularity within the meaning of sec. 115, if the Court gives judgment without issuing notice, and judgment so given will be set aside in revision (i).

Delivery of award.—The act of an arbitrator in delivering an award to the proper officer of the Court for the purpose of being filed in Court is not an "application" within the meaning of the Limitation Act. Hence there is no period of limitation within which an award should be delivered by an arbitrator to the Court (j).

Form.—For form of award see the Appendix to this Schedule, form no. 5

11. [S. 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the

Statement of special case
by arbitrators or umpire(b) *Muthukutti v Acha Nayakan* (1895) 18
Mad 22(c) *Ayyasami Mudaliar v Appanday* (1920) 38

(d) "

(e) "

(f) (1909) 32 Mad 510 41 C 871
(g) *Sham Ram v Fakir Chand* (1885) 7 All 523

(g) " " " "

(h)

(i)

A C 1018 see also *bagyappa* (1928) 50 All 51, 102 I C 608 (27) A
A 614(j) *Roberts v Harrison* (1831) 7 Cal 333

form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Special case—The special case must be on a point of law only (1)

Appeal.—An appeal lies from an order on an award stated in the form of a special case [s 104, sub s (1), cl (b)] Where the arbitrators differ on certain matters referred to them, but instead of referring their differences to an umpire as provided by the order of reference, they submit *their own opinions* in the form of a special case for the opinion of the Court such submission is not an award stated in the form of a special case, and no appeal therefore lies from any order made upon such submission (1)

Form—For form of special case see the Appendix to this Schedule form no 4

Power to modify or correct award

12. [S. 185.] The Court may, by order, modify or correct an award,—

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision, or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission

Power to modify or correct—The Court has no power to modify or correct an award except in the three cases mentioned in the paragraph and it cannot alter the directions given in the award as to payment of costs (m) A Court acts without jurisdiction if it modifies an award because it takes a view different from that held by the arbitrator (n) The Court cannot extend the time fixed for payment in the award or insert a provision for an easement of necessity (o)

Where a part of the award is upon a matter not referred to arbitration.—Where the matters in dispute in a suit are referred to arbitration but not the question of costs any direction in the award as to costs may be struck out by the Court, for such direction is a matter that is separable (p) An award that goes beyond the terms of the reference is to that extent *ultra vires* (q) But where no separation is possible the Court should remit the award to the reconsideration of the same arbitrator under paragraph 14 cl. (a)

- (k) *Laxman v Panchandra* (10-5) 48 Bom 663 84 I C 378 (25) A B 22
- (l) *Parashotamdas v Jangopal* (1910) 35 Bom 130 81 I C 171
- (m) *Anand Ram v Cundlia* (1906) 7 Lah 327 94 I C 736, (26) A L 519
- (n) *Parma Das v Jyoti* (1916) Punj Rec no 78 p 243 35 I C 887 *Gopal Dinker v Anand Narayan* (1911) 45 Bom 512 52 I C 785 (21) A B 191 *Aftab Lagam*

- v Haji Abdul* (1914) 22 All L J 816 81 I C 525 (24) A A 600
- (o) *Kankabud v Anambatta* (1930) 11 Lah 342, 12-1 I C 353 (33) A L 26
- (p) *Dagduas v Jankun* (18-5) 9 Bom 82 See also *Amolot Nakh v Charam Das* (1913) Punj Rec no 52, p 202 17 I C 644
- (q) *Mumaz Ali v Farhat Ali* (1901) 23 All 524 *Huda v Manuvpal Committee of Lahore* (1912) 23 Cal 854 29 I A 163

Arbitration.

Sch. II,
paras.
12-14

Arbitrator's power to set aside gift on payment of a certain sum as compensation.—The power to decide all disputes between the parties includes the power, where the validity of a gift is challenged, to set aside the gift upon payment of compensation to the donee (r).

Clause (c).—This clause is new. An arithmetical error is no ground for setting aside an award (s).

Appeal.—An appeal lies from an order modifying or correcting an award; see sec 104 sub-sec (1), cl (c). An appeal which was incompetent as an appeal from a decree in terms of a modified award was heard as an appeal from the order modifying the award (t).

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration

Costs of Arbitration.—This paragraph refers to the costs of proceedings before the arbitrator. The Court has also power to make an order as to costs of proceedings in Court after the award. But if the question of the costs of the suit has been referred to the arbitrator the Court is debarred by paragraph 3 from making an order as to costs of the suit prior to the reference (u).

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

Where award or matter referred to arbitrator may be remitted

- (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;
- (c) where an objection to the legality of the award is apparent upon the face of it.

Remission of award when the award has left undetermined any of the matters referred to arbitration.—The reason why an award which does not dispose of all matters referred is invalid, seems to be that there is an implied condition in the submission of the parties to the arbitration that the award shall dispose of all

(r) *Gowah v. Pathan* (1925) 3 Luck. 110.
L.C. 345, (25) A.O. 1.

(s) *Sham Lal v. Parasharam Das* (1925) 42 All. 277, 54 I.C. 585.

(t) *Sham Lal v. Parasharam Das* (1925) 58 C.W.N. 1069, 125 I.C. 515, (25) A.O. 115.
(u) *Ram v. Gopal* (1925) 54 All. 122, 126 I.C. 709, (25) A.O. 115.

This implied condition may be waived by the consent of all the parties before the arbitrators (1)

Where the issues in a suit were referred to arbitration, and there was no distinct and separate finding by the arbitrators on each of the issues, but there was a decision on the whole matter in controversy between the parties, it was held that the award could not be said to have left undetermined any of the matters referred to arbitration, and it should not therefore be remitted to the reconsideration of the arbitrator (1c). A separate finding on each issue is not necessary, when the whole matter in issue between the parties is decided by the arbitrators (x). But where several issues in a suit are referred to arbitration, and the arbitrator decides by the award only one issue, the award must be remitted to his reconsideration (y). If the arbitrator fails to reconsider the award, the award becomes void see paragraph 15. Even if parties come to an agreement as regards some of the matters referred to arbitration, the award should contain a determination of those matters though it be in terms of the agreement, otherwise the award would be open to the objection that it has left those matters undetermined (z).

Award patently illegal—This is the rule in *Hodgkinson v Fernie* (a) which limits the right of interference by the Court to the case 'where a question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award'. This rule was extended in *Sandaner v Asser* (b) to a case where an award referred to a contract and construed it. The Court of Appeal held that they were entitled to look at the contract and come to the conclusion that it was wrongly construed. *Sandaner v Asser* has been doubted, and in *Champsey Bhara & Co v Jitraj Billoo* (c) the Privy Council said 'An error of law on the face of the award means in their Lordships' view that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator, stating the reasons for his judgment some legal proposition which is the basis of the award and which you can say is erroneous'. In this case cotton had been rejected by a buyer on a final award that it was of inferior quality under Rule 52 of the Rules of the Bombay Cotton Trade Association. This rule gave the buyer the option of invoicing rejected cotton back at the market rate—an option which he would of course only exercise if the market rate had risen. But here the market rate was below the contract rate and the defaulting seller claimed to recover the difference. The award allowed the claim and in the preamble of the award narrating the events which led up to the dispute and the reference to arbitration mention was made of the contract and the letter of rejection for inferiority. The Bombay High Court seized upon this recital and said that as the contract referred to the Rules and as the rejection was under Rule 52, the arbitrators must have wrongly construed the option in the rule as an obligation, and that this was an error patent on the face of the award. The Privy Council however said that the rule in *Hodgkinson v Fernie* (d) does not mean that if in the narrative a reference is made to the contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties depend to see if that contention is sound. They also observed that the arbitrators were entitled to put their own construction on Rule 52. In another similar case the error was said to be in the construction of a contract which was referred to in the award,

(r) *Makund Ram v Salig Ram* (1894) 21 Cal 590 21 I A 47. *Bhagwan Das v Airc* Dial (1913) Punj Rec no 9, p 325 at p 33. 17 I C 544. *Jenendra v Surra* (Andhra (1927) 6 Lat 556 109 I C 82 (25) A 1 7.
(s) *George v Easton Soury* (1899) 22 Mad 407.
(t) *Gulam Khan v Muhammad Hassan* (1907) 29 Cal 167 166 29 I A 51.
(y) *Jonardon v Sambhu Nath* (1899) 16 Cal

606.
(z) *Hari Kunwar v Lakshmi Ram* (1916) 34 All, 340 39, 393 35 I C 833.
(a) (1857) 3 C B N S 129 20.
(b) [1903] 2 K B 184.
(c) (1931) 47 Bom 576 50 I A 376 73 I C 457 (23) A 14 68 44 mod in *Practical* *Meghmal v Madan* (1900) 5 Cal 100.
(d) 1857 I C 49 (25) A C 599.
(e) (1857) 3 C B N S 129

Arbitration.

Sch. II,
paras.
14, 15

but their Lordships pointed out that the contract was not incorporated in the award which only made a guarded allusion to it for the purpose of earmarking the origin of the dispute (e) Where the only question is a suit was whether a Hindu was born blind and therefore not entitled to inherit and the suit was referred to arbitration and the arbitrator made an award whereby the blind man was declared to be entitled to a life interest in a certain portion of the property, it was held on an objection to the award under cl (c) of this paragraph that the award was not so patently illegal that it could not be remitted to the reconsideration of the arbitrator (f) If one of the parties to an award is a syndicate the fact that it is an illegal association as it is not registered under sec 4 of the Companies Act is not an illegality apparent on the face of the award for the number of persons composing a syndicate is a mixed question of fact and law (g)

Appeal—No appeal lies from an order under this paragraph remitting an award to the reconsideration of arbitrators Where an award is remitted to the reconsideration of the arbitrator, and the arbitrator submits a fresh award and a decree is passed in accordance with the revised award no appeal lies from the decree on the ground that the order of remittal was wrong (r 16) and that the original award ought to have been accepted and acted upon (h) But where an award is remitted to the reconsideration of the arbitrator and the arbitrator refuses to reconsider the award (which consequently becomes void under paragraph 15) and the Court proceeds to try the case and passes a decree in the ordinary way [para 15 sub para (2)] the legality of the order remitting the award may be challenged on appeal from such decree (i) see sec 105

15. [S. 52I.] (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it But no award shall be set aside except on one of the following grounds, namely—

Grounds for setting aside
award

- (a) corruption or misconduct of the arbitrator or umpire,
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire,
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

(e) *Salleh Mahomed v Nathoomal* (1907) 54 I A 427 104 I C 476 55 Cal 126
(27) A PC 164
(f) *Madeipalli v Madeipalli* (1918) 41 Mad 1022 44 I C 644

(g) *Raoji v Ratansi* (1930) 54 Bom 698 126 I C 305 (30) A B 431
(h) *Subbiah v Subramania* (1908) 31 Mad 479
(i) *George v Vastan Soury* (1899) 20 Mad 207

Points of distinction between s 521 of the Code of 1882 and this paragraph —

- 1 Award made after expiration of period allowed by Court See notes below under the same head
- 2 When the award is otherwise invalid See notes under the same head
- 3 Clause (2) is new

Misconduct—The term 'misconduct' does not necessarily imply moral turpitude, it includes neglect of the duties and responsibilities of the arbitrators, and what Courts of Justice expect from them before allowing finality to their awards (j) Nor does it necessarily imply corruption (k)

Acts amounting to misconduct—The following acts have been held to amount to 'misconduct' on the part of an arbitrator affording a ground for setting aside an award —

- 1 Irregularities in procedure which amount to no proper hearing of the matters in dispute (l), e.g., hearing and receiving evidence from one side in the absence of the other side without giving the other side affected by such evidence the opportunity of meeting and answering it (m)
- 2 Proceeding with arbitration in the absence of one of the arbitrators (n)
- 3 Refusing to hear witness produced by the parties (o)
- 4 Arbitrators improperly adding another to their number (p)
- 5 Where three out of five arbitrators were not present at the time the award was made and did not sign the award although it purported to be signed by all of them it was held that this amounted to misconduct, and the award was set aside (q)
- 6 Making inquiries about the matters in reference from outside sources in the absence of the parties (r)
- 7 An unexplained delay of 5 years in making the award has been held to imply misconduct (s)

Acquiescence in acts amounting to misconduct—It is misconduct if some of the arbitrators are not present at some of the meetings. But if this procedure is adopted with the concurrence of all the parties or acquiesced in by them it is not open to any of the parties to impeach the award on that ground (t)

Acts not amounting to misconduct—An arbitrator is not bound by technical rules of procedure. Therefore it is not a valid objection to an award that the arbitrator did not act in strict conformity with the rules of evidence (u). But he should not make

- | | |
|--|--|
| <p>(j) <i>Gonsa Sahai v Lekhraj</i> (1887) 9 All 253 <i>Amir Begum v Badr-ud-din Hussain</i> (1914) 36 All 336 23 J C 65 [P C] <i>Tyrelbhai v Abdul Hussain</i> (1931) 25 Bom L R 392 85 I C 424 (24) A B 149</p> <p>(k) <i>Kali Charan v Sarai Chander</i> (1903) 30 Cal 39</p> <p>(l) <i>Amir Begum v Badr-ud-din</i> (1914) 36 All 336 23 J C 65 (1 C)</p> <p>(m) <i>Cursetji v W. Crowder</i> (1894) 18 Bom 299 <i>Mohammed Ali v Abdul Hamud</i> (1905) 1 Lah L J 463, 64 I C 161 (25) A L 57</p> <p>(n) <i>Thammamurthy v Espiratu</i> (1889) 12 Mad 113, <i>Nandam v Fakir Chand</i> (1885) 7 All 523</p> | <p>(o) <i>Rughoor v Ma na Koer</i> (1883) 12 C L R 564</p> <p>(p) <i>Ishran v Bahoran</i> (1875) 7 W 1 367</p> <p>(q) <i>Pam Narayan v Ba j Nala</i> (1907) 29 Cal 36</p> <p>(r) <i>Abdul Hamud v Muhammad</i> (1927) 8 Lah 379 101 I C 153 (27) A L 425 <i>Bhaiya v Jagdishwar</i> (1931) 52 All 938 128 I C 4 (31) A A 26</p> <p>(s) <i>Bhoglal v Chamanlal</i> (1928) 52 Bom 116, 107 I C 70 (27) A B 49</p> <p>(t) <i>Kanj Lal v Banwari Lal</i> (1919) 4 Pat L J 594 47-48 44 I C 711, <i>Cursetji v Crowder</i> (1894) 18 Bom 299</p> <p>(u) <i>Suppu v Goriunderkharper</i> (1884) 11 Mad 85 <i>Munung Sher v Min Ayun</i> (1925) 3 Rang 37 91 I C 659 (25) A R 343</p> |
|--|--|

Arbitration.

Sch. II,
para. 15

private inquiries behind the backs of the parties (r) unless authorized by the wide terms of the reference (u) Again the rule of evidence which declares that letters written "without prejudice" should not be admitted in evidence, being a rule founded upon natural justice, is as binding upon arbitrators as upon Courts of Justice, and an arbitrator is wrong in receiving and acting upon such a letter But if no objection is taken by the other side to the admissibility of such letter, and an award is made, the award will not be set aside on the ground of misconduct (x) If it is provided in an agreement for reference that an adjustment relied upon by the plaintiff should not be taken into consideration by the arbitrator, a *bona fide* mistake on the part of the arbitrator in admitting the adjustment in evidence does not amount to misconduct Such a stipulation is nothing but a rule of evidence introduced *pro hac vice* (y) If the arbitrator is selected on account of his special knowledge of the matter in dispute it is not misconduct for him to use his special knowledge (z) But otherwise it is misconduct for an arbitrator to ignore the evidence and decide on his special knowledge (a)

It is not misconduct on the part of the arbitrator to delegate to a third party the performance of acts of a ministerial character, so long as he exercises his own judgment on the matters referred (b) "Misconduct" cannot be presumed from the mere fact that the arbitrator is the relative of one of the parties (c) The mere fact that the arbitrator has failed to account for the delay in making the award is no ground for presuming fraud (d)

In *Bula v Municipal Committee of Lahore* (e), certain matters in dispute between A and B were referred to arbitration The agreement of reference was drawn up by A's counsel The arbitrator, feeling doubtful as to the meaning of a certain clause in the agreement, wrote to A to obtain his counsel's opinion on the meaning of that clause, A obtained the opinion, and sent it on to the arbitrator B was not informed of this until after the award was made It was held that though it would have been prudent and discreet for the arbitrator to have written to A with B's knowledge and informed B of the opinion, the omission to do this did not amount to "misconduct," as there was no ground for impeaching the good faith of any of the parties concerned

In *Louis Dreyfus v Arunachala* (f) an umpire admitted in his award having taken 'independent legal opinion' as to the construction of an alleged agreement but the Privy Council upheld the award Their Lordships said 'The precise length to which an arbitrator may go in seeking outside advice upon matters of law may be difficult to prescribe in general terms . . . In their Lordships' judgment the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon.'

Evidence of arbitrator—Where a charge of dishonesty or partiality is made against an arbitrator, any relevant evidence he can give is properly admissible It is, however, necessary to take care that evidence admitted as relevant on such charges is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final (g)

(v) *Ganga Sahai v Balken Singh* (1922) 20 All L J 147, 65 I C 779 (—2) A.A. 64

(w) *Hussain Baksh v Jachman Das* (1922) 20 All L J 125 64 I C 931 (22) A.A. 69

(x) *Howard v Wilson* (1879) 4 Cal 231

(y) *Ashabul v Essaji* (1914) 38 Bom 60 19 I C 931

(z) *Daulatsing v Ratna* (1926) 29 Bom L R 946 97 I C 673 (—6) A.B. 57

(a) *Capalan v Surayanarayana* (1926) 50 Mad

L J 514 95 I C 740 (26) A.M. 75°

(b) *Bula v Municipal Committee of Lahore* (1902) 29 Cal 854 29 I A 168

(c) *Nainsukh v Umada* (1885) 7 All 273

(d) *Sarappa v Derchand* (1907) 26 Bom. 132

(e) *1902* 29 Cal 854, 29 I A 168

(f) (1931) 58 I A 381 391 25 C W 1287, 124 I C 1080 (31) A PC 289

(g) *Amir Begam v Badar ud Din* (1914) 36 All. 336 344 23 I C 625 [P.C.]

Appeal from decree based on an award on ground of misconduct—No appeal lies from a decree passed in accordance with an award on the ground of misconduct of the arbitrator (k). The only remedy available to the party aggrieved by the award is to apply to have it set aside under this paragraph. See notes to paragraph 16 below, under the head "Invalid award."

Fraudulent concealment of any matter which ought to have been disclosed—Where the arbitrator was the retained pleader of the plaintiff and this fact was not disclosed by the plaintiff to the defendant before the arbitrator was appointed the award was set aside on the ground that that fact was one which ought to have been disclosed. Every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (i).

Award made subsequent to order superseding arbitration—If an order is made superseding the arbitration under paragraph 5 or 8 or under cl (2) of this paragraph or if the period fixed for making the award has expired the arbitrators have no longer *seisin* of the reference, and they are *functi officio*, and cease to have any more power to make an award than the man in the street (j). Similarly an arbitrator is *functus officio* after the award is made, and he cannot thereafter add to or alter the award (k).

Award made after expiration of period allowed by Court—Clause (c) of s 521 stopped at the words "the suit which occur in cl (1) sub cl (c) of this para." It was followed by another clause which ran thus: "And no award shall be valid unless made within the period allowed by the Court." The latter clause has now been omitted, and instead thereof we have the words "or after the expiration of the period allowed by the Court" added into sub cl (c). The effect of this alteration is that the only remedy now open to the party impeaching an award on the ground that it was made after the expiration of the period allowed by the Court is to apply under this paragraph to set aside the award. If no application is made to set aside the award under this paragraph or if the application is made but refused the award becomes final and no appeal will lie from a decree based upon the award (l). [Under the Code of 1882 it was held that an appeal lay from a decree based upon such an award (m)]. If the application to set aside the award is granted and an order is made under sub para (2) superseding the arbitration the order is appealable under s 105 sub s. (1) cl (a). See notes to r 16 below "No appeal lies from a decree based on an award etc," and notes to paragraph 3 above, "Making of award."

Another consequence of the alteration is that whereas under s 521 of the old Code an award out of time was a nullity (n) it is not so under the present rule. Under the present rule it is merely voidable and if not sought to be set aside within the period of limitation [Limitation Act 1908 art 159] it is binding upon the parties.

- (h) *Wajls v. Elys* (1905) 29 Bom 485. *Eam Dhan v. Karan Singh* (1896) 18 All 414. *Bihari Lal v. Channai Lal* (1901) 29 All 457. *Kombi v. Jany* (1870) 21 Mad 405.
- (i) *Kali Prosenno v. Pajani Kant* (1888) 25 Cal 141. *Yusuf Khan v. Husein Ali* (1906) 1 Luck 159. 931 C 446. (n) A O 30.
- (j) *Ibrahim v. Mohsin* (1896) 18 All 422, 425.
- (k) *Jafri Brosam v. Sood* 41 Fa 2 (1901) 23 All 323, 281 A 111.

- (l) *Sah Kruto Das & Co v. Satish Chandra* (1911) 39 Cal 822. 181 C 69.
- (m) *Patto Kumari v. Lpende Nath* (1919) 4 Lat 1 J 465. 501 C 52. (1912) 39 Cal 822. 181 C 69. *supra*. *Kashin Singh v. Mohan Lal* (1917) 54 L C 177.
- (n) *Chuka Mal v. Hari Ram* (1866) 8 All 549. *Har Varan v. Bhagwant* (1921) 13 All 307. 181 A 55. *Lachman Das v. Abpar*. *Kash* (1904) 31 All 169.

Arbitration.

Sch. II,
para. 15

When the award is otherwise invalid—The words “or being otherwise invalid” at the end of sub cl (c) are new. Under the Code of 1852 it was held that when an award was not a valid and legal award, an appeal would lie from the decree based upon such award, even though the decree might be in accordance with the award. The leading case on the subject was *Kali Prasanna Ghose v. Bryani Kant (o)* decided by the High Court of Calcutta in the year 1898. The object of adding the words “or being otherwise invalid” into sub cl (c) is to supersede the Calcutta and other decisions which allowed an appeal from a decree based upon an invalid award and to give effect to the principle of finality in cases of arbitration enunciated by their Lordships of the Privy Council in *Ghulam Khan v. Muhammad Hassan (p)* and followed in recent cases (q). The result is that the only remedy now open to a party seeking to impeach an award as being invalid is to apply under this paragraph to have it set aside. If he fails to do so, or if an application is made but refused, the award becomes final and no appeal will lie from a decree based upon the award. See notes to paragraph 16 under the head “Invalid award”. It is worth while noting that the Special Committee which introduced these alterations intended to allow an appeal from an order under this paragraph setting aside or refusing to set aside an award (r), but no such provision is contained in s. 104. The words “or being otherwise invalid” include every ground on which the validity of an award could be impeached. See note “Invalid award” under paragraph 16 below. But some cases, while conceding that an appeal will not lie from a decree in terms of an award on the ground that the award is invalid, restrict the meaning of these words to objections *ejusdem generis* with those in the preceding sentences of the clause. In this view objections that the reference is invalid cannot be taken under paragraph 15 but the order of the Court making the reference may be challenged in revision as being invalid (s).

An award is not illegal merely because it is based on evidence given by one of the parties on a special oath administered under the Indian Oaths Act with the consent of the other party (t).

An award is invalid if the arbitrators go beyond the scope of the suit and decide matters which are not in suit and which concern persons who are not parties to the suit. Rankin, J., said such an award cannot be treated partly as an award on a reference by the Court and partly as an award by private agreement, for there is no provision for such simultaneous arbitration and the jurisdiction for the different types of arbitration must not be confused (u). The Privy Council reserved their opinion as to whether there may not be an exception to this comprehensive statement as to simultaneous arbitration, but held that such an award was not in accordance with the order of reference and therefore “otherwise invalid” under para 15 (v). In a subsequent case parties to a suit applied for a reference as to matters in difference in the suit and other matters as well. The Court referred to arbitration the matters in difference in the suit only. The parties then made a reference without the intervention of the Court of these other matters to the same arbitrators who made two awards. The Court held that as the arbitrators had kept the two matters distinct the award on the suit reference was valid (w).

(o) (1898) 25 Cal 141

(p) (1902) 29 Cal 167 183 29 I A 51

(q) See *Chairman of the Purnea Municipality v. Sita Shankar Jaiam* (1906) 33 Cal 999 902

(r) C. A. 111 of 1907

(s) C. A. 111 of 1907

y. *Chari Ram* (1927) 49 All 912, 102 I A 236 (27) A C 563.(t) *Bhagprath v. Ram Ghulam* (1882) 4 All 233.(u) *Pampratap v. Durgaprasad* (1924) 24 C W N 424 433 83 I C 300 (-4) A C 567.(v) *Ram Pratap v. Durga Prasad* (1926) 53 I A 53 Cal 254, 92 I C 643 (25) A C 293(w) *Jatindra v. Manindra* (1906) 44 Cal 1 J 224 98 I C 203, (27) A C 52.

Appeal from order under this paragraph—Except in the case provided by s 104, cl (a) no appeal lies from an order under this paragraph setting aside or refusing to set aside an award (x). If the objecting party does not appear in support of his objection, the Court has no option but to pronounce judgment in accordance with the award (y), and the decree made thereon cannot be set aside under O 9 r 13, because it is not an *ex parte* decree (z). But if the order under this paragraph is made by a Chartered High Court, it amounts to a judgment within the meaning of cl 15 of the Letters Patent and is appealable under that clause. See notes to s 104 under the head 'Letters Patent appeal'. See also notes to paragraph 21 below under the head 'Appeal'.

C

a

be ultimately passed in the suit (a) [see s 105]. A different view has been taken by the High Court of Allahabad (b).

Revision—An order under this paragraph setting aside or refusing to set aside an award is not subject to revision (c). But an order superseding arbitration may be attacked under s 105 in appeal from the decree in the suit (d).

Suit to set aside an award—If the proceedings are not fraudulent, fictitious or vexatious no suit will lie to set aside an award (e).

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration in manner aforesaid and no application has been made to set aside the award or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

Judgment to be according
to award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with, the award.

After the time for making such application has expired.—That is after 10 days from the date on which the award is filed in Court and notice of the filing has been given to the parties: see Limitation Act 1908 sch I art 178 as amended by Act 18 of 1919. Before the amendment the period of 10 days commenced from the date on which

(x) *Zahar Ahmad v. Tashmunn Hussain* (1906) 45

All 47 N 11 (4) 4 (6) A A 55

(y) *Jaghnath Das v. Hrudai Chandra* (1904) 3 Lat

839 831 (6) (4) A 1 603

(z) (1904) 3 Lat 839 831 (6) (4) A P

6 3 *supra*

(a)

" " "

(b) " " " " "

(c) " " " " "

" " " " "

Dutta Mal (1916) Punj Rec no 117

p 361 34 I C 19 *Chamanbhai v.*

Kesharilal (1903) 4 Bom 71 3 I C

464 (3) A B 40 *Shah Muhammad v.*

Fahmulah (1905) 47 All 121 85 I C

502 (5) A A 454 *Fuad Singh v. Faqira*

Singh (1931) 53 All 1006 136 I C 565

(3) A A 45 *Nasirwanji v. Jamshedji*

(1931) 34 Bom L R 3 6 134 I C 215,

(3) A B 71 *Pam Narayan v. Mohan Lal*

(1933) 14 Lat 715 143 I C 309 (33)

A L 60

(d) *Indra Prasad v. Mathura Prasad* (1925) 47

All 916 91 I C 173 (5) A A 506

(e) *Isaji v. Lalani* (1931) 54 Bom 626 126

I C 35 (3) A B 431

Arbitration.

Sch. II,
para. 16

the award was submitted to the Court. See the preamble to Act 18 of 1919. The amendment seems to have been suggested by the judgments of the learned judges in the undermentioned Calcutta case (f). In a case where judgment was delivered five days after the date on which the award was filed and the parties had notice of the date and were unable to show that any further objections would have been formulated, the error was held to be cured by s. 99 (g).

No appeal lies from a decree based on an award except in so far as such decree is in excess of or not in accordance with the award.—In reference to arbitration the general rule is that, as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot object to his decision either upon the law or upon the facts. It is now well established that where a matter is referred to an arbitrator, he is the sole and final judge of all questions not only of fact but of law (h). Thus where an award was impeached on the ground that it was against law, their Lordships of the Privy Council said: "They [arbitrators] may have erred in law, but arbitrators may be judges of law as well as judges of fact, and an error in law certainly does not vitiate an award" (i). And this principle has been carried so far that if parties submit to an arbitrator the decision of a bare point of law, and he gives an erroneous decision, his award is binding notwithstanding (j). In all these cases the Court would say to the party seeking to set aside the award: "You have constituted your own tribunal, you are bound by its decision" (k). The present paragraph gives effect to 'the principle of finality' of awards by declaring that no appeal shall lie from a decree based on an award, except in so far as the decree is in excess of, or not in accordance with, the award (l). The only cases in which the Code allows an appeal from a decree based on an award are—

- (1) where the decree is in excess of the award, as where the decree gives interest which the arbitrators have not awarded (m), or
- (2) where the decree is not in accordance with the award

In this respect there is no difference between a decree based upon a private award (para. 21) and a decree based upon an award made through the intervention of the Court (n).

Is a decree based on an award which has been modified by the Court under paragraph 12 a decree in accordance with the award? It has been held by the High Court of Allahabad that it is not, and hence an appeal lies from the decree. Thus where an award directed the defendant to make certain payments to the plaintiff by instalments, and the award was modified by the Court under paragraph 12 by omitting the directions as to payments by instalments, and a decree was passed on the award as so modified, it was held that an appeal would lie from the decree (o). The soundness of this decision is open to question. It is submitted that a decree is in accordance with an award within the meaning of this paragraph, if it is in accordance with the award as modified under paragraph 12, though it may not be in accordance with the original award. Paragraph 16 says: "The Court shall proceed to pronounce judgment according to the award." It is

(f) *Sorachand v. Hurry Bux* (1919) 46 Cal 721
53 I C 46

(g) *Bankey Lal v. Chotley* (1931) 53 All 669

(h)

(i)

(j)

(k) Per Williams J. in *Hodgkinson v. Fernie*
(1857) 3 C B 8 189 202

(l) "

(m)

(n)

(o)

Arbitration.

Sch. II,
para 16

of paragraph 16 by suggesting that there was no award (v) There is one Calcutta decision that an appeal lies if the award is not supported by a valid reference (w) But this decision stands alone against an overwhelming mass of authority so that all those cases under the old Code in which it was held that a decree though it be in accordance with the award may be challenged by way of appeal on the ground that there was no valid and legal award, are no longer law In a Lahore case sons of one of the parties interested in the property were joined as parties after the award was filed, and made detailed objections to the award When their objections were disallowed and a decree passed in terms of the award, the Court held that they had by their conduct submitted to the arbitration proceedings and had no right of appeal although they had not actually been parties to the reference (x)

Illustrations

(a) An order of reference made on the application of *some only* of the parties interested is illegal [see paragraph 1] Therefore, an award made in pursuance of such order is also illegal According to the old section an appeal would lie from a decree upon such an award (y) But no appeal lies under this paragraph, and the only remedy open to the party aggrieved by the award is to apply to the Court under paragraph 15 cl (1), sub cl (c), to set aside the award Such an application should be made within 10 days from the date on which the award is submitted to the Court See paragraph 1

(b) An award made *after* the expiration of the period fixed by the Court under paragraph 3 or enlarged by the Court under paragraph 8, is invalid According to the old section an appeal would lie from a decree based on such award (z) No appeal lies under the present paragraph but the party aggrieved by the award may apply to have it set aside under paragraph 15 See notes to para 15, 'Award made after expiration of period allowed by Court'

(c) An award must be signed before it is filed and it must be signed by all the arbitrators An award signed by *some only* of the arbitrators is illegal Similarly an award signed by an arbitrator *after* the same has been filed in Court is illegal According to the old section an appeal would lie from a decree based on such award (a) No appeal lies under this paragraph, but the party aggrieved by the award may apply under paragraph 15 to have it set aside (b)

(d) The matters in difference in a suit between A and B are referred to the arbitration of C C is the retained pleader of A, but this fact is not disclosed to B [see para 15] C makes an award The award is illegal According to the old section an appeal would lie from the decree (c) No appeal lies under the present paragraph, but B can apply to have the award set aside under paragraph 15

An appeal lies from a decree based upon a judgment pronounced in contravention of the provisions of this paragraph though the decree may be in accordance with the award—It has been held by the High Court of Allahabad that if a decree is passed on an award *before the time for making the application*

| | | | |
|-----|---|---|--|
| (v) | " | " | 2 I C 363 |
| (w) | | | (2) <i>Chiba Mal v Hari Ram</i> (1886) 8 All 548 <i>Lachman Das v Abparloah</i> (1908) 30 All 169 |
| | | | (a) <i>Nandram v Nandchand</i> (1893) 17 Bom 357 <i>Romesh Chandra v Karunamoyi</i> (1900) 33 Cal 429 |
| (z) | | | (b) <i>Rhishman v Chandicharan</i> (1918) 1 Pat L J 306 35 I C 358 |
| (y) | | | (c) <i>Fali Prasanno Ghose v Rajanva Kant</i> (1898) 25 Cal 141 |

Ad

to set aside the award has expired, an appeal will lie from the decree, though the decree may be in accordance with the award (d). But in such cases the Bombay and Lahore High Courts interfere by way of revision (e). The Allahabad High Court has held that where an application to set aside an award has been refused by the Court without considering it, and a decree is passed on the award, an appeal will lie from the decree though the decree may be in accordance with the award. The reason given is that the word "refused" in this paragraph means refused after judicial consideration (f).

Second appeal—A second appeal will lie to the High Court where the decree of the Court of first instance is in accordance with the award, and such decree is set aside by the first appellate Court. The reason is that no appeal lies from a decree passed in accordance with an award, and the first appellate Court acts *without jurisdiction* in entertaining the appeal and setting aside the decree passed in accordance with the award (g). In a similar case the High Court of Calcutta held that no second appeal lies, but that the High Court may *revise* the order under s. 115 (h).

A second appeal will also lie where the Court of first instance sets aside the award and passes a decree on the merits, and the first appellate Court sets aside the decree and passes a decree in accordance with the award. The mere fact that the decree of the first appellate Court is in accordance with the award is no ground for refusing the appeal (i).

Revision—We have seen that no appeal lies from a decree passed in accordance with an award. Section 115 provides that where no appeal lies from a decision, an application may be made to the High Court for a *revision* of the decision. No such application, however, should be admitted in the case of an award. In the case of an award, revision would be more objectionable than an appeal. If an application for revision were admissible in a case where the decree is in accordance with the award, the finality of any award would be open to question (j). Thus where an application was made for revision on the ground that there was no valid order of reference and that the award was therefore a nullity and that no decree ought to have been passed on such an award, the High Court of Allahabad refused to entertain the application (k). But in a later case where the lower Court dealing with the objections set aside the award because of a supposed defect in the reference, the Allahabad High Court interfered in revision on the ground that the Court had acted without jurisdiction (l). The better opinion seems to be that revision is admissible for the purpose not of interfering with the arbitrator but with the exercise of jurisdiction by the Courts below, i.e., the procedure and order of the judge dealing with the objections (m). See notes above, 'An appeal lies from a decree based upon a judgment' etc.

- (d) *Nayam ud-din v. Albert Pucck* (1907) 29 All 584
- (e)
- (f)
- (g)
- (h)
- (i)
- (j) *Ghulam Khan v. Muhammad Hassan* (1917) 29 Cal 167 29 I A 51 *Fatcha v. Abdul*
- (1915) 38 Mad 56 1 I C 304 I F A 4nnamalai v I E A R Innamalai (1933) 61 Mad L J 376 (33) A M 637
- (k) *Ajudhia Prasad v. Badar ul Husain* (1917) 39 All 449 493-495 41 I C 357
- (l) *Kanka va Lal v. Jayannath Prasad* (1921) 43 All 305 60 I C 857 (21) A A 16 *Copal Das v. Baij Nath* (1926) 49 All 233 91 I C 930 (6) A A 34 *Taj Singh v. Ghazi Lam* (1927) 49 All 812 10 I C 236 (27) A A 563
- (m) *Merali v. Jerry* (1912) 36 Linn 105 12 I C 67 *Kankaya Lal v. Jayannath Prasad* supra *Gobind Singh v. Bhurga Nath* (1924) 46 All 6-6 82 I C 16 (24) A A 705 *Bhukhalal v. Acharya Lal* (1925) 49 Linn 525 8 I C 910 (25) A B 341 see also *Akshaya Lal v. Narain Singh* (1916) Punj Rec no 24 p 53 31 I C 707 *Lamaramani v. Venkatarama* (1926) 49 Mad L J 523, 91 I C 745 (26) A M 221

Arbitration.

Sch. II,
paras.
16, 17

Enforcement.—When a decree is passed in terms of the award the only mode of enforcing the award is by execution of the decree; no separate suit will lie to enforce the award (n).

Where the Court acts as arbitrator.—Where a reference is made to the presiding Judge, the parties must be deemed to have agreed to accept his decision as final. Hence no appeal lies from the decision of the judge in such a case (o). Nor is the decision subject to the provisions of the present Schedule so as to entitle either party to object to the decision as if it was an award under this schedule. A decree passed in accordance with such a decision must be regarded as a consent decree and it comes within the purview of O 23, r 3. The same principle applies even if the reference is made to the presiding Judge and another person jointly (p). A Judge to whom a reference is made has no power to alter his decision once it is given. In this respect his position is that of an arbitrator who has no power to alter an award once it is made by him (q). See notes to s 21 above.

Distinction between valuer and arbitrator.—A sues B for a declaration that he is entitled to one half share of certain property. An order is made by consent that A should pay B a quarter of the value of the property to be settled by a certain referee nominated by the parties. The order is not one passed under paras 2 and 3, and the decision of the referee is not an award on which a judgment could be pronounced under the present paragraph (r). But the terms of the agreement between the parties may be such that the valuer may be invested with the power of an arbitrator in which case the valuation made by him may operate as an award. In *Jackson v Barry Railway Co* (s), the building contract contained the following clause: "In the event of any question or dispute arising between the company and the contractor as to [then followed the enumeration of several questions], such questions or disputes shall be referred to the engineer whose decision shall be conclusive and binding on both parties. It was assumed that the above clause was an agreement to refer to arbitration, and the only question argued was whether in view of a letter written by the engineer to the contractor after intimation to the parties to proceed with the arbitration the engineer had rendered himself incapable of acting as an arbitrator. It was contended on behalf of the contractor that the true inference from the letter was that the engineer had so completely made up his mind against him that he would not be patiently listened to and receive an honest decision, but this contention was overruled.

Order of reference on agreements to refer.

17. [S. 523.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court of competent jurisdiction in the matter to which they agree relates, that the agreement be filed in Court.

Application to file in Court agreement to refer to arbitration

- (n) *Sari Sekharshwar v Lalit Mohan* (1925) 32 I A 79, 52 (SI) 314 86 I C 245 (25) A PC 34
(o) *Nadimani v Thammara* (1903) 28 Mad 79, *Sajal Zain v Kalahasti* (1933) 23 Lohm 702
(p) *Ching v Venkatasami* (1913) 42 Ma 1 625, 628 51 I C 827

- (1) *Barkanta Nath v Sita Nath* (1911) 33 Cal 421 9 I C 296
(r) *Chooney Money v Pam Kinkor* (1901) 25 Cal 155 *Macpherson v Jameswar* (1903) 30 Cal 831
(s) [1893] 1 Ch 238, *Ires v Williams* [1894] 2 Ch 478

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more parties interested or claiming to be interested as plaintiffs, and the others or other of them as defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator

Alteration in the paragraph—In cl 4 the words "and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator," are substituted for the words "and shall make an order of reference thereon and may also nominate the arbitrator when he is not a member thereof and the parties cannot agree as to the nomination"

Does not apply—The procedure prescribed by this paragraph does not apply to cases to which the Arbitration Act applies. See notes to s 89

Scope of the paragraph—Paras 1 to 16 deal with cases in which the parties to a suit agree to refer the matters in difference between them in the suit to arbitration and apply to the Court for an order of reference. The application in such a case must be made by all the parties to the suit interested in the matters in difference proposed to be referred to arbitration. Thus and the subsequent paragraph refer to cases in which persons themselves agree, independently of the Court, to refer the matters in difference between them to arbitration (f). In such a case any party to the agreement may apply to the Court to have the agreement filed and to have an order of reference made thereon. Where such an order is made the provisions of paras 2 to 16 apply to the proceedings in so far as they are consistent with the agreement so filed (u) [para 19]. When a submission is filed in Court under this paragraph, the submission is said to be made a rule of the Court.

Agreement to refer to arbitration matters in difference in a pending suit—An agreement to refer to arbitration matters in difference between the parties to a pending suit without the order of the Court under para 1 to 3 above is illegal and

(f) *Gulam Khan v. Mohammed Hasan* (1907) 11 Cal 167. (u) *Shaukat v. Shaukat* (1905) 11 All 53, 29 Cal 167. 29 L.A. 51.

Arbitration.**Sch. II,
para. 17**

cannot be filed under this paragraph (1) Whether an award made on such a reference is an adjustment within the meaning of O 23 r 3 has been discussed in the notes on that rule under the heading submission and award

Though an agreement to refer matters in dispute in a pending suit without an order of the Court is invalid there is nothing to prevent parties compromising their suit on the terms of an award made on such an agreement Thus in a Patna case (u) parties came to an agreement to arbitrate in a pending suit and applied the same day to the Court to withdraw the suit The suit was allowed to be withdrawn and the award made and filed under paras 20 and 21 This was quite correct, for the agreement was virtually conditional on the Court surrendering its jurisdiction by allowing the suit to be withdrawn An agreement to refer to arbitration the partition of a testator's estate does not encroach upon the jurisdiction of the Court in which proceedings for the probate of the will are pending and is therefore valid (x)

The agreement must be in writing —This paragraph does not apply unless the agreement to refer is in writing (y)

Agreement to refer future differences to arbitration —Where a charter party contains a clause that any disagreement that *may* arise [*i.e.*, arise *in future*] between the contracting parties as to the proper interpretation of the charter should be referred to arbitration the agreement though it refers to *future* differences can be filed under this paragraph (z) Agreements to refer *future* differences are not outside the scope of this section

Numbered and registered as a suit —It has been held that in spite of these words a proceeding under this para is not a suit for a suit is commenced by filing a plaint (a) The High Court of Calcutta has held that a proceeding under para 21 is a suit (b) It is submitted however that these words make it a statutory suit, otherwise the words would have been Numbered and registered as if it were a suit

Sufficient cause —Where an agreement is to refer to several specified arbitrators and one of the arbitrators dies before the application is made under this paragraph the Court should not make an order of reference under this paragraph (c) But it is otherwise if the agreement contains an express provision that in case of death of any arbitrator another arbitrator may be appointed in his place (d) During the pendency of a private arbitration one of the parties died and the arbitrator thinking he had no power to join the legal representative refused to go on On an application to file the agreement it was held that the Court has no power to order the arbitrator to proceed (e) In another similar case (f) the Court appointed a new arbitrator under para 5 which is made applicable by para 19 if its exercise is not inconsistent with the agreement of reference

Arbitrator appointed in accordance with the provisions of the agreement —Thus where an agreement provides for a reference to a European merchant the Court has no power to appoint an Indian merchant (g) If the agreement is for

(v) "

(w)

(x)

(y)

(z) "

(a)

(b) (1) A P 181
G r Charan v U na Charan (191) " 96
C W N 940 701 C 985

(c)

(d)

(e)

(f)

(g)

Where the agreement to refer has been duly revoked.—Where an agreement to refer has been revoked for good cause by one of the parties thereto, the Court is not competent to order it to be filed under this paragraph (j) nor can the agreement be filed if it has lapsed owing to the laches of a party (k) See notes to para. 1 under the head 'Revocation of arbitrator's authority'.

Appeal—In order under this paragraph filing or refusing to file an agreement to refer to arbitration is now appealable as an order [s 104, subs (1), cl (d)] Under the Code of 1882 it was appealable as a decree (m)

Indian Arbitration Act, 1899—The Indian Arbitration Act makes no provision for the appointment of a fresh arbitrator to fill a vacancy when the reference is to three arbitrators but this fact will not justify the Court in filing an agreement to refer to three arbitrators if it falls within the purview of that Act (o)

Stay of suit where there is an agreement to refer to arbitration

(A) *Lamprolaima* & *Laprovya* (19 6) 51 Mad I J
440 9th 10 2nd 4 1-6) A M 1183

(1)

(j) _____

(k) _____

(D) $\frac{1}{\sqrt{2}} \begin{pmatrix} 1 & -i \\ i & 1 \end{pmatrix}$

(m) $\frac{1}{2} \pi$ is a root of $\chi_{\mathfrak{p}}(x)$ if and only if $\mathfrak{p} \equiv 1 \pmod{4}$.

29 Jul 16 29 1 & 31 See also *Leontidea*
chata V. Langsd. (1916) 36 Mad 3.3 354
855 10 16 X 4

(a) *Wali Muhammad v. Bahawal Baksh* (1914)
[1915] 1 F.R. 24 p. 101 at 11 (95)

(e) *Kentia* *immsii* v. *Narungponi* (1931) 56
 Ind 194 130 14 C/S (31) A.M. 170
Copa v. *Moray* (1919) 43 *Boon* 809
 50 14 411

Arbitration.

Sch. II,
para. 18

History of the section.—This paragraph is a reproduction with slight alterations of section 19 of the Indian Arbitration Act. The latter section is based on s. 4 of the English Arbitration Act 1889 which again is based on the Common Law Procedure Act, 1854 s. 11. As to the history of the last mentioned section, see *Dalrymple & Fraser v Ossett Corporation* (p).

By s. 28 of the Indian Contract Act agreements in restraint of legal proceedings are declared void. To that section there was an exception to the effect that if the parties have agreed to refer their dispute to arbitration the existence of the agreement shall be a bar to seeking redress in the ordinary Courts. The exception also recognised the right to sue for specific performance of the agreement. Then came the Specific Relief Act of 1877 which by s. 21 took away the right to sue for the specific performance of the agreement but preserved the right to the party who was willing to abide by the agreement to object to a trial of the suit filed by the other party. Lastly paragraph 22 of this Schedule repealed that portion of s. 21 of the Specific Relief Act which enabled the defendant to plead the agreement to refer as a bar to the suit. In lieu of this provision we have the present paragraph which enables a party who is willing to abide by the agreement to apply for a stay of the suit filed by the other party. But the application must be made at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. If the application is not so made the suit will proceed and any award made by the arbitrator after the institution of the suit is a nullity. The reason is that as soon as a suit is brought in respect of the subject matter of the reference the arbitrator becomes *functus officio* (q). The Calcutta High Court has held that though the award made while the suit is pending and not stayed is a nullity the party bringing by the award may still obtain a stay order, apply for the award to be filed under para. 20 and then when the Court refuses to file it on the ground that it is invalid the arbitrators whose jurisdiction has been restored by the stay order may complete their proceedings and make a fresh award (r). The rule does not apply when the award deals with a question that is not in issue in the suit (s).

* At the earliest possible opportunity and in all cases where issues are settled at or before such settlement.—The corresponding words in s. 19 of the Indian Arbitration Act 1909 are, at any time after appearance and before filing a written statement or taking any other steps in the proceedings. It has been held under the English Arbitration Act, 1889, that where the defendant did not know what was the subject matter of the action and asked for a statement of claim the mere request for the statement of claim was not a step in the proceeding (t). But where the defendant was unaware that the contract contained an arbitration clause and asked for an order of discovery and the order asked for was made it was held that he had taken a step in the proceedings and therefore was not entitled to a stay (u).

* Institutes any suit.—These words show that the present rule refers only to suits instituted after the agreement to refer to arbitration has been made. As to B in respect of certain matters. The parties then agree to refer the matters to arbitration.

(p) 11912 3 K. B. 237 266-2 a.

(q)

(r) As soon as the suit is instituted the private tribunal becomes *functus officio*.
(s) also *Chaman Lal v. J. Gulchand* (1922)
44 All. 292, 65 I. C. 795 (22) A. I. 42

(t)

(u)

(v)

"No sufficient cause"—The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists (*w*)

Denial of agreement—Where one of the parties denies the agreement to refer set up by the other party, it is within the province of the Court to decide whether there is such an agreement (c) •

Validity of agreement to refer—To bring a case within this paragraph there must be a subsisting agreement to refer capable of being carried into effect. A suit therefore cannot be stayed under this paragraph if the submission has been revoked for good cause (d). Nor can it be stayed if the original contract containing the arbitration clause is followed by another agreement *materially* altering the original contract, for in that case the arbitration clause ceases by virtue of the alteration to have any effect. But a mere extension of time for the performance of that which a party under the original contract is bound to perform does not amount to a *material* alteration, and the arbitration clause does not cease to operate in such a case (e). See Pollock and Mulla's Indian Contract Act, notes to s. 28.

Bombay Cotton Contracts Act, 1922—Bye law 38A framed under this Act requires certain cotton contracts to be referred to arbitration. If a suit is brought on such a contract the Court has jurisdiction to try it but the defendant may apply to the

- | | | | | |
|-----|--|---|----------------------|--|
| (r) | Tampayan v. House (1908) 35 Cal 199 | Ferris v. Willapudi (1910) 34 Bom 32 | 41 C | 133 both cases under Sec 19 of the Arbitration Act |
| (w) | Dinabandhu v. Duranprasad (1919) 46 Cal 1041 | 511 C 80 | Hodgson v. Padayilas | Sengupta Insurance Co (1882) 9 Q B D |
| (x) | " " | " " | " " | " " |
| (y) | " " | " " | " " | " " |
| (z) | " " | " " | " " | " " |
| (1) | (1913) A C 41 | 256 | | |
| (2) | (1913) A C 241 | supra Printing Machinery Co v. Lyndey & Mackenzie Ltd (1912) 1 Ch 566 | | |
| (3) | Luzman v. Manjunath (1921) 45 Bom 1141 | 641 C 2-9 | (21) | A B 455 |
| (c) | Shro Parashad v. Indore Malva United Mills (1917) Punj 1 cc no 62, p 220 | 27 I C 504 | | |
| (d) | Lundell v. Thompson (1876) 1 Q B D 743, | Thruschke v. Springsted & Arthur Gradischoff v. Briscoe (1888) 21 Q B D 177 | | |
| (e) | Lachmibai v. Hoare, Muter & Co (1914) 41 Cal 25 | 21 I C 21 | | |

Arbitration.

Sch. II,
paras.
18, 19

Court to stay the suit (f) But the Bombay High Court will not file the award as an adjustment of the suit if the award is invalid and embraces matters not included in the arbitration clause (g)

Stay refused—Where an arbitration clause does not cover all the matters in respect of which the suit is brought, the Court will not, as a rule, split the suit into two parts one to be tried by the arbitrator and the other to be tried in Court, the Court will in such a case, try the whole suit (h) But if the main subject of the action is within the arbitration clause, the fact that a small portion of the relief claimed is not within the scope of the agreement is not sufficient reason for refusing to stay proceedings (i) Where fraud is charged, the Court will in general refuse to refer the dispute to arbitration if the party charged with the fraud desires a public inquiry (j)

Presidency Small Cause Court—The Presidency Small Cause Court, Bombay, has power to stay a suit under this para by virtue of rules framed under the Presidency Small Cause Courts Act, 1882 by the High Court of Bombay (k)

Appeal—An appeal lies from an order staying or refusing to stay a suit when there is an agreement to refer to arbitration, see s 104, sub-s (1), cl (e)

19. [S. 524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon

Provisions applicable to
proceedings under para
graph 17

Does not apply—This paragraph does not apply to cases to which the Arbitration Act applies See notes to s 89

"So far as they are consistent with any agreement filed under paragraph 17"—This paragraph provides that where an order of reference is made under paragraph 17 the provisions of paras 3 to 16 shall apply to all proceedings under the order only so far as they are consistent with the agreement filed under paragraph 17 Thus under paragraph 8 the Court has the power to extend the period for the making of the award But if the agreement filed under paragraph 17 provides that the arbitrators shall make their award within a fixed period and that they shall have no power to enlarge the time for making the award, the stipulation in the agreement will prevail to the exclusion of the provision in paragraph 8 But the words 'so far as they are consistent with any agreement filed under paragraph 17' would not preclude the Court from setting aside an award for misconduct of the arbitrators, though there may be a clause in the agreement that the award should be accepted as 'final' (l), nor would they preclude the Court from making an order as to costs when there is no such provision in the award (m) It has been held that under these words the Court may appoint a new arbitrator in place of one who refuses to act in the absence of a clause excluding the power of the Court to do so (n) But if the Court makes such an appointment the procedure of paragraph 5

(f)
(g)
(h)
(i)
(j)

(k)
(l)
(m)
(n)

must be observed and there must be formal notice of one party to the other (o) If the new arbitrator refuses to act the Court may then order superseding arbitration and such order is not appealable (r)

Arbitration without the intervention of a Court.

20. [S. 525.] (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Old section — This paragraph corresponds to sec 523 of the Code of 1924 which provided that in cl (1) the words 'any Court having jurisdiction over the subject matter of the award' have been substituted for the words 'Court of the lowest grade in which the action over the matter to which the award relates' See note at law at the bottom of the page.

Does not apply—This paragraph does not apply to cases to which the Arbitration Act applies see note to s. 89

Pending suit—See notes to para 17 above under the head *Agreement to refer to arbitration matters in a pending suit*. See also notes to (i) 21 and (ii) 24.

Scope of this and subsequent paragraph — The present paragraph and paragraph 21 refer to cases where the agreement of reference is made and the arbitration is itself takes place without the intervention of the Court and the assistance of that court is only sought in order to give effect to the award (a).

Arbitration.

Sch. II, para. 20 saved by sec 89 as appears from the words "save in so far as is otherwise provided by any other law for the time being in force" (s) See notes to para 21 below, "*Res judicata*"

A valid award constitutes a bar to a suit on the original demand—An award duly passed in accordance with the submission of the parties is equivalent to final judgment Hence if an award is made for a partition of joint property no party to the reference can sue for partition The award is an answer to the suit, though no decree may have been passed on the award (t)

Court to which application should be made under this paragraph—It is the subject matter of the award, and not the subject matter of the reference, that determines the jurisdiction of the Court under the present paragraph Under the old section the application to file the award had to be made to "the Court of the lowest grade having jurisdiction over the matter to which the award relates," and these words were held by the High Court of Calcutta to mean "the Court of the lowest grade having jurisdiction over the subject matter of the reference" (u) The words "subject matter of the award" have been substituted in this paragraph for the words "matter to which the award relates" to make it clear that an application under this paragraph may be made to any Court having jurisdiction over the subject matter of the award So when the subject matter of an award was the management and control of three temples outside the district of Berar and the question of the application of the revenue was between members of the founder's family not resident in Berar, the Privy Council held that the District Judge of Berar has no jurisdiction to entertain an application to file it (z) In the case last cited the whole of the subject matter of the award was outside British India But the same rule applies when part of the subject matter of the award is outside British India, so that the Court cannot entertain an application to file an award effecting a partition of properties some in the Madras Presidency and some in Travancore (w)

Limitation—The application under this paragraph should be made within 6 months from the date of the award Limitation Act, 1908, sch I, art 178 (x) The date of the award means not the date the award bears but the date on which it was given to the parties (y) i.e., the date of publication (z) The application is not a suit and therefore the applicant cannot claim the benefit of section 6 of the Limitation Act (a) See notes to para 17 above, "Numbered and registered as a suit"

Where an award is delivered in parts—If the agreement to refer provides that the matter in dispute may be taken up and dealt with *seriatim* and that the award may be delivered bit by bit each portion decided may be dealt with as a distinct award under this paragraph (b)

Lost award.—When an award has been lost, the procedure of this rule cannot be resorted to and the parties must be referred to a regular suit (c)

"Where any matter has been referred to arbitration"—Do the words "any matter" refer only to a matter in respect of which a suit can be entertained by a Civil Court under s 9 of the Code?—This paragraph provides that when any matter has been

(s)

(t)

(u)

(v)

(w)

(x)

(y)

(z)

(a)

(b)

(c) *Munir Khodja v Ghulam Nabi* (1900) 1 Lah 45 55 1 C 845

Arbitration.

Sch. II,
paras.
20, 21

referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply that the award be filed in Court. Paragraph 21 provides for the passing of a decree on the award. But what if the matter referred to arbitration is one as to which a Civil Court has no jurisdiction to entertain a suit under sec. 9 of the Code, e.g., disputes about *man pan*, and an award is made thereon? Has the Court jurisdiction to file such an award, and pass a decree thereon under paragraph 21? It has been held by the High Court of Bombay, that it has and that it is not against the policy of the law to give effect to such awards (d). The result is that rights which are not at all civil rights may be the subject matter of an arbitration and award and of the decree of a Civil Court. It would be interesting to know how the decree, if disobeyed, would be enforced. However this may be, it is clear that if a matter is such that on grounds of public policy it can be disposed of only by a Court, it cannot be the subject of a reference, and if such a matter is referred and an award is made, the Courts should refuse to pass a decree thereon. Thus the right to succeed to the trusteeship of a public charitable trust is not a right which can be settled by arbitration. A Court therefore has no jurisdiction to entertain an application to file an award in such a matter under this paragraph (e).

Numbered and registered as a suit.—See notes to para 17 under the same head. The Bombay High Court has held that the application when numbered and registered as a suit becomes a suit for the purpose of O. 35 and the Court has jurisdiction to direct attachment before judgment (f).

Notice.—If the parties are numerous a notice by public advertisement will suffice, and a separate notice under O. 1, r. 8, is not necessary (g).

21. [S. 526.] (1) Where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Points of distinction between s. 526 of the Code of 1882 and this provision.—

1. The words, "where the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon" have been added in order to remove the view held by the High Court of Bombay under the old section that the Court had no power to entertain a reference relating to the duration and validity of the agreement of reference and of the award, and to give effect to the view held by the High Court under sec. 526 of the new Code. Where the Court is satisfied the matter has been referred to arbitration, &c.

1. The award is numbered and registered as a suit under O. 35 of the Code of 1882, and the Court has jurisdiction to direct attachment before judgment.

2. The award is numbered and registered as a suit under O. 35 of the Code of 1882, and the Court has jurisdiction to direct attachment before judgment.

Arbitration.

Sche. II,
para. 21.

This word "proved" has been substituted for the word "shown" In fact it was held under the old section that the word "shown" meant "proved" (g) See notes below under the head "Proved"

Does not apply—This paragraph does not apply to cases to which the Arbitration Act applies See notes to sec 89

When the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon—These words are new In the absence of these words in the corresponding section of the Code of 1882 it was held by the High Court of Bombay that if an application was made under that section to file an award, and the other party raised objections to the factum or validity of the submission and award, the Court has no jurisdiction to inquire whether the parties had or had not referred the matters in dispute to arbitration, and should therefore reject the application, and refer the applicant to a regular suit to enforce the award (h) On the other hand, the High Courts of Allahabad (i), Calcutta (j) and Madras (l) held that the Court had the power under that section to determine all questions relating to the existence and validity of the alleged agreement to refer and of the award, and that the applicant must not be referred to a separate suit The present paragraph supersedes the Bombay decisions, and gives effect to the decisions of the other High Courts

Oral award—In an arbitration without the intervention of the Court the provisions of paragraph 10 do not apply, and if writing is not required by the terms of the submission an oral award is good and will bind the parties (l) In a Bombay case Sir Lawrence Jenkins said that an oral award though undesirable was perfectly valid (m)

Award under Co operative Societies Act—An award made by an Inspector of Co operative Credit Societies under rules framed under sec 43 of the Co operative Credit Societies Act 2 of 1912 has itself the force of a decree and need not be filed in Court (n)

"Proved"—It is not sufficient to "allege" grounds of objections under paras 14 and 15 It is necessary that the ground of objections should be *proved* See notes above under the head "Points of distinction," etc

Grounds of objection under paras 14 and 15—Where a matter has been referred to arbitration under an order of the Court, the Court has power in the cases mentioned in para 14 to remit the award to the reconsideration of the arbitrator Thus if an award determines any matter not referred to arbitration, the Court may remit the award under para 14, and if such matter can be separated without affecting the determination of the matters referred the Court may amend the award by striking out that portion of the award which is in excess of the reference, and enforce the award as to the rest of it In the case, however, of an arbitration without the intervention of the Court [paras 20 21], the High Courts have held in a series of cases that if the award determines matters outside the scope of the reference, the Court must refuse to file the award even when the matter not referred can be separated from that which was referred, the reason given being that the Court had under this para only two courses open to it, namely, to file the award or refuse to file it, and that it had no power to remit or amend

(g) *Jagan Nath v Mannu Lal* (1894) 16 All 221,
Dhanyubhai v Mathurbhai (1904) 28 Bom
287

(h) "

(i) "

(j) "

(k) *Chintamallayya v Thadai Gangireddy* (1897)
20 Mad 89

(l)

(m)

(n)

the award (o) This however, is incorrect for para 21 refers to para 14 where the principle of separation is recognised The point is concluded by the decision of the Privy Council (p) that the part of the award which is good should be filed and the remainder that is bad rejected

An arithmetical error, according to the Allahabad High Court does not render the award invalid (q) But the Lahore High Court has held that the Judge has no power to correct an arithmetical mistakes even with the consent of the party affected the reason given being that a Court acting under this paragraph must either file the award as it is or refuse to file it (r) But this is inconsistent with the Privy Council ruling referred to above

Award made after long delay—Where the agreement to refer was made in 1905 and the award was not made until 1910 and the Court came to the conclusion that it would probably not have been made at all but for one of the parties having brought a criminal complaint against one of the arbitrators, the Court refused the application to file the award The Court presumed from the circumstances of the case that the reference had been abandoned (s)

Award made after revocation of submission—An award made after the agreement to refer has been revoked by one of the parties thereto for good cause cannot be filed under this paragraph (t)

Appeal—An appeal lies from an order under this paragraph filing or refusing to file an award [s 104 sub s (1) cl (f)] even though no express order is made (u) But no appeal lies from the order passed on appeal (v), see s 104 (2)(w) But sec 104 refers to appeals within British India and does not take away the right of appeal to Privy Council given by section 109 (z) Again though an appeal lies from an order made under the paragraph no appeal lies from a decree passed on an award except in so far as the decree is in excess of or not in accordance with the award (y) [see sub para (2)] But is the right of appeal lost if the decree on the award is passed before the appeal is preferred from the order? It has been held that it is not, and it has been further held that if the appellate Court sets aside the order, it is competent also to declare that the decree based on the order is vacated (z) See notes to para 15 above, "Award made after expiration of period allowed by the Court"

- (o) *Allarathia v Jehangir* (18 3) 10 Bom II C 391 *Murtaza Khan v Phulja Bai* (1905) 27 All 506 *Dandekar v Dandekar* (188) 6 Bom 663 *Mana v Malichery* (1880) 3 Mad 63 *Thiruvannamalai Thengar v Iyandatha* (1906) 29 Mad 303 *Dina bandhu v Chintamani* (1914) 19 C W N 4 6 26 I C 696 *Kunj Lal v Banu caru Lal* (1919) 4 Pat L J 394 401 40 45 I C 11 *Dhanpat Das v Kahan Devi* (1914) Punj Rec no 30 p 108 23 I C 433

- (p) *Ruta v Municipal Committee of Lahore* (190) 29 Cal 854 29 I A 164 *Amir Jagan v Badrudin Hussain* (1914) 36 All 336 23 I C 625 followed in *Shauk Mahomed v Shauk Abdul Latif* (19 5) 4 Pat 60 93 I C 261 (5) A I 810

- (q) *Sham Lal v Parshotam Das* (1900) 42 All 25 54 I C 383

- (r) *Mahomed Afzal v Abdul Hamid* (1903) 1 Lah L J 463, 84 I C 161 (25) A L 570

- (s) *Muhammad Ruman Khan v Sardar Popam* (1919) Punj I C no 71 p 177 54 I C 84

- (t) *Shahmukhi v Vohra Chander* (1879) 4 C L R 92

- (u) *Shankar Das v Amurkand* (1925) 1 Lah L J 91 85 I C 533, (25) A L 2 1 *Jagat Lander v Sarwan Lander* (1935) 4 All 43,

(r)

(u)

(z)

- (y) *Bahadur Singh v Nari Purn Singh* (1904) 30 All 151 *Kulsum v Ali Akbar* (191) 39 All 401 411 39 I C 720 *Musung Purna v Musung Purna* (1913) 1 Rang 264, 61 I 504 (23) A E 199

- () *Shauk Muhammad v Shauk Abdul* (1925) 4 Pat 60 93 I C 261 (25) A F 610 *Jagat v Sarwan* (1925) 47 All 43 84 I C 56 (25) A 404 see 19 C W N 944 (23) I C 557

Arbitration.

Sche. II,
para. 21.

This word 'proved' has been substituted for the word "shown" In fact it was held under the old section that the word "shown" meant "proved" (g) See notes below under the head "Proved"

Does not apply—This paragraph does not apply to cases to which the Arbitration Act applies See notes to sec 89

When the Court is satisfied that the matter has been referred to arbitration and that an award has been made thereon—These words are new In the absence of these words in the corresponding section of the Code of 1882 it was held by the High Court of Bombay that if an application was made under that section to file an award, and the other party raised objections to the factum or validity of the submission and award, the Court has no jurisdiction to inquire whether the parties had or had not referred the matters in dispute to arbitration, and should therefore reject the application, and refer the applicant to a *regular suit* to enforce the award (k) On the other hand, the High Courts of Allahabad (i), Calcutta (j) and Madras (l) held that the Court had the power under that section to determine all questions relating to the existence and validity of the alleged agreement to refer and of the award, and that the applicant must not be referred to a separate suit The present paragraph supercedes the Bombay decisions, and gives effect to the decisions of the other High Courts

Oral award—In an arbitration without the intervention of the Court the provisions of paragraph 10 do not apply, and if writing is not required by the terms of the submission an oral award is good and will bind the parties (f) In a Bombay case Sir Lawrence Jenkins said that an oral award though undesirable was perfectly valid (m)

Award under Co-operative Societies Act.—An award made by an Inspector of Co-operative Credit Societies under rules framed under sec 43 of the Co-operative Credit Societies Act 2 of 1912 has the force of a decree and need not be filed in Court (n)

"Proved"—It is not sufficient to "allege" grounds of objections under paras 14 and 15 It is necessary that the ground of objections should be *proved* See notes above under the head "Points of distinction," etc

Grounds of objection under paras 14 and 15—Where a matter has been referred to arbitration *under an order of the Court*, the Court has power in the cases mentioned in para 14 to remit the award to the reconsideration of the arbitrator Thus if an award determines any matter not referred to arbitration, the Court may remit the award under para 14, and if such matter can be separated without affecting the determination of the matters referred, the Court may amend the award by striking out that portion of the award which is in excess of the reference, and enforce the award as to the rest of it In the case, however, of an arbitration *without the intervention of the Court* [paras 20-21], the High Courts have held in a series of cases that if the award determines matters outside the scope of the reference, the Court must refuse to file the award even when the matter not referred can be separated from that which was referred, the reason given being that the Court had under this para only two courses open to it, namely, to file the award or refuse to file it, and that it had no power to remit or amend

(g) *Jagan Nath v Mannu Lal* (1894) 18 All 231, *Dhanubhai v Mathurbhai* (1904) 23 Bom 287

(h) *Tejpur v Mahomed* (1896) 20 Bom 596

(i) *Amrit Ram v Dharai Ram* (1895) 17 All 21

(j) *Ganesh v Kashi* (1906) 28 All 621

(k) *Mahomed v Hakim* (1898) 25 Cal 757

(l) *Chintamallayya v Thada Gangreddy* (1897) 20 Mad 89

(f) " " " " " "

(m)

(n)

Arbitration.

Sch. II,
para. 21

the award (o) This, however, is incorrect for para 21 refers to para 14 where the principle of separation is recognised The point is concluded by the decision of the Privy Council (p) that the part of the award which is good should be filed and the remainder that is bad rejected

An arithmetical error, according to the Allahabad High Court does not render the award invalid (q) But the Lahore High Court has held that the Judge has no power to correct an arithmetical mistakes even with the consent of the party affected, the reason given being that a Court acting under this paragraph must either file the award as it is or refuse to file it (r) But this is inconsistent with the Privy Council ruling referred to above

Award made after long delay—Where the agreement to refer was made in 1905 and the award was not made until 1910 and the Court came to the conclusion that it would probably not have been made at all but for one of the parties having brought a criminal complaint against one of the arbitrators, the Court refused the application to file the award The Court presumed from the circumstances of the case that the reference had been abandoned (s)

Award made after revocation of submission—An award made after the agreement to refer has been revoked by one of the parties thereto for good cause cannot be filed under this paragraph (t)

Appeal—An appeal lies from an order under this paragraph filing or refusing to file an award [s 104 sub s (1), cl (f)] even though no express order is made (u) But no appeal lies from the order passed on appeal (v), see s 104 (2) (w) But sec 104 refers to appeals within British India and does not take away the right of appeal to Privy Council given by section 103 (x) Again though an appeal lies from an order made under the paragraph no appeal lies from a decree passed on an award except in so far as the decree is in excess of or not in accordance with the award (y) [see sub para (2)] But is the right of appeal lost if the decree on the award is passed before the appeal is preferred from the order? It has been held that it is not, and it has been further held that if the appellate Court sets aside the order, it is competent also to declare that the decree based on the order is vacated (z) See notes to para 15 above, "Award made after expiration of period allowed by the Court"

(o) *Allarathia v Jehangir* (1873) 10 Bom II C

(r)

(s)

(p)

(q)

(r)

(t)

(u)

(s) *Muhammad Ramzan Khan v Sardar Eryam*

(1919) Punj Rec no 71 p 177 5 A L J 847

(t) *Shobhramah v Venu Chander* (1879) 4 C L

R 92

(u) *Shankar Das v Amurkand* (1925) 7 Lab

L J 91 8 A L J 523 (25) A L J 321 *Jagat*

Jander v Narayan Jander (1922) 4 A L J 743

(v) *Shahid Muhammad v*

4 Pat 670 93 L C

Jagat v Narayan

1 A L J 76 (25) A A

94 29 L C 357

Arbitration.

Sch II,
paras.
21-23

If a ruling is made by the arbitrator in an application not to receive a petition of objection which has been filed in respect of the award, (i) it applies to the award under para. (2). It objects to the filing of the award on certain grounds. On the date of the hearing, the objector does not appear. Thereupon his objections are allowed and an *ex parte* decree is passed against him in accordance with the award. He then applies under the order to set aside the *ex parte* decree and to hear his objections to the award. The application is rejected. He then appeals from the order rejecting the application. Is the order appealable? Yes it is appealable under O 43 r 1 (1) which it is provided that an appeal lies from an order respecting an application for an order to set aside an *ex parte* decree in a case open to appeal. The case is one for an appeal from the decision between the parties was whether or not the award should be set aside. If the Court and any order made upon it will be appealable under O 43 r 1 (1) (b).

Res judicata—It has been held by the High Court of Allahabad that the refusal of a Court to file a private award on the ground of misconduct of the arbitrator is not a *res judicata* in respect of a suit subsequently brought to enforce the award. The reason given being that the doctrine of *res judicata* presupposes a former *ad litem* decree in the suit and that the order of refusal is not a decree, but merely an order. This decision has been followed by the Bombay High Court (d). The Calcutta High Court has held that the bar of *res judicata* will only apply to grounds of objection referred to in paras. 14 and 15 which were heard and finally decided (e).

Withdrawal of suit—The fact that an application has been made under para. (2) does not preclude the applicant from withdrawing the application under O 23 r 1 at any time prior to the pronouncement of judgment and preparation of the decree. It is true that a suit alone can be withdrawn under O 23 r 1 but an application filed under para. (2) is numbered and registered as a suit (f).

22. [New Cf Arbitration Act 9 of 1899, s. 3.] The last thirty seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this Schedule apply.

Inclusion of certain words in the Specific Relief Act 1877

Last thirty seven words of sec. 21 of the Specific Relief Act.—The said words are— but if any person who has made such a contract [that is a contract to refer to arbitration] and has refused to perform it sues in respect of any subject which he has contracted to refer the existence of such contract shall bar the suit. These words have been omitted in view of the provisions of para. 18 above.

23. [New] The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Forms

| (a) | (d) |
|-----|--|
| (b) | (e) <i>Guru Charan v. Uma Charan</i> (1911) 20 C W N 910 O I C 985 |
| (c) | (f) <i>Go. ri Shankar v. Ma. da Koor</i> (1903) 31 Cal 516 |

APPENDIX.

No 1

APPLICATION FOR AN ORDER OF REFERENCE

(Title of suit)

- 1 This suit is instituted for (*state nature of claim*)
- 2 The matter in difference between the parties is (*state matter of difference*)
- 3 The applicants being all the parties interested have agreed that the matter in difference between them shall have referred to arbitration
- 4 The application therefore apply for an order of reference

A B

C D

Dated the _____ day of _____ 19__

NOTE—If the parties are agreed as to the arbitrators it should be so stated

No 2

ORDER OF REFERENCE

(Title of suit)

Upon reading the application presented on the _____ day of _____ 19__, it is ordered that the following matter in difference arising in this suit, namely —

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire, and such arbitrators are to make their award in writing on or before the _____ day of _____

19__, and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within _____ months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply

Given under my hand and the seal of the Court, this _____ day of _____ 19__

Judge

No 3

ORDER FOR APPOINTMENT OF NEW ARBITRATOR

(Title of suit)

Whereas by an order, dated the _____ day of _____ 19__ [*state order of reference and death, refusal, etc., of arbitrator*] it is by consent ordered that

Arbitration.

Sch. II Z be appointed in the place of A deceased (or as the case may be) to act as arbitrator with J, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the _____ day of 19 .

Given under my hand and the seal of the Court, this _____ day of 19 .
Judge.

No. 4

SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between A B of _____ and C D of _____ the following special case is stated for the opinion of the Court:—

[Here state the facts concisely in numbered paragraphs]

The question of law for the opinions of the Court are —

First, whether _____

Secondly, whether _____

Dated the _____ day of _____ 19 .
X.
Y.

No. 5

AWARD.

(Title of suit)

In the matter of an arbitration between A B of _____ and C D of _____

WHEREAS in pursuance of an order of reference made by the Court of _____ and dated the _____ day of 19 _____ the following matter in difference between A B and C D, namely,

_____ has been referred to us for determination,

Now we, having duly considered the matter referred to us, do hereby make our award as follows —

We award—

(1) that _____

(2) that _____

Dated the _____ day of _____ 19 .
X.
Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—
Powers of Collector

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree ; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold ; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary.

Clause (a)—See O 21, r 83

Payment by instalments.—A Collector to whom a decree for sale of mortgaged property has been transferred for execution under s 68 is limited to one of the three courses specified in this paragraph, and may not depart from them, much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments (g) Nor has the Collector jurisdiction, when mortgaged property is sold under O 34, r. 12, free of a prior mortgage encumbrance, to settle accounts as to what is due on each mortgage (h) When the Collector receives sale proceeds, they are assets held by the Court ; and so an application for ratable distribution must be made before receipt of sale proceeds by the Collector (i)

2. [S. 325.] Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided.

Procedure of Collector in special cases

(g) *Mahadevi v Hari* (1883) 7 Bom 332

(h) *Abdul Kader v Muhammad Mahadevi* (1924) 46 All 414, 78 I C 429, (24) A.A. 207

(i) *Dattatraya v. Pundlik* (1920) 22 Bom L.R. 1001, 58 I C 992.

Arbitration.

Sch. II Z be appointed in the place of A deceased (or as the case may be) to act as arbitrator with I, the surviving arbitrator, under the said order, and if it is ordered that the award of the said arbitrators be made on or before the _____ day of 19 ____.

Given under my hand and the seal of the Court, this _____ day of 19 ____.

Judge

No 4

SPECIAL CASE.

(Title of suit)

In the matter of an arbitration between A B of _____ and C D of _____ the following special case is stated for the opinion of the Court —

{Here state the facts concisely in numbered paragraphs}

The question of law for the opinions of the Court are —

First, whether _____

Secondly, whether _____

Dated the _____ day of _____ 19 ____.

X
Y

No 5

AWARD

(Title of suit)

In the matter of an arbitration between A B of _____ and C D of _____ —

WHEREAS in pursuance of an order of reference made by the Court of _____

and dated the _____ day of 19 ____ the following matter in difference between A B and C D, namely _____

has been referred to us for determination,

Now we having duly considered the matter referred to us, do hereby make our award as follows —

We award—

(1) that _____

(2) that _____

Dated the _____ day of _____ 19 ____.

X
Y

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—

Powers of Collector

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment debtor to raise the amount of the decree, or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold, or
- (c) sell the property ordered to be sold or so much thereof as may be necessary

Clause (a).—See O 21 r 83

Payment by instalments.—A Collector to whom a decree for sale of mortgaged property has been transferred for execution under s 68 is limited to one of the three courses specified in this paragraph and may not depart from them much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments (g) Nor has the Collector jurisdiction when mortgaged property is sold under O 34 r 12 free of a prior mortgage encumbrance to settle accounts as to what is due on each mortgage (h) When the Collector receives sale proceeds they are assets held by the Court and so an application for ratable distribution must be made before receipt of sale proceeds by the Collector (i)

2. [S. 325.] Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided

Procedure of Collector in special cases

(g) *Mahadev v Hari* (1883) 7 Bom 32*
 (h) *Abdul Kadir v Muhammad Mahomed* (1904) 46 All 414 81 C 429 (24) A.A. 30

(i) *Dattatraya v Pandik* (1900) 22 Bom L.R. 1001 58 I.C. 992.

Execution by Collectors.Sch. III,
paras. 3, 4

3. [S. 322 A.] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

Notice to be given to
decree-holders and to per-
sons having claims on
property

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;
- (b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

Power of Collector to hear objections to execution of decree transferred to him for execution—Where a decree for money is transferred for execution to the Collector under s. 68, he is not authorized under this paragraph to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached (2)

4. [S. 322 B.] (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem

Amount of decrees for
payment of money to be
ascertained, and immov-
able property available for
their satisfaction

Execution by Collectors

necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immovable property, and may, from time to time, adjourn such hearing and inquiry

Sch. III,
paras. 4-6

(2) Where there is no dispute as to the fact or extent of the liability of the judgment debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision

5. [S. 322 C.] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court, and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector

Where District Court may
issue notices and hold
inquiry

6. [S. 322 D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree

Effect of decision of Court
as to dispute

Execution by Collectors.

Sch. III,
para. 7

7. [S. 323.]

Scheme for liquidation
of decrees for payment of
money

(1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property, or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or
 - (ii) by mortgaging the whole or any part of such property, or
 - (iii) by selling part of such property, or
 - (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale, or
 - (v) partly by one of such modes, and partly by another or others of such modes

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it

letting or managing, or for preserving the
 sale in satisfaction of an incumbrance, the
 discharge the claim of any incumbrancer which
 able or compound the claim of any incum
 it has become payable or not, and, for the
 ding funds to effect such discharge or com-
 mortgage, let or sell any portion of the property

Execution by Collectors

which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

The words Local Government have been substituted for the words Chief Controlling Revenue Authority which occurred in the corresponding sec 393 C P C 1889.

8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Recovery of balance
(if any) after letting or
management

Mortgage.—Instead of selling the Collector may mortgage the property (1)

9. [S. 324A] (1) The Collector shall from time to time render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

Collector to
accounts to Court

render

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the

Execution by Collectors.

Sch. III,
para. 7

7. [S. 323.]

*Scheme for liquidation
of decrees for payment of
money*

(1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or
 - (ii) by mortgaging the whole or any part of such property, or
 - (iii) by selling part of such property, or
 - (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale, or
 - (v) partly by one of such modes, and partly by another or others of such modes

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or compensation, may mortgage, let or sell any portion of the property

Execution by Collectors.

Sch. III.
para. 79

When he is so authorized, he may, as to the amount due in any proceeding, sell the property of the debtor, either in his own name or in the name of the judgment-debtor, or he may agree to sell the property of the debtor, one to be named by the debtor, and one to be named by the judgment-debtor.

4. In exercising under this paragraph the Collector shall be subject to such rules consistent with this Act as may from time to time be made in this behalf by the Local Government.

The words "Local Government" have been substituted for the words "Chief Executive Revenue Officer" which occurred in the corresponding sec. 321, C.P.D. Act.

8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor, or his representative in person, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Warning.—Instead of selling the Collector may mortgage the property.

9. [S. 324A.] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the

Execution by Collectors.

Sch. III,
para. 9 property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part and if the Collector so directs, the expenses of any witnesses summoned by him

(3) The balance shall be applied by the Court—

- (a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and,
- (b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct, or
- (c) where the Collector has proceeded under paragraph 2,—
 - (i) in keeping down the interest on incumbrances on the property,
 - (ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit, and
 - (iii) in discharging rateably the claims of the original decree holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment debtor or such other person as the Court directs

Accounts—The Collector, though bound to render accounts under this paragraph cannot be compelled to give up the account books in Court, nor does this paragraph require him to pay the balance into Court (1)

Execution by Collectors.

Sch. III,
paras. 9-11

Charges.—In Bombay the Collector is entitled to deduct fees according to the scale presented in case of sales by the Land Revenue Code and the Civil Court will make a further deduction on account of postage from the balance of the sale proceeds (m)

10. [S. 325.] Where the Collector sells any property under this Schedule he shall put it up to public auction in one or more lots as he thinks fit and may—

Sales how to be conducted.

- (a) fix a reasonable reserved price for each lot,
- (b) adjourn the sale for a reasonable time whenever, for reason to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property,
- (c) buy in the property offered for sale, and re sell the same by public auction or private contract, as he thinks fit

11. [S. 325A.] (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1

Restrictions as to alienation by judgment-debtor or his representative and prosecution of remedies by decree-holders

to 10, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money

(2) During the same period no Civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree holder has been temporarily deprived

Execution by Collectors.

Sch. III,
paras.
11-13

Incompetent to mortgage, charge, lease or alienate—A mortgage by a judgment-debtor of his property, while it is under the management of the Collector to whom decrees against the judgment-debtor have been transferred for execution, is absolutely void, and not merely void as against the Collector and those claiming under him (a). A gift by the judgment-debtor of property under the management of the Collector is void even though the gift deed is registered after the property is released from management (b).

"Alienate"—The word *alienate* in this paragraph contemplates a transfer which is to take effect immediately and not after death. It does not therefore include a disposition of property by will (p).

Alienation subsequent to certification of adjustment—An intimation by a decree holder to the Collector to whom the decree is transferred for execution that his claim under the decree has been satisfied by the judgment-debtor and the recording of such intimation by the Collector amounts to a due certifying of the adjustment of a decree within the meaning of O 21, r 2. After the adjustment has been so certified the prohibition against alienation imposed by this paragraph no longer subsists and it is competent to the judgment-debtor to mortgage, sell or alienate his property (q).

Limitation—When the property of the judgment-debtor was taken under management by the Collector and released more than 12 years after the date of the decree, that period was excluded in the computation of limitation both under the Limitation Act and section 48 of the Code (r).

12. [S. 325B.] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Provision where property is in several districts

13. [S. 325C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

Powers of Collector to compel Attendance and production

(a) *Go*

(a) *Abdul Fakhman v. Goya Prasad* (1929) 5 Luck 384 (29) A O 435

(p) *Muhammad Sajjad v. Muhammad Iqbal* (1910) 33 All 233 81 C 834

(q) *Kushalechand v. Chandram* (1911) 35 Bom 516, 121 C 572

(r) *Shayam Karam v. Collector of Benares* (1920) 42 All 118, 521 C 742

THE FOURTH SCHEDULE.

(See Section 155.)

ENACTMENTS AMENDED.

| 1 | 2 | 3 | 4 |
|------|-----|--------------------------|---|
| Year | No | Short title. | Amendment. |
| 1870 | VII | The Court Fees Act, 1870 | <p>.. In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set off or counter-claim" and after the word "Act" the words "or of cross objection" shall be inserted.</p> <p>From article II of Schedule II, the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely —</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."</p> |

APPENDIX I.

The High Courts Act or the Charter Act, 1861.

An Act for Establishing High Courts of Judicature in India (s)
(24 & 25 Vict., C. 104); [6th August 1861].

Repealed and re enacted with slight modifications by the
Government of India Act, 1915.

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same as follows:—

1 It shall be lawful for Her Majesty, by Letters Patent under the great Seal of the United Kingdom to erect and establish a High Court of Judicature at *Fort William in Bengal* for the Bengal Division of the Presidency of *Fort William*, aforesaid, and by like Letters Patent to erect and establish like High Courts at *Madras* and *Bombay* for those Presidencies respectively. Such High Courts to be established in the said several Presidencies at such time or respective times as to Her Majesty may seem fit and the High Court to be established under any such Letters Patent in any of the said Presidencies shall be deemed to be established from and after the publication of such Letters Patent in the same Presidency, or such other time as in such Letters Patent may be appointed in this behalf.

2 The High Court of Judicature at *Fort William in Bengal* and at the Presidencies of *Madras* and *Bombay*, respectively, shall consist of a Chief Justice and as many Judges not exceeding fifteen as Her Majesty may, from time to time, think fit and appoint who shall be selected from—

- 1st Barristers of not less than five years' standing, or
- 2nd Members of the Covenanted Civil Service of not less than ten years' standing and who shall have served as *Zillah Judges* or shall have exercised the like powers as those of a *Zillah Judge* for at least three years of that period, or
- 3rd Persons who have held judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years, or
- 4th Persons who have been Pleaders of a Sudder Court or a High Court for a period of not less than ten years if such Pleaders of a Sudder Court shall have been admitted as Pleaders of a High Court

Provided that not less than one third of the Judges of such High Courts, respectively, including the Chief Justice, shall be Barristers, and not less than one third shall be Members of the Covenanted Civil Service

(s) By the terms of this Act the exercise of jurisdiction in any part of Her Majesty's Indian Territories by the High Courts was meant to be subject to and not exclusive of the general legislative power of the Governor General in Council. An exercise of legislative authority by the Governor General in Council whereby any place or territory is removed from the jurisdiction of the High Court is one expressly contemplated by this Statute and by the Letters Patent issued under it—*Empress v. Burah* (1879) 4 Cal 172, L. R. 5 I A 178

High Courts Act.

8 Upon the establishment of such High Court as aforesaid in the Presidency of *Fort William in Bengal*, the Supreme Court and the Court of *Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta*, in the same Presidency, shall be abolished.

And upon the establishment of such High Court in the Presidency of *Madras*, the Supreme Court and the Court of the *Sudder Adawlut and Foujdarry Adawlut* in the same Presidency shall be abolished.

And upon the establishment of such High Court in the Presidency of *Bombay* the Supreme Court and the Court of *Sudder Dewany Adawlut and Sudder Foujdarry Adawlut* in the same Presidency shall be abolished.

And the records and documents of the several Courts so abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

9 Each of the High Courts to be established under this Act shall have and exercise all such Civil Criminal Admiralty, and Vice Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of *India* in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

Subject and without prejudice to legislative powers of the Governor General in Council—See notes to cl. 44 of the Letters Patent, *infra*.

10 Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of *Calcutta, Madras and Bombay*, respectively, over inhabitants of such parts of *India* as may not be comprised within the local limits of the Letters Patent to be issued under this Act establish High Courts at *Fort William, Madras and Bombay*, shall be exercised by such High Courts respectively.

Repealed by 28 Vict c 15 s 2

11 Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in *India* of Acts of Parliament or of any Orders of Her Majesty in Council, or Charters or of any Acts of the Legislature of *India* which at the time or respective times of the establishment of such High Courts are respectively applicable to the Supreme Courts at *Fort William in Bengal, Madras and Bombay*, respectively, or to the Judges of those Courts shall be taken to be applicable to the said High Courts and the Judges thereof respectively, so far as may be consistent with the provisions of this Act, and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters said of the Governor General of *India* in Council.

High Courts Act

12. From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings and all previous proceedings in the said abolished Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively.

Provisions as to power of jurisdiction in a divided Court

Power to High Courts to provide for exercise of jurisdiction by single Judges or Division Courts

13. Subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under this Act may, by their own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice.

Chief Justice to determine what Judge or Judges shall sit alone or in the Division Courts

14. The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid.

High Court to prescribe and to frame rules of practice for subordinate Courts

15. Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction, and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table, and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts, provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Fort William of the Governor-General in Council, and in Madras or Bombay, of the Governor in Council of the respective Presidencies.

Her Majesty may establish a High Court in the North Western Provinces.

16. It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other

High Courts Act.

8 Upon the establishment of such High Court as aforesaid in the Presidency of Fort William in Bengal the Supreme Court and the Court of Sadler Dewany Adawlut and Sadler Nizamut Adawlut at Calcutta, in the same Presidency, shall be abolished.

And upon the establishment of such High Court in the Presidency of Madras, the Supreme Court and the Court of the Sadler Adawlut and Foujarry Adawlut in the same Presidency shall be abolished.

And upon the establishment of such High Court in the Presidency of Bombay the Supreme Court and the Court of Sadler Dewany Adawlut and Sadler Foujarry Adawlut in the same Presidency shall be abolished.

And the records and documents of the several Courts abolished in each Presidency shall become, and be, records and documents of the High Court established in the same Presidency.

9 Each of the High Courts to be established under this Act shall have and exercise all such Civil, Criminal, Admiralty, and Vice Admiralty, Jurisdiction and powers Testamentary, Intestate, and Matrimonial Jurisdiction original and appellate and all such powers and authority for, and in relation to, the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid, grant and direct subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby, and save as by such Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

Subject and without prejudice to legislative powers of the Governor-General in Council—See notes to cl 44 of the Letters Patent, *infra*

10 Until the Crown shall otherwise provide under the powers of this Act all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras and Bombay, respectively, over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establish High Courts at Fort William, Madras and Bombay, shall be exercised by such High Courts respectively.

Repealed by 28 Vict c 15, s. 2

11 Upon the establishment of the said High Courts in the said Presidencies respectively, all provisions then in force in India of Acts of Parliament or of any Orders of Her Majesty in Council, or Charters or of any Acts of the Legislature of India which at the time or respective times of the establishment of such

existing provisions applicable to Supreme Courts to apply to High Courts

in pursuance thereof, and subject to the legislative powers in relation to the said of the Governor General of India in Council

High Courts Act

12 From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof and such proceedings and all previous proceedings in the said last mentioned Courts shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively

13 Subject to any laws or regulations which may be made by the Governor General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice

14 The Chief Justice of each High Court shall, from time to time, determine what Judge in each case shall sit alone, and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts as aforesaid

15 Each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction, and shall have power to call for returns, and to direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, and also to prescribe forms for every proceeding in the said Court for which it shall think necessary that a form be provided, and also for keeping all books, entries, and accounts to be kept by the officers and also to settle tables of fees to be allowed to the Sheriff, Attorneys, and all clerks and officers of Courts and from time to time to alter any such rule or form or table, and the rules so made and the forms so framed, and the tables so settled, shall be used and observed in the said Courts, provided that such general rules and forms and tables be not inconsistent with the provisions of any law in force, and shall before they are issued, have received the sanction, in the Presidency of Fort William of the Governor General in Council, and in Madras or Bombay of the Governor in Council of the respective Presidencies

16 It shall be lawful for Her Majesty, if at any time hereafter Her Majesty sees fit so to do, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature in and for any portion of the territories within Her Majesty's dominions in India not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and of such number of other Judges with such qualifications as are required in persons to be appointed to the High Courts established at the Presidencies hereinbefore mentioned, as Her Majesty from time to time, may think fit and appoint, and it shall be lawful for Her Majesty by such Letters Patent to confer on such Court any such jurisdiction, powers, and authority as under this Act is authorized to be conferred on or will become vested in the High Court to be established in any Presidency hereinbefore mentioned, and, subject to the directions of such Letters Patent all the provisions of this Act having reference to the High Court established in any such Presidency, and to the Chief Justice and other

High Courts Act.

Judges of such Court, and to the Governor General or Governor of the Presidency in which such High Court is established, shall as far as circumstances may permit, be applicable to the High Court established, in the said territories, and to the Chief Justice and other Judges thereof, and to the person administering the Government of the said territories.

17 It shall be lawful for Her Majesty, if Her Majesty shall so think fit, at any time within three years after the establishment of any High Court under this Act by her Letters Patent, to revoke all or such parts or provisions as Her Majesty may think fit, of the Letters Patent by which such Court was established and to grant and make such other powers and provisions as Her Majesty may think fit and as might have been granted or made by such first Letters Patent, or, without any such revocation as aforesaid, by like Letters Patent to grant and make any additional or supplementary powers and provisions which might have been granted or made in the first instance.

18 *It shall be lawful for Her Majesty from time to time, by Her Order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under this Act, and generally to alter and determine the territorial limits of the jurisdiction of the said several Courts as to Her Majesty, with the advice of Her Privy Council, may seem meet*

Other or supplementary
Charters may be granted
within three years after
establishment of a Court

Territorial limits of juris-
diction of Court may be
altered by order in Council

Repealed by 28 Vict., c. 15, s. 2

19 The word "Barrister" in this Act shall be deemed to include Barristers of England or Ireland, or members of the Faculty of Advocates in Scotland, and the words "Governor General and Governor" shall comprehend the officer administering the Government

Interpretation of terms

GOVERNMENT OF INDIA ACT, 1915.

An Act to consolidate enactments relating to the Government of India

29th July 1915

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows

* * * * *

PART IX

THE INDIAN HIGH COURTS

Constitution

101. [Ch. Act., ss. 2, 19.](1) The high courts referred to in this Act are the high courts of judicature for the time being established in British India by letters patent

(2) Each high court shall consist of a chief justice and as many other judges as His Majesty may think fit to appoint
Provided as follows —

- (i) the Governor General in Council may appoint persons to act as additional judges of any high court for such period not exceeding two years, as may be required, and the judges so appointed shall, whilst so acting have all the powers of a judge of the high court appointed by His Majesty under this Act,
- (ii) the maximum number of judges of a high court, including the chief justice and additional judges, shall be twenty
- (3) A judge of a high Court must be—
 - (a) a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing, or

Government of India Act.

Ss.
101-104

- (b) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a district judge; or
- (c) a person having held judicial office, not inferior to that of a subordinate judge or a judge of a small cause court, for a period of not less than five years, or
- (d) a person having been a pleader of a high court for a period of not less than ten years

(4) Provided that not less than one third of the judges of a high court, including the chief justice but excluding additional judges must be such barristers or advocates as aforesaid, and that not less than one third must be members of the Indian Civil Service

(5) The high court for the North Western Provinces may be styled the high court of judicature at Allahabad, and the high court at Fort William in Bengal is in this Act referred to as the high court at Calcutta

Tenure of office of judges
of high courts

102. [Ch. Act, s. 4].—(1) Every judge of a high court shall hold his office during His Majesty's pleasure

(2) Any such judge may resign his office, in the case of the high court at Calcutta, to the Governor General in Council, and in other cases to the local Government

Precedence of judges of
high courts

103. [Ch. Act, s. 5].—(1) The chief justice of a high court shall have rank and precedence before the other judges of the same court

(2) All the other judges of a high court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents

Salaries &c of judges of
high courts

104. [Ch. Act, s. 6].—(1) The Secretary of State in Council may fix the salaries, allowances, furloughs, retiring pensions, and (where necessary) expenses for equipment and voyage, for the chief justices and other judges of the several

Government of India Act.

high courts and may alter them but any such alteration shall not affect the salary of any judge appointed before the date thereof Ss.
104, 105

(2) The remuneration fixed for a judge under this section shall commence on his taking upon himself the execution of his office and shall be the whole profit or advantage which he shall enjoy from his office during his continuance therein

(3) If a judge of a high court dies during his voyage to India or within six months after his arrival there for the purpose of taking upon himself the execution of his office the Secretary of State shall pay to his legal personal representatives out of the revenues of India such a sum of money as will with the amount received by or due to him at the time of his death on account of salary, make up the amount of one year's salary

(4) If a judge of a high court dies while in possession of his office and after the expiration of six months from his arrival in India for the purpose of taking upon himself the execution of his office the Secretary of State shall pay to his legal personal representatives out of the revenues of India over and above the sum due to him at the time of his death a sum equal to six months' salary

105. [Ch. Act, s. 7].—(1) On the occurrence of a vacancy in the office of chief justice of a high court and during any absence of such a chief justice the Governor General in Council in the case of the high court at Calcutta and the local Government in other cases, shall appoint one of the other judges of the same high court to perform the duties of chief justice of the court until some person has been appointed by His Majesty to the office of chief justice of the court and has entered on the discharge of the duties of that office or until the chief justice has returned from his absence as the case requires

(2) On the occurrence of a vacancy in the office of any other judge of a high court and during any absence of any such judge, or on the appointment of any such judge to act as chief justice the Governor General in Council in the case of the high court at Calcutta, and the local Government in other

Government of India Act

Ss. 105, 106 cases may appoint a person with such qualifications as are required in persons to be appointed to the high court to act as a judge of the court, and the person so appointed may sit and perform the duties of a judge of the court until some person has been appointed by His Majesty to the office of judge of the court and has entered on the discharge of the duties of the office or until the absent judge has returned from his absence or until the Governor General in Council or the local Government as the case may be sees cause to cancel the appointment of the acting judge.

* Upon the happening of a vacancy in the office of any other Judge of any such High Court.—There was referred a Judge appointed to the office of the High Court in a person appointed to the office of a Judge of the High Court.

Time for appointment of acting judge.—There is no limit of time mentioned in the section with which the appointment of an acting judge is to be made. Such an appointment therefore is not invalid because it was not made immediately upon or within a reasonable time after the occurrence of the vacancy which it supplied (u).

Jurisdiction

106. [Ch Act, s 9]—(1) The several high courts are courts of record and have such jurisdiction original and appellate including admiralty jurisdiction in respect of offences committed on the high seas and all such powers and authority over or in relation to the administration of justice including power to appoint clerks and other ministerial officers of the court and power to make rules for regulating the practice of the court as are vested in them by letters patent and subject to the provisions of any such letters patent all such jurisdiction powers and authority as are vested in those courts respectively at the commencement of this Act

(2) [21 Geo 3, c 70]—The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force

Sub section (2)—This sub-section reproduces in effect the provisions of sec 5 of the Statute 1 Geo 3 c 70 relating to the Supreme Court of Calcutta cl 3 of the Charter of the Supreme Court of Madras 1800 and cl 30 of the Charter of the Supreme

(t) *Queen Empress v. Agra Pann* (1841) 16 All 13 15 | (u) *Balwant Singh v. Pan Kishori* (1873) 20 All 26 27.

Government of India Act

Court of Bombay, 1823 There was no such provision in the High Courts' Act, 1861, nor in any of the High Courts' charters See Despatch from Secretary of State, cl 17

Ss.
106, 107

The High Court has power under the Specific Relief Act 1 of 1877, s 45, to make an order requiring the Chief Revenue authority to state a case and refer it to the High Court under s 51 of the Income Tax Act 7 of 1918, the power not being the 'exercise of original jurisdiction in any matter concerning the revenue,' so as to be excluded by sub-sec (2) (i)

Revenue.—Income tax is revenue within the meaning of this section (iv) And so money derived from the sale of smuggled goods, which have been seized and confiscated (z)

107. [Ch. Act, s. 15.]—Each of the high courts has superintendence over all courts for the time being subject to its appellate jurisdiction, and may do any of the following things, that is to say,—

Powers of high court with respect to subordinate courts

- (a) call for returns ;
- (b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction ,
- (c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts ,
- (d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts , and
- (e) settle tables of fees to be allowed to the sheriff, attorneys, and all clerks and officers of courts

Provided that such rules, forms and tables shall not be inconsistent with the provisions of any Act for the time being in force, and shall require the previous approval, in the case of the high court at Calcutta, of the Governor-General in Council, and in other cases of the local Government

Power of superintendence.—The general superintendence which the High Court has over all jurisdiction subject to appeal is a duty to keep them within the bounds of their authority, to see that they do what their duty requires and that they do it in a legal manner It does not involve responsibility for the correctness of their decisions either

(v) *41 Cock Ashdown & Co Ltd v Chief Revenue authority Bombay* (19-3) 50 I A 27
4 Bom 4-51 C 39 (-3) A PC 133
The decision to the contrary in *Chief Commissioner of Income Tax v North Anantapur Gold Mines Ltd* (19-1) 44

Mad "18 64 I C 68" (21) A M 524 is no longer good law
(w) *Best & Co Ltd v Collector of Madras* (1918) 35 Mad L J 23 48 I C 790
(z) *Govindarajulu v Secretary of State* (1927) 50 Mad 449 105 I C 576 (27) A M 689

Government of India Act

S. 107

in fact or in law (y). The power of superintendence cannot be taken from the High Court by emergency legislation under s. 72 of the Government of India Act ()

Power of superintendence Civil proceedings—The High Courts have under this section not only administrative but judicial powers. In the exercise of its power of superintendence a High Court may direct a Subordinate Court to do its duty, and this power is not limited to cases in which the Subordinate Court declines to hear or determine a suit or application within its jurisdiction. But a High Court is not competent in the exercise of this power to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact (a). A High Court in the exercise of its superintending power will not ordinarily interfere except in cases of grave and otherwise irreparable injustice (b). If the lower Court has held that the plaintiff's valuation as to Court fee is correct the High Court will not interfere in revision or under this section (c). See note 'Court fee' under s. 115 at p. 200.

The power of revision conferred upon a High Court by s. 115 of the Civil Procedure Code is limited to cases in which an appeal lies to the High Court. There is no such limitation upon the power of superintendence conferred upon a High Court by the present section (d). The power of superintendence includes the power of revision (e) and too High Court has under s. 115 and this section directed an amendment of a plaint which has been refused by the lower Court (f). All that is necessary is that the Court over which the power of superintendence is sought to be exercised shall be subject to its appellate jurisdiction. If the Subordinate Court is one from which an appeal lies to the High Court though in certain specified cases only, then it is subject to the appellate jurisdiction of the High Court and that is sufficient to attract the power of superintendence conferred by this section and that power may therefore be exercised over the Subordinate Court even in cases where a direct appeal does not lie (g). Under this power a High Court can direct a transfer of an inquiry under sec. 14 of the Legal Practitioners Act into the conduct of a pleader (h), and can revise an order of a District Judge declaring a person a tout under s. 36 of the Legal Practitioners Act (i).

Insolvency proceedings—The Insolvency Judge in the High Court has no power under this section to stay insolvency proceedings in a District Court (j).

Power of superintendence Criminal proceedings—In the exercise of its power of superintendence the High Court will interfere with an order under s. 145 of the Criminal Procedure Code 1898 when the Magistrate has acted without jurisdiction or has exceeded his jurisdiction or where there has been a material irregularity in the

(y) *Manmohan Singh v. Emperor* (1933) 60 Cal 618
14 2 2 0 (33) 3 5 12 1st Division
C J

(z) 60 C 1 018 s. pra *Falkar Ina v. Emperor*
(1933) 37 Bon 93 141 I C 70 (33)
A B 2

(a) *Ty. Ina v. Harskh* (18 6) 1 All 101
M. Hananad v. Inan v. Fatma (1897)
9 All 1 1 461 *Hah v. Salvi* (18 6)

Government of India Act.

S. 107

proceedings which amounts to a refusal to exercise jurisdiction or to an usurpation of jurisdiction, or which has prejudiced a party to the proceedings (k) In case of a difference of opinion, the senior Judge's opinion will prevail (l)

The High Court has power under this section to stay the trial of a criminal case by a Magistrate pending the decision of a civil suit between the parties (m), and to set aside an order by a Collector directing a prosecution (n)

Agency Courts—Under rule 14 of the Rules of 1920 framed under the Ganjam and Vizagapatam Agency Courts Act 24 of 1879 and under the present section, the High Court has power to transfer to its file cases pending before the Agency Commissioner (o) The High Court has power under this section to transfer a case from the Mewar Agent to the District Court, Khandesh (p)

Defence of India Act, 1915—The High Court has no jurisdiction to superintend the proceedings of commissioners appointed under the Defence of India Act, 1915 (q)

Rent Act—It has been held by the High Court of Calcutta that it has power under this section to revise the orders of the Rent Controller under the Calcutta Rent Act (r) The High Court of Rangoon has held that it has no power to interfere with the orders of the Rent Controller under the Rangoon Rent Act (s)

Land Acquisition Act—The Bombay High Court has held that if the Collector refuses to make a reference to the Civil Court under sec 18 of the Land Acquisition Act, 1894 the High Court cannot in the exercise of its power of superintendence direct him to do so as the Collector is not a Court subject to the appellate jurisdiction (t) But the Calcutta High Court has held that the Calcutta Improvement Tribunal acting under the Land Acquisition Act is a Court and subject to the superintendence of the High Court (u)

Board of Revenue—The Board of revenue directing the operations of a settlement officer under the Madras Estates Land Act is not a civil Court nor subject to the superintendence of the High Court (v)

Municipal Commissioner—A Municipal Commissioner sitting as an Election Court is not subject to the superintendence of the High Court under this section, nor is he subject to the appellate jurisdiction (w)

When present section to be resorted to—The special power of superintendence conferred by this section is not as a rule to be exercised in cases where there is

- | | |
|---|---|
| <p>(k) —</p> <p>(l) <i>Moniram v. Mirjan</i> (1919) 24 C W N 97 54 I C 169 <i>Indian Iron & Steel Co v. Bansa</i> (19 0) 3 Cal L J 54 59 I C 403</p> <p>(m) <i>Nambia v. Sadas Muthu</i> (19 3) 44 Mad L J 64 61 I C 87 (23) A M 595</p> <p>(n) <i>Faujdar Pat v. King Emperor</i> (19 6) 90 I C 445 (6) A P 25</p> <p>(o) <i>Maharajah of Jyppore v. Rajah Gangaraja</i> (19 3) 46 Mad 26 72 I C 45 (23) A M 604</p> <p>(p) <i>Pestonjis v. Collector of West Khandesh</i> (19 7) 51 Bom 416 101 I C 58 (7) A B 27</p> | <p>(q) <i>Sheonandan v. King Emperor</i> (1918) 3 Pat L J 581 46 I C 977</p> <p>(r) —</p> <p>(s) —</p> <p>(t) —</p> <p>(u) <i>Adhar v. Radha</i> (193) 36 C W N 370 130 I C 180 (3) A C 660</p> <p>(v) <i>Pann of Mandasa v. Jayannavalulu</i> (1937) 55 Mad 843 140 I C 331 (3) A M 612</p> <p>(w) <i>Abdur Rahaman v. Abdur Rahaman</i> (1925) 47 All 513 87 I C 51 (5) A A 330 [I B]</p> |
|---|---|

Government of India Act

any part of British India not included within the limits for which the high court was established, and also to exercise any such jurisdiction in respect of Christian subjects of His Majesty resident in any part of India outside British India

Ss.
109, 110

(2) The Governor General in Council shall transmit to the Secretary of State an authentic copy of every order made under this section

(3) His Majesty may signify, through the Secretary of State in Council, his disallowance of any such order, and such disallowance shall make void and annul the order as from the day on which the Governor General notifies that he has received intimation of the disallowance, but no act done by any high court before such notification shall be deemed invalid by reason only of such disallowance

110. [13 Geo. III, c. 63, ss. 15, 17 ; 21 Geo. III, c. 70, s. 1 ; 37 Geo. III, c. 142, s. 11 ; 39 & 40 Geo. III, c. 79, s. 3 ; 4 Geo. IV, c. 41, s. 7.]—(1) The Governor General, each Governor and each of the members of their respective executive councils, shall not—

Exemption from jurisdiction of high court

- (a) be subject to the original jurisdiction of any high court by reason of anything counselled, ordered or done by any of them in his public capacity only, nor
- (b) be liable to be arrested or imprisoned in any suit or proceeding in any high court acting in the exercise of its original jurisdiction, nor
- (c) be subject to the original criminal jurisdiction of any high court in respect of any offence not being treason or felony

(2) The exemption under this section from liability to arrest and imprisonment shall extend also to the chief justices and other judges of the several high courts

Writ of certiorari.—The High Court has no jurisdiction to issue a writ of certiorari to a Local Government (e)

Government of India Act.

- Ss. 111-113. 111. [21 Geo. III, c. 70, ss. 2, 3, 4.]—The order in writing of the Governor-General in Council for any act shall, in any proceeding, civil or criminal, in any high court acting in the exercise of its original jurisdiction, be a full justification of the act, except so far as the order extends to any European British subject, but nothing in this section shall exempt the governor-general, or any member of his executive council, or any person acting under their orders, from any proceedings in respect of any such act before any competent court in England.

Written order by Governor-General justifying act in any court in India

Law to be administered.

112. [21 Geo. III, c. 70, s. 17 ; 37 Geo. III, c. 142, s. 13.]—The high courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.

Law to be administered in cases of inheritance and succession

Additional High Courts

113. His Majesty may, if he sees fit, by letters patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another high court and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act, and where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration

Power to establish additional high courts

Government of India Act.

Advocate General

S. 114

114. [53 Geo. III, c. 255, s. 111 ; 21 & Vic., c. 106, s. 29.]—

Appointment and powers
of Advocate General

(1) His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate General for each of the presidencies of Bengal, Madras and Bombay

(2) The Advocate-General for each of those presidencies may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England

131. Nothing in this Act shall affect the power of the

Savings

Governor-General in Legislative Council to repeal or alter any of the provisions mentioned in the Fifth Schedule to this Act, or the validity of any previous exercise of this power

DESPATCH FROM SECRETARY OF STATE.

SIR CHARLES WOOD'S DESPATCH ACCOMPANYING FIRST
LETTERS PATENT OR CHARTER

Judicial, No 24

INDIA OFFICE,
London, 14th May, 1862

To

HIS EXCELLENCY THE RIGHT HONOURABLE
THE GOVERNOR GENERAL OF INDIA IN COUNCIL

My Lord,

I HEREWITH transmit to you the Letters Patent or Charter (A), under the Royal Sign Manual, for the High Court of Judicature to be established in Bengal in accordance with the provisions of the Act 24 and 25, Victoria, Chapter 131, for establishing High Court of Judicature in India, and request that you will take immediate measure for instituting the Court, the first Judges of which including those appointed under the 3rd section of the Act, are designated in the second clause of the Charter. Those appointed by the Crown will be severally informed by me of their appointments to the Court

2 This Charter will accomplish the great object which has so long been contemplated, of substituting for the Supreme and Sudder Courts abolished by the Act of High Court of Judicature, possessing the combined powers and authorities of the abolished Courts and exercising jurisdiction both over the Provinces under the Sudder Court and over the Presidency Town which forms the local jurisdiction of the Supreme Court

3 Before I review the provisions in detail, it is necessary that I should direct your attention to the general scope and main provisions of the Act in question

4 It abolishes, in the first place (as soon as the Charter shall issue), the Supreme Court and the Court of Sudder Dewany Adawlut. It vests in the High Court (by the last provision of section 9) the powers and authorities of those Courts respectively, except so far as the Crown may by such Charter otherwise direct. And by (the first part of the same section) it invests the High Court with such Civil, Criminal, Admiralty, Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdiction, and all such powers and authority in relation to the administration of justice in the Presidency, as the same Charter may confer. With respect, therefore, to the fusion of the Supreme and Sudder Courts, it appears obvious that the Act itself speaks, and that to assume and effect the same purpose by affirmative declaration in the Charter would be superfluous. It has been, consequently, deemed unnecessary that the Charter should exhibit on the face of it an explicit statement of the powers and jurisdiction to be possessed by the new Court in consequence of the fusion as would have been the proper course if these powers and jurisdiction had been entirely new. Recourse has been had in some places in lieu of such explicit statement to reference to statutory provisions, and in others, to the Charter of the Supreme Court when the object of clearness appeared to require it. But wherever the Charter does not otherwise specify, the High Court will use powers and administer the jurisprudence appertaining to those Courts respectively to whose authority it now succeeds

(A) The Letters Patent dated the 14th May 1862 forwarded with this despatch were afterwards revoked by further Letters Patent, dated 28th December, 1865 for which see post

Despatch from Secretary of State.

5 But the Charter is intended positively to declare all such Civil, Criminal and other jurisdictions above specified as the Crown thinks proper by this Charter to confer on it supplementary or additional to its main purpose, namely, the fusion of the afore said Courts

6 Moreover the words giving authority to confer on the Court such jurisdiction and such powers and authorities for the administration of justice as the Crown may direct, appear very large and such as, in point of fact invest the Crown with extensive legislative powers, so far as the administration of justice, within the meaning of the sections may require It has been however, thought best to use this power very sparingly and simply as ancillary to the real purpose of the Act, namely the establishment of new Courts

7 Another reason for the form which the present Letters Patent assume is to be found in the provisions of section 17 of the Act of last Session By that section power is given to the Crown to recall the Letters Patent establishing the Court at any time within three years after its establishment, and to grant other Letters Patent in their stead This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed On this point, I request you will put yourselves in communication with the Judges of the Court and at any time previous to the expiration of two years from the date of establishment of the Court furnish me with any suggestions they make or any amendments they may propose in the Letters Patent now transmitted and I shall be glad if in proposing alterations the Judges will put their recommendations as nearly as possible in the form in which they wish them to appear in the future Letters Patent

8 I proceed to notice in order such of the provisions of the Charter as appear to me to call for special remark

9 By clause 6, power is given to the Chief Justice to appoint the officers of the Court, and to fix their salaries subject however in both cases to the approval and confirmation of the Governor General in Council This provision does not refer to the setting of tables of fees where fees are allowed which under section 13 of the Act is required to be done by the Court

10 The Supreme Court exercise an authority entirely independent of the Government in regard to its ministerial officers The Government however has always considered itself at liberty to receive representations from any of the officers of the Sudder or Subordinate Courts who felt themselves aggrieved by the orders of the Judicial Authorities and to express its opinion on the propriety or otherwise of the proceedings of the Courts in such cases It will be expedient for you to take the question into your consideration and after communication with the Court to adopt some rule in regard to it which of course must be uniformly applicable to all the officers of the Court Constituted as the High Court will be it will merit all the confidence you can repose in it but as a question of policy the extension of the liberty of application to the Government to those who have not hitherto enjoyed it appears to me preferable to taking it away from those who have heretofore been permitted to avail themselves of it as a mode of obtaining redress against proceedings alleged by the applicants to be unjust and oppressive

Despatch from Secretary of State.

11. In regard to the admission of Advocates, Vakeels, and Attorneys the recommendations of the Law Commissioners have been followed
 Clauses 7 to 10 Under the existing practice, the Advocate pleads, and the Attorney acts, for the suitors of the Supreme Court and the Vakeel both pleads and acts for the suitors of the Sudder Court, of which Court the Advocate and Attorney of the Supreme Court are *ex-officio* Vakeels. These terms are employed in the Charter simply to express the functions of these several classes of practitioners. The Advocate and Attorney will respectively plead and act in the High Court and the Vakeel will both plead and act in the High Court as he did in the Sudder Court. Any person may apply to be admitted either as an Advocate, or Vakeel, or Attorney under the rules which the Court is authorised by the Charter to make, and there is nothing in the Charter to prevent the admission of Advocates and Attorneys to be also Vakeels of the High Court, should the Judges consider such a course to be expedient.

12. The provisions in the Act, section 2, clause 4, which declares that Pleader of the Sudder Court, "who shall have been admitted as Pleaders of the High Court" shall be eligible, under certain conditions, to the Bench of the Court, implies that a discretionary power may be exercised as to the admission of the present Pleaders of the Sudder Court to the Bar of the High Court. This enactment will account to you for the omission from the Charter of any provision appointing all the present practitioners of the Supreme and Sudder Courts to the High Court. I conclude, however, that unless, in any special cases, there are strong reasons to the contrary, the Court will admit the whole of the practitioners in the abolished Courts at the date of their abolition, to be the first Advocates, Vakeels, and Attorneys of the High Court.

13. With reference to the concluding sentence of clause 10, it is to be observed
 Clause 10 that the Letters Patent contain no provision reserving to the Attorneys of the present Supreme Court the right of pleading after the issue of this Charter, in the Insolvent Court, as newly regulated by clause 17. No such provision, however, is necessary, as the Insolvent Court is a separate tribunal not affected by the Act authorising the Letters Patent and will continue a separate Court though for the future, presided over by a Judge of the High Court. The Attorneys, therefore, will, as heretofore, practise in accordance with the rules of the Insolvent Court itself.

14. By the important provisions contained in the clauses of the Charter, 11 to 35 inclusive, effect is given to the 9th section of the Act, respecting the jurisdictions and powers to be exercised by the High Court.

15. The original civil jurisdiction now exercised by the Supreme Court within the limits of the Presidency Town will henceforth be exercised
 Civil Jurisdiction, Clause 11 under the Charter, by the High Court, including in that term (Clause 36 of the Charter) a Judge or Division Court of the High Court, appointed or constituted under the provisions of the 13th section of the Act.

16. As it is very desirable that every suit should be instituted in the Court of the district in which the property forming the subject of dispute is situated, or in which the cause of action has its origin, or in which the defendant resides or carries on business, the jurisdiction hitherto exercised by the Supreme Court (on the ground of constructive inhabitancy or otherwise) over persons and property beyond the local limits of the Presidency Town, but within the limits of the Presidency or Division subject to the authority of the High Court has not been vested in the High Court. The concluding

Despatch from Secretary of State

provision of clause 11 provides that the exercise of the ordinary original civil jurisdiction of the Court shall be confined to the local limits of the Presidency Town, with power, however, to the Court, under clause 13, to call for and try any suit instituted in any Court subject to its superintendence, when, for reasons to be recorded, it shall think proper to do so

17 The terms of clause 12, defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Code of Civil Procedure (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction By the 8th section of the 21st George III, C 70, the Supreme Court is precluded from exercising any jurisdiction in any matter concerning the revenue Further, a decision* of the Judicial Committee of the Privy Council, pronounced in April 1856, ruled against the exercise of the Ecclesiastical jurisdiction of the Supreme Court in matters matrimonial between others than Christians, and even expressed some hesitation as to whether that Court should administer a remedy in such cases on the Civil side It is one object of the present Charter to do away with all such restrictions and limitations, as far as this can be done without trenching on the proper province of legislation It has, therefore, been sought to invest the High Court, in the exercise of its original civil jurisdiction, with as ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Towns and in the interior of the country in this respect, as nearly as may be, on the same footing

18 I shall be glad to be furnished with your opinion, after consultation with the Judges of the Courts as to the concluding portion of clause 12, excluding the jurisdiction of the Court in regard to cases falling within the jurisdiction of the Small Cause Court of Calcutta, in which the debt or damage or value of the property sued for does not exceed 100 Rupees Hitherto, I believe, there has been no tendency to bring into the Supreme Court cases cognizable by the Small Cause Court, but should it appear that under the new system, the time of the High Court is unnecessarily taken up with trying cases which might be instituted in the Small Cause Court, it may become a question for consideration whether the sum, excluding the jurisdiction of the High Court, might not be raised to say, 300 or 500 Rupees

19 It has been suggested that the Small Cause Court should be placed on the same footing as a Zillah Court in its subjection to the High Court as a Court of appeal and general superintendence But I do not consider that it was the purpose of the Act of Parliament of last Session that the Crown, in framing a Charter under it for the High Court, should interfere with the present position and jurisdiction of other and independent Courts This subject, if desirable, is properly to be attained by legislation Should you be of opinion that the Small Cause Court ought to be placed in the same relation to the High Court as any other Court subject to its appellate jurisdiction and general control the measure can be carried into effect by an Act of the Governor General in Council

20 As already observed, the effect of clause 12 will be to confine the ordinary original civil jurisdiction of the High Court within narrower limits than the civil jurisdiction exercised by the Supreme Court By clause 13, however the High Court is empowered to call for and to try,

Dispatch from Secretary of State.

as a Court of first instance, any suit which the law requires to be instituted before some other tribunal. By the exercise of the power thus conferred on it, the High Court will be enabled to obviate all reasonable ground of complaint, when it shall deem that any hardship or injustice is likely to result from the compulsory institution in a Zillah Court of a suit which, but for the change in the system, might have been instituted in the Supreme Court.

21. The introduction of the words "whether within or without the Bengal Division of the Presidency of Fort William" in this and in several other clauses, may appear to require explanation. The Court about to be established is called in section 2 of the Act, 24 and 25 Victoria, C. 101, a Court "for the Bengal Division of the Presidency of Fort William." That title is of course preserved in the Charter. By sec. 8 the Supreme and Sudder Courts are abolished and by section 9 all their jurisdiction, power, and authority, except when otherwise provided, are vested in the High Court. But the Supreme Court has various original jurisdictions, extending over the whole of the Presidency of Fort William, and also over some of the Non Regulation Provinces under the Government of India, and the Sudder Court has various appellate jurisdictions extending over the Bengal Division of the Presidency, and also over the Province of Assam and others, which are not properly parts of the Presidency. The result is, that the High Court "for the Bengal Division," succeeding to the powers of both the Supreme and the Sudder Courts, has, in several respects, jurisdictions in territories not within the Bengal Division. As this is the result of the Act, it might not have been necessary to notice it in the Charter. But for the sake of clearness, and order to show distinctly that the Charter is meant to apply to these extra local jurisdictions, as well as to the strictly local jurisdiction within the Bengal Division, it has been deemed advisable to introduce these words.

22. Clauses 14 and 15 give effect to the recommendation of the law Commissioners that the High Court shall have all the appellate jurisdiction which is now exercised by the Sudder Dewany Adawlut, and a new appellate jurisdiction and civil cases, from the Courts of original jurisdiction, constituted by one or more of its own Judges, except that in the case of a decision which has been passed by a majority of the full number of the judges of the Court, the appeal shall lie to Her Majesty in Council.

23. It will appear, from a subsequent clause of the Letters Patent, that the provisions of the Code of Civil Procedure, 1859, shall apply to the High Court.

differ as to the judgment to be given. For such a case, the Court of Civil Procedure, which is adapted to Courts of first instance presided over by single Judges only, contain no provision. To call in a third Judge, and to re try the case, with a view to a judgment from which there may be an appeal to the High Court under clause 14 would be productive of unnecessary delay and expense to the parties, and I am of opinion that the Court should make provision for such a contingency, by a rule made under the 13th section of the Act of Parliament, providing either that the judgment shall be in accordance with opinion of the senior of the Judges constituting the Division Court, or that the final judgment shall be entered *pro forma*, according to such opinion, such judgment being a judgment for the purpose of an appeal against the same, but not an authority for purpose.

Despatch from Secretary of State.

24 The substantive civil law to be administered by the High Court within the jurisdiction of the Supreme and Sudder Courts, respectively, will, until otherwise provided, continue as at present This, as I have said, it was no part of the purpose of the Act of Parliament or Charter to effect And the clauses on which I am now commenting are probably superfluous But they have been introduced to obviate any apprehension which might have been entertained that in fusing the two Courts together, it was intended to fuse also the law which they have respectively hitherto administered, and thus to make a substantial innovation, not only in the tribunals for administration of the law but of the law itself I trust, however, that measures may be taken ere long for effecting great improvements in this respect, by enacting for the British possession in India a body of substantive law, by which all classes shall be governed, and all transactions shall be regulated except in cases to which our Judicatures are required to apply the personal laws of any classes of our Indian subjects

25 Under clauses 21, 22 and 38, no change will be effected by the Charter in the administration of criminal justice in the Presidency Town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country It appears, however, to Her Majesty's Government that some modification of the existing practice, both at the capital and in the provinces, is necessary and on these points, I shall address you in a separate despatch

26 The Sudder Court exercises no original jurisdiction but by clause 23 original criminal jurisdiction throughout the territories subject to its authority, has been given to the High Court, the principal object being to enable the Judges to hold trials for offences committed out of the Presidency Town, at which from their importance or for other specific cause, it may be expedient that a Judge or Judges of the High Court should preside

27 The remaining clauses of the Letters Patent on the subject of the criminal jurisdiction of the High Court do not call for any particular notice They contain no special provisions respecting the transfer to that Court of the Criminal jurisdiction exercised by the Supreme Court over inhabitants of such parts of India as are not comprised within the local limits of the Letters Patent that having been fully provided for by section 10 of the Act under the authority of which the High Court is established

28 As in the case of the Small Cause Court, you will consult the Judges in regard to the relation in which the High Court is to stand to the Magistrates of Calcutta

29 Clause 30, respecting the exercise of the jurisdiction by the High Court elsewhere than at its ordinary place of sitting, is a very important provision and one which, I have no doubt, if judiciously carried into effect, will materially tend to the greater efficiency of all the judicatories subject to the superintendence and authority of the High Court Circumstances may frequently arise when the deputation of a Judge or Judges of the High Court would be a measure of the highest expediency For such cases the clause under consideration will enable the Government to provide by deputing one or more Judges from the High Court, who would avail themselves of the opportunity thus afforded them of making a searching inquiry into the manner in which the local Courts were performing their duties

despatch from Secretary of State.

30 With reference to this clause, it has been considered whether the precedence of section 14 of the Act of Parliament should not be followed and the authority to make the necessary arrangement for exercise of the Court's jurisdiction out of the usual place of sitting vested in the Chief Justice. On the whole it was thought that acts partaking so much of an administrative character might be more perfectly performed by the Governor General in Council. But it is scarcely for me to add that Her Majesty's Government entertain full confidence that the Chief Justice will be the authority habitually consulted in the matter.

31 The Supreme Court exercises at present Admiralty Jurisdiction under its

Clauses 31 and 32.

Charter. The Chief Justice has Vice Admiralty Jurisdiction under the commission of the 19th July, 1822, and all or any of the Judges of the Supreme Court may be appointed Commissioners, under the provisions of 39 and 40, George III, C 79, section 25 for the trial and adjudication of prize causes and other maritime questions arising in India. By the present Charter, the whole of these jurisdictions and power will be vested in the High Court, and as in the Act above cited, by the expression "other maritime questions" in general mention is made of all the jurisdictions conferred as above mentioned in the clauses of the Charter, providing both for the civil and criminal maritime jurisdiction of the High Court.

Clauses 33 and 34

32 The clauses respecting testamentary and intestate jurisdiction do not call for any remark.

33 Her Majesty's Government are desirous of placing the Christian subjects of the

Clause 35

Crown within the Presidency in the same position under the High Court, as to "matters matrimonial" in general as they now are under the Supreme Court, and thus they believe to be effected by clause 35 of the Charter. But they consider it expedient that the High Court should possess in addition, the power of decreeing divorce, which the Supreme Court does not possess, in other words, that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England, established in virtue of 20 and 21 Vic. C 85, and in regard to which further provisions were made by 22 and 23 Vic. C 61, and 23 and 24 Vic. C 144. The Act of Parliament for establishing the High Court, however, does not purport to give to the Crown the power of importing into the Charter all the provisions of the Divorce Court Act, and some of them the Crown clearly could not so import, such for instance as those which prescribe the period of remarriage, or those which exempt from punishment clergymen refusing to re-marry adulterers. All these are, in truth, matters for Indian legislation and I request that you will immediately take the subject into your consideration and introduce into your Council a Bill for conferring upon the High Court the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords.

34 The object of the proviso at the end of clause 35 is to obviate any doubt that may possibly arise as to whether, by vesting the High Court with the powers of the Court for Divorce and Matrimonial Causes in England, it was intended to take away from the Courts within the divisions of the Presidency not established by Royal Charter any jurisdiction which they might have in matters Matrimonial, as, for instance, in a suit for alimony between Armenians or Native Christians. With any such jurisdiction it is not intended to interfere.

Despatch from Secretary of State

35. Clause 36 refers to the powers of single Judges and Division Courts, appointed or constituted under the provisions of the 13th section of the Act. By section 14 of the Act, the power of determining from time to time what Judge in each case shall sit alone, and what Judges shall constitute Division Courts, is placed in the hands of the Chief Justice. It will be observed that the law does not require that a Judge selected from the Bar shall necessarily form a part of every Division Court, and it will be for the Chief Justice to consider whether, in cases exclusively between natives, it will not be desirable to follow, as far as possible, the course which has already been resolved upon in regard to the cases under appeal to the Sudder Court at the time of its abolition, and to constitute the Division Courts of Judges trained in the country, whose knowledge of the Native language will obviate the expense and delay of translating the proceedings.

36. Clause 37 is a very important one, and there is little doubt, will prove a very salutary provision. It has, therefore, been inserted, although the change introduced is somewhat greater and more substantial than is generally aimed at in this Charter. It extends to the High Court the Code of Civil Procedure enacted by the Legislature of India for the Court, not established by Royal Charter, and thus accomplishes the object so long contemplated of substituting one simple Code of Procedure for the various systems (corresponding to its common law, equity and admiralty jurisdiction) which have been in operation in the Supreme Court since the date of its establishment.

37. In regard to the rules respecting appeals to the Privy Council the object has been to avoid unnecessary innovation where so much of change, with its necessary inconvenience, is unavoidable. The existing rules which regulate these appeals are, therefore, left in force, with one or two additions only, which experience in the Court of the Judicial Committee has found advisable. For instance, clause 40 is introduced, as it had been commonly introduced of late years in the appeal rules of other dependencies of Great Britain in order to remove all doubts as to the power of the High Court to allow an appeal to the Council from interlocutory judgments.

38. It will, however, be obvious to you that the rules, as now framed, will be liable to the reproach of confusion, and perhaps of uncertainty. They will be compounded of those contained in the Charter and those already in force which will necessitate reference to several documents. You will agree with me that a simple and intelligible Code of Rules, to regulate appeals to the Privy Council from the new High Courts, or rather from the High Courts in general which may be constituted under the Act of Parliament, will be of great advantage to the suitors and the public. I should wish, therefore, that only of the first objects of the Judges, as soon as the amount of labour thrown on them by their new position may allow it, might be to prepare suggestions for such a Code of Rules which might then be reduced into a complete shape by the authority of the Privy Council at Home.

39. In forwarding the Letters Patent to the Judges of the High Court you are requested to furnish them with a copy of this despatch. I trust that the Letters Patent taken in connection with the Act for establishing the Court, will be found to contain everything requisite for enabling the Court to proceed at once to the discharge of its important duties. It is possible that omissions may be discovered by the legal authorities in India, which may impede the proper action of the Courts, and should the Judges represent to you that such is the case you will take immediate steps for supplying what is wanting by such legislative measures as you may consider most expedient for remedying the defects brought under your consideration.

Despatch from Secretary of State.

40 I cannot conclude this despatch without expressing the deep interest felt by Her Majesty's Government in the success of this important measure. The Crown by its Letters Patent has sanctioned the establishment of a tribunal as the Chief Court of Justice in India, which in the trained learning of the Judges selected from the Bar, and in the knowledge of the language, feelings, and habits of the Natives of that country possessed by the other members of the Court, combines the most material elements of success. And Her Majesty's Government look with confidence to the zealous exertions and cordial co-operation of the Judges to place the administration of Justice in India, under the controlling authority of the Court, in such a state of efficiency as will render it in every respect adequate to its ends, and satisfactory to the people and to the Government.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble Servant,

(Signed) C. WOOD

APPENDIX II.

Letters Patent for the High Court of Calcutta.

(Dated the 28th December 1865.)

[A B—The Letters Patent for the High Courts of Madras and Bombay are mutatis mutandis in almost the same terms.]

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To all to whom these Presents shall come, greeting. Whereas by an Act of Parliament passed in the Twenty fourth and Twenty-fifth Years of Our reign, intituled "An Act for establishing High Courts of Judicature in India" it was, amongst other things, enacted that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that such High Court should consist of a Chief Justice, and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act is declared. Provided always, that the persons who at the time of the establishment of such High Court were Judges of the Supreme Court of Judicature, and permanent Judges of the Court of Sudder Dewanny Adawlut or Sudder Adawlut of the same Presidency, should be and become Judges of such High Court without further appointment for that purpose, and the Chief Justice of such Supreme Court should become the Chief Justice of such High Court, and that upon the establishment of such High Court as aforesaid, the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Nizamut Adawlut at Calcutta in the said Presidency, should be abolished —

And that the High Court of Judicature so to be established should have and exercise all such Civil, Criminal, Admiralty

Let. Pat. [Cal., Bom., and Mad.]

Cls. 1, 2 and Vice-Admiralty, Testamentary, Intestate, and Matrimonial Jurisdiction, original and appellate, and, all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might, by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original, civil and criminal jurisdictions beyond the limits of the Presidency Town as might be prescribed thereby: and save as by such Letters Patent might be otherwise directed, subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last-mentioned Courts (g) —

1. Now know ye that We, upon full consideration of the premises, and of Our special grace, certain knowledge, and mere motion, have thought fit to revoke, and do by these presents (from and after the date of the publication thereof as herein-after provided and subject to the provisions thereof) revoke Our said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, except so far as the Letters Patent of the fourteenth year of His Majesty King George the Third, dated the twenty-sixth March, one thousand seven hundred and seventy-four, establishing a Supreme Court of Judicature at Fort William in Bengal, were revoked or determined thereby.

2. And We do by these presents grant, direct and ordain that notwithstanding the revocation of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, the High Court of Judicature, called the High Court of Judicature at Fort William in Bengal, shall be and continue, as from the time of the original erection and establishment thereof, the High Court of Judicature at Fort William in Bengal, for the Bengal Division of the Presidency of Fort William aforesaid, and that the said Court shall be and continue a

Revocation of Letters Patent of 1862

High Court at Fort William to be continued

Let. Pat. [Cal, Bom., and Mad]

Cls 2-5

Court of record, and that all proceedings commenced in the said High Court prior to the date of the publication of these Letters Patent shall be continued and depend in the said High Court as if they had commenced in the said High Court after the date of such publication, and that all rules and orders in force in the said High Court, immediately before the date of the publication of these Letters Patent, shall continue in force, except so far as the same are altered hereby, until the same are altered by competent authority

3. And We do hereby appoint and ordain that the person and persons who shall immediately before the date of the publication of these Letters Patent, be the Chief Justice and Judges, or acting Chief Justice or Judges, if any, of the said High Court of Judicature at Fort William in Bengal, shall continue to be the Chief Justice and Judges, or acting Chief Justice, or Judges, of the said High Court, until further or other provisions shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act for establishing High Courts of Judicature in India

Judges of the said High Court to be continued

4. And We do hereby appoint and ordain that every clerk and ministerial officer of the said High Court of Judicature at Fort William in Bengal, appointed by virtue of the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty two, shall continue to hold and enjoy his office and employment, with the salary thereunto annexed, until he be removed from such office and employment, and he shall be subject to the like power of removal, regulations and provisions as if he were appointed by virtue of these Letters Patent

Clerks &c of the said High Court to be continued

5. And We do hereby ordain that the Chief Justice and every Judge who shall be from time to time appointed to the said High Court of Judicature at Fort William in Bengal previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration, before such authority or person as the Governor General in Council may commission to receive it —

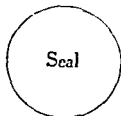
Declaration to be made by Judges

Let. Pat. [Cal, Bom., and Mad.]

Cls. 5-8

"I, A B, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"

6. And We do hereby grant, ordain and appoint, that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms, within an exergue or label surrounding the same with this inscription "The Seal of the High Court at Fort William in Bengal"



And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the office of the Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice, under the provisions of section 7 of the said recited Act and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to him, or their possession

7. And We do hereby further grant, ordain, and appoint that all writs, summons, precepts, rules, orders and other mandatory process to be used issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court

Writs to be issued in the name of the Crown and under the Seal

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, Appointment of Officers as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor-General in Council, to

Let. Pat. [Cal., Bom., and Mad.]

Cis. 8-10

appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent (h). And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of. Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they shall hold their respective offices; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Admission of Advocates, Vakeels and Attorneys

Powers of High Court in admitting Advocates, Vakeels and Attorneys

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet, and such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors according as the said High Court may by its rules and directions determine, and subject to such rules and directions

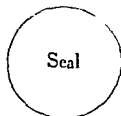
In making rules for the qualifications, &c. of Advocates, Vakeels and Attorneys

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper person to be Advocates, Vakeels and

(h) The words "And we do hereby ordain that every such appeal must be forthwith submitted to the approval of the Governor-General in Council and shall be either confirmed or shall vest in the Governor-General in Council" which occurred in this clause were omitted by the Amending Letters Patent, dated 11th March 1919

Let Pat. [Cal, Bom, and Mad]

Cls. 5-8 "I, A B, appointed Chief Justice [or a Judge] of the High Court of Judicature at Fort William in Bengal, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment"



6. And We do hereby grant, ordain and appoint, that the said High Court of Judicature at Fort William in Bengal shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal Arms within an evergule or label surrounding the same with this inscription "The Seal of the High Court at Fort William in Bengal"

And We do further grant, ordain, and appoint that the said Seal shall be delivered to and kept in the custody of the Chief Justice and in case of vacancy of the office of the Chief Justice or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice, under the provisions of section 7 of the said recited Act and We do further grant, ordain and appoint that whensoever it shall happen that the office of Chief Justice or of the Judge to whom the custody of the said Seal be committed shall be vacant, the said High Court shall be and is hereby authorized and empowered to demand, seize, and take the said Seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, or their possession

7. And We do hereby further grant, ordain and appoint that all writs, summons, precepts rules orders and other mandatory process to be used, issued or awarded by the said High Court of Judicature at Fort William in Bengal, shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the Seal of the said High Court

Writs, &c. to issue in name of the Crown and under the Seal

8. And We do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal from time to time, as occasion may require and subject to any rules and restrictions which may be prescribed by the Governor General in Council, to

Appointment of Officers

Let. Pat. [Cal., Bom , and Mad.]

Cls. 8-10

appoint so many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent (h) And it is our further will and pleasure, and We do hereby for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice shall, from time to time, appoint for each office and place respectively, and as the Governor-General in Council shall approve of Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court so long as they shall hold their respective offices ; but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed by the Governor-General in Council, and to absent himself from the said limits during the term of such leave, in accordance with the said rules

Admission of Advocates, Vakeels and Attorneys

9. And We do hereby authorize and empower the said High Court of Judicature at Fort William in Bengal to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys as to the said High Court shall seem meet , and such Advocates, Vakeels and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors according as the said High Court may by its rules and directions determine, and subject to such rules and directions

10. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have power to make rules for the qualification and admission of proper person to be Advocates, Vakeels and

In making rules for the qualifications of Advocates, Vakeels and Attorneys

(A) The words "And we do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Governor-General in Council and shall be either confirmed or disallowed by the Governor-General in Council" which occurred in this clause were omitted by the Amending Letters Patent dated 11th March 1919

Let. Pat. [Cal., Bom., and Mad.]

Cl. 10 Attorneys-at-Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-Law; and no person whatsoever but such Advocates, Vakeels, or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor, shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor.

Bar Councils Act.—The powers of a High Court under clauses 9 and 10 of the Letters Patent are subject to the provisions of the Indian Bar Councils Act (See s 19 (2) of Act 78 of 1926). A complaint of misconduct by an advocate must first be referred for inquiry to the Bar Council (i)

Power to remove or suspend on reasonable cause.—The words “on reasonable cause” are not confined to purely professional misconduct, but embrace all causes which may afford reasonable ground for suspension or removal (j). As to what is reasonable cause see the undermentioned cases (l). The Madras High Court has held that negligence is not professional misconduct (l).

An attorney is an officer of the Court, and any person aggrieved by the misconduct of an Attorney has the right to invoke the disciplinary jurisdiction of the Court (m).

Proceedings in the disciplinary jurisdiction are not of a criminal nature and the rules of Criminal Procedure such as filing a written statement by the accused do not apply (n). The procedure in the exercise of the disciplinary jurisdiction is left to the discretion of the Court, but the Privy Council have said that the disciplinary provisions of the Legal Practitioners Act 18 of 1879, are an appropriate guide. When grave charges are involved scrupulous care should be taken not only that justice is done but that justice should seem to be done so that it is not desirable that the proceedings should be held before the same judges as heard the case out of which the charges arise (o). Their Lordships also said that if charges of a criminal nature are preferred it is eminently fitting that the criminal

(i) *In the matter of a Talil of Atimgarh* (1925) 16 All L.J. 1039 11-1 C 114 (28) A.A. 439 & B.

(j) *Le Mesurier v. Wajid* (1905) 20 Cal 890 906

(k) *S. v. S.* (1905) 24 B.L.R. 1111

903 76 1 C 873, (24) A.M. 265

(l) *Talil in re* (1926) 49 Mad 523 98 I C 685 (26) A.M. 568

(m) *An Attorney in the matter of* (1914) 41 Cal 113 19 I C 993

(n) *In re Abdul Fasih* (1913) 4 Lah 271, 76 I C 325 (24) A.L. 123

(o) *Har Prasad v. Judges of the Allahabad High Court* (1931) 54 I A 132 53 All 183 132 I C 608 (31) A.P.C. 112

Let. Pat. [Cal., Bom., and Mad.]

Cls.
10, 11

prosecution should preclude disciplinary action (p) But disciplinary action may be taken although the advocate has not been tried on the criminal charge involved (q)

Professional etiquette affecting counsel—It is unprofessional for counsel to cross examine a witness as to facts about which he has no instructions but are within his personal knowledge. When counsel during the hearing of a case calls for the

must be deemed to be held with a view to his attending the trial (s)

Appeal—See notes to clause 39 below

Civil Jurisdiction of the High Court.

11. And We do hereby ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise ordinary original civil jurisdiction within such local limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India, and until some local limits shall be so declared and prescribed, within the limits declared and prescribed by the proclamation fixing the limits of Calcutta issued by the Governor-General in Council on the Tenth day of September, in the year of Our Lord, one thousand seven hundred and ninety-four, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction (t).

Local limits of the ordinary original jurisdiction of the High Court—Power is given by s 109 of the Government of India Act to the Governor General in Council to alter the local limits of the jurisdiction of High Courts

Issue of Warrant—The High Court at Calcutta has power to issue warrants in cases of

has held that it has such power (ul) Such an order, however, may be made

(p) *Har Prasad v Judges of the Allahabad High Court* (1931) 54 I A 152 53 All 183 13- J C 608, (31) A PC 112

(q) *In re An Advocate* (1931) 54 Mad 857 134 I C 35 (3.) A M 131

(r) *Weston v Peary Mohan Dass* (1913) 40 Cal 898 231 C 25

(s) *An Advocate in re* (1917) 44 Cal 41 42 I C 63 [practice for seniors to name their juniors and for juniors to name their seniors condemned]

(t) In the Madras and Bombay Letters Patent

the words are by any law made by the Governor in Council. In the same Letters Patent for the words within the limits declared and prescribed there are substituted within the limits of the local jurisdiction of the said High Court of Bombay at the date of the publication of these presents

(u) *Panch of Lammad v Setharam* (1903) 26 Mad 120

(ul) *Maharans of Daroda v Karturbhais* (1934) 36 Bom L R 454

Let. Pat. [Cal, Bom., and Mad]

Cls. 11, 12 for the arrest of a defendant who has been guilty of a contempt of Court (c) The reason is that an order for attachment for contempt is not an order made in exercise of the High Court's civil jurisdiction (w)

12. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees

Scope of the clause—Barring certain suits specified at the end of this clause the High Courts of Calcutta Madras and Bombay are empowered to try the following suits in the exercise of their ordinary original civil jurisdiction namely—

I Suits for land or other immovable property—

- (a) if the land or property is situated wholly within the local limits of the ordinary original civil jurisdiction of the said High Courts or
- (b) where the land or property is situated in part only within the said limits if the leave of the Court shall have been first obtained (x) See notes below, Suit for land of which a part is within jurisdiction

II Suits other than those for land—

- (a) if the cause of action has arisen wholly within the said limits or
- (b) where the cause of action has arisen in part only within the said limits if the leave of the Court shall have been first obtained or
- (c) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits

Suits for land or other immovable property—The High Court of Calcutta has held that a suit for land within the meaning of this clause is a suit substantially for land that is for the purpose of acquiring title to or possession of land (y)

- (v) *Harivallabhdas v Lachhend* (1870) 7 Bom H C 17.
- (w) *Nairaojee v Narotamdas* (1883) 7 Bom 5
- (x) *Balaram v Ramchandra* (1898) 2 Bom

- (y) *Delhi and London Bank v Wood* (1876) 1 Cal 249 253 *East Indian Railway Co v Bengal Coal Co* (1876) 1 Cal 95 *Hara Lal v Damb* (190) 29 Cal 315

of a declaration of interest in land (s). A agreement in Calcutta to sell to B land situated outside the original jurisdiction of the Calcutta High Court. If A fails to perform his contract and B sues A for specific performance, the suit is one for land, and it will not be entertained by the Court, the land being situated outside its jurisdiction. But if B fails to perform his contract, and A sues B for specific performance, the suit is not one for land, and hence the suit will be in the Calcutta Court (a). Similarly, a suit by a mortgagee for specific performance of an agreement to execute a mortgage of land is a suit for land, and it will not be entertained by the Calcutta Court if the land is situated beyond the original jurisdiction of the Court (b). And it has been laid down by the same High Court that suits for redemption or foreclosure or for sale of mortgage property are all suits for land, and they will not be entertained by that Court if the land is situated beyond its original jurisdiction (c), also that a suit by a lessee for a declaration that a lease was a subsisting lease and for rents and profits is a suit for land, and it will not be entertained if the land is situated beyond its jurisdiction (d). A suit for a share in the sale proceeds of land without jurisdiction is not a suit for land (e). Page, J., in the case last cited said that the term suits for land or other immovable property means suits in which having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property. The learned Judge observed that this construction conformed to the rule that questions relating to title or ownership of land should be determined not only by the *lex situs* but also in the *forum situs*. In short, the Calcutta High Court would appear to hold that suits of the kind mentioned in (a) to (e) of sec. 16 of the Code are all suits for land (f). The same view was taken until recently by the Madras High Court (g). In *Ullappa Chettiar v. Goranda Doss* (h) a Full Bench of the Madras High Court held that a suit by a purchaser of land situate outside Madras for specific performance of a contract to sell made in Madras, against the vendor who resides in Madras, is not a suit for land, and is cognizable by the High Court of Madras. In the view taken by Courts Trotter, C.J., a suit in which the plaintiff asks for a decree which, if passed, would compel the defendant to do or abstain from doing something which the Court orders him to do, would not be a suit for land, but a suit in which a plaintiff asks for a decree which if passed, would bring about *proprio vigore* an immediate change in the ownership of property would be a suit for land (i). Thus a suit for maintenance in which the plaintiff prays that the amount may be charged on specific land is a suit for land, for if a charge is created by the decree, it can be enforced by a sale of the land (j).

The High Court of Bombay gives a very restricted meaning to the expression suit for land. Sir Charles Sargent in *Holkur v. Dattabhas* (k) held that the Court had jurisdiction to try a suit for specific performance of an agreement to execute a mortgage made in Bombay of land situate outside the original jurisdiction. The *ratio decidendi* was that the expression "suit for land" was intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would refuse to entertain on the ground that the land was situate abroad. This case was followed though sometimes with evident reluctance for many years. Farren C.J., in an

- (a) *Kanti Chunder v. Kusory Mohun Roy* (1899) 19 Cal 361 365.
 (b) *Land Mortgage Bank v. Sudaradorn* (1899) 19 Cal 358. *Narendra Nath v. Eral Nool* (1902) 49 Cal 670. 70 I C 92 (22) A C 413.
 (c) *Seena A Poy v. Cal v Doss* (1880) 5 Cal 88. *Lalanchand v. Gobind* (1921) 48 Cal 882 66 I C 484 (22) A C 324.
 (d) *Kanti Chunder v. Kusory Mohun Roy* (1902) 19 Cal 361 at p 365.
 (e) *Ebrahim v. Feroos Akunder* (1909) 36 Cal 59 11 C 472.

- (f) *Coculus v. Channal* (1907) 54 Cal 633 601 104 I C 721 (27) A C 768.
 (g) *Sudamnik Coal Co v. Empire Coal Co* (1915) 42 Cal 942 951 952 31 I C 541.
 (h) *Nalim v. Krishnamurthy* (1904) 27 Mad 157 161.
 (i) (1929) 57 Mad 809 114 I C 73 (29) A M 721.
 (j) (1909) 52 Mad 809 813, *supra*.
 (k) *Sundera Rao v. Tirumal* (1911) 33 Mad 131, 31 I C 930.
 (l) (1904) 24 I M 353.

Let. Pat. [Cal., Bom., and Mad.]

Cls. 11, 12 for the arrest of a defendant who has been guilty of a contempt of Court (v) The reason is that an order for attachment for contempt is not an order made in exercise of the High Court's civil jurisdiction (w)

12. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for, does not exceed one hundred rupees

Scope of the clause—Barring certain suits specified at the end of this clause the High Courts of Calcutta Madras and Bombay are empowered to try the following suits in the exercise of their ordinary original civil jurisdiction namely—

I Suits for land or other immovable property—

- (a) if the land or property is situated wholly within the local limits of the ordinary original civil jurisdiction of the said High Courts or
- (b) where the land or property is situated in part only within the said limits, if the leave of the Court shall have been first obtained (x) See notes below, * Suit for land of which a part is within jurisdiction

II Suits other than those for land—

- (a) if the cause of action has arisen wholly within the said limits, or
- (b) where the cause of action has arisen in part only within the said limits if the leave of the Court shall have been first obtained or
- (c) if the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits

"Suits for land or other immovable property"—The High Court of Calcutta has held that a 'suit for land' within the meaning of this clause is a suit substantially for land that is, for the purpose of acquiring title to or possession of land (y)

(v) *Hari Lalbhadra v. Utamchand* (18 0) 7 Bom. H. C. 17.

(w) *Nairahoo v. Narotamdas* (1833) 7 Bom. 5

(x) *Balaram v. Ramchandra* (1898) 2. Bom.

9 9 5
(y) *Delhi and London Bank v. Wardie* (18 6) 1 Cal. 249 63 *East Indian Railway Co. v. Bengal Coal Co.* (18 6) 1 Cal. 95 *Hara Lal v. Nandini* (190) 29 Cal. 315

or for declaring any interest in land (z) A agrees in Calcutta to sell to B land situated outside the original jurisdiction of the Calcutta High Court If A fails to perform his contract and B sues A for specific performance, the suit is one for land, and it will not be entertained by the Court, the land being situated outside its jurisdiction But if B fails to perform his contract, and A sues B for specific performance, the suit is not one for land, and hence the suit will lie in the Calcutta Court (a) Similarly, a suit by a mortgagee for specific performance of an agreement to execute a mortgage of land is a suit for land, and it will not be entertained by the Calcutta Court, if the land is situated beyond the original jurisdiction of the Court (b) And it has been laid down by the same High Court that suits for redemption or foreclosure or for sale of mortgage property are all suits for land, and they will not be entertained by that Court if the land is situated beyond its original jurisdiction (c), also that a suit by a lessee for a declaration that a lease was a subsisting lease and for rents and profits is a suit for land, and it will not be entertained if the land is situated beyond its jurisdiction (d) A suit for a share in the sale proceeds of land without jurisdiction is not a suit for land (e) Page, J, in the case last cited said that the term 'suits for land or other immovable property' means suits in which having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property. The learned Judge observed that this construction conformed to the rule that questions relating to title or ownership of land should be determined not only by the *lex situs* but also in the *forum situs*. In short, the Calcutta High Court would appear to hold that suits of the kind mentioned in (a) to (e) of sec 16 of the Code are all suits for land (f) The same view was taken until recently by the Madras High Court (g) In *Vellappa Chettiar v Govinda Dass* (h), a Full Bench of the Madras High Court held that a suit by a purchaser of land situate outside Madras for specific performance of a contract to sell, made in Madras, against the vendor who resides in Madras, is not a suit for land, and is cognisable by the High Court of Madras In the view taken by Courts Trotter, C J, a suit in which the plaintiff asks for a decree which, if passed, would compel the defendant to do or abstain from doing something which the Court orders him to do, would not be a suit for land, but a suit in which a plaintiff asks for a decree which, if passed, would bring about *proprio vigore* an immediate change in the ownership of property would be a suit for land (i) Thus a suit for maintenance in which the plaintiff prays that the amount may be charged on specific land is a suit for land, for if a charge is created by the decree, it can be enforced by a sale of the land (j)

The High Court of Bombay gives a very restricted meaning to the expression "suit for land" Sir Charles Sargent in *Hollur v Dadabhai* (k) held that the Court had jurisdiction to try a suit for specific performance of an agreement to execute a mortgage made in Bombay of land situate outside the original jurisdiction The *ratio decidendi* was that the expression "suit for land" was intended to exclude from the Court's jurisdiction only such suits relating to land as, if brought in England, the Courts would refuse to entertain on the ground that the land was situate abroad. This case was followed though sometimes with evident reluctance for many years Farren, C J, in an

- | | |
|--|---|
| (2) <i>Kanti Chunder v Kishore Mohun Roy</i> (1892) 19 Cal 361 365 | (e) <i>Goraltaz v Chapanlal</i> (1927) 54 Cal 655, 661 104 I C 721 (27) A C 768 |
| (a) <i>Land Mortgage Bank v Sudarudern</i> (1892) 19 Cal 354 <i>Vagendra Nath v Lralgoal</i> (1922) 49 Cal 670 70 I C 92 (22) A C 443 | (f) <i>Sudamdh Coal Co v Empire Coal Co</i> (1915) 42 Cal 942 951 952 31 I C 581 |
| (b) " " " " " " | (g) <i>Valm v Krishnaswamy</i> (1904) 27 Mad 157, 161 |
| (c) " " " " " " | (h) (1929) 52 Mad 809 118 I C 73 (29) A M 721 |
| (d) " " " " " " | (i) (1929) 52 Mad 809 815, <i>supra</i> |
| | (j) <i>Sundara Bai v Turumal</i> (1910) 33 Mad 131, 31 I C 930 |
| | (k) (1890) 14 Bom 353 |

Let. Pat. [Cal., Bom., and Mad.]

Cl. 12

unreported case (l) passed a foreclosure decree on a mortgage of land outside jurisdiction and this was followed by Strachey, J., in *Sorabji v. Ruttonji* (m). In *Hunsey v. Runchordas* (n) a purchaser's suit for specific performance of an agreement to sell land situate beyond the local limits of jurisdiction was entertained although the prayer was that the defendant be ordered "upon making out a marketable title to the said land to execute a conveyance thereof in favour of the plaintiff." In *Venkatrao v. Khimji* (o) a suit for sale was decreed on a mortgage of land outside jurisdiction and Scott, C.J., said that such a suit was not a suit for land as it was not a suit "to obtain land or to obtain a declaration of title to land or to obtain damages for interference with land." This case was followed with much hesitation by Shah, J., and *Jamji v. Alubai* (p) which was also a suit for sale by a mortgagee. On the other hand Jenkins, C.J., in *Vaghaji v. Camaji* (q) correctly sum-

the Court had no jurisdiction to make a declaration as to which of two mortgages of land outside jurisdiction has priority. In *Yeshwantiben v. Janardhan* (s) Fawcett, J., held that a suit by a wife praying that her maintenance be secured by a charge on her husband's immovable property in Bombay was a suit for land. The same learned Judge in *Rajah Kodakkal v. Mulshar Timber Co* (t) said that if the land is outside jurisdiction a suit to declare a charge on it is not a suit for land but resiled from this opinion in his judgment in *Hatimbhai v. Framroz* (u).

Now as explained by Jenkins, C.J., in *Vaghaji v. Camaji* (i) the Courts in England do not entertain suits for land outside jurisdiction unless (1) the defendant is in England and (2) there is some privity between the parties on the ground of contract, trust or fraud. The defendant in *Holkar's* case did not reside or carry on business in Bombay and this fact appears to have been overlooked in the judgment. The case was adversely criticized on this ground in previous editions of this commentary and that criticism was entirely accepted by a Full Bench of *and Hearing Co v. Climax Syndicate* (w) a suit against the defendant mortgagee who

sale of the mortgaged properties which were also outside jurisdiction. The mortgage had been executed in Bombay and though curiously enough the judgment does not refer to this fact, that was the circumstance which brought the case within *Holkar v. Dadabhai*. Nevertheless the Court overruling *Holkar v. Dadabhai* said the suit was not competent. The Court entirely agreed with the Calcutta decisions and quoted with approval the dictum of Jenkins, C.J., in *Sudamdih Coal Co v. Empire Coal Co* (x) that regard must be had to the substance of the suit in deciding whether it was a suit for land.

But the Bombay High Court has again changed its mind and in *Hatimbhai v. [unintelligible]* (y) held that a suit to enforce his mortgage by a mortgagee who resides in Bombay is a suit for land if the mortgage is wholly outside the limits of its original civil jurisdiction. The judgment was approved on the equitable

- | | |
|--|--|
| (l) <i>Kesornji v. Khimji</i> suit No 291 of 1893 | (t) (1921) 48 Bom 625, 80 I C 1049, (24) A B 412 |
| (m) (1898) 22 Bom 701 | (u) (1927) 51 Bom 516, 104 I C 8 (27) A B 278 F B |
| (n) (1905) 7 Bom L R 319, 323 | (v) (1905) 29 Bom 249 |
| (o) (1924) 28 Bom L R 535, 536, 80 I C 442 | (w) (1928) 50 Bom 1, 91 I C 847, (26) A B 2 F B |
| (p) (1924) 28 Bom L R 535, 80 I C 1007, (24) A B 419 | (x) (1915) 42 Cal 942, 31 I C 581 |
| (q) (1905) 29 Bom 249 | (y) (1927) 51 Bom 516, 104 I C 8, (27) A B 278 F B |
| (r) (1925) 27 Bom L R 570, 88 I C 92 (25) A B 233 | |
| (s) (1923) 25 Bom L R 1172, 81 I C 778 (24) A B 141 | |

Let. Pat. [Cal., Bom., and Mad.]

Cl. 12.

jurisdiction wrongly claimed in *Holkar's* case, but rests on two main grounds (1) that a suit for sale on a mortgage is a suit in personam to recover a debt and (2) that suits for land are suits the primary object of which is to obtain a declaration of title to or possession of land. This view is inconsistent with the definition of "mortgage" in sec 58 of the Transfer of Property Act, 1882. The same High Court has held (z) following *Hatimbhai's* case, and dissenting from *Prantal v Goculdas* (a), that the High Court has jurisdiction in a suit brought by an equitable mortgagee against the mortgagor for lands situate outside Bombay to implead a legal mortgagee residing out of Bombay and alleging a prior legal mortgage in his favour, provided the legal mortgage is executed in Bombay. Following *Hatimbhai's* case the Bombay High Court has also held that the High Court has no jurisdiction to make a decree declaring that a sale of land outside the original jurisdiction is invalid (b).

Suits for the partition of land and suits for a declaration of title to land are suits for land and will not be entertained if the land is outside jurisdiction (c). A suit for damages for trespass to land is a suit for land (d). Suits for the recovery of title deeds are according to the Calcutta High Court not suits for land (e), but the Bombay High Court has held that they are, if a question of title to land is involved (f). This seems incorrect, for as said in *India Spinning and Weaving Co v Climax Syndicate* (g), 'it is difficult to see how a suit to recover title deeds can be beyond the jurisdiction of the Court if the defendant is within the jurisdiction'.

The Bombay High Court has held that an administration suit is not a suit for land although there are immovable properties alleged to belong to the estate of the deceased beyond jurisdiction and the High Court therefore can entertain such a suit and determine the question whether they belonged to the deceased at the time of his death. If the suit is otherwise within jurisdiction no leave under cl 12 is necessary merely because the immovable properties or some of them are situated beyond jurisdiction (h). The High Court of Calcutta has held that a suit for administration and as incidental to that suit, for a declaration that certain leases granted by the executors of the estate cannot stand as against the plaintiff (the beneficiary) is not a suit for land (i). In a Privy Council case where a suit was brought by three out of four executors against the fourth executor for his removal from the office of trustee and executor and for accounts of the assets of the deceased and for administration of his estate, it was held that the suit was not one for land and that the High Court of Madras had jurisdiction to entertain the suit though the property left by the deceased was outside jurisdiction as a part of the cause of action had arisen within the jurisdiction and the defendant was dwelling in Madras at the time of the institution of the suit (j). In a Calcutta case it was held that the High Court may entertain a suit by an executor for a declaration

Let. Pat. [Cal., Bom., and Mad.]

Cl. 12

an injunction (though not for possession) in respect of the estate of the testator consisting of several immovable properties provided one at least of the properties is situated within its original jurisdiction, and leave of the Court is obtained, it is not necessary that the cause of action should arise within the local limits, or be specifically with reference to that property which is situated within those limits (l)

Every suit which has any reference to land is not a suit for land (h). In *Last Mortgage Indl v. Sulurdeen Ahmed*, Trevelyan, J., said: "I decline to hold that wherever land has anything to do with a suit it is therefore a 'suit for land' (m). Thus a suit by a trustee against his co-trustees to enforce his right under a deed of trust to act jointly with the defendants as shewait and manager of lands dedicated to an ill in which neither the plaintiff nor the defendants has any beneficial interest is not a suit for land, and may be entertained by the High Court, though the land may be situate outside jurisdiction (n). So a suit for an account and dissolution of partnership is not a suit for land because one asset of the partnership happens to be a tea garden situate in the mufassal (o).

"All other cases"—suits for partition of movable and immovable property the latter being situated wholly outside jurisdiction—The words

all other cases in this clause do not include cases of suits for immovable *plus* movable property. They refer to cases in which immovable property is not involved. Hence if A sues B for partition of movable and immovable property and the immovable property is situated wholly outside jurisdiction the suit must be dismissed as to such property, even if the leave of the Court has been obtained. This is because the immovable property being situated *wholly* outside jurisdiction, the Court has no power to grant leave to sue as regards such property (p). In such a case the plaint may be amended with the leave of the Court by omitting paragraphs which relate to immovable property, and the suit may be proceeded with so far as it relates to movable property (q).

Suit for land of which part is within jurisdiction—Where there are several immovable properties, then if even one of them is situated within jurisdiction the Court can entertain a suit for a partition of all the properties including those situated outside jurisdiction provided the leave of the Court has been first obtained. Such a case comes within the following words of cl. 12, namely, "the said High Court shall be empowered to determine suits of every description, if, in the case of suits for land such land shall be situated either wholly or in case the leave of the Court shall have been first obtained in part within the local limits" (r). But in *Hatimbhai v. Framroo* (s) some of the Judges were of opinion that the condition as to leave of the Court did not apply to suits for land where some part of the land was situate outside jurisdiction. If some of the properties are situated within and some outside jurisdiction but no leave is obtained the Court can proceed only with the suit so far as it relates to the immovable properties situated within jurisdiction (t). Similarly if some of the properties included in a deed of mortgage are within, and some outside the jurisdiction the Court has jurisdiction on leave

(k) *Ginodi Sundary v. Valins* (1909) 36 Cal 251 C 514

(l) *Jugodumbha v. Pundomoney* (1875) 15 B L R 318 329

(m) (1891) 19 Cal 358 367

(n) *Jugodumbha v. Pundomoney* (1875) 15 B L R 318

(o) See *Kellie v. Fraser* (1877) 2 Cal 445 464

(p) *Jairam v. Atmaram* (1880) 4 Bom 483

(q) *Hera Lal v. Nandabhai* (1907) 29 Cal 315

(r) *Seshagiri v. Rama Rau* (1896) 19 Mad 445

(s) *Idol Karim v. Badrudin* (1905) 25 Mad 216

(t) *Bachoo v. Vengudaz* (1914) 16 Bom L R 263 269 23 L C 912, s.c. on appeal, to 1 C (1916) 43 L A 56, 40 Bom 20 52 L C 403

(u) *Gorindhal Bansal v. Bansal* (1912) 46 Bom 249

(v) (1913) 51 Bom 516 104 L C 8 (27) A D 281 B

(w) *Balaram v. Panchandra* (1891) 20 Bom 922 925

(x) *Panchandra v. Shub Chander* (1887) 14 Cal 535

to sue being obtained, to entertain a suit on the mortgage in respect of all the properties including those situated outside jurisdiction (u), but not if the properties outside jurisdiction are the subject of a *separate* mortgage (v) The same rules apply where some of the properties are situated in British India and some outside British India (w) See notes above, "Scope of the clause"

Leave of Court.—The leave under this clause is a condition precedent to jurisdiction, so that unless the condition is fulfilled by obtaining the necessary leave to sue, the Court will have no jurisdiction to entertain the suit (x) Such leave affords the very foundation of the jurisdiction hence it must be obtained before the institution of the suit, it cannot be granted after the suit has been instituted The leave granted is confined to the cause or causes of action set forth in the plaint at the time when the leave was granted hence the plaint cannot be amended so as to alter the cause of action (y) But if the cause of action is not altered, there is no objection to an amendment (z) If a suit is brought in a Chartered High Court with leave of the Court, but there is nothing on the face of the plaint to show that any part of the cause of action arose within its jurisdiction, the plaintiff may be allowed to prove by evidence that part of the cause of action arose within the jurisdiction, and if it is necessary to amend the plaint by adding a statement that part of the cause of action arose within the jurisdiction, the amendment may be allowed, for such an amendment does not alter or add to the original cause of action (a) Where a defendant who does not reside within the jurisdiction and against whom the cause of action has arisen in *part* only within the jurisdiction, is added after the institution of the suit, leave under this clause must be obtained at the time of the application for adding him as a party, though leave was obtained when the suit was originally filed (b) The force of an order granting leave to institute a suit is exhausted when the suit is instituted in pursuance of the order Hence if the suit is withdrawn with liberty to bring a fresh suit upon the same cause of action, and a fresh suit is brought, there is nothing to prevent the Court from granting fresh leave to institute the fresh suit (c)

The leave under this section must be distinctly applied for and obtained It cannot be implied from the fact that the plaintiff was granted leave to sue as a pauper (d), or from the fact that a defendant is added who does not reside within the jurisdiction (e) Nor can it be presumed from the fact that the Court orders a third party notice to be served on a party resident outside its jurisdiction The defendant taking out such notice must apply for leave under clause 12, and the leave must be endorsed on the notice as it is on a plaint (f) The granting of leave under this clause is discretionary (g), but an assignment of a debt is part of the cause of action and in a case where no other part of the cause of action arose within jurisdiction it was held that the Court should not refuse leave merely on suspicion that the assignment was not bona fide (h)

Cause of action—See notes to s 20 of the Code, 'Cause of action,' 'Cause of action in suit on contracts,' and 'Cause of action in other suits,' above

- | | |
|--|---|
| <p>(u) <i>Hareendral v Hari Das</i> (1914) 41 I A 110 41 Cal 9 2 23 I C 63* <i>Matigara Coal Co v Shrayers Ltd</i> (1911) 34 Cal 8 4 131 I C 429 <i>Sarat Chandra v Naha priet</i> (1910) 37 Cal 90* 911 8 I C 1142</p> <p>(v) <i>Krushna Kishore v Amarnath</i> (19 0) 4 C W N 633 56 I C 552</p> <p>(w) <i>Corindial v Bhanisal</i> (192 4) 46 Bom 249 7 I C 934 (21) A B 3 5 <i>Jama charya v Anantacharya</i> (1894) 18 Bom 389 [a case under s 17 of the Code]</p> <p>(x) <i>De Souza v Colea</i> (1867) 3 M H C 234</p> <p>(y) <i>Pampartab v Premnath</i> (1891) 15 Bom 93</p> <p>(z) <i>Foolisab v Pampartab</i> (1893) 17 Bom 46</p> <p>(a) <i>Pink v Buldeo Dass</i> (1899) 26 Cal 713</p> | <p>(b) <i>Pampartab v Foolisab</i> (1896) 20 Bom 767 <i>Pampartab v Garribankar</i> (1923) 5 Bom L R 7 85 I C 484 (24) A B 109</p> <p>(c) <i>Sabbhapathi v Lakshmu</i> (1901) 4 Mad 293</p> <p>(d) <i>Jarum v Atmaram</i> (1880) 4 Bom 432</p> <p>(e) (1896) 20 Bom 67 <i>supra</i></p> <p>(f) <i>Karim Elahi v Sher Ahmed</i> (19 0) 43 Bom 24 59 I C 23 <i>reversing Field & Co v Sher Mahomed</i> (1919) 21 Bom L R 205 59 I C 18</p> <p>(g) <i>Watkins v Lakshmarayan</i> (1927) 29 Bom L I 131 100 I C 916 (27) A B 660</p> <p>(h) <i>Harnathrao v Avaramoni</i> (1933) 37 C W N 1159 (24) A C 175</p> |
|--|---|

Let. Pat. [Cal., Bom., and Mad.]

Cl. 12

and if the application is rejected, he may appeal from the order rejecting the application (r) Similarly if the plaintiff applies for leave, and leave is refused, the plaintiff may appeal from the order (s) The appeal would be one under cl 15 of the Letters Patent

The order granting or refusing leave by one Judge cannot be superseded by another Judge *except on appeal* from the order (t)

Waiver.—There are two classes of cases to be considered under this head, namely—

- (1) where the plaintiff in his plaint alleges that *part* of the cause of action arose outside the local limits of the ordinary original civil jurisdiction and fails to obtain leave and the case comes on for trial,
- (2) where the plaintiff in his plaint alleges that the *whole* cause of action arose within the local limits of the ordinary original civil jurisdiction, but it turns out at the trial that part of the cause of action arose within and part outside the local limits of the ordinary original civil jurisdiction

In case (1) the defendant may by appearing and pleading waive the objection to the jurisdiction Thus it was held by the High Court of Calcutta (u), following *Moore v. Gamgee* (v) in a case where the plaintiff alleged in his plaint that *part* of the cause of action had arisen within the local limits of the ordinary original civil jurisdiction but no leave was obtained by the plaintiff under clause 12, and the defendant without raising any objection to the jurisdiction filed his written statement and applied subsequently for a commission to examine witnesses that the defendant had waived his objection to the jurisdiction These decisions proceeded on the ground that the absence of leave under this clause did not go to the root of the jurisdiction of the Court They are not consistent with the observations of Sir Richard Couch in *Hadjee Ismail v Hadjee Mahomed* (w) where the learned Judge said that an order granting leave under clause 12 was not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving jurisdiction to the Court which it otherwise would not have, and the judgment of Telang, J, in *Rampurab v Premsookh* (x), in which it was said that leave under cl 12 affords the very foundation of the jurisdiction The Rangoon High Court has followed the Calcutta view (y) But the Bombay High Court differs holding that if part of the cause of action arises outside jurisdiction, the obtaining of leave is a condition which the Court is not competent to ignore or the parties to waive (z)

As to case (2) it has been held that where the plaintiff sets up a complete jurisdiction in the Court to try the case, and it turns out at the trial that the Court had not complete jurisdiction the defendant cannot be held bound by the doctrine of estoppel (a)

As to the application of s 21 of the Code, see notes on that section

Suits against Secretary of State—The Secretary of State does not dwell or carry on business or personally work for gain within the meaning of the clause He cannot accordingly be sued in a Chartered High Court unless the whole cause of action

(r) *Tarboji v Camaji* (1905) 29 Bom 249

(s) " " " "

(t) " " " "

(u) " " " "

(v) (1900) 23 Q B D 244 But see p 247 of

the Report

(w)

(x)

(y)

(z)

(a) *Shama Kanta Chatterji & Co v Kurrum* (1917) 44 Cal. 10 23 L. C. 571

Let. Pat. [Cal., Bom., and Mad.]

Cls. 12, 13 has arisen within the jurisdiction of that Court or part of the cause of action has arisen within the jurisdiction and leave of the Court has been obtained (b)

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

"When the High Court shall think proper to do so."—In a suit for immovable property instituted in the Dinagepur Court, the defendant applied for its transfer to the Calcutta High Court under this clause, the grounds of the application being (1) that questions of difficulty arose in the suit, (2) that the defendant's witnesses lived in Calcutta, and that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expenses, (3) that the agreement upon which the suit was brought was executed in Calcutta, and (4) that even the plaintiff resided and carried on business in Calcutta. It was held that the case was a proper one for transfer to the High Court (c)

"Subjects to its superintendence."—Note that the words used in this clause are 'subject to its superintendence,' while those used in sec. 15 of the Charter Act [now s. 107 of the Government of India Act, 1915] are "subject to its appellate jurisdiction. The power of transfer contained in sec. 15 of the Charter Act has nothing to do with the power of removal conferred by the present clause, and the Letters Patent make superintendence, not appellate jurisdiction, the condition of the exercise of the power of removal conferred by this clause. It has accordingly been held that the Court of the Political Resident at Aden being a Court *subject to the superintendence* of the High Court of Bombay within the meaning of the present clause, the High Court of Bombay has power to remove a suit from that Court to itself for trial and determination, though the Aden Court is not subject to the *appellate* jurisdiction of the High Court (d)

Suit—A contested probate proceeding is a suit and can be transferred under this clause (e)

Transfer of suit from Presidency Small Cause Court to High Court—The High Court has power to transfer to itself a suit from the Presidency Small Cause Court, and the order for such transfer can be made, if allowed by the rules of the High Court, by a single Judge of that Court (f)

(b)

Bom. 246 [P.C.], *Sheonandan v. King-Empress* (1913) 3 Pat. L. J. 581, 606 607, 45 I.C. 977

(c)

(m) *Janoo Lal v. Sariamangala* (1897) 24 471, 83

Officer v. Ismail Hajeer (1908) 30

(n)

II C 59

Let. Pat. [Cal., Bom., and Mad.]

Cls. 12, 13 has arisen within the jurisdiction of that Court or part of the cause of action has arisen within the jurisdiction and leave of the Court has been obtained (b)

13. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

"When the High Court shall think proper to do so."—In a suit for immovable property instituted in the Dinagepur Court, the defendant applied for its transfer to the Calcutta High Court under this clause, the grounds of the application being (1) that questions of difficulty arose in the suit, (2) that the defendant's witnesses lived in Calcutta, and that it would be impossible for her to go to Dinagepur and take her witnesses there owing to the expenses, (3) that the agreement upon which the suit was brought was executed in Calcutta, and (4) that even the plaintiff resided and carried on business in Calcutta. It was held that the case was a proper one for transfer to the High Court (c)

"Subjects to its superintendence."—Note that the words used in this clause are 'subject to its superintendence,' while those used in sec. 15 of the Charter Act [now s. 107 of the Government of India Act, 1915] are "subject to its appellate jurisdiction. The power of transfer contained in sec. 15 of the Charter Act has nothing to do with the power of removal conferred by the present clause, and the Letters Patent make superintendence, not appellate jurisdiction the condition of the exercise of the power of removal conferred by this clause. It has accordingly been held that the Court of the Political Resident at Aden being a Court *subject to the superintendence* of the High Court of Bombay within the meaning of the present clause, the High Court of Bombay has power to remove a suit from that Court to itself for trial and determination, though the Aden Court is not subject to the *appellate* jurisdiction of the High Court (d)

Suit—A contested probate proceeding is a suit and can be transferred under this clause (e)

Transfer of suit from Presidency Small Cause Court to High Court—The High Court has power to transfer to itself a suit from the Presidency Small Cause Court, and the order for such transfer can be made, if allowed by the rules of the High Court, by a single Judge of that Court (f)

- (b)
 (m) *Jagdeo Lal v. Sarvamangala* (1897) 24
 471 83
Officer v. Ismail Hayes (1900) 30

- Bom 246 [P.C.], *Sheonandan v. King*
 Emperor (1918) 3 Pat. L. J. 551, 605 607,
 46 I.C. 977
 (e)
 (f)
 H.C. 59

Let. Pat. [Cal., Bom., and Mad.]

Cl. 15

15. And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made [on or after the first day of February 1929] in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

Amendment.—The above clause is clause 15 as amended by the Letters Patent of 1928 which came into force on the date of publication in Calcutta on the 11th January 1928, in Bombay on the 27th January 1928 and in Madras on the 13th January 1928. Clause 10 of the Allahabad Letters Patent, clause 13 of the Rangoon Letters Patent, clause 10 of the Lahore Letters Patent, and clause 10 of the Patna Letters Patent, have been similarly amended, and they came into force respectively on the 28th January 1928, 2nd February 1928, 8th February 1928 and 30th January 1928. The previous Letters Patent were as follows:—

And We do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, 1915, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 13 of the said recited Act, and that an appeal shall also lie to the said High Court from the judgment (not being a sentence or order as aforesaid) of two or more Judges of the said High Court, or of such

Division Court, whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court, at the time being, but that the right of appeal from other judgments of the Judges of the said High Court, or of such Division Court, shall be to Us, Our heirs or successors in Our or Their Privy Council, as hereinafter provided

The effect of the amendment made in 1928 is—

- (1) the exclusion of a right of appeal from a judgment passed by a single Judge sitting in second appeal unless the Judge who passed the judgment grants a certificate that the case is a fit one for appeal There is no question of grant of certificate that the case is a fit one for appeal in the case of two Judges composing a Division Bench differing in opinion (g),
- (2) the exclusion of a right of appeal when the Judges of a Division Bench are equally divided in opinion This case is provided for by the amendment of clause 36

There is as before an unqualified right of appeal from the judgment of a single Judge on the original side

As to amendment no (1) it was held by the High Court of Calcutta that it has no retrospective effect and that it could not apply to suits filed before the amended Letters Patent came into force (r) The clause was therefore again amended by adding the words in rectangular brackets, namely, "on or after the first day of February, 1929" The result is that there is no right of appeal from the judgment of a single Judge sitting in second appeal in cases where the judgment is pronounced after the 1st February, 1929, whatever may be the date when the suit was filed unless a certificate is granted declaring that the case is a fit one for appeal (s)

Meaning of "judgment" as used in this clause —

1 *Calcutta High Court*—The leading case on the subject is that of *The Justices of the Peace for Calcutta v The Oriental Gas Co* (t), decided by the High Court of Calcutta so far back as 1872 In that case Couch, C J, said "We think 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined" This definition is now of some antiquity, and is rapidly becoming, if it has not already become, almost classical (u) The point actually decided in *The Justices of the Peace for Calcutta v The Oriental Gas Co* was that no appeal lies under his clause from an order directing the issue of a mandamus to the Justices of the Peace for Calcutta to compel them to refer to arbitration a question of compensation. The above decision was followed by a decision of the same Court in *Hadjee Ismail v Hadjee Mahomed* (v), where it was held that an appeal lies under this clause from an order refusing to set aside an order granting leave to sue to the plaintiff under cl 12 of the Letters Patent Referring to the said order, Couch, C J, said "It is not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have And it may fairly be said to determine some right between them, viz., the right to sue in a

(g) *Pam Charon v Hamid* (19 9) 56 Cal 507

(r)

(s)

(t) (1872) 18 Beng L R 241

(u) (1872) 18 Beng L R 433 452 17 W R 264

(v) *1st Marican C J in Brij v Coomaraswami* (1901) 5 C W N 781

(v) (1874) 13 Beng L R 91, 101

Let. Pat. [Cal., Bom., and Mad.]

Cl. 15

particular Court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence." In a later case, Garth, C.J., said "I think that word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point, not affecting the merits or the result of the entire suit" (c). The right of appeal depends upon whether or not the Judge finally decided the rights of the parties (x), but an order extending the period of limitation which merely puts in peril the finality of a decision is not a judgment under this clause (y).

The definition of "judgment" in the case of *Justices of the Peace for Calcutta* (z) was adopted by a majority of the same High Court in a later case where it was held that an appeal lies under this clause from an order made by a single Judge of that Court under O 45, r 15, refusing to transmit for execution an Order of His Majesty in Council (a). The decision was affirmed on appeal to the Privy Council (b). Referring to the judgment of the majority, their Lordships said "These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under s. 610 [now O 45, r 15] would or would not be a merely ministerial proceeding, Mr Justice Pontifex [whose order was appealed from] had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi for an execution in this suit. They held, therefore, that it was a judgment within the meaning of cl. 15." In a later case, Sanderson, C.J., said that the definition of "judgment" given by Couch, C.J., had never been regarded as absolutely exhaustive, and that in every case where the Court was called upon to decide whether the decision under appeal was or was not "a judgment" regard must be had to the nature of the order (c).

able number of years in this Court those two decisions (e) have to my knowledge been regarded as the leading decisions to be followed on the question whether an order in any particular case is a "judgment within the meaning of clause 15 of the Letters Patent." The leading Bombay case is *Sonbai v Ahmedbhai* decided in the year 1872 (f).

3 *Madras High Court*—Turning now to the Madras decisions the earlier leading case on the subject was *De Sou a v Coles* (g) decided in the year 1863. The modern leading case is that of *Tuljaram v Alagappa* (h) decided by a Full Bench of that Court in 1910. In the former case, Bittlestone, J., said "The word 'judgment' cannot be limited to the final judgment in the suit but must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant. When the language giving the appeal is so general in its terms

(w) *Ebrahem v Fuchhrunnissa* (1878) 4 Cal 531
594

(x)

(y)

(z)

(a)

(b) *Hurrah Chunder v Kail Sundari* (1882) 9
Cal. 487 493 101 A 4

(c)

Mockerjee J. See also *Afathura v*
Haran (1916) 43 Cal 657 54 I C 634

(d)

(e)

(f)

(g) (1863) 3 Mad II C 584 587 338
(h) (1912) 35 Mad I 7, 8 I C 340

as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from. This definition has now been rejected as too wide, and instead thereof, we have another definition of the term 'judgment' laid down in *Tuljaram's case*. In that case White, C J, said as follows—

'The test seems to me to be not what is the form of the adjudication, but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceedings, I think the adjudication is a 'judgment' within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a 'judgment' within the meaning of the Letters Patent, I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained),—e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a 'judgment' within the meaning of the clause."

It will be seen that the definition of 'judgment' as stated by White, C J, is wider than that in *Justice of the Peace for Calcutta*, and narrower than the one in *De Souza v Coles*. Referring to the former case, White, C J, said that he was not prepared to say as was said in that case that 'judgment' within the meaning of this clause must be a decision which affects the merit by determining some right or liability. The learned Chief Justice added (at p 7) "I think the decision may be a judgment for the purposes of the clause, though it does not affect the merits of the suit or proceedings and does not determine any question of right raised in the suit or proceeding." The result is that some orders which have been held not to be appealable by the Calcutta High Court have been held to be appealable by the Madras High Court, e.g., an order under cl 13 of the Letters Patent transferring a suit from a subordinate Court to the High Court (i). Such an order of transfer is appealable in Madras as it puts an end to the suit as it stood in the Court from which it was transferred, while an order refusing a transfer is not appealable as the proceedings are allowed to go on (j). Referring to the definition of 'judgment' in *De Souza v Coles*, the learned Chief Justice said that it was too wide.

4 *Allahabad High Court*—*L P, cl (10)*—In Allahabad it has been generally held that no order which is appealable under sec 104 and O 43, r 1, is appealable under the present clause (k). And, further, no appellate order from which a second appeal is excluded under section 104 can be appealed from under this clause (l). Conversely an order from which an appeal is allowed under sec 104 and O 43, r 1, to the High Court from a subordinate Court is an order from which an appeal will lie under this clause (m). The only definition hitherto given by that Court of the word "judgment" is that it must be "such a judgment on the part of all the learned and honourable Judges who may constitute a Bench as disposes of the suit or the appeal before it" (n). See notes to sec 104, "Letters Patent appeal."

(i) *Kashan v Somaram* (1920) 47 Cal 1104.

(j)

(k) "

(l) *Puri Lal v Madan Lal* (1917) 39 All 191, 39 L C 460.

(m) *Sadiq Ali v Anwar Ali* (1923) 45 All. 60, 71, 72; O I C 803 (23) A A 44.

(n) *Ghadr Ram v Suraj* (1926) 1 All 31, 33. See also *Haji v Hameed* (1925) 17 All 43; 44; *Asif Sadiq Ali v Anwar Ali* (1923) 45 All 60, 70 L C 803, (23) A A 44. See also *Jinnat v Shadial* (1926) 45 All 64, 69 L C 804, (26) A A 64.

Let. Pat. [Cal., Bom., and Mad.]

Cl. 15

5 *Lahore High Court*—*L P, cl (10)*—The High Court of Lahore has adopted the definition of "judgment" as given by White, C.J., in *Tuljaram's case* referred to above under the head "*Madras High Court*" (o) In a recent case it was held that the expression "judgment" in this clause is not synonymous with the word "decree" as defined in sec 2 of the Code (p)

6 *Rangoon High Court*—*L P, cl (13)*—The Rangoon High Court has held that the word "judgment" in cl 13 of the Letters Patent is intended to cover an order as well as a decree, but the effect of the judgment must be such as to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceedings. If it has this effect the adjudication is a judgment, otherwise not. The decision of an issue which has the effect of allowing a suit to proceed does not affect the merits or result of the whole suit in that it does not decide the case one way or another, and is, therefore, not a "judgment" (q) The order of a judge on a preliminary issue allowing the suit to proceed merely paves the way for the determination of the question between the parties is not a judgment (r)

Interlocutory order.—All the High Courts are now agreed that no appeal lies under this clause from an order merely regulating procedure in a suit or from an order on an application which is nothing more than a step towards obtaining a final judgment in the suit, though a finding on an issue may amount to a judgment if it implies the final determination of the suit (s) It has thus been held that no appeal lies from the following orders, namely, an order directing a party to produce and give inspection of documents (t) an order directing the issue of a commission for the examination of witnesses (u), an order refusing to try certain issues as preliminary issues (v), an order refusing to frame an issue asked for by one of the parties (w) an order amending the title of a plaint so as to convert a summary suit into a short cause (x), an order under cl 15 of the Letters Patent transferring a suit from the Presidency Small Cause Court to the High Court (y) [though the contrary has been held on the last mentioned point by the Madras High Court in *Chandrasekhar v. Subramanyam* (1912) 35 Mad 1] (z) an order directing the trial of issues between the defendant and a third party (c) an order transposing a defendant as plaintiff (d) or adding a party (e) an order restoring a suit dismissed for default (f), an order settling the terms of a proclamation for

(o)

(p)

(q)

(r)

(s)

(t)

(u)

(v)

(w) *Tuljaram v Alagappa* (1912) 35 Mad 1
8 I C 340 *Ebrahim v Euckramad*
(18 S) 4 Cal 531

(x) *Manulal v Manulal* (1925) 27 Bom L R 99
86 I C 100 (25) A B 159

(y) *Ehottan v Sonavram* (1920) 47 Cal 1104
60 I C 963

(z) *Krishna v Thanukachala* (1903) 47 Mad
100 40 v C 100 (103) A M 90

(a)

(b)

(c)

(d)

(e)

(f)

(r) *V R. M. Raman Chettyar v Bank of Chet*
tinad (1933) 11 Rang 10 142 I C 68
(33) A. R. 15

sale (g) an order as to the sufficiency of security for stay of execution (h), an order postponing a sale (i) an order for security under O 38, r 5 (j), and an order under O 22, r 5 directing that a receiver of an insolvent estate continuing a suit should not be required to give security (k) The decision in an earlier Madras case (l) that an appeal lies under this clause from an order fixing a distant date for the hearing of a suit has been disapproved in later decisions of the same Court (m), such an order is one relating merely to the date of hearing, and is not a "judgment" An order giving leave to defend on a summons under Chap 134 of the original side rules of the Calcutta High Court is not a judgment (n) nor an order dispensing with a reserved price at a sale as required by the rules of the Calcutta High Court (o), not an order joining a party as legal representative of a deceased appellant (p), nor an order of a Judge in the exercise of insolvency jurisdiction referring a claimant to a regular suit (q), nor an order referring back a report of the Official Referee in Madras (r), nor an order transferring a suit (s), nor an order refusing to revoke leave to sue on the original side of the High Court (t), nor an order made under sec 195 of the Indian Companies Act, 1913, directing the examination of some of the directors of the company as to their dealings in respect of the affairs of the company (u) nor an order refusing (v) or granting (w) leave to file a suit in forma pauperis nor an order allowing a fresh declaration of partner's names under O 30, r 2(x)

But an appeal lies from the following orders, namely, an order directing a plaintiff to give security for costs (y), an order in appeal staying proceedings of the trial Court subsequent to the passing of a preliminary decree (z), an order refusing or granting a stay of execution (a), an order staying a suit (b), an order rejecting an application to set aside the abatement of a suit or appeal (c), an order refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court (d), an order directing payment to a party of a certain sum per month for his maintenance pending the suit (e), an order that the receiver is entitled to commission (f), an order made by a single judge of the Calcutta High Court dismissing a suit for want of prosecution under Chapter 10, rule 36 of the High Court Rules (g), an order giving plaintiffs leave to

- | | |
|--|--|
| (g) | (e) <i>Sadashiv v Soondardas</i> (1930) 32 Bom LR 1647 130 IC 241, (31) A.B. 166 |
| (h) | (w) <i>Mfa Thau v Maung Pa</i> (1906) 4 Rang 20 95 IC 523 (26) A.R. 110 |
| (i) | (z) |
| (j) | (y) |
| (k) | 3. 2000. 00. |
| (l) | (r) <i>Shubba Mai v Rup Narain</i> (1928) 111 IC 24 (28) A.L. 904 |
| (m) | (a) |
| (n) <i>Tuljaram v Alagappa</i> (1912) 35 Mad 1 16-17 81 C. 340 | |
| (o) <i>Meghica v Kalooram</i> (1906) 53 Cal. 776, 96 IC 182 (26) A.C. 842 | |
| (p) <i>Mahomed Fazlul v Ahmad Muhammad</i> (1933) 60 Cal. 506 145 IC 318 (33) A.C. 504 | |
| (q) <i>Appaji v Thanlammal</i> (1933) 56 Mad. 689, 142 IC 679 (33) A.M. 41 | |
| (r) | |
| (s) | |
| (t) | |
| (u) | |
| (v) | |
| (w) <i>Madan Gopal v Sachandra Nath</i> (1908) 55 Cal. 75 104 IC 64, (25) A.C. 295 | |
| | (b) <i>Jirani v Parojshaw</i> (1933) 57 Bom 364 144 IC 806 (33) A.B. 85 |
| | (c) <i>Sadiq Ali v Anwar Ali</i> (1933) 45 All. 66 70 IC 805, (3) A.A. 44 |
| | (d) <i>Sonachalam v Kumaratelu</i> (1904) 47 Mad 316 79 IC 109 (24) A.M. 597 |
| | (e) <i>Syed v Subhan</i> (1925) 48 Mad. L.J. 395 86 IC 909 (25) A.M. 443 |
| | (f) <i>Mfa Humana v Official Receiver</i> (23) A.R. 301 |
| | (g) <i>Uday Chand v Kheturdas</i> (1924) 51 Cal. 905 81 IC 1044 (24) A.C. 1025 |

sale (g) an order as to the sufficiency of security for stay of execution (h), an order postponing a sale (i), an order for security under O 38, r 5 (j), and an order under O 22, r 8 directing that a receiver of an insolvent estate continuing a suit should not be required to give security (k). The decision in an earlier Madras case (l) that an appeal lies under this clause from an order fixing a distant date for the hearing of a suit has been disapproved in later decisions of the same Court (m), such an order is one relating merely to the date of hearing, and is not a "judgment". An order giving leave to defend on a summons under Chap 134 of the original side rules of the Calcutta High Court is not a judgment (n), nor an order dispensing with a reserved price at a sale as required by the rules of the Calcutta High Court (o), not an order joining a party as legal representative of a deceased appellant (p), nor an order of a Judge in the exercise of insolvency jurisdiction referring a claimant to a regular suit (q), nor an order referring back a report of the Official Referee in Madras (r), nor an order transferring a suit (s), nor an order refusing to revoke leave to sue on the original side of the High Court (t), nor an order made under sec 195 of the Indian Companies Act, 1913, directing the examination of some of the directors of the company as to their dealings in respect of the affairs of the company (u), nor an order refusing (v) or granting (w) leave to file a suit in forma pauperis nor an order allowing a fresh declaration of partner's names under O 30, r 2(x).

But an appeal lies from the following orders, namely, an order directing a plaintiff to give security for costs (y), an order in appeal staying proceedings of the trial Court subsequent to the passing of a preliminary decree (z), an order refusing or granting a stay of execution (a), an order staying a suit (b), an order rejecting an application to set aside the abatement of a suit or appeal (c), an order refusing to stay execution of a decree of a Mufassal Court pending an appeal therefrom to the High Court (d), an order directing payment to a party of a certain sum per month for his maintenance pending the suit (e), an order that the receiver is entitled to commission (f), an order made by a single judge of the Calcutta High Court dismissing a suit for want of prosecution under Chapter 10, rule 36, of the High Court Rules (g), an order giving plaintiffs leave to

- (g) *Tularam v Alagappa* (1912) 35 Mad 1 16-17, 8 I C 340
(n) *Meghjee v Kelooram* (1926) 53 Cal 776, 96 I C 182 (26) A C 842
(m) *Maharaja of Pulaputram v Rama Rao* (1921) 50 Mad 770 105 I C 159 (27) A M 846
(w) *Madam Gopal v Sachindra Nath* (1978) 55 Cal 262, 104 I C 764 (26) A C 295

- (e) *Sadashiv v Soondardas* (1830) 32 Bom L.R 1647, 130 I C 241 (31) A.B 166
(w) *Ma Thau v Maung Pa* (1926) 4 Rang 20 95 I C 523 (26) A R 110
(z) *Shubba Mal v Rup Narain* (1926) 111
(g) *Uday Chand v Khedwas* (1924) 51 Cal 905, 81 I C 1045 (24) A C 1025

Let. Pat. [Cal., Bom., and Mad.]

Cl. 15 withdraw from the suit with liberty to take such action thereafter as they may be advised (h) an order for attachment (i), an order remanding an appeal under O 41, r 23 (i2), an order setting aside an abatement of suit (j), an order appointing a receiver (k) an order giving leave to defend under chapter 13 A of the Original Side Rules of the Calcutta High Court directing that if a security was not furnished a decree should be drawn up (l), an order dismissing a petition to set aside an award (m), an order rejecting an application under O 41, r 19 (n), and an order granting leave to change an attorney (n1) An order refusing leave to amend a plaint followed by a dismissal of the suit is a judgment and appealable as such (o)

Whether wrong exercise of discretion may be a ground of appeal.—It has been held by the High Court of Allahabad that the fact of a matter being within the discretion of the original Judge is a ground for refusing to entertain the appeal (p) On the other hand it has been held by the High Court of Madras that the fact that the making of an order was a matter of discretion is not a ground for refusing to entertain an appeal though it may be a good reason for declining to interfere with that discretion in appeal (q)

Orders in suits and appeals.—We have already noted in their proper place what orders made under the Code are appealable under this clause and what orders are not so appealable The following is a list of such orders —

- S 115 [revision]—see notes, 'Appeal above'
- O 1, r 3 [joinder of defendants]—see notes, "Appeal above"
- O 6, r 17 [amendment of pleadings]—see notes, "Appeal above"
- O 9, r 9 [restoring of suit]—see notes, "Appeal above"
- O 9, r 13 [ex parte decree]—see notes, "Appeal above"
- O 11, r 18 [inspection]—see notes, "Appeal above"
- O 14, r 3 [issues]—see notes, "Appeal above"
- O 20, r 15 [accounts]—see notes, "Letters Patent Appeal above"
- O 21 r 58 [claims to property under attachment]—see notes "Appeal above"
- O 22, r 9 [abatement]—see notes, "Letters Patent Appeal above"
- O 22, r 10 [abatement]—see notes, "Letters Patent Appeal above"
- O 23, r 1 [withdrawal from suit]—see notes, "Letters Patent Appeal above"
- O 25, r 1 [security for costs of suit]—see notes, "Appeal above"
- O 26, r 4 [evidence on commission]—see notes, "Appeal above"
- O 33, r 5 [leave to sue as a pauper]—see notes, "Letters Patent Appeal above"
- O 37, r 3 [leave to defend in a summary suit]—see notes, "Appeal above"
- O 39, r 1 [injunction]—see notes, "Appeal above"
- O 41, r 5 [stay of execution pending appeal]—see notes, "Appeal above"

| | |
|--|--|
| (h) | (i) <i>Chattu Lal v Marwari</i> (19 6) 50 C W N 298 96 IC 839 (96) A C 668 |
| (i) | (m) <i>Shivji v Ramjimal</i> (1931) 55 Bom 452 19 IC 886 (31) A B L 5 |
| (i2) | (n) <i>Mahar Chand v Habub</i> (25) A L 617 86 IC 95 |
| (j) | (n1) |
| (k) | (o) |
| (l) | (p) |
| (k) <i>Arumagan v Kanappa</i> (1927) 5 Rang 99 101 IC 91 () A R 139 | (q) |

Let. Pat. [Cal., Bom., and Mad.]

Cl. 15

- O 41, r 10 [striking out appeal for failure to deposit security for costs]—see notes, "Appeal from order dismissing petition, etc., above"
- O 41, r 23 [remand]—see notes, "Letters Patent Appeal above"
- O 41, r 25 [order directing trial of issue]—see notes, "Appeal above"
- O 44, r 1 [leave to appeal in forma pauperis]—see notes "Appeal above"
- O 45, r 3 [leave to appeal to Privy Council]—see notes, "Appeal above"
- O 45, r 7 [security for costs of appeal to Privy Council]—see notes, "Appeal above"
- O 45, r 13 [stay of execution pending appeal to Privy Council]—see notes, "Appeal above"
- O 45, r. 15 [execution of order of Privy Council]—see notes, "Letters Patent Appeal above"
- O 47, r 7 [review]—see notes, "Appeal above"

Orders in proceedings other than suits and appeals.—A "judgment" within the meaning of this clause need not be an adjudication in a *suit* or *appeal* as technically understood. An adjudication which terminates what may be called an original petition like an application for the custody of a minor may be a "judgment" so as to be appealable under this clause. The following is a list of such adjudications—

- 1 *Habeas corpus*—An appeal lies under this clause from an order deciding the claim of relatives to the custody of a minor on a writ of *habeas corpus* (r)
- 2 *Leave to sue under cl 12 of the charter*—An appeal lies from an order refusing to set aside an order granting leave to sue under cl 12 of the Letters Patent and also from an order refusing to grant leave to sue. See notes to cl 12 above, "Appeal"
- 3 *Administrator General's Act 3 of 1913*—An appeal lies from an order allowing to the Administrator General commission at a certain rate (s)
- 4 *Probate and Administration Act, 1881, s 90* [now Indian Succession Act 39 of 1925, s 307]—An appeal lies from an order purporting to be made under s 90 of the Probate and Administration Act at the instance of a beneficiary in a case in which there is no restriction imposed by the will on the power of the executor to sell immovable property forming part of the estate of the deceased. Such an order is really one made without jurisdiction (t). An appeal also lies from an order granting probate (u)
- 5 *Limitation Act, s 5*—It has been held by the High Court of Calcutta that no appeal lies from an order refusing to excuse the delay in filing an appeal or application (v). The High Court of Bombay has held that an appeal does lie from such an order (w).
- 6 *Mandamus*—It has been held by the High Court of Calcutta in the leading case of *The Justices of the Peace for Calcutta v The Oriental Gas Co* (x), that no appeal lies from an order which directs a mandamus to issue to a public body

(r) *Narandas Dhanji, in the matter of* (1890) 14 Bom 555

(s) *Somasundaram v Administrator-General* (1876) 1 Mad 149

(t) *Indra Chandra Singh, in the goods of* (1896) 23 Cal 581

(u) *Umrao Chand v Bunderben* (1895) 17 All 475.

(v) *Gohinda Lal v Shiba Das* (1906) 33 Cal 1341

(w) *Ramchandra v Mahadev* (1915) 44 Bom 260
44 I.C. 913 *Varadar v Valsaj* (1914) 44 Bom 412 S.C. 862, (24) A.B. 322 See also *Kurus Mal v Jam Nath* (1906) 24 All 414

(x) (1872) 8 Beng L.R. 433.

Let. Pat. [Cal., Bom., and Mad.]

CL. 15

this clause by the Amended Letters Patent of 11th March 1919. The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of revisional jurisdiction (o). An interlocutory order on a civil revision petition is made in the exercise of revisional jurisdiction and is not appealable (p). See notes to s. 115, 'Appeal'.

Orders made in the exercise of the power of superintendence.—The words 'not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section one hundred and seven of the Government of India Act, 1915,' were added into this clause by the Amended Letters Patent of 11th March 1919. The addition of these words makes it clear that no appeal lies under this clause from orders made in the exercise of the power of superintendence under s. 107 of the Government of India Act, 1915.

Declares that the case is a fit one for appeal.—The requisition of a certificate of fitness for appeal only applies in the case of a judgment of a single Judge in the exercise of appellate jurisdiction (q) and it applies even though the Judge is a temporary Judge who has ceased to officiate (r). A Bombay Judge has said that the certificate should be given only in cases of great public or private importance on the same principles as apply in appeals to the Privy Council under s. 109 (s), but the Madras High Court considers that this is too strict a test and that it is neither possible nor desirable to lay down rules applicable to all cases (t). The Bombay High Court has held that this provision is retrospective (u). On the other hand the Allahabad High Court considers that no certificate is necessary if the judgment appealed from was delivered before publication of the amending Letters Patent (v). The Calcutta High Court in a Full Bench has held that it only applies to suits filed on or after the date of publication of the amendment (w) and the Madras High Court has taken the same view (x). No appeal lies from an order refusing to certify fitness for appeal (y).

Points on which appeal may be heard.—It has been held by the High Courts of Allahabad (z), Patna (a), and Lahore (b) that an appellant is not entitled in an appeal under this clause to be heard on points which have not been raised before the Judge from whose judgment the appeal is preferred (c).

The appeal given to the Full Court under this clause is not confined to the points on which the Judges of the Division Court differ, the whole appeal is open before the Court for decision (d).

(o) *Eyomkes v Bhutnath* (1911) 34 Cal. L.J. 489
64 I.C. 689 (21) A.C. 217 *Raghubans*

(p)

(q)

(r)

(s)

(t)

(u)

(v)

(w)

640 F.B.

(x) *Varadara Samner In re* (1929) 52 Mad. 361,
115 I.C. 811 (29) A.M. 391

(y)

(z) *U. J. Bhattacharya v. Durpa Das* (1898) 20 All.
258

(a) *Debi Charan v. Shukh Medhi* (1916) 1 Pat.
L.J. 435 490 35 I.C. 888

(b) *Ahmad Shah v. Faujdar* (1920) 2 Lah. L.J. 1
55 I.C. 983

(c) (1898) 20 All. 258 *supra*

(d) *Ram Dyal v. Ram Das* (1861) 1 All. 161 *Felji*
Estuary & Co. v. Bachoo (1904) 48 Bom.
691 87 I.C. 192 (25) A.B. 114 *Upendra*
Nath v. Bind Shri (1915) 22 Cal. L.J. 452,
32 I.C. 468 *Gopervar v. Hem Chandra*
(1909) 31 Cal. L.J. 447 57 I.C. 276
Purnab Akkharat Press Co. v. Opri
(1909) 31 Lah. 1 93 I.C. 344 (25) A.L.
63

Let. Pat. [Cal., Bom., and Mad.]

Cls. 15-17 Land acquisition appeal.—The decision of the High Court in a land acquisition appeal is not a 'judgment' within the meaning of this clause so as to enable a party to file a further appeal to the High Court under this clause (e) See notes to cl 39. The decision must amount to a judgment decree, or order.

Inherent jurisdiction—The Bombay High Court has held that apart from cl 15 it has inherent jurisdiction to hear an appeal in a matter affecting a ward of the Court (f) See clause 17 *infra*.

Sentence or order in the exercise of criminal jurisdiction.—An order granting sanction under s 193 (1) of the Criminal Procedure Code is one made in the exercise of criminal jurisdiction and is not a "judgment" within the meaning of this clause (g) See the undermentioned case (h)

Review.—It is competent to the High Court to review judgments in appeals preferred under cl 15 above (i)

16. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force

Board of Revenue—The Board of Revenue directing the operations of a settlement officer under the Madras Estates Land Act is not a civil Court nor subject to the superintendence of the Madras High Court (j)

17. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics, within the Bengal Division of the Presidency of Fort William, as that which was vested in the said High Court immediately before the publication of these presents

Jurisdiction as to infants and lunatics—Within the Bengal Division of the Presidency of Fort William. —See the argument of counsel in *Besant v Narayanasah* (k)

Jurisdiction of Supreme Courts as to infants and lunatics—See cl 25

(e) *Manatikraman v Collector of the Nuljeri*

(f)

(g)

(h)

597 *Kuppi swami A par re* (1916) 39 Mad 561 91 C 109 *Appadu v Appadu* (1916) 39 Mad 4 9 28 I C 68

(i) *Venkata Sannarasaidu v Sr Rajah Krishna* (1917) 40 Mad 651 3 I C 8 3

(j) *Raja of Mandana v Jagannayulu* (1930) 65 Mad 883 140 I C 331 (3) A M 612

(k) (1914) 41 I A 314 38 Mad 807 41 I C 290

Let Pat [Cal, Bom., and Mad]

without the limits of its ordinary jurisdiction (l) But it has been held that it has no power to direct an inquisition or appoint a guardian of a person not resident in Calcutta who is alleged to be a lunatic (m) Cls 17-19

18. And We do further ordain that the Court for relief of Insolvent Debtors at Calcutta shall be held before one of the Judges of the said High Court of Judicature at Fort William in Bengal, and the said High Court, and any such Judge thereof, shall have and exercise, within the Bengal Division of the Presidency of Fort William, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India

Provision with respect to the insolvent Court

Laws relating to insolvent debtors in India.—The law relating to insolvent debtors in the presidency towns is now contained in the Presidency towns Insolvency Act 1919 Note that cl 12 does not control the provisions of this clause so as to limit the insolvency jurisdiction of the Court (n)

Law to be administered by the High Court of Judicature at Fort William in Bengal

19. And We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued

By the High Court in the exercise of ordinary original civil jurisdiction

Law or equity to be applied to each case.—See the undermentioned case (o) See also Pollock and Mulla's Indian Contract Act 6th ed pp 25 The present clause is to be read with cl. 44 below

Law or equity administered by the Supreme Courts.—See cls 13 17 and 18 of the Charter of the Supreme Court of Calcutta cls 21 22 and 31 of the Charter of the Supreme Court of Madras and cls 28 29 and 41 of the Charter of the Supreme Court of Bombay

The Supreme Court charters have not been construed as applying the English law to India in its entirety but as nearly as the circumstances of the place and of the inhabitants admit (p) English precedents and procedure should not be followed if

(l) *In re Tarun Chandra* (1930) 57 Cal. 533 193

1 C 379 (30) A.C. 594

(m) *In the matter of Phanindra* (1931) 58 Cal. 919 133 I.C. 184 (3) A.C. 91

(n) *Abdul Khader v. The Official Assignee of Madras* (1916) 40 Mad. 810 35 I.C. 594

In the matter of Krishna Rao (1908) 51 Mad. 540 110 I.C. 149 (9) A.M. 73

(o) *Madhub Chunder v. Pajoomar Doss* (1841) 14 Beng. L.E. 6 at p. 83

(p) *Advocate-General of Bengal v. Surnomoye Doss* (1864) 9 M.L. 35

Let. Pat. [Cal., Bom., and Mad.]

Cls. 19-22 they are against 'justice and right' or 'justice, equity and good conscience' which are the true guides to be followed according to the Charter Acts (g) An Indian married woman against whom an imputation of unchastity is made can maintain an action or slander without the proof of special damage required by English law (r)

20. And We do further ordain that, with respect to the law or equity and the rule of good conscience to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal, in the exercise of its extraordinary original civil jurisdiction, such law or equity and the rule of good conscience shall be the law or equity and the rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein.

"The law which would have been applied by any local Courts."—See notes to cl 13 above, "Powers of High Courts in dealing with suits transferred under this clause."

21. And We do further ordain that, with respect to the law or equity and the rule of good conscience to be applied by the said High Court of Judicature at Fort William in Bengal, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case.

Injunction.—The Madras High Court has held that as a Subordinate Court cannot issue an injunction otherwise than in accordance with O 39, so the High Court, under this clause, has no power to do so in the exercise of its appellate jurisdiction (s). The High Court of Calcutta has, however, issued such an injunction in its appellate jurisdiction (t).

Criminal Jurisdiction.

22. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction within the local limits of its ordinary

(g) "The law which would have been applied by any local Courts."

(s) *Karuppayya v Ponnusami* (1933) 56 Mad 563, 141 I C 607, (33) A.M. 500

(r)

(t) *In re Nanda Lal* (1932) 36 C W N 291, 137 I C 618, (32) A C 353

Let Pat. [Cal, Bom, and Mad]

Cis 22-25

original civil jurisdiction, and also in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William and beyond such limits and not within the limits of the criminal jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these Presents (u)

23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to
persons

24. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate General, or by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original
criminal jurisdiction

Scope of the clause—This clause gives power to the High Court to remove from a Court in the mofussil a criminal trial and have it before the High Court itself and it can do that upon charges preferred by the Advocate General or trying magistrate or other officer specially empowered by the Local Government in that behalf (v) The extraordinary criminal jurisdiction given by this clause is over persons residing within the jurisdiction of any Court now subject to the superintendence of the High Court (w) An application under this clause must be made to the High Court on its appellate side (x)

25. And We do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed or made in any criminal trial before the Courts of original Criminal Jurisdiction which may be

No appeal from High
Court exercising original
jurisdiction

Court may reserve points
of law

(u) And also in respect of all such persons beyond such limits, or over whom the said High Court of Judicature at Fort William shall have criminal jurisdiction at the time of publication of these Presents—*Madras and Bombay Letters Patent*

(v) *Sashadhar v. Charles Tennant* (192) 55 C. W. N. 104, 132 L. C. 398, (3) A. C. 9

(w) *Sashadhar v. Charles Tennant* (191) 55 C. W. N. 104, 132 L. C. 398, (3) A. C. 13

(x) *Sashadhar v. Charles Tennant* (192) 55 C. W. N. 104, 132 L. C. 398, (3) A. C. 321.

Let Pat [Cal, Bom., and Mad]

Cls 25-28 constituted by one or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

26. And We do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate General, that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original Criminal Jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right

Review on certificate of Advocate General—See the undermentioned case (y) If there is no error of law the High Court cannot deal further with the case and cannot consider the question of alteration of sentence (z) But if there is an error of law the High Court has to decide the case finally on review (a)

27. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force

Appeals from Criminal Courts in the Provinces
Subject to its superintendence—Note that the words used in s 15 of the Charter Act [now s 107 of the Government of India Act 1915] are subject to its appellate jurisdiction while those in the present sections are subject to its superintendence (b) Compare cl 13 above

28. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall be a Court of Reference and Revision from the Criminal Courts subject to its

Hearing of referred cases and revision of criminal trials

(y) *Empo v Fa h Chand* (1911) 44 Cal 477
33 IC 945
(z) *King Emperor v Barend a Kumar Ghose*
(1939) 3 CWN 10 81 IC 353 (4)
VC 27

(a) *Emperor v Panchu Das* (1900) 47 Cal 671
58 IC 99

(b) *Sheonandan v King Emperor* (1918) 3 Pat
LJ 581 606 607 46 IC 977

Let. Pat. [Cal., Bom., and Mad.]

Cls. 28-39

appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other Officers now authorized to refer cases to the said High Court, and to revise all such cases tried by any Officer or Court possessing criminal jurisdiction, as are now subject to reference to, or revision by, the said High Court.

Now subject to reference to or revision by the said High Court.—The High Court cannot under this clause revise an order of a Secretary to Government issuing a warrant under the Goondas Act (Bengal Act 1 of 1923) as such Secretary was not an officer possessing criminal jurisdiction in 1865 when the Letters Patent were issued (c).

29. And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or

High Court may direct the transfer of a case from one Court to another

superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other Officer or Court.

Scope of the clause.—If a criminal trial is proceeding or is about to be begun in the mofussil, the High Court, under this clause, has power to remove it and direct any other Court of sufficient jurisdiction to hear the criminal case or appeal; and in that connection there is an ancillary power that this applies not only to the criminal case or appeal but applies also to inquiries. The High Court has power to direct a preliminary investigation or trial of any criminal case by any Officer or Court otherwise competent to try or investigate though such case belongs in the ordinary course to the jurisdiction of some other officer (d)

Criminal Law.

30. And We do further ordain that all persons brought for trial before the said High Court of Judicature at Fort Wilham in Bengal either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of Appeal, Reference or Revision charged with any offence for which provision is made by Act No. XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise.

Offenders to be punished under Indian Penal Code.

(c) *Dhimesh Bawa v Emperor* (1924) 51 Cal 460, 83 I C 600 (24) A C 698
(d) *Sashadhar v Charles Tregart* (1932) 35 C

W N 108° 136 I C 598 (32) A C 229;
Queen v Nababdurip (1865) 1 Beng L R 15.

Let. Pat. [Cal., Bom., and Mad.]

Cls. 31, 32 *Exercise of Jurisdiction elsewhere than at the ordinary place of sitting of the High Court.*

31. And We do further ordain that whenever it shall appear to the Governor-General in Council convenient that the jurisdiction and power by these Our Letters Patent, or by the recited Act, vested in the said High Court of Judicature at Fort William in Bengal, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court at such place or places shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Judges may be authorized to sit in any place or by way of circuit or special commission

Admiralty and Vice-Admiralty Jurisdiction.

32 And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have and exercise all such civil and maritime jurisdiction as may now be exercised by the said High Court as a Court of Admiralty or of Vice-Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as may now be exercised by the said High Court

CHL.

Admiralty jurisdiction of Supreme Courts—See cl 26 of the Charter of the Calcutta Supreme Court cl 41 of the Charter of the Madras Supreme Court and cl 53 of the Charter of the Bombay Supreme Court

Necessaries supplied to a ship—It was settled to be the law in England that prior to the passing of 3 and 4 Vict c 65, the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship though perhaps it occasionally purported to exercise the jurisdiction where not prohibited (e) The same view has obtained in India (f) but there is a difference of opinion as to whether the extended powers under 3 and 4 Vict c 65 and 24 Vict c 10 became vested in the Indian High Court by virtue of the several Letters Patent (g) Assuming that the High Court in its Admiralty jurisdic

Let. Pat. [Cal., Bom., and Mad.]

Cls. 32-34

necessaries supplied to a ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the Court that at the time of the institution of the suit the owner is domiciled in British India or Burma (A)

33. And We do further ordain that the said High Court
of Judicature at Fort William in Bengal
shall have and exercise all such criminal

Criminal

jurisdiction as may now be exercised by the said High Court as a Court of Admiralty, or of Vice-Admiralty, or otherwise in connection with maritime matters or matters of prize

Testamentary and Intestate Jurisdiction.

34. And We do further ordain that the said High Court
of Judicature at Fort William in Bengal
shall have the like power and authority as
that which may now be lawfully exercised

Testamentary and Intes
tate jurisdiction

by the said High Court, except within the limits of the jurisdiction for that purpose of any other High Court established by Her Majesty's Letters Patent, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division (i), subject to the orders of the Governor-General in Council as to the period when the said High Court shall cease to exercise testamentary and intestate jurisdiction in any place or places beyond the limits of the provinces or places for which it was established. Provided always, that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India by which power is given to any other Court to grant such probates and letters of administration

Ecclesiastical Jurisdiction of Supreme Courts—See cl 22 of the Charter of the Supreme Court of Calcutta cl 37 of the Charter of the Supreme Court of Madras and cl 47 of the Charter of the Supreme Court of Bombay

(h) *Madras Steam Navigation Co. v. Shanmugam*
Harris (1915) 42 Cal 85 38 I C 463 [suit
for damages for wrongful seizure]

(i) And we do further ordain that the said High
Court of Judicature at ^{Bombay} ~~Madras~~ shall have
the like power and authority as that which

may be now lawfully exercised by the said
High Court in relation to the granting of
probates of last wills and testaments and
letters of administration of the goods
chattels credits, and all other effects what-
soever of persons dying intestate whether
within or without the Presidency of ^{Bombay} ~~Madras~~
—*Madras and Bombay Letters Patent*

Let Pat [Cal, Bom, and Mad]

Cls 33, 36

35. And We do further ordain that the said High Court of Judicature at Fort William in Bengal shall have jurisdiction within the Bengal Division of the Presidency of Fort William in matters matrimonial between Our subjects professing the Christian religion. Provided always, that nothing therein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter within the said Presidency lawfully possessed thereof

Our subjects professing the Christian religion —The High Court has jurisdiction under this clause if one party professes the Christian religion (j) See Indian Divorce Act, s 2 as amended by act 30 of 1927

Powers of single Judges and Division Courts.

36. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purpose, in pursuance of section one hundred and eight of the Government of India Act, 1915 (k), and if such Division Court is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it

under sec 98 Under the former Letters Patent it was held that this clause is not controlled by sec 98 of the Code and if the Judges are equally divided the opinion of the

(j)

(k)

Inda Act 1915 were substituted for the words under the provisions of the thirteenth section of the aforesaid Act of the Twenty four and Twenty fifth years of Our reign by the amended Letters Patent of 11th March 1919

Let. Pat. [Cal., Bom., and Mad.]

Cls. 36 37

senior Judge prevails (l) From the decree passed in conformity with the opinion of the senior Judge an appeal lies under cl 15 and the whole appeal is open on appeal and not merely the points on which the Judges differed (m) But now the procedure in case of a difference of opinion is the same as under sec 98 except that (1) under sec 98 reference is optional while under this clause it is obligatory and (2) under sec 98 reference is only on a point of law while under this clause a difference both of law and of fact can be referred The clause as amended applies to an appeal which was pending at the time the amendment came into force (n)

Section 98 was amended in 1923 by the addition of subsection (3) so that this clause of the Letters Patent supersedes s 98 and applies not only to appeals from the original side of a Chartered High Court but also to appeals to a Chartered High Court from decrees of Subordinate Judges while s 98 applies only to Courts other than Chartered High Courts (o) See note 'Sec 98 of Code and cl 36 of Letters Patent' under s 98 at p 328, and the undermentioned case (ol)

Where an application is made to the High Court under s 193, clause (6) of the Criminal Procedure Code, to revoke a sanction granted by lower Court or to give a sanction refused by it, and the Judges composing the bench hearing the application are equally divided in opinion, the case is governed by the present clause and not by s 422 or s 439 of that Code (p)

Civil Procedure.

37. And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort

Regulation of proceedings

William in Bengal, from time to time, to

make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice Admiralty, Testamentary, Intestate and Matrimonial Jurisdictions, respectively. Provided always that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No VIII of 1859, and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India

Rules of the Calcutta High Court.—Under the rules of the Calcutta High Court a pleader or advocate cannot plead by merely putting in a memorandum of appearance unless there has been an appearance by the party in person or by a pleader appointed

(l)

(o) "

(m)

(ol)

(n)

(p)

See also A C 581
 (p) *Espu v Espu* (1911) 35 Mad. 750 14 I.C. 20
 [F E] *Iandu v Jannadas* (1924) 27
 Lon. L. E. 470 85 I.C. 779 (2)
 A B 118 *Suresh Chandra v Shri*
Kanta (1924) 51 Cal. 672 25 I.C. 672, (24)
 A.C. 835 [F E]

Let. Pat. [Cal, Bom., and Mad]

Cls 37-39 to act for him If the plaintiff intended to act has engaged a pleader or advocate merely to lead the memorandum of appearance need not be filed (q).

38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these Presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid

Appeals to Privy Council

39. And We do further ordain that any person or persons may appeal to Us, Our heirs and successors in Our or Their Privy Council in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the said High Court of Judicature at Fort William in Bengal, made on appeal and from any final judgment, decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 15th clause of these presents Provided, in either case, that the sum or matter at issue is of the amount or value of not less than Rupees 10,000, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand, or question to or respecting property amounting to or of the value of not less than Rupees 10,000, or from any other final judgment, decree, or order made either on appeal or otherwise as aforesaid, when the said High Court shall declare that the case

Let. Pat. [Cal., Bom., and Mad.]

Cls. 39, 40

Final order.—See note under the same heading under s 109 at p 352

The final judgment decree or order must be one made on appeal or in the exercise of original jurisdiction—Cl 10 of the Charter empowers the High Court to deal with professional misconduct by suspension or removal. An order made under that clause is not in the exercise either of the original or appellate jurisdiction of the High Court, and is not therefore appealable to His Majesty in Council (a). A decree or order passed by a High Court in its appellate jurisdiction is not necessarily a decree or order passed on appeal. When a decree of the High Court was varied by the Privy Council and directions given for an account to be taken by the High Court, a decree passed by the High Court in pursuance of such directions is not a decree passed on appeal from which an appeal lies (a). An order made in the exercise of the power of superintendence under s 15 of the High Courts Act (b) [now s 107 of the Government of India Act 1915] or in the exercise of revisional jurisdiction under section 115 of the Code (c), is appealable to the Privy Council. It may here be stated that cl 15 of the Letters Patent was amended by the Amended Letters Patent of 11th March 1910 by adding into the clause certain words which make it clear that no appeal lies to the High Court under that clause from an order made in the exercise of revisional jurisdiction or from an order made in the exercise of the power of superintendence under s 107 of the Government of India Act, 1915. But if the order in revision is made by a single Judge section 111 of the Code bars an appeal to the Privy Council (d).

'Made on appeal. — An order made by the High Court rejecting an application to amend a decree passed by that Court on appeal is not an order "made on appeal" within the meaning of this clause (e), nor is an order made by the High Court rejecting an application to review a judgment passed on appeal (f). Such an order is not an order made on appeal against the judgment sought to be reviewed, it is an order in the appeal in which the judgment sought to be reviewed was given (g).

40. And We further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order, or sentence of the High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or Their Privy Council, subject to the same rules, regulations, and limitations as are herein expressed

- (2) *An Attorney in the matter of* (1914) 41 Cal 734 2 IC 34 *Jamchandra v The President of Fakia Association* (1916) 39 Mad 128 29 IC 789 *G S D v Govenment Pleader* (1900) 32 Bom 106, *For Kishore v King Emperor* (1919) 4 Pat LJ 423 52 IC 599, *In re Raghava Reddi* (1900) 43 Mad LJ 38 69 IC 290 (2) A M 440
- (a) *Bai Mangru v Bharatkhand Cotton Mills* (1930) 55 Bom 785 139 IC 183 (32) A D 90
- (b) *Mirdro v Girdhari* (1874) 31 Beng LR

- 103 *But see Sundar Koer v Chandshwar* (1903) 30 Cal 679 at pp 681 680
- (c) *Secretary of State v British India Steam Navigation Co* (1911) 13 Cal LJ 90 9 IC 183
- (d) *Satyra Narayana v Fenkata* (1903) 46 Mad 958 75 IC 604 (24) A M 399
- (e) *Sunder Koer v Chandshwar* (1903) 30 Cal 679
- (f) *Soudamone v Maharaj Dheraj* (1866) 6 W R (Misc R) 110
- (g) *Rajah Enact v Panee Poonshum* (1869) 10 W R (LR) 1 at pp 2 3

Let. Pat. [Cal., Bom., and Mad.]

respecting appeals from final judgments, decrees, orders and sentences. **Cls. 40-42**

Appeal from interlocutory judgment.—No appeal lies to the Privy Council from an interlocutory judgment or order of a Judge of a High Court until such judgment or order has been subjected to an appeal to the High Court under cl. 15, except in those cases in which by reason of the number of Judges who have made such order an appeal under cl. 15 is given directly to the Privy Council (h) The High Court will not, it seems, in the exercise of its discretion under this clause grant leave to appeal to the Privy Council upon a mere question of practice, such as an order for inspection of documents (i) or an order refusing the appointment of a receiver in a suit (j) But an order made by the High Court of Bombay under cl. 13 of the Letters Patent transferring to itself a suit from the Court of the Resident at Aden raises a question of jurisdiction as distinguished from practice, and leave may be granted from such an order to appeal to the Privy Council (k) But for this clause no appeal would lie from an interlocutory judgment or order (l)

41. And We do further ordain that from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case, where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

Appeal in criminal cases
etc

Appeals in criminal cases—See the undermentioned case (m)

42. And We do further ordain that in all cases of appeal made from any judgment, order, sentence, or decree of the said High Court of Judicature at Fort William in Bengal to Us Our heirs or successors, in Our or Their Privy Council, such High Court shall certify and transmit to Us, our heirs and successors in our or their Privy Council, a true

Rules as to transmission
of copies of evidence and
other documents

- (h) *Sonbai v Ahmedbhai* (1871) 9 Bom HC 398
(i) *Sonbai v Ahmedbhai* (1871) 9 Bom HC 398
(j) *Chunda Dutt v Pudmanand* (1895) 20 Cal 908
(k) *Municipal Officer Aden v Abdul Karim* (1904) 28 Bom 990

- (l) *Tata Iron & Steel Co v Chief Revenue Authority* (1923) 47 Bom 724 50 IA 21
74 IC 469 (23) APC 143 c tin.
Golirang v La Banquet & Hochelaga (1884)
5 AC 371
(m) *Barendra v Emperor* (1925) 5 IA 40 5
Cal 197 65 IC 47 (25) APC 1

Let Pat [Cal, Bom., and Mad.]

Cls 42-44 and correct copy of all evidence, proceedings, judgments, decrees, and orders had or made in such cases appealed, so far as the same have relation to the matters of appeal such copies to be certified under the seal of the said High Court, And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or Their Privy Council a copy of the reasons given by the Judges of such Court, or by any such Judges, for or against the judgment or determination appealed against

And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute or cause to be executed such judgments and orders as We, Our heirs or successors in Our or Their Privy Council, shall think fit to make in the premises in such manner as any original judgments decree or decretal orders, or other order or rule of the said High Court should or might have been executed

Calls for Records, &c, by the Government.

43. And it is Our further will and pleasure that the said High Court of Judicature at Fort William in Bengal shall comply with such requisitions as may be made by the Government for records, returns, and statements, in such form and manner as such Government may deem proper

High Court to comply
with requisitions from
Government for records &c

44. And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council and also of the Governor General in Council under section seventy one of the Government of India Act 1915 and also of the Governor General in cases of emergency under section seventy two of that Act, and may be in all respects amended and altered thereby

Powers of the Indian
Legislature preserved

Alterations in this clause—This clause was substituted for the original clause 44 by the Amending Letters Patent of 11th March 1919. The material alteration consists in substituting the words powers of the Governor General in Legislative Council and also of the Governor General in Council for the words powers of the Governor General in Council

Let. Pat. [Cal., Bom., and Mad.]

Cls. 44, 45

Legislative powers of the Governor General in Council—The powers of the Governor General in Council to make laws are derived from the Indian Councils Act of 1861 (24 and 25 Vict., c. 67). By sec. 22 of that Act the Governor General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of justice and for all persons whatever, British or Native, foreigners or others. But a proviso to that section enacts that there is to be no powers to repeal or in any way affect any Act passed in the same session of Parliament with the Indian Councils Act. The High Courts Act of 1861 (24 and 25 Vict., c. 104) is such an Act, and the Governor General in Council therefore has no power to alter its provisions, unless such power is expressly given by the Act. Thus the Governor General in Council has no power to alter the provisions of that Act as to the qualifications of the judges of the High Courts (sec. 3) or the provisions of sec. 15 thereof giving the High Courts superintendence over the Courts which are subject to its appellate jurisdiction (n). Nor can the Governor General in Council by emergency legislation under s. 72 of the Government of India Act deprive the High Court of its power of superintendence (o). But the Governor General in Council has power to remove any place or territory from the jurisdiction of a High Court, the reason being that such power is distinctly recognized by sec. 9 of the said Act, and it is also consistent with the Letters Patent (cl. 44) as required by the said sec. 9 (p).

Further, there is a proviso to sec. 22 of the Indian Councils Act, which enacts that there is to be no power to repeal or in any way affect any provision of the Government of India Act of 1858. Sec. 65 of the latter Act provides that all persons shall have and take the same suits, remedies and proceedings against the Secretary of State for India in Council as they could have done against the East India Company. Before the Government of India Act, 1858 a British subject could sue the *East India Company* to determine his claim to any right over land. The Governor General in Council has therefore no power under the Indian Councils Act to pass an Act taking away the right of a British subject to sue the *Secretary of State* in a Civil Court to determine his claim to any right over land (q). See now the Government of India Act, 1915, s. 106 (2).

An order made in revision by a single Judge is final since the amendment of cl. 15 and would therefore be appealable to Privy Council under cl. 39, but as Letters Patent are subject to Imperial Legislation that appeal is taken away by Section 111 of the Code (r).

45. And it is Our further will and pleasure that these Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication, and that from and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent, granted by

Provisions of former Letters Patent inconsistent with these Letters Patent to be void

Letters Patent shall be published by the Governor-General in Council, and shall come into operation from and after the date of such publication, and that from

and after the date on which effect shall have been given to them, so much of the aforesaid Letters Patent, granted by

(n) *Q. een v. Meers* (1841) 14 Long L.R. 106 11

(o) *Bhikshana v. Emperor* (1833) 57 Bom. 93
141 I.C. 20 (33) A.B. 1 *Man natha*
v. Emperor (1933) 60 Cal. 618 14
I.C. 20 (33) A.C. 13.

(p) *Empress v. Burah* (1879) 4 Cal. 171 177
5 I.A. 178 *James Currie in the matter of*

(1876) 1 Bom. 405 409 410 *Imperial*
v. Emperor (1933) 60 Cal. 614 14 I.C.
31 (33) A.C. 364

(q) *Secretary of State v. Mouton* (1912) 40 I.A.
48 18 I.C.

(r) *S. v. Narayana v. Venk. S.* (1931) 46 Mad.
908 5 I.A. 64 (4) A.C. 332

Let. Pat. [Cal, Bom., and Mad]

Cl. 45 His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In Witness whereof We have caused these Our Letters to be made Patent Witness Ourselves at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign

(Sd) C ROMILLY

Letters Patent for the High Court of Allahabad.

(March 17, 1866)

[The two first paragraphs of the Preamble are similar to those of the Calcutta Letters Patent of 1863] Cls. 1, 2

And whereas it is further declared by the said recited Act that it shall be lawful for Us by Letters Patent, to erect and establish a High Court of Judicature in and for any person of the territories within Her Majesty's dominions in India, not included within the limits of the local jurisdiction of another High Court, to consist of a Chief Justice and such number of other Judges with such qualifications as were by the same Act required in persons to be appointed to the High Courts, established at the said *Presidencies, as We from time to time might think fit and appoint, and that, subject to the directions of the Letters Patent, all the provisions of the said recited Act, relative to High Courts and to the Chief Justice and other Judges of such Courts and to the Governor General or Governor of the Presidency, in which such High Courts were established shall, as far as circumstances may permit, be applicable to any new High Court which may be established in the said territories, and to the Chief Justice and other Judges thereof, and to the persons administering the Government of the said territories*

And whereas We did upon full consideration of the premises, think fit to erect and establish, and by Our Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the fourteenth day of May, in the twenty fifth year of Our reign, in the year of Our Lord one thousand eight hundred and sixty two, did accordingly, for Us, Our heirs and successors, erect and establish at Fort

1 Now know ye that We, upon full consideration of the premises and of Our special grace certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly, for Us, Our heirs and successors, erect and establish for the North Western Provinces of the Presidency of the Fort William aforesaid, a High Court of Judicature, which shall be called the High Court of Judicature, for the North-Western Provinces, and We do hereby constitute the said Court to be a Court of Record

2. And We do hereby appoint and ordain that the High Court of Judicature for the North Western Provinces shall until further or other provisions shall be made by Us or Our heirs and successors, in that behalf, in accordance with the said recited Act consist of a Chief Justice and five Judges, the first Chief Justice being Walter Morgan, Esquire, and the five Judges being Alexander Ross, Esquire, William Edwards Esquire, William Roberts, Esquire, Francis Boyle Pearson, Esquire, and Charles Arthur Turner, Esquire being respectively qualified as in the said Act is declared

[Powers of Crown to appoint a sixth puisne Judge — A question having arisen as to the validity of the appointment of a sixth puisne judge, it was held that

Let. Pat. [Cal., Bom., and Mad.]

- Cl. 45 His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty-two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the twenty-eighth day of December, in the twenty-ninth year of Our reign.

(Sd.) C. ROMILLY.

Let. Pat [Cal, Bom, and Mad]

Cl 45 His Majesty, King George The Third, as was not revoked or determined by the said Letters Patent of the fourteenth of May, one thousand eight hundred and sixty two, and is inconsistent with these Letters Patent, shall cease, determine, and be utterly void, to all intents and purposes whatsoever

In Witness whereof We have caused these Our Letters to be made Patent Witness Ourselves at Westminster, the twenty eighth day of December, in the twenty ninth year of Our reign

(Sd) C ROMILLY

Let. Pat. [All.]

Cls. 2-15

under clauses 1 and 2 it was quite competent to the Crown to appoint a sixth puisne judge (s) [See High Courts Act, 1861, s 16]

3 And We do ordain that the Chief Justice and every Judge of the said High Court of Judicature, for the North Western Provinces
Declaration to be made by Judges previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Governor General in Council may commission to receive it —

‘ I A B, appointed Chief Justice [or a Judge] of the High Court of Judicature, for the North Western Provinces, do solemnly declare that I will faithfully perform the duties of my office of the best of my ability, knowledge and judgment ’

4 8 [These clauses are similar to clauses 6 to 10 of the Calcutta Letters Patent of 1865]

Civil Jurisdiction of the High Court

9 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have power to remove and to try
Extraordinary original civil jurisdiction and determine as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purpose of justice the reasons for so doing being recorded on the proceedings of the said High Court

Original Jurisdiction — [Note that the High Court of Allahabad does not possess ordinary original civil jurisdiction]

10 11 — Clause 10 is the same as the amended clause 15 of the Calcutta Letters Patent See notes to clause 15 of Calcutta Clause 11 is the same as clause 16 of the Calcutta Letters Patent 1865

12 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have the like power and authority
Jurisdiction as to infants and lunatics with respect to the persons and estates of infants idiots and lunatics within the North Western Provinces, as that which is exercised in the Bengal Division of the Presidency of Fort William by the High Court of Judicature at Fort William in Bengal, but subject to the provisions of any laws or regulations now in force

Hindu Joint Family — The jurisdiction of the Court of Chancery which descended to the Supreme Court of Calcutta is conferred by this clause on the High Court of Allahabad but the Court is reluctant to exercise it in the case of a Hindu joint family (t)

13 14 [These clauses are similar to clauses 20 and 21 of the Calcutta Letters Patent of 1865]

Criminal Jurisdiction

15 And We do further ordain that the said High Court of Judicature, for the North Western Provinces, shall have ordinary original
Ordinary original jurisdiction criminal jurisdiction in respect of all such persons within the said Provinces as the High Court of Judicature at Fort

Let. Pat. [All.]

Cls. 15-23

William in Bengal, shall have criminal jurisdiction over at the date of the publication of these presents, and the criminal jurisdiction of the said last mentioned High Court over such person shall cease at such date: Provided, nevertheless that criminal proceedings which shall at such date have been commenced in the said last mentioned High Court shall continue as if these presents had not been issued

16 And We do further ordain that the said High Court of Judicature, for the Jurisdiction as to persons North Western Provinces, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

17. And We do further ordain that the said High Court of Judicature, for the Extraordinary original criminal jurisdiction, North Western Provinces, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the Sudder Nizamut Adawlat, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

18 [This clause is similar to clause 25 of the Calcutta Letters Patent of 1865]

19 And We do further ordain that, on such point or points of law being reserved as aforesaid, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

20. And We do further ordain that the said High Court of judicature, for the Appeals from Criminal Courts in the Provinces North Western Provinces, shall be a Court of Appeal from the Criminal Courts of the said Provinces, and from all other Courts from which there is now an appeal to the Court of Sudder Nizamut Adawlat for the said Provinces, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said Court of Sudder Adawlat by virtue of any law now in force

21. And We do further ordain that the said High Court shall be a Court of review in and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges or by any other Officers now authorized to refer cases to the Court of Sudder Nizamut Adawlat or the Sudder Nizamut Adawlat, and to remove all such cases sent by any Officer or Court exercising criminal jurisdiction, as are now subject to reference or to removal by the said Courts of Sudder Nizamut Adawlat.

22. And We do further ordain that the said High Court shall have power to set aside the finding of any criminal case or appeal from any Court to any other Court of original or appellate jurisdiction, and also to set aside the preliminary investigation or trial of any criminal case by any Officer or Court exercising jurisdiction to inquire into or try it, and to send such case back to the ordinary course of the proceedings in such case as may be proper.

23. This clause is similar to clause 26 of the Calcutta Letters Patent of 1865.

Let. Pat. [All.]

Cls. 24-29

Exercise of Jurisdiction elsewhere, than at the ordinary place of sitting of High Court

24 And We do further ordain that whenever it shall appear to the Lieutenant Governor of the North Western Provinces, subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by the recited act, vested in the said High Court, should be exercised in any place within the jurisdiction of any Court now subject to the superintendence of any Sudder Dewany Adawlut of the Sudder Nizamut Adawlut of the North Western Provinces, other than the usual places of sitting of the said High Court, or at several such places by way of circuit, the proceedings in cases before the said High Court, at such place or places, shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Judges may be authorized to sit in any places by way of circuit or special commission.

Testamentary and Intestate Jurisdiction.

25 And We do further ordain that the said High Court of Judicature for the North Western Provinces, shall have the like power and authority as that which is now lawfully exercised within the said Provinces, by the said High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and

ed always that any proceedings already commenced in relation to any of the matters aforesaid in the said last mentioned High Court shall continue as if these presents had not been issued Provided also that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration

26 27 [These clauses correspond with clause 35 of the Calcutta Letters Patent of 1865 and clause 36 of the Calcutta Letters Patent, 1928]

Civil Procedure

28 And We do further ordain that it shall be lawful for the said High Court of Judicature for the North Western Provinces from time to time to make rules and orders for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council and being Act No VIII of 1859 and the provisions of any law which has been or may be made, amending or altering the same, by competent legislative authority for India, to all proceedings in its testamentary, intestate, and matrimonial jurisdiction respectively

Regulation of proceedings

Criminal Procedure

29 And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court, in the exercise of its ordinary original criminal jurisdiction, shall be regulated by the procedure and practice which was in use in the High Court of Judicature for Fort William in Bengal, immediately before the publication of these presents subject to any law which has been or may be made

Regulation of proceedings

Let. Pat. [All.]

Cls. 29-35

n relation thereto by competent legislative authority for India; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor General in Council, and being Act No XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Appeals to Privy Council

30 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or Their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree, or order of the said High Court of Judicature for the North Western Provinces, made on appeal, and from any final judgment, decree, or order made in the exercise of original jurisdiction by the Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the said High Court under the provision contained in the 10th Clause of these presents. Provided, in either case, that the sum or matter at issue is of amount or value of not less than 10,000 rupees, or that such judgment, decree, or order shall involve, directly or indirectly, some claim, demand or question to or respecting property amounting to, or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid when the said High Court shall declare that the case is a fit one for appeal to Us, Our heirs or successors in Our or Their Privy Council subject always to such rules and orders as are now in force, or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Provinces, except so far as the said existing rules and orders, respectively, are hereby varied and subject also to such further rules and orders, as we may, with the advice of our Privy Council, hereafter make in that behalf

31, 32, 33, 34, 35 [These clauses are similar to clauses 40, 41, 42, 43 and 44 of the Calcutta Letters Patent of 1865]

By Warrant under the Queen's Sign Manual

(Sd.) C ROMILLY

Letters Patent for the High Court of Patna.

(February 9, 1916.)

GEORGE THE FIFTH, by the grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India To all to whom these presents shall come, greeting WHEREAS by an Act of Parliament passed in the Twenty fourth and Twenty fifth Years of the Reign of Her late Majesty Queen Victoria, and called the Indian High Courts Act, 1861, it was, amongst other things, enacted by section one, that it should be lawful for Her Majesty, by Letters Patent under the Great Seal of the United Kingdom, to erect and establish a High Court of Judicature at Port William in Bengal, for the Bengal Division of the Presidency of Port William,

and, by section two, that such High Court should consist of a Chief Justice and as many Judges, *not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint, who should be selected from among persons qualified as in the said Act was declared,*

and, by section eight, that upon the establishment of such High Court as aforesaid the Supreme Court and the Court of Sudder Dewany Adawlut and Sudder Nizamut Adawlut at Calcutta, in the said Presidency, should be abolished,

and, by section nine, that the High Court of Judicature so to be established should have and exercise all such civil, criminal, admiralty, and vice admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the said Presidency as Her Majesty might by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations, as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency town, as might be prescribed thereby, and that, save as by such Letters Patent might be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council, the High Court so to be established should have and exercise all jurisdiction, and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under the said Act at the time of the abolition of such last mentioned Courts

And whereas it was further declared by section sixteen of the said recited Act that it should be lawful for Us by Letters Patent to erect and establish a High Court of Judicature in and for any portion of territories within Our Dominions in India, not included within the limits of the local jurisdiction of another High Courts, to consist of Chief Justice and such number of other Judges, with such qualifications as were by the

powers and authority as under the same Act was authorized to be conferred on or would become vested in the High Court established in any of the said Presidencies, and that

Let. Pat. [Patna.]

other Judges thereof, and to the persons administering the Government of the said territories :

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Fourteenth day of May, in the Twenty-fifth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty two, did erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William aforesaid, and did constitute that Court to be a Court of Record

And whereas Her late Majesty Queen Victoria, by Letters Patent under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-eighth day of December in the Twenty ninth Year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty five, did revoke the said Letters Patent bearing date the Fourteenth day of May in the Year of Our Lord one thousand eight hundred and sixty two, but notwithstanding that revocation did continue the said High Court of Judicature at Fort William in Bengal and declare that the Court should continue to be a Court of Record

And whereas, upon full consideration of the premises, Her late Majesty Queen Victoria, by Letters Patent under that Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster the Seventeenth day of March, in the Twentieth year of Her Reign, in the Year of Our Lord One thousand eight hundred and sixty six, did erect and establish a High Court of Judicature for the North Western Provinces, which said Court is situated at Allahabad in the Province of Agra and is now called the High Court of Judicature at Allahabad, and did constitute that Court to be a Court of Record

And whereas by an Act of Parliament passed in the First and Second Years of Our Reign, and called the Indian High Courts Act, 1861, it was enacted, amongst other things, by section one, that the maximum number of Judges of a High Court of Judicature in India including the Chief Justice should be twenty,

and, by section two, that Our power under section sixteen of the Indian High Courts Act, 1861, might be exercised from time to time and that a High Court might be established under the said section sixteen in any portion of the territories within Our Dominions in India, whether or not included within the limits of the local jurisdiction of another High Court, and that, where such a High Court was established in any part of such territories included within the limits of the local jurisdiction of another High Court, it should be lawful for Us by Letters Patent to alter the local jurisdiction of that other High Court, and to make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits

And whereas the said Indian High Courts Acts, 1861 and 1911, have been repealed and re-enacted by an Act of Parliament passed in the Fifth and Sixth Years of Our Reign, and called the Government of India Act, 1915,

And whereas certain territories formerly subject to and included within the limits of the Presidency of Fort William in Bengal were by proclamation made by the Governor-General of India on the Twenty-second day of March in the Year of Our Lord One

Recital of establishment of
High Courts at Fort William
and Allahabad

Recital of Act 1 & 2 Geo
5 c 13

Recital of Act 5 & 6 Geo
5, c 61

Recital of creation of Pro-
vince of Bihar and Orissa.

Let. Pat. [Patna.]

Cls. 1-5

thousand nine hundred and twelve, constituted a separate Province, called the Province of Bihar and Orissa, and are now governed by a Lieutenant Governor in Council

1 Now know ye that We, upon full consideration of the premises, and of Our Special grace, certain knowledge, and mere motion, have thought fit to erect and establish, and by these presents We do accordingly for Us, Our Heirs and Successors, erect and establish for the Province of Bihar and Orissa aforesaid, with effect from the date of the publication of these presents in the Bihar and Orissa Gazette, a High Court of Judicature, which shall be called the High Court of Judicature at Patna, and We do hereby constitute the said Court to be a Court of Record

2 And We do hereby appoint and ordain that the High Court of Judicature at Patna shall, until further or other provision be made by Us, or Our Heirs and Successors, in that behalf, in accordance with section one hundred and one of the said recited Government of India Act, 1915, consist of a Chief Justice and six other Judges, the first Chief Justice being Sir Edward Maynard Des Champs Chamier, Knight, and the six other Judges being Saiyid Shurf ud din, Esquire, Edmund Pelly Chapman, Esquire, Baranta Kumar Mullick, Esquire, Francis Reginald Roe, Esquire, the Honourable Cecil Atkinson and Jowala Persad, Esquire, being respectively qualified as in the said Act is declared

3 And We do hereby ordain that the Chief Justice and every other Judge of the High Court of Judicature at Patna previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before such authority or person as the Lieutenant Governor in Council may commission to receive it —

"I, A B, appointed Chief Justice [or a Judge] of the High Court of Judicature at Patna, do solemnly declare that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment "

4 And We do hereby grant, ordain and appoint that the High Court of Judicature at Patna shall have and use, as occasion may require, a seal bearing a device and impression of Our Royal arms within an exergue or label surrounding the same, with this inscription, "The Seal of the High Court at Patna And We



Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section One hundred and five of the Government of India Act, 1915 and We do further grant, ordain and appoint that whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby authorised and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or the possession

5 And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Patna shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court

Writ &c, to issue in name of the Crown, and under seal

Let. Pat. [Patna.]

Cls. 6-9

6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Patna from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor in Council, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent And We do hereby ordain that every such appointment shall be forthwith submitted to the approval of the Lieutenant Governor in Council and shall be either confirmed or disallowed by the Lieutenant Governor in Council And it is Our further will and pleasure, and We do hereby, for Us, Our heirs and successors, give, grant, direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively and as the Lieutenant Governor in Council subject to the control of the Governor General in Council, may approve of Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Admission of Advocates, Vakils and Attorneys

7 And We do hereby authorize and empower the High Court of Judicature at Patna to approve admit and enrol such and so many Advocates, Vakils and Attorneys, as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions, determine and subject to such rules and directions

8 And We do hereby ordain that the High Court of Judicature at Patna shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at Law of the said High Courts and shall be empowered to remove or to suspend from practice on reasonable cause, the said Advocates, Vakils or Attorneys at Law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear plead or act on his own behalf, or on behalf of a co suitor

Civil Jurisdiction of the High Court

9 And We do further ordain that the High Court of Judicature at Patna shall have power to remove, and to try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Let. Pat. [Patna.]

Cls. 10-14

10 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made in the exercise of appellate jurisdiction in respect of a decree or order made on or after the first day of February, 1929, in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one or appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided

11 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Civil Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

12 And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Bihar and Orissa as that which was vested in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents

Law to be administered by the High Court

13 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Patna in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided be the law or equity which would have been applied to such case by any local Court having jurisdiction therein

14 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Patna to each case coming before it in the exercise of its appellate jurisdiction such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Let. Pat. [Patna.]

Cls. 15-21

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Patna shall have ordinary original criminal jurisdiction in respect of all such persons within the Province of Bihar and Orissa as the High Court of Judicature at Fort William in Bengal had such criminal jurisdiction over immediately before the publication of these presents

Ordinary original criminal
jurisdiction of the High
Court

16 And We do further ordain that the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

17 And We do further ordain that the High Court of Judicature at Patna shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any Magistrate or other officer specially empowered by the Government in that behalf

Extraordinary original
criminal jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Patna from any sentence or order passed or made by the Courts of original criminal jurisdiction which may be constituted by one or more judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

No appeal from High
Court exercising original
jurisdiction

Court may reserve points
of law

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Patna shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court may seem right

High Court to review
cases on points of law reserv-
ed by one or more Judges
of the High Court

20 And We do further ordain that the High Court of Judicature at Patna shall be a Court of Appeal from the Criminal Courts of the Province of Bihar and Orissa and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the High Court of Judicature at Fort William in Bengal by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Patna by any law made by competent legislative authority for India

Appeals from other Cri-
minal Courts in the Province
of Bihar and Orissa

21 And We do further ordain that the High Court of Judicature at Patna shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction and shall have power to hear and determine all such cases referred to it by the Session Judges, or by any other officers in the Province of Bihar and Orissa who were immediately before the publication of these presents, authorized to refer cases to the High Court of Judicature at Fort William in Bengal

Hearing of referred cases
and revision of criminal
trials

Let. Pat. [Patna.]

Cls. 21-26 and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Province of Bihar and Orissa, as were, immediately before the publication of these presents, subject to reference to or revision by the High Court of Judicature at Fort William in Bengal

22 And We do further ordain that the High Court of Judicature at Patna shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such case belongs in ordinary course to the jurisdiction of some other officer or Court

High Court may direct the transfer of a case from one Court to another

Criminal Law

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Patna, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal reference or revision, charged with any offence for which provision is made by Act No XLV of 1860, called the "Indian Penal Code," or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Offenders to be punished under Indian Penal Code

Admiralty Jurisdiction

24 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such civil and maritime jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions as was so exercisable by the High Court of Judicature at Fort William in Bengal

Civil

25 And We do further ordain that the High Court of Judicature at Patna shall have and exercise in the Province of Bihar and Orissa, all such criminal jurisdiction as was exercisable therein immediately before the publication of these presents by the High Court of Judicature at Fort William in Bengal as a Court of Admiralty, or otherwise in connection with maritime matters or matters of prize

Criminal

Testamentary and Intestate Jurisdiction

26 And We do further ordain that the High Court of Judicature at Patna shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Province of Bihar and Orissa by the High Court of Judicature at Fort William in Bengal, in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chatties, credits and all other effects whatsoever of persons dying intestate. Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration

Testamentary and intestate jurisdiction

Let. Pat. [Patna.]

Cls. 27-30

Matrimonial Jurisdiction

27 And We do further ordain that the High Court of Judicature at Patna shall have jurisdiction, within the Province of Bihar and Orissa, in matters matrimonial between Our subjects professing the Christian religion. Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Province, which is lawfully possessed of that jurisdiction.

Powers of single Judges and Division Courts

28 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Patna, in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section One hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there be a majority, but if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

Amendment—The words in the last clause after the words "equally divided" were substituted for the words "the opinion of the senior Judge shall prevail" by amended Letters Patent of 1928. See note under clause 36 of the Calcutta Letters Patent.

Contempt of Court—A Full Bench of the High Court of Patna has held that a Division Bench has power under this clause to issue a rule to show cause against commitment for contempt (u).

Civil Procedure

29 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure, being an Act No V of 1908 passed by the Governor General in Council, and the provisions of any law which has been or may be made amending or altering the same by competent legislative authority for India to all proceedings in its testamentary, intestate and matrimonial jurisdiction, respectively.

Criminal Procedure

30 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Patna, in the exercise of its ordinary original criminal jurisdiction shall be regulated by the procedure and practice which was in use in the High Court of Judicature at Fort William in Bengal immediately before the publication of these presents subject to any law which has been or may be made in relation thereto by competent legislative authority for India, and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, being Act No V of 1898, passed by the Governor General in Council, or by such further or other laws in relation to criminal procedure as may have been or may be made by such authority as aforesaid.

Let. Pat. [Patna.]

Cls. 31-34

Appeals to Privy Council

31 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council, in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature of Patna made on appeal, and from any final judgment decree or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents. Provided in either case, that the sum or matter at issue is of the amount of value of not less than 10,000 rupees, or that such judgment decree or order involves directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order of the said High Court.

orders as are now in force, or may from time to time be made respecting appeals to Our selves in Council from the Courts of the Province of Bihar and Orissa except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and order as We may, with the advice of Our Privy Council, hereafter make in that behalf

32 And We do further ordain that it shall be lawful for the High Court of Judicature at Patna, at its discretion, on the motion, or, if the said High Court be not sitting then, for any Judge of the said High Court, upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our heirs and successors in Our or their Privy Council subject to the same rules regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

33 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Patna made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors in Council provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require but subject always to such rules and orders as are now in force or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Bihar and Orissa

34 And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Patna to Us Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a true and correct copy of all evidence, proceedings, judgments decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal

Let. Pat. [Patna.]

Cls. 34-38

such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our heirs and successors in Our or their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges, for or against the judgment or determination appealed against. And we do further ordain that the said High Court shall, in all cases of appeal to Us, Our heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed.

*Exercise of jurisdiction elsewhere than at the usual place
of sitting of the High Court*

35 And We do further ordain that, unless the Governor General in Council otherwise directs, one or more Judges of the High Court of Judicature at Patna shall visit the Division of Orissa, by way of circuit, whenever the Chief Justice from time to time appoints, in order to exercise in respect of cases arising in that Division the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915, vested in the said High Court. Provided always that such visits shall be made not less than four times in every year, unless the Chief Justice, with the approval of the Lieutenant Governor in Council otherwise directs. Provided also that the said High Court shall have power from time to time to make rules with the previous sanction of the Lieutenant Governor in Council, for declaring what cases or class of cases arising in the Division of Orissa shall be heard at Patna and not in that Division and that the Chief Justice may, in his discretion, order that any particular case arising in the Division of Orissa shall be heard at Patna or in that Division.

36 And We do further ordain that whenever it appears to the Lieutenant Governor in Council subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, 1915 vested in the High Court of Judicature at Patna should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly.

37 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Patna visit any place under the 35th or the 36th clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India.

Delegation of Duties to Officers

38 The High Court of Judicature at Patna may from time to time make rules for delegating to any Registrar Prothonotary or Master or other official of the Court any Judicial, quasi-judicial and non-judicial duties.

Let. Pat. [Patna.]

Cls. 39-41 *Cessation of Jurisdiction of the High Court of Judicature at Fort William in Bengal*

39 And We do further ordain that the jurisdiction of the High Court of Judicature at Fort William in Bengal in any matter in which jurisdiction is by these presents given to the High Court of Judicature at Patna shall cease from the date of the publication of these presents, and that all proceedings pending in the former Court on that date in reference to any such matter shall be transferred to the latter Court

Provided, first, that the High Court of Judicature at Fort William in Bengal shall continue to exercise jurisdiction—

- (a) in all proceedings pending in that Court on the date of the publication of these presents in which any decree or order, other than an order of an interlocutory nature, has been passed or made by that Court, or in which the validity of any such decree or order is directly in question,* and
- (b) in all proceedings [not being proceedings referred to in paragraph (a) of this clause] pending in that Court on the date of the publication of these presents under the 13th, 15th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 32nd, 33rd, 34th, or 35th clause of the Letters Patent bearing date at Westminster the Twenty eighth day of December, in the Year of Our Lord One thousand eight hundred and sixty five, relating to that Court and
- (c) in all proceedings instituted in that Court, on or after the date of the publication of these presents, with reference to any decree or order passed or made by that Court

Provided, secondly, that, if any question arises as to whether any case is covered by the first proviso to this clause, the matter shall be referred to the Chief Justice of the High Court of Judicature at Fort William in Bengal, and his decision shall be final

Calls for Records etc, by the Government

40 And it is Our further will and pleasure that the High Court of Judicature at Patna shall comply with such requirements as may be made by the Lieutenant Governor in Council for records returns and statements, in such form and manner as he may deem proper

Power of Indian Legislatures

41 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative power of the Governor General in Legislative Council and also of the Governor General in Council under section Seventy one of the Government of India Act, 1915, and also of the Governor General in cases of emergency under section Seventy two of that Act, and may be in all respects amended and altered thereby

In Witness whereof we have caused these Our Letters to be made Patent Witness Ourself at Westminster the Ninth day of February, in the Year of Our Lord One thousand nine hundred and sixteen and in the sixth year of Our Reign

By Warrant under the King's Sign Manual

(Signed) SCHUSTER

Let. Pat. [Lahore.]

Cls. 4-7

4. And We do hereby grant, ordain and appoint that the High Court of Judicature at Lahore shall have and use as occasion may require, a Seal bearing a device and impression of Our Royal arms, within an exergue or label surrounding the same, with this inscription "The Seal of the High Court at Lahore" And We do further grant, ordain and appoint that the said seal shall be delivered to and kept in the custody of the Chief Justice, and in case of vacancy of the Office of Chief Justice, or during any absence of the Chief Justice, the same shall be delivered over and kept in the custody of the person appointed to act as Chief Justice under the provisions of section one hundred and five of the Government of India Act, 1915, and We do further grant, ordain and appoint that, whensoever the office of Chief Justice or of the Judge to whom the custody of the said seal be committed is vacant, the said High Court shall be, and is hereby, authorized and empowered to demand, seize and take the said seal from any person or persons whomsoever, by what ways and means soever the same may have come to his, her or their possession



- 5 And We do hereby further grant, ordain and appoint that all writs, summonses, precepts, rules, orders and other mandatory process to be used issued or awarded by the High Court of Judicature at Lahore shall run and be in the name and style of Us, or of Our heirs and successors, and shall be sealed with the seal of the said High Court

Writs etc to issue in
name of the Crown and
under seal

- 6 And We do hereby authorize and empower the Chief Justice of the High Court of Judicature at Lahore from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed from time to time by the Lieutenant Governor of the Punjab, to appoint so many and such clerks and other ministerial officers as may be found necessary for the administration of justice and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent, And it is Our further will and pleasure and we do hereby, for Us, Our heirs and successors give, grant direct and appoint, that all and every the officers and clerks to be appointed as aforesaid shall have and receive respectively such reasonable salaries as the Chief Justice may, from time to time, appoint for each office and place respectively, and as the Lieutenant Governor of the Punjab subject to the control of the Governor General in Council, may approve of Provided always, and it is Our will and pleasure, that all and every the officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said Court, so long as they hold their respective offices, but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave of absence under any rules prescribed from time to time by the Governor General in Council, and to absent himself from the said limits during the term of such leave in accordance with the said rules

Appointment of officers

Admission of Advocates, Vakils and Attorneys

- 7 And We do hereby authorize and empower the High Court of Judicature at Lahore to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court may seem meet, and such Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court, and to plead or to act, or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in
admitting Advocates, Vakils
and Attorneys

Let. Pat. [Lahore.]

Cls. 8-11

8 And We do hereby ordain that the High Court of Judicature at Lahore shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys at Law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co suitor

Powers of High Court in making rules for the qualifications, etc. of Advocates, Vakils and Attorneys

have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys at Law of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakils or Attorneys at Law, and no person whatsoever but such Advocates, Vakils or Attorneys shall be allowed to act or to plead for, or on behalf of, any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co suitor

Civil Jurisdiction of the High Court

9 And We do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

Extraordinary original civil jurisdiction

have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court

10 And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence, under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or their Privy Council, as hereinafter provided.

Appeal to the High Court from Judges of the Court

And We do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence, under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our heirs or successors in Our or their Privy Council, as hereinafter provided.

11 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

Appeal from other Civil Courts in the Provinces of the Punjab and Delhi

And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Civil Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

Let. Pat. [Lahore.]

Cls. 12-19

12 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority with respect to the persons and estates, of infants, idiots and lunatics within the Provinces of the Punjab and Delhi as that which was vested in the Chief Court of the Punjab immediately before the publication of these presents

Juris diction as to Infants and Lunatics

Law to be administered by the High Court

13 And We do further ordain that, with respect to the law or equity to be applied to each case coming before the High Court of Judicature at Lahore in the exercise of its extraordinary original civil jurisdiction, such law or equity shall, until otherwise provided, be the law or equity which would have been applied to such case by any local Court having jurisdiction therein.

By the High Court in the exercise of extraordinary original civil jurisdiction

14 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Lahore to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

By the High Court in the exercise of appellate jurisdiction

Criminal Jurisdiction

15 And We do further ordain that the High Court of Judicature at Lahore shall have ordinary original criminal jurisdiction in respect of all such persons within the Provinces of the Punjab and Delhi as the Chief Court of the Punjab had such criminal jurisdiction over immediately before the publication of these presents

Ordinary original criminal jurisdiction of the High Court

16 And We do further ordain that the High Court of Judicature at Lahore, in the exercise of its ordinary original criminal jurisdiction shall be empowered to try all persons brought before it in due course of law

Jurisdiction as to persons

17 And We do further ordain that the High Court of Judicature at Lahore shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court subject to its superintendence, and shall have authority to try at its discretion any such persons brought before it on charges preferred by any magistrate or other officer, specially empowered by the Government in that behalf

Extraordinary original criminal jurisdiction

18 And We do further ordain that there shall be no appeal to the High Court of Judicature at Lahore from any sentence or order passed or made by the Courts of original criminal jurisdiction which or more Judges of the said High Court But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court

No appeal from High Court exercising original jurisdiction may be constituted by one Court may reserve points of law

19 And We do further ordain that, on such point or points of law being so reserved as aforesaid, the High Court of Judicature at Lahore shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to direct judgment and sentence as to the said High Court may seem right

High Court to review as on points of law reserved by one or more of the High Court

Let. Pat. [Lahore.]

Cls. 20-24

20 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of Appeal from the Criminal Courts of the Provinces of the Punjab and Delhi and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as were, immediately before the date of the publication of these presents, subject to appeal to the Chief Court of the Punjab by virtue of any law then in force, or as may after that date be declared subject to appeal to the High Court of Judicature at Lahore by any law made by competent legislative authority for India

21 And We do further ordain that the High Court of Judicature at Lahore shall be a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, and shall have power to hear and determine all such cases referred to it by the Sessions Judges, or by any other officers in the Provinces of the Punjab and Delhi who were, immediately before the publication of these presents, authorized to refer cases to the Chief Court of the Punjab and to revise all such cases tried by any officer or Court possessing criminal jurisdiction in the Provinces of the Punjab and Delhi, as were, immediately before the publication of these presents, subject to reference to or revision by the Chief Court of the Punjab

22 And We do further ordain that the High Court of Judicature at Lahore shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also to direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it though such case belongs in ordinary course to the jurisdiction of some other officer or Court

Criminal Law

23 And We do further ordain that all persons brought for trial before the High Court of Judicature at Lahore, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a court of appeal, reference or revision charged with any offence for which provision is made by Act No XLV of 1860, called the Indian Penal Code, or by any Act amending or excluding the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise

Testamentary and Intestate Jurisdiction

24 And We do further ordain that the High Court of Judicature at Lahore shall have the like power and authority as that which was immediately before the publication of these presents lawfully exercised within the Provinces of the Punjab and Delhi by the Chief Court of the Punjab in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects whatsoever of persons dying intestate Provided always that nothing in these Letters Patent contained shall interfere with the provisions of any law which has been made by competent legislative authority for India, by which power is given to any other Court to grant such probates and letters of administration

Let. Pat. [Lahore.]
Cls. 25-29

Matrimonial Jurisdiction

25 And We do further ordain that the High Court of Judicature at Lahore shall have jurisdiction, within the Provinces of the Punjab and Delhi in matters matrimonial between Our subjects professing the Christian religion. Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court, not established by Letters Patent within the said Provinces, which is lawfully possessed of that jurisdiction.

Powers of single Judges and Division Courts

26 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Lahore in the exercise of its original or appellate jurisdiction may be performed by any Judge, or by any Division Court, thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, 1915, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges if there be a majority but if the Judges be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

Amendment—The words in the last clause after the words 'equally divided' were substituted for the words 'the opinion of the senior Judge shall prevail' by the amended Letters Patent of 1928. See note under clause 36 of the Calcutta Letters Patent.

Civil Procedure

27 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore from time to time to make rules and orders for regulating the practice of the Court and for the purpose of adopting as far as possible the provisions of the Code of Civil Procedure being an Act No V of 1908, passed by the Governor General in Council and the provisions of any law which has been or may be made, amending or altering the same by competent legislative authority for India to all proceedings in its testamentary, intestate and matrimonial jurisdiction respectively.

Criminal Procedure

28 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Lahore shall be regulated by the Code of Criminal Procedure being an Act No V of 1898 passed by the Governor General in Council or by such further or other law in relation to criminal procedure as may have been or may be made by competent legislative authority for India.

Appeals to Privy Council

29 And We do further ordain that any person or persons may appeal to Us, Our heirs and successors, in Our or their Privy Council in any matter not being of criminal jurisdiction, from any final judgment, decree or order of the High Court of Judicature at Lahore made on appeal, and from any final judgment, decree or order made in the

Let. Pat. [Lahore.]

Cls. 29-32

exercise of original jurisdiction by Judges of the said High Court, or of any Division Court from which an appeal does not lie to the said High Court under the provisions contained in the 10th clause of these presents. Provided in either case, that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10,000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our heirs or successors, in Our or their Privy Council, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

30 And We do further ordain that it shall be lawful for the High Court of Judicature at Lahore at its discretion, on the motion, or, if the said High Court be not sitting, then for any Judge of the said High Court, upon the petition, of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court, in any such proceeding as aforesaid, not being of criminal jurisdiction, to grant permission to such party to appeal against the same to Us, Our heirs and successors, in Our or their Privy Council subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees and orders

31 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders, as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi

32 And We do further ordain that, in all case of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Lahore to Us, Our heirs or successors, in Our or their Privy Council, such High Court shall certify and transmit to Us Our heirs and successors in Our or their Privy Council, a true and correct copy of all evidence proceedings judgments decrees and orders had or made, in such cases appealed, so far as the same have relation to the matters of appeal, such copies to be certified under the seal of the said High Court And that the said High Court shall also certify and transmit to Us, Our heirs and successors, in Our or their Privy Council, a copy of the reasons given by the Judges of such Court or by any of such Judges, for or against the judgment or determination appealed against And We do further ordain that the said High Court shall in all cases of appeal to Us Our heirs or successors conform to and execute, or cause to be executed, such judgments and orders as

Appeal from interlocutory judgment

Appeal in criminal cases

For as to transmission of copies of evidence and other documents

Let. Pat. [Lahore.]

Cls. 32-37 We, Our heirs or successors, in Our or their Privy Council, may think fit to make in the premises, in such manner as any original judgment, decree or decretal orders, or other order or rule of the said High Court, should or might have been executed

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

33 And We do further ordain that whenever it appears to the Lieutenant Governor of the Punjab, subject to the control of the Governor General in Council, convenient that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act 1915, vested in the High Court of Judicature at Lahore should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court, other than the usual place of sitting of the said High Court, or at several such places by way of circuit, one or more Judges of the Court shall visit such place or places accordingly

34 And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Lahore visit any place under the 33rd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by competent legislative authority for India

Delegation of Duties to Officers

35 The High Court of Judicature at Lahore may from time to time make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi judicial and non judicial duties

Calls for records, etc., by the Government

36 And it is Our further will and pleasure that the High Court of Judicature at Lahore shall comply with such requisitions as may be made by the Governor General in Council or by the Lieutenant Governor of the Punjab for records, returns and statements, in such form and manner as he may deem proper

Powers of Indian Legislature

37 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor General in Legislative Council and also of the Governor General in Council under section seventy-one of the Government of India Act, 1915, and also of the Governor General in cases of emergency under section seventy two of that Act, and may be in all respects amended and altered thereby

In Witness thereof We have caused these Our Letters to be made Patent

Witness Ourselves at Westminster the 21st day of March in the Year of Our Lord one thousand nine hundred and nineteen and in the ninth Year of Our reign

By Warrant under the King's Sign Manual

(Signed) SCHUSTER

Let. Pat. [Rangoon.]

Cls. 7-11

Admission of Advocates and Pleaders

7. And We do hereby authorize and empower the High Court of Judicature at Rangoon to approve, admit and enrol such and so many Advocates, Pleaders and Attorneys as to the said High Court may seem meet and such Advocates, Pleaders and Attorneys shall be and are hereby authorized to appear for the sutors of the said High Court and to plead, or to act, or to plead and act, for the said sutors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions

Powers of High Court in admitting Advocates, Pleaders and Attorneys.

See In the matter of certain First Grade Advocaters (r)

8. And We do hereby ordain that the High Court of Judicature at Rangoon shall have power to make rules from time to time for the qualification and admission of proper persons to be Advocates, Pleaders and Attorneys of the said High Court, and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Pleaders or Attorneys and no person whatsoever but such Advocates, Pleaders or Attorneys shall be allowed to act or to plead, for, or on behalf of, any sutor of the said High Court, except that any sutor shall be allowed to appear, plead or act on his own behalf or on behalf of a co sutor

Powers of High Court in making rules for the qualifications etc. of Advocates, Pleaders and Attorneys

Civil Jurisdiction of the High Court

9 And We do hereby ordain that the High Court of Judicature at Rangoon shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the local legislature and until some local limits shall be so declared and prescribed, within the limits of the ordinary original civil jurisdiction of the Chief Court of Lower Burma immediately before the publication of these presents, and the ordinary original civil jurisdiction of the said High Court shall not extend beyond the limits for the time being declared and prescribed as the local limits of such jurisdiction.

Local limits of the ordinary original civil jurisdiction

10 And We do further ordain that the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen, either wholly or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell, or carry on business, or personally work for gain within such limits, except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Rangoon Small Cause Court

Original jurisdiction as to suits.

11 And We do further ordain that the High Court of Judicature at Rangoon shall have power to remove, and to try and determine, as a Court of extraordinary original civil jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence, when the said High Court may think proper to do so, either on the

Extraordinary original civil jurisdiction

Let. Pat. [Rangoon.]

Cls. 11-14

Application for Transfer.—Application for transfer should be heard by a Judge sitting on the Original Side of the High Court (w) The original side of the High Court is not competent to transfer a proceeding under the Provincial Insolvency Act from one Court to another (x)

12 And We do further ordain that when the plaintiff has several causes of action against the defendant, such causes of action not being for land or other immovable property, and the High Court of Judicature at Rangoon shall have original jurisdiction in respect of one such cause of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make such order for trial of the same as to the said High Court shall seem fit

13 And We do further ordain that an appeal shall lie to the High Court of Judicature at Rangoon, from the judgment (not being a judgment made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court pursuant to section 108 of the Government of India Act made in the exercise of appellate jurisdiction in respect of a decree or order made on or after the first day of February, 1929, in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal, that the right of appeal from other judgments of Judges of the said High Court of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.

14 And

Appeal from a Court

of the Judicial Commissioner of Upper Burma was a Court of Appeal and from all other Civil Courts, whether within or without the Province of Burma, for which the said High Court is declared to be a Court of Appeal by any law made by the local legislature or by competent legislative authority for India and shall exercise appellate jurisdiction in the exercise of these presents in force, or as may after that date be declared subject to appeal to the said High Court by any law made by the local legislature or by competent legislative authority for India

(w) *Jupiter General Insurance Co., Ltd. v. Abdul Aziz* (1923) 1 Rang 220 76 I C 479 (23) A R 185

(x) *Oomer Ahmed Brothers In the matter of* (1926) 4 Rang 504 100 I C 265 (27) A R 105

Let. Pat. [Rangoon.]

Cls. 15-21

15 And We do further ordain that the High Court of Judicature at Rangoon shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics within the Province of Burma, as that which was vested in the Chief Court of Lower Burma and the Court of the Judicial Commissioner of Upper Burma immediately before the publication of these presents

Jurisdiction as to Infants and Lunatics

16. And We do further ordain that the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court of Judicature at Rangoon, and the said High Court, and any such Judge thereof, shall have and exercise within the Province of Burma, such power and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma

Provision with respect to the Insolvent Court

17 And We do further ordain that, with respect to the law to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such law shall be the law which would have been applied by the Chief Court of Lower Burma to such case if these

Law to be administered by the High Court in the exercise of ordinary original civil jurisdiction

Letters Patent had not issued

18 And We do further ordain that, with respect to the equity to be applied to each case coming before the High Court of Judicature at Rangoon in the exercise of its ordinary original civil jurisdiction, such equity shall be the equity as nearly as may be which the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction is authorized to apply to such case

Equity to be administered by the High Court in the exercise of ordinary original civil jurisdiction

19 And We do further ordain that with respect to the law or equity and rule of good conscience to be applied to each case coming before the High Court of Judicature at Rangoon, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall, until otherwise provided, be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction thereon

Law and equity to be administered by the High Court in the exercise of extraordinary original civil jurisdiction

20 And We do further ordain that, with respect to the law or equity and rule of good conscience to be applied by the High Court of Judicature at Rangoon, to each case coming before it in the exercise of its appellate jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which the Court in which the proceedings in such case were originally instituted ought to have applied to such case

Law and equity to be administered by the High Court in the exercise of appellate jurisdiction

CRIMINAL JURISDICTION

21 And We do further ordain that the High Court of Judicature at Rangoon shall have ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction, and also in respect of all persons beyond such limits over whom the Chief Court of Lower Burma has such criminal jurisdiction immediately before the publication of these presents

Ordinary original criminal jurisdiction of the High Court

Let. Pat. [Rangoon.]

Cls. 33-36

Matrimonial Jurisdiction

33 And We do further ordain that the High Court of Judicature at Rangoon shall have jurisdiction, within the Province of Burma, in matters matrimonial between Our subjects professing the Christian religion. Provided always that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Letters Patent within the said Province which is lawfully possessed of that jurisdiction.

Powers of Single Judges and Division Courts

34 And We do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Rangoon in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court, thereof, appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but, if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it."

Amendment—The words in the last clause after the words "equally divided" were substituted for the words 'the opinion of the senior Judge shall prevail' by the amended Letters Patent of 1928. See note under clause 36 of the Calcutta Letters Patent.

Civil Procedure

35 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, testamentary, intestate and matrimonial jurisdiction respectively. Provided that such rules and orders shall not be made by the local legislature or by competent legislative authority for India.

Criminal Procedure

36 And We do further ordain that the proceedings in all criminal cases brought before the High Court of Judicature at Rangoon shall be regulated by the Criminal Procedure, being an Act, passed by the Legislative Council, or by any other law which may have been or may be made by the local legislature or by competent legislative authority for India.

Let. Pat. [Rangoon.]

Cls. 37-40

Appeals to Privy Council

37 And We do further ordain that any person or persons may appeal to Us, Our Heirs and Successors in Our or Their Privy Council, in any matter not being of criminal jurisdiction from any final judgment, decree or order of the High Court of Judicature at Rangoon made on appeal and from any final judgment, decree or order, made in the exercise of original jurisdiction of Judges of the said High Court or of any Division Court, from which an appeal shall not lie to the said High Court under the provisions contained in the 13th clause of these presents

Provided in either case that the sum or matter at issue is of the amount or value of not less than 10,000 rupees, or that such judgment, decree or order involves, directly or indirectly, some claim, demand or question to or respecting property amounting to or of the value of not less than 10 000 rupees, or from any other final judgment, decree or order made either on appeal or otherwise as aforesaid, when the said High Court declares that the case is a fit one for appeal to Us, Our Heirs and Successors, in Our or Their Privy Council but subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the Province of Burma, except so far as the said existing rules and orders respectively are hereby varied, and subject also to such further rules and orders as We may, with the advice of Our Privy Council, hereafter make in that behalf

38 And We do further ordain that it shall be lawful for the High Court of Judicature at Rangoon at its discretion, on the motion, or if the said High Court be not sitting, then for any Judge of the said High Court upon the petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree or order of the said High Court in any such proceedings as aforesaid, not being of criminal jurisdiction to grant permission to such party to appeal against the same to Us, Our Heirs and Successors, in Our or Their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgment, decrees and orders

39 And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Rangoon made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 24th clause of these presents, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order or sentence to appeal to Us, Our Heirs and Successors, in Our or Their Privy Council, provided the said High Court shall declare that the case is a fit one for such appeal and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and order as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Province of Burma

40 And We do further ordain that, in all cases of appeal made from any judgment, decree, order or sentence of the High Court of Judicature at Rangoon to Us, Our Heirs and Successors, in Our or Their Privy Council such High Court shall certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council a true and correct copy of all evidence, proceedings, judgment, decrees, and orders had or made, in such cases appealed, so far as the same have

Let. Pat. [Rangoon.]

Cls. 40-45

relation to the matters of appeal, such copies to be certified under the seal of the said High Court. And that the said High Court shall also certify and transmit to Us, Our Heirs and Successors, in Our or Their Privy Council, a copy of the reasons given by the Judges of such Court, or by any of such Judges for or against the judgment or determination appealed against. And We do further ordain that the said High Court shall, in all cases of appeal to Us, Our Heirs and Successors, in Our or Their Privy Council conform to and execute, or cause to be executed such judgments and orders as We, Our Heirs and Successors in Our or Their Privy Council may think fit to make in the premises, in such manner as any original judgment, decree or decretal order or other order or rule of the said High Court should or might have been executed.

Exercise of Jurisdiction elsewhere than at the usual place of sitting of the High Court

41. And We do further ordain that unless the Governor of Burma in Council otherwise directs one or more Judges of the High Court of Judicature at Rangoon, as the Chief Justice may from time to time direct shall sit at Mandalay, in order to exercise in respect of cases arising in such areas in Upper Burma as the Governor of Burma in Council may direct the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the said High Court provided that the Chief Justice may, in his discretion, order that any particular case arising in the said areas in Upper Burma shall be heard at Rangoon.

42. And We do further ordain that whenever it appears convenient to the Governor of Burma in Council that the jurisdiction and power by these Our Letters Patent, or by or under the Government of India Act, vested in the High Court of Judicature at Rangoon should be exercised in any place within the jurisdiction of any Court subject to the superintendence of the said High Court other than the usual place of sitting of the said High Court or at several such places by way of circuit, one or more Judges of the said High Court shall visit such place or places accordingly.

43. And We do further ordain that whenever any Judge or Judges of the High Court of Judicature at Rangoon shall visit or sit at any place under the 41st or the 42nd clause of these presents the proceedings in cases before him or them at such place shall be regulated by any law relating thereto which has been or may be made by the local legislature or by a competent legislative authority for India.

Provisions regarding pending proceedings

44. And We do further ordain that all suits, appeals, revisions, applications, reviews, executions and other proceedings whatsoever pending immediately before the publication of these presents in the Chief Court of Lower Burma, or before the Judicial Commissioner of Upper Burma or in the Court of the Judicial Commissioner of Upper Burma, in the exercise of any jurisdiction vested in them by any law, shall be continued and concluded in the High Court of Judicature at Rangoon as if the same had been instituted in the said High Court, and the said High Court shall in relation to all such proceedings exercise the jurisdiction given to it by these presents.

Delegation of Duties to Officers

45. The High Court of Judicature at Rangoon may, from time to time, make rules for delegating to any Registrar, Prothonotary or Master or other official of the Court any judicial, quasi judicial and non judicial duties.

~

Let. Pat. [Rangoon.]

Cls. 46, 47

Calls for Records, etc., by the Government

- 46 And it is Our further will and pleasure that the High Court of Judicature at Rangoon shall comply with such requisitions as may be made by the Governor General of India in Council or by the Governor of Burma in Council for records, returns and statements in such form and manner as he may deem proper

Powers of Indian Legislatures

- 47 And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the local legislature and of the Indian legislature and also of the Governor General in Council under section seventy one of the Government of India Act, and also of the Governor General under section seventy two of that Act, and may be in all respects amended and altered thereby

In WITNESS whereof We have caused these Our Letters to be made Patent

WITNESS Ourself at Westminster the eleventh day of November in the Year of our Lord one thousand nine hundred and twenty two and in the thirteenth Year of Our reign.

BY WARRANT under the King's Sign Manual

(Signed) SCHUSTER

— o —

petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat.

O 7, r 3—*After O 7, r 3 add the words—*

and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without at the option of the party the same are in terms of the local measures.

O 7, r 9—*Cancel clause (1) Rule 9, Order III, and substitute therefor the following —*

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1) (a) The plaintiff shall present with his plaint —

(i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants or for any other sufficient reason permits him to present a like number of concise statements of the nature of the claim made or of the relief claimed in the suit in which case he shall present such statements

(ii) draft forms of summons and fees for the service thereof

O 7 r 11—*Add the following as clause (c) to Rule 11, Order III —*

(c) Where any of the provisions of Rule 9 (1) (a) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so

O 9 r 9—*Make the following alterations —*

(a) *Renumber* sub rule (2) Rule 9 Order IX, as sub rule (3) and *insert* therein after the words notice of the application, the words with a copy thereof (or concise statement as the case may be)

(b) *Insert* the following as sub rule (2) Rule 9 *ibid* —

(2) The plaintiff shall for service on the Opposite Parties present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties or

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements

O 9 r 13—*Renumber* Rule 13 Order 9 as Rule 13 (1) and *add the following as* Rule 13 (2) —

(2) The defendant shall for service on the Opposite Party, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties or

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements

APPENDIX III.

Rules made by the High Court of Calcutta, under s. 122.

O. 5, r. 5.—*Insert the words "for the ascertainment whether the suit will be contested" after the words "issues only" in rule 5, Order V, First Schedule to the Code of Civil Procedure, 1908.*

O. 5, rr. 15, 17.—*Cancel Rules 15 and 17, Order V, and substitute therefor the following —*

15 Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Article 164 of Schedule I of the Limitation Act, 1908, not to have been duly served

Explanation—A servant is not a member of the family within the meaning of this rule

17. Where the defendant or his agent or such other persons as aforesaid refuses to sign the acknowledgment or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed

O. 5, r. 19—*Cancel Rule 19, Order V, and substitute therefor the following —*

19 Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit

O. 5, r. 19A.—*Insert the following after Rule 19, Order V —*

19A A declaration made and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.

O. 6, r. 14.—*Insert the following after Rule 14, Order VI —*

14. (a) Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in rule 14 of this Order of the party's address for service. Such address may from time to time be changed by lodging in court a form duly filled up and stating the new address of the party and accompanied by a verified

petition The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purpose of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat

O. 7, r. 3—*After O. 7, r. 3, add the words—*

and when the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same are in terms of the local measures.

O. 7, r. 9—*Cancel clause (1), Rule 9, Order VII, and substitute therefor the following —*

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1) (a) The plaintiff shall present with his plaint :—

(i) as many copies on plain paper of the plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements,

(ii) draft forms of summons and fees for the service thereof "

O. 7, r. 11—*Add the following as clause (e) to Rule 11, Order VII —*

(e) Where any of the provisions of Rule 9 (1) (a) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so

O. 9, r. 9.—*Make the following alterations —*

(a) *Renumber sub rule (2), Rule 9, Order IX, as sub rule (3) and insert therein after the words 'notice of the application,' the words 'with a copy thereof (or concise statement as the case may be)'*

(b) *Insert the following as sub rule (2), Rule 9, ibid —*

"(2) The plaintiff shall, for service on the Opposite Parties, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements "

O. 9, r. 13—*Renumber Rule 13, Order 9, as Rule 13 (1) and add the following as Rule 13 (2) :—*

"(2) The defendant shall, for service on the Opposite Party, present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or,

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements "

Rules—Cal.

App. III.

0. 9. r 14.—*Cancel the word "therein" in Rule 14, Order 9, and substitute therefor the following words:—*

"together with a copy thereof (or concise statement as the case may be)."

0. 16. r 2.—*Cancel clauses (1) and (2) of Rule 2, Order XVI, and substitute therefor the following:—*

(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and his one-day attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, all reasonable remuneration for the time occupied both in giving evidence and in preparing any work of an expert character necessary for the case.

0. 16. r 3.—*Cancel Rule 3, Order XVI, and substitute therefor the following:—*

3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

0. 16. r 4.—*Cancel clause (1) of Rule 4, Order XVI, and substitute therefor the following:—*

(1) Where it appears to the Court or to such a person as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses of reasonable remuneration the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party claiming the summons, or the Court may discharge the person summoned without requiring him to give evidence, or may in such order such leave and discharge on such person as it thinks fit.

0. 16. r 7 A.—*Insert the following after Rule 7, Order XVI:—*

Rule 7 (a) (i). Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Justice or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order V shall apply to summonses personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party re-issue such summons to be served by the Court in like manner as a summons to a defendant.

0. 16. r 8.—*Cancel Rule 8, Order XVI, and substitute therefor the following:—*

(1) Every summons under this Order not being a summons made over to a party for service under Rule 7 (a) (i) of this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under Rule 2 of this Order.

O 16 r 21—*Cancel Rule 21, Order XXI, and substitute therefor the following —*

21 (1) When any party to a suit is required by any other party thereto to give evidence or to produce a document the provision as to witnesses shall apply to him so far as applicable

(2) When any party to a suit gives evidence on his own behalf, the Court may in its discretion permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing

O 18, r 2 A—*Insert the following as Rule 2 f Order XXI —*

2A Notwithstanding anything contained in clauses (1) and (2) of Rule 2 the Court may for sufficient reason go on with the hearing although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit

O 21, r 16—*In the first proviso to Rule 16 Order XVI, cancel the words ‘ and the decree shall not be executed until the Court has heard their objections (if any) to its execution ’ and substitute therefor the following words —*

and until the Court has heard their objections (if any) the decree shall not be executed provided that if with the application for execution an affidavit by the transferee admitting the transfer or an instrument of transfer duly registered be filed the Court may proceed with the execution of the decree pending the hearing of such objections

O 21 r 17—*In sub rule (1) Rule 17 Order XVI cancel the words ‘ the Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it ’ and substitute therefor the following words —*

the Court shall allow the defect to be remedied then and there or within a time to be fixed by it If the defect is not remedied within the time fixed the Court may reject the application

O 21 r 22—*Add the following as sub rule (3) Rule 29 Order XVI —*

(3) Omission to issue a notice in a case where notice is required under sub rule (1) or to record reasons in a case where notice is dispensed with under sub rule (2) shall not affect the jurisdiction of the Court in executing the decree

O 21 r 24—*Add the following to sub rule (3) Rule 21 Order XVI —*

and a day shall also be specified on or before which it shall be returned to the Court

O 21 r 26—*In sub rule (3) Rule 26 Order XVI cancel the words ‘ the Court may require such security from or impose such conditions upon the judgment debtor as it thinks fit ’ and substitute therefor the following words —*

the Court shall require security from the judgment debtor unless sufficient cause is shown to the contrary

O 21, r 31—*Substitute the words ‘ three months ’ for the words ‘ six months ’ in sub rules (2) and (3) of Rule 31 Order XVI*

O 21 r 32—*Substitute the words ‘ three months ’ for the words ‘ one year ’ in sub rule (3) Rule 32 Order XVI*

O 21 r 39—*Omit the words ‘ in the civil prison ’ in sub rule (5) Rule 39, Order XVI*

Rules—Cal.

App. III.

O 21 r 43—*Order XXI, Rule 43, shall read as follows —*

43 Where the property to be attached is movable property, other than agricultural produce in the possession of the judgment debtor the attachment shall be made by actual seizure and save as otherwise prescribed the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof

Provided that when the property seized does not in the opinion of the attaching officer exceed twenty rupees in value or is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value the attaching officer may sell it at once

O 21, r 45—*Add the following to sub rule (1) Rule 45 Order XXI —*

and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time

O 21 r 53—(a) *In sub rule (1) (b) insert after the words* then by the issue to such other Court *the words* and to any Court to which it has been transferred for execution *and also insert therein the words* or Courts *after the words* requesting such other Court

(b) *In sub rule (1) (b) cancel the words* to execute its own decree *and substitute therefor the words* to execute the attached decree with the consent of the said decree holder expressed in writing or the permission of the attaching Court

(c) *In sub rule (4) insert after the words* by sending to such other Court *the words* and to any Court to which it has been transferred for execution

(d) *In sub rule (6) substitute the words* in contravention of the said order with knowledge thereof *for the words* in contravention of such order after receipt of notice thereof

O 21 r 54—*Add the following as sub rule (3) Rule 54 Order XXI —*

(3) Such order shall take effect where there is no consideration for such transfer
transfer
to whom
when the

order is proclaimed under sub rule (2) whichever is earlier

O 21, r 57—*Add the following words at the end of Rule 57 Order XXI —*
unless the Court shall make an order to the contrary

O 21 r 58—*Add the following words at the end of sub rule (2) Rule 58 Order XXI —*

upon such terms as to security or otherwise as to the court shall seem fit

O 21, r 63A—*Add the following as Rule 63A Order XXI —*

63A When an attachment of movable property ceases the Court may order the restoration of the attached property to the person in whose possession it was before the attachment

O 21 r 69—*Substitute the words* one Calendar month *for the words* "Seven days" *in sub rule (2) Rule 69 Order XXI*

O. 21, r. 75.—(a) *Insert the following words in sub rule (2), after the words "where the crop from its nature does not admit of being stored" —*

"or can be sold to greater advantage in an unripe state (e g, as green wheat) "

(b) *Cancel the word "and" between the words "tending" and "cutting" in sub rule (2), and substitute therefor the word "or"*

O. 21, r. 89 —*In sub rule (1), Rule 89, Order XXI, cancel the words "either owning such property or holding an interest therein by virtue of a title acquired before such sale" and substitute the words "whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale)"*

O. 21, r. 90 —(a) *Add the following words to Rule 90 (1), Order XXI —*

"or on the ground of failure to issue notice to him as required by rule 22 of this Order"

(b) *Cancel the proviso to Rule 90 (1), and substitute therefor the following —*

"Provided (i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon"

O. 21, r. 98 —*Insert the words "or on his behalf" after the words "at his instigation" occurring twice in Rule 98 Order XXI*

O. 21 r. 99 —*Insert the words "to have a right" after the words "in good faith" in Rule 99, Order XXI*

O. 21A.—*Insert the following as Order XVII —*

1 Every person applying to a Civil Court to attach movable property shall, in addition to the process fee, deposit such reasonable sum as the Court may direct, if it thinks necessary, for the cost of its removal to the court house, for its custody, and, if such property is livestock, for its maintenance according to the rates prescribed in Rule 2 of this Order. If the deposit, when ordered, be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

2 The following daily rates shall be chargeable for the custody and maintenance of livestock under attachment —

Goat and pig—Annas 2 to annas 4

Sheep—Annas 2 to annas 3

Cow and bullock—Annas 6 to annas 10

Calf—Annas 3 to annas 6

Buffalo—Annas 8 to annas 12

Horse—Annas 8 to annas 12

Ass—Annas 3 to annas 5

Poultry—Annas 2 to annas 3 pies 6

Explanation.—Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima

9 Nothing in these rules shall prevent the judgment debtor or any person claiming to be interested in attached livestock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court

10 The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

11 In the event of the custodian of attached property failing, after due notice to produce such property at the place named to the officer deputed for the purpose, or to restore it to its owner if so ordered or failing in the case of livestock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings

12 When property other than livestock is brought to the Court, it shall immediately be made over to the Nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court If the property cannot from its nature or bulk be conveniently stored, or kept on the Court premises or in the personal custody of the Nazir, he may, subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept All such costs shall be paid into Court by the decree holder in advance for such period as the Court may from time to time direct

13 When attached livestock is brought to Court under special order as aforesaid it shall be immediately made over to the Nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court

14 If there be a pound maintained by Government or local authority in or near the place where the Court is held the Nazir shall subject to the approval of the Court, be at liberty to place in it such livestock as can be properly kept there in which case the pound keeper will be responsible for the property to the Nazir and shall receive from the Nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description

15 If there be no pound available, or, if in the opinion of the Court, it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep them in his own premises, or he may entrust them to any person selected by himself and approved by the Court

16 All costs for the keeping and maintenance of the livestock shall be paid into Court by the decree holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct In the event of failure to pay the costs within the time fixed by the Court the attachment shall be withdrawn and the livestock shall be at the disposal of the person in whose possession it was at the time of attachment

17 So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor

Rules—Cal.

App. III.

O. 22, r. 11.—*Add the following to Rule 11, Order XXI —*

Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XII, Rule 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party

O. 32, r. 4.—*Substitute the words, " Except as otherwise provided in this Order, " for the words, " Where there is no other person fit and willing to act as guardian for the suit," in clause (4), rule 4, Order XXII, First Schedule to the Code of Civil Procedure, 1908*

O. 34, r. 4.—*Renumber sub rules (3) and (4), Rule 4, Order XXII, as sub rules (4) and (5) respectively and insert the following as sub rule (3) —*

" (3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally "

O. 37, r. 1.—*In Rule 1 of Order XXVII make following amendments —*

(a) in clause (c) the word " and " shall be omitted,

(b) after clause (c) the following clause shall be inserted, namely —

(cc) all civil courts (except courts of small causes) in the districts of Chittagong, Dacca, Pabna and 24 Parganas, and "

O. 39, r. 1.—*Renumber Rule 1, Order XXXIX, as Rule 1 (1) and add the following as sub rules (2) and (3) —*

" (2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release

(3) The property attached under sub rule (2) may, when the Court considers it fit so to direct, be sold and out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto "

O. 41, r. 14 —*Insert the following as clause (3) to Rule 14, Order XLI —*

(3) It shall be in the discretion of the Appellate Court to make an order at any stage of the appeal whether on its own motion or ex parte dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent

Provided that—

(a) The Court may require notice of the appeal to be published in any news paper or newspapers as it may direct

(b) No such order shall preclude any such respondent or legal representative from appearing to contest the appeal

O. 43, r. 1 —*Insert the following after clause (i), Rule 1, Order XLIII —*

" (1) (a) An order under rule 57 of Order XXI, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue "

Rules—Cal.
App. III.

O 48 r 1—*Cancel clause (2), Rule 1, Order XLIII, and substitute therefor the following*—

“(2) The court fee chargeable for such service shall be paid when the process is applied for, or within such time if any, as the Court may, when ordering its issue, fix for the purpose

Schedule I—Appendix B—No 1 A—*Insert the following form in Appendix B, and number it as 1A*—

No 1A

Summons to defendant for ascertainment whether the suit will be contested (Order 5, rules 1 and 5)

(Title)

To
(Name description and place of residence)

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit on the day of 19, at o'clock in the noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part directions may be given you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely

Take notice that in default of your appearance on the day before mentioned the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions

Given under my hand and the seal of the Court this day of 19
Seal Judge

NOTICE—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit to avoid execution of any decree which may be passed against your person or property or both

Schedule I—Appendix B—Form No 10—*Insert the words* (or proof of the above having been duly made by the declaration of) *after the words* proof of the above having been duly taken by me on the oath of in Form No 10 Appendix B

Schedule I—Appendix B—Form No 11—*Substitute the following for the existing Form No 11 Appendix B*—

Declaration of process server to accompany Return of a Summons or Notice (Order 5 Rule 18)

(Title)

I a process server of this Court declare—(1) On the day of 19 I received a summons notice issued by the Court of in suit No of 19 in the said Court dated day of 19 for service on (2) The said was at the time

Rules—Cal.

App. III. personally known to me and I served the said summons/notice on him/her on the day of 19 at about o'clock in the noon at by tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process and in whose presence

(b) Signature of process server

Or

(2) The said not being personally known to me pointed out to me a person whom he stated to be the said and I served the said summons/notice on him/her on the day of 19 at about o'clock in the noon at by tendering a copy thereof to him/her and requiring his/her signature to the original summons/notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process and in whose presence

(b) Signature of process server

Or

(2) The said and the house in which he ordinarily resides being personally known to me I went to the said house, in and there on the day of 19, at about o'clock in the noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served with special reference to Order 5 Rules 15 and 17

(b) Signature of process server

Or

(2) One at pointed out to me which he said was the house in which ordinarily resides I did not find the said there

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served with special reference to Order 5, Rules 15 and 17

(b) Signature of process server

Or

(3) If substituted service has been ordered state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service

Rules—Cal.

App. III.

Schedule I—Appendix A—Form No. 13—In the form of "Breach of agreement to purchase land," No. 13 of Appendix A to the First Schedule, *cancel* the word "bighas" and *substitute* therefor the words $\frac{\text{"acres"}}{\text{"bighas"}}$.

Schedule I.—Appendix D—Form No. 1—*Cancel* the table under the head "costs of suit" in form No. 1, Appendix D, *ibid* and *substitute* therefor the following —

| <i>Plaintiff</i> | <i>Rs a p</i> | <i>Defendants</i> | <i>Rs a p</i> |
|--|---------------|--|---------------|
| 1 Stamp for plaint | | 1 Stamp for power | |
| 2 Stamp for power | | 2 Stamp for petitions and affidavits | |
| 3 Stamp for petitions and affidavits | | 3 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891 | |
| 4 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891 | | 4 Pleader's fee | |
| 5 Pleader's fee on Rs | | 5 Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) | |
| 6 Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) | | 6 Process fees | |
| 7 Process fees | | 7 Commissioner's fees | |
| 8 Commissioner's fees | | 8 Demi paper | |
| 9 Demi paper | | 9 Cost of transmission of records | |
| 10 Cost of transmission of records | | 10 Other costs allowed under the Code and General Rules and Orders | |
| 11 Other costs allowed under the Code and General Rules and Orders | | 11 Adjournment cost not paid in cash (to be added or deducted as the case may be) | |
| 12 Adjournment cost not paid in cash (to be added or deducted as the case may be) | | | |

Schedule I—Appendix D.—Form No. 2—*Cancel* the table under the head "costs of suit" in form No. 2, Appendix D, *ibid* and *substitute* therefor the following —

| <i>Plaintiff</i> | <i>Rs a p</i> | <i>Defendant</i> | <i>Rs a p</i> |
|--|---------------|--|---------------|
| 1 Stamp for plaint | | 1 Stamp for power | |
| 2 Stamp for power | | 2 Stamp for petitions and affidavits | |
| 3 Stamp for petitions and affidavits | | 3 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891 | |
| 4 Cost of exhibits including copies made under the Bankers Books Evidence Act 1891 | | 4 Pleader's fee | |
| 5 Pleader's fee on Rs | | 5 Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) | |
| 6 Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) | | 6 Process fees | |
| 7 Process fees | | 7 Commissioner's fees | |
| 8 Commissioner's fees | | 8 Demi paper | |
| 9 Demi paper | | 9 Cost of transmission of records | |
| 10 Cost of transmission of records | | 10 Other costs allowed under the Code and General Rules and Orders | |
| 11 Other costs allowed under the Code and General Rules and Orders | | 11 Adjournment costs not paid in cash (to be deducted or added as the case may be) | |
| 12 Adjournment costs not paid in cash (to be added or deducted as the case may be) | | | |

Rules—Cal.

App. III.

Schedule I—Appendix E—Form No. 15A—Insert the following after the Form No. 15, Appendix F—

FORM No. 14A.

Bond for safe custody of movable property attached and left in charge of any person and sureties

[ORDER XXIV, RULES 3 (a) AND 5]

In the Court of _____ at _____

Civil Suit No _____ of _____

A B of _____

against _____

C D of _____

Know all men by these presents that we, I J of _____, etc., and K L of _____, etc., and M N of _____, etc., are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves and each of us in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this _____ day of _____ 19 _____

And whereas the movable property livestock specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the _____ day of _____ 19 _____, in execution of a decree in favour of _____ in suit No _____ of _____ 19 _____, on the file of _____, and the said property has been left in the charge of the said I J

Now the condition of this obligation is that if the above bounden I J shall duly account for and produce when required before the said Court all and every the property / livestock aforesaid and shall properly maintain and take due care of the livestock aforesaid and shall obey any further order of the Court in respect thereof then this obligation shall be void otherwise it shall remain in full force and be enforceable against the above bounden I J in the execution proceedings.

I J

K L

M N

Signed and delivered by the above bounden in the presence of

By order of the High Court,

N L HINDI FY,

Registrar,

Schedule I—Appendix G—Form No. 9—In the form of "Decree in Appeal," No. 9 of Appendix G to the First Schedule, cancel the words from "Memorandum of Appeal" to "the following reasons, namely —"

Rules—Cal.
App. III.

Schedule I—Appendix H—Form No 14—*Cancel* columns 20 to 27 of Form No 14—Register of Civil Suits, Appendix H, Schedule I, and *substitute* therefor the following columns —

| Execution | | | | | | Return of Executions | | | | | | | |
|-----------|---|----|--|----|---|----------------------|-------------------------|----|------------------------------|----|---|----|--|
| 20 | Number of execution application as per execution application register and the date of application | 21 | Relief sought if money, amount claimed | 22 | Order and date thereof. If portion of relief not granted what portion | 23 | Against whom order made | 24 | For what amount to be stated | 25 | Amount of costs | 26 | Adjustments and satisfaction reported if any |
| | | | | | | | | | | 27 | Amount paid into court | 28 | Persons arrested |
| | | | | | | | | | | 29 | Whether judgment debtor committed to jail if not why not. If committed to jail the period of stay in jail | 30 | Minute of other return other than arrest and payment |
| | | | | | | | | | | 31 | Amount of relief still due and why execution petition is still so | 32 | If petition infructuous why and to what extent |
| | | | | | | | | | | 33 | Appeal if any against order in execution and if so, the result | | |

By order of the High Court,

N L HINDLEY,

Registrar.

APPENDIX IV.

Rules made by the High Court of Bombay, under s. 122.

O 3, r. 2, clause (a).—O 3, r. 2, cl (a), *be amended to read as follows* —

Persons holding general powers of attorney or in the case of proceedings on the Original Side of the Bombay High Court attorneys holding the requisite special powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance application or act is made or done authorising them to make and do such appearances applications and acts on behalf of such parties (a)

O 3, r. 4.—In sub rule 3 or rule 4 of Order III as amended by Act XXII of 1926, the words "or any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act"

O 5, r. 21A — *The following shall be inserted as Rule 21A* —

21A Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the head quarters of a district or recognised subdivision of a district, such as a taluka, tahsil or mahal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the Bombay Government Gazette. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

O 5, r. 22 — *The following proviso be added to O 5, r. 22* —

Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

O 7, r. 19 — *The following shall be added as rule 19* —

19 Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

O 7, r. 20 — *The following shall be added as r 20* —

20 An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

0 7, r. 21.—*The following shall be added as r 21 —*

21 Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *ex molo*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just

0 7, r 22—*The following shall be added as r 22 —*

22 Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post prepaid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served "

0 7, r. 23—*The following shall be added as r 23 —*

23 Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party

0 7, r 24—*The following shall be added as r 24 —*

24 A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

0 7, r 25—*The following shall be added as r 25 —*

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons, it thinks fit to do so

0 7 r 26—*The following shall be added as r 26 —*

26 Nothing in these rules shall apply to the notice prescribed by Order XXI rule 22

0 8, r 11—*The following shall be added as r 11 —*

11 Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service and if he fails to do so he shall be liable to have his defence, if any struck out and to be placed in the same position as if he had not defended In this respect the Court may act *ex molo* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit

" Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under section 7 of the Dekkan Agriculturists Relief Act, 1879, or otherwise or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule,

Rules—Bom.

App. IV.

O 8, r 12—*The following shall be added as r 12 —*

12 Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the last preceding rule —

O 9, r 4—*Order IX, rule 4, shall be numbered Order IX, rule 4 (1), and the sub rule (2) shall be added to it, namely —*

(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule

O 9, r 9—*The following shall be added as sub rule (3) to Order IX, rule 9, namely —*

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule

O 9, r 13—*Rule 13 of Order IX shall be numbered as rule 13 (1), and the following sub rule shall be added to it, namely —*

(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule

O 9, r 15—*The following shall be added to Order IX as rule 15 —*

In the application of this Order to appeals so far as may be the word "plaintiff" shall be held to include an appellant the word "defendant" a respondent and the word "suit" an appeal.

O 13, r 9—*Between the first and second proviso to sub rule (1) of rule 9 of Order XIII, the following proviso shall be inserted, namely —*

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI rule 1, may be returned after the appeal has been disposed of by the Court

O 16, r 1 (a)—*The following shall be added as rule 1 A to Order XVI —*

1 A (1) The Court may, on the application of any party for a summons for the attendance of any person permit that service of such summons shall be effected by such party

~ applying for
t reasonable
o be effected

O 16, r 2 (1)—*The following shall be inserted as proviso to sub rule (1) of rule 2 of Order 16 —*

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation, applies for a

travelling and other expenses of such witness

O 16, r 3—*The following shall be inserted as proviso to rule 3 of Order 16 —*

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal, in his official capacity, or to produce a document from public records the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him

O 21, r. 22—In rule 22 of Order XXI the words "two years" shall be substituted for the words "one year" wherever they occur

O 21, r 24—*The following proviso shall be added to sub rule (2) of r 24—*

Provided that a First Class Subordinate Judge, may in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court

O 21, r. 44A.—*After r 44 of O 21, the following shall be inserted, namely —*

44A Where the property to be attached is agricultural produce a copy of the warrant or order of attachment shall be sent by post to the Office of the Collector of the District in which the land is situate

O 21, r 45—*The following words shall be added to sub rule (1) of rule 45 of Order XXI, after substituting a semicolon for the full stop —*

and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time

O 21, r 54—*The following shall be added to sub rule (1) of rule 54 of Order XXI —*

Such order shall take effect where there is no consideration for such transfer or charge, from the date of such order and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged

O 21, r 69 (2) —

In sub rule (2) of rule 69 of Order XXI thirty days shall be substituted for seven days

O 21 r 72A — *After r 72 of O 21 the following shall be inserted namely —*

72A If leave to bid is granted to the mortgagee of immovable property, a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid

O 21, r 91—*The following rule shall be added as rule 91A in Order XXI of the Code of Civil Procedure —*

Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under rules 39, 90 or 91, and in the case of an application under rule 89, the deposit required by that rule if made to the Collector or the Officer to whom the decree is referred for execution in accordance with any rule framed by the local Government under section 70 of the Code shall be deemed to have been made to or in the Court within the meaning of rules 80, 90 and 91

O 25, r 2.—*The following shall be added as sub rule (4) to Order XXI, rule 2 namely —*

(4) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule

O 32, r 3 (4) —

The words "to the minor and" in line 2 of sub rule (4) of rule 3 of Order XXVII shall be deleted

Rules—Bom.

App. IV.

O. 33, r. 1—*The following sentence shall be added to the Explanation to rule 2 of Order XXXIII, Civil Procedure Code, namely,—*

In determining whether he is possessed of sufficient means the subject matter of the suit shall be excluded.

O 34, r. 2 (d) —*Substitute for clause (d) of rule 2 of Order XXXIV, the following.—*

(d) that, if such payment is not made on or before the day to be fixed by the Court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3

O 34, r. 4 (1) —

In sub rule (1) of rule 4 of Order XXXIV, after the words “as therein mentioned” substitute “the plaintiff shall be entitled to apply for a final decree for sale under rule 5”

O. 34, r. 5 (2) —

In sub rule (2) of rule 5 of Order XXXIV, after the words “proceeds of the sale,” substitute “(after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment ”

O 34, r. 7 (d).—

For clause (d) of rule 7 of Order XXXIV, substitute “(d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8 ”

O. 37, r. 2.—*In sub rule (1) of rule 2 of Order XXXVII, after the words “ promissory notes ” the following words shall be inserted, namely —*

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub rule (1).

O. 37, r. 3 —*In rule 3 of Order XXXIII, the following sub rule (3) shall be inserted —*

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub rule (1)

O. 41, r. 3-A.—*After rule 3 of Order XLI, the following rule shall be inserted, namely —*

3 A Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13

In sub rule (2) of rule 3 of Order XLV, after the words “to show cause why the said certificate should not be granted” the following words shall be inserted, namely —
“ unless it thinks fit to refuse the certificate.”

Rules—Bom.
App. IV.

O 41 r 38—*The following shall be added as r 38 —*

38 (1) An address for service filed under Order VII rule 19 or Order VIII rule 11 subsequently altered under Order VII rule 24 or Order VIII rule 12 shall hold good during all appellate proceedings arising out of the original suit or petition subject to any alteration under sub rule (3)

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses

(3) Rules 22 and 24 of Order VII shall apply so far as may be to appellate proceedings

O 43 r 1—

Clause (w) of rule 1 of Order XLIII shall be deleted

O 45 r 3(2)—

In sub rule (2) of rule 3 of Order XLV after the words to show cause why the said certificate should not be granted the following words shall be inserted namely — unless it thinks fit to refuse the certificate

O 45 r 7 A—*After rule 7 of Order XLI the following rule shall be inserted, namely —*

"A No such security as is mentioned in rule 7 (1) clause (a) shall be required from the Secretary of State for India in Council or where the local Government has undertaken the defence of the suit from any public officer sued in respect of an act alleged to be done by him in his official capacity

O 46 r 8—*The following shall be added as r 8 —*

Applicability of Rule 38 of Order XLI shall apply so far as may be to proceedings under this Order

O 47 r 5—

In Order XLVII rule 5 for the word six the word two shall be substituted

O 47 r 10—*The following shall be added as r 10 —*

Applicability of Rule 38 of Order XLI shall apply so far as may be to proceedings under this Order

O 49 r 3—(a) *In rule 3 of Order XLIX the following clause shall be inserted as clause (1) namely*

(1) rule 21A of Order V

(b) *For the existing clause (1) the following shall be substituted namely*

(1a) rule 10 rule 11 clauses (b) and (c) and rules 19 to 26 of Order VII

(c) *Below clause (1a) the following shall be inserted namely*

(1b) rules 11 and 12 of Order VIII and

(d) *Below clause (6) the following shall be inserted namely*

(7) rule 38 of Order XLI

Rules—Bom.

App. IV.

O. 49, r. 3.—

In rule 3 of Order XLIX the word "and" immediately preceding paragraph (6) shall be omitted and the following paragraph shall be inserted between paras (5) and (6), namely—

' (5a) rule 72A of Order XXI, and '

O. 49, r. 3.—

For the words "rule 33" occurring below item (b) of rule 3 of Order XLIX, the words "rules 31 and 35" shall be substituted

O. 49, r. 4.—*The following rule made under s. 128 (2) (i) to be added as r. 4 in O. 49—*

Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court fees and may admit the appeal to the register even though the subsequent payment of Court fee may have been made after the time prescribed for presentation of the appeal.

O. 52.—*The following shall be added as Order LII—*

Applicability of Rule 3s of Order XLII to Proceedings under section 115

1 Rule 3s of Order XLII shall apply, so far as may be to proceedings under section 115 of the Code

Schedule I—Appendix B—Forms Nos. 1, 2, 3, 5 and 6.—*The following notes shall be inserted in red ink in forms Nos. 1, 2, 3, 5 and 6 of Appendix B to Schedule I—*

Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out

Schedule I—Appendix B—Form No. 10—*Form No. 10 in Appendix B be amended to read as follows—*

To accompany Returns of Summons of another Court (Order V, r. 23)

(Title)

Read proceeding from the _____ forwarding
for service on _____ in suit No _____ of 10 _____ of that Court

Read Serving Officer's endorsement stating that the _____ and proof
of the above having been duly taken by me on the oath of _____ and
it is ordered that the _____ be returned to the _____ with
this proceeding

I hereby declare that the said summons on _____ has been duly
served

Judge

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner "

Schedule I—Appendix D—Form No. 4—

In line 4 of Form No. 4 in Appendix D, for "realization" substitute "the day hereinafter referred to "

For clause (2) of the said form, substitute "(2) That if such payment is not made on or before the said day of _____ 19____, the plaintiff shall be entitled to apply to the Court for a final decree for sale "

Delete Clause (3) of the said form

Rules—Bom.

App. IV.

Schedule I—Appendix D—Form No. 5.—

For clause (2) of Form No. 5 in Appendix D, substitute ' (2) That if such payment is not made on or before the said day of 19 , the defendant shall be entitled to apply for a final decree for foreclosure or sale '

Schedule I—Appendix D—Form No. 10 A. *Add the following form as Form No. 10 A —*

No. 10 A

Final Decree for sale

(Title)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plaintiff dated the day of 19, and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been made

It is hereby decreed as follows —

(1) That the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at per cent per annum and subsequent costs and that the balance if any be paid to the defendant

(2) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

APPENDIX V.

Rules made by the High Court of Allahabad, under s. 122.

Order IV.

1 (1) *For rule 1 (1) substitute the following —*

Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with a true copy for service with the summons upon each defendant unless the Court for good cause shown allows time for filing such copies

(2) The Court fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for.

And *re number* the present sub rule (2) as sub rule (3)

Order V.

2. *Omit* the words " or, if so permitted, by a concise statement "

Add the following rules 4A —

4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement

15. *For* the words " Where in any suit the defendant cannot be found " *read* " When the defendant is absent or cannot be personally served "

25. *For* the word " shall " in the third line *read* the word " may "

Add the following rule 25A —

25A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service

26. *After* the words " the summons may " *insert* the words " in addition to, or in substitution for the method permitted by rule 25 "

27. *To O V, r 27, add the following as note 1 and note 2 —*

1. A list of heads of offices to whom summons shall be sent for service on the servants of Railway Companies working in whole or in part in these Provinces is given in Appendix (2) to the General Rules (Civil) of 1911

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

Rules—All.
App. V.

Illustration If the Court sees fit to issue a summons to a kanungo or patwari it shall inform the Collector of the district, and if to a sub registrar it shall inform the District Registrar to whom the sub registrar is subordinate

Add the following rules at the end of O 5 —

28. 1 The present rule 28 shall be numbered 28 (1)

2 *Add the following as rule 28 (2) —*

Where the address of such Commanding Officer is not known, the Court may apply to the Officer Commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub rule (4) of this rule

3 *Add the following sub rules (3), (4) and (5) —*

(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable service shall be made on the defendant in person

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the Officer Commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the Officer Commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give as may lead to the discovery of his address

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post

29. In rule 29, sub rule (1), line 2, for the words " rule 28 " read " rule 28 (1) "

31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court

32. Ordinarily every process except those that are to be served on Europeans, shall be written in the Court vernacular But where a process is sent for execution to the Court of a district where a different language is in ordinary use it shall be written in English and shall be accompanied by a letter in English requesting its execution

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation

Order VII.

9. In rule 9—(a)—for the semicolon after 'it' in clause (1) substitute a fullstop and delete the rest of this clause as well as clauses (2) and (3), and

(b) Re number clause 4 as clause (2), deleting the words " or statements " therein

17. At the end of clause 2 of rule 17 of Order VII add the following proviso —

Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the person producing it or someone on his behalf shall attest it as a true copy, and in that case the Court or its officer need not examine or compare the copy with the original.

Rules—All.

App. V.

Add the following rules at the end of O 7—

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately on being so added file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo moto* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader notices or processes for service on him shall be served in the manner prescribed by Order III, rule 3, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reason, it thinks fit to do so.

Order VIII.

Add the following rules at the end of O 8—

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing file in Court a proceeding stating his address for service, and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo moto* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule.

Order IX.

2. After the words in the fourth line "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

13. *Add the following proviso —*

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

Order XIII.*Add the following rules at the end of O 13 —*

12. Every document not written in the Court vernacular or in English which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants the documents of the first party defendant may be marked A1, B1, C1, &c., AA1, BB1 &c. and those of the second A2, B2, C2, &c., AA2, BB2 &c. When a number of documents of the same nature is admitted as for example a series of receipts for rent the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series

Order XVI.1. *The following proviso to be added —*

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor

2. (4) This rule shall not apply in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters

8. For the words in line 1 "under this order shall be served" read "under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service, and failing such service shall be served"

Add the following rules at the end of O 16 —

22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale —

- (a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day,
- (b) In the case of witnesses of a better class such as zamindars, traders, pleaders and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct, and

Rules—All.

App. V.

Add the following rules at the end of O 7 —

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as afore said shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Order VIII.

Add the following rules at the end of O 8 —

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons

the Court may act *suo motu* or on the application of any party for an order to be made and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule.

Order IX.

2. After the words in the fourth line "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

13. *Add the following proviso —*

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

Order XIII.*Add the following rules at the end of O 13 —*

12. Every document not written in the Court vernacular or in English which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character

13. When a document included in the list, prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A1, B1 C1, &c, A11, B11, &c and those of the second A2 B2, C2, &c, A22, B22, &c. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series

Order XVI.1. *The following proviso to be added —*

Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor

2. (4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters

8. For the words in line 1 "under this order shall be served" read "under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service, and failing such service shall be served"

Add the following rules at the end of O 16 —

22. (1) Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale —

- (a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day,
- (b) In the case of witnesses of a better class, such as zamindars, traders, pleaders and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct, and

Rules—All.

App. V.

- (c) In the case of witnesses of superior rank including officers of Government in receipt of salary of not less than Rs. 200 a month, from three to five rupees a day.

(2) If a witness demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense

Illustration.

A post office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned, the travelling and other expenses allowed to witnesses of the class or rank to which he belongs, and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons was issued.

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper.

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.

23. In cases to which Government is a party, Government servants, not being police constables, whose salary exceeds Rs. 10 per mensem, and who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.

Order XVII.

- 1 (2) *Add the following further proviso —*

Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order XVI, rule I.

- 2 *Order XVII, all its rule 2 —*

Where on any such day the evidence, or a substantial portion of the evidence, of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present and may dispose of it on the merits.

Explanation—No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application.

3. *Amend rule 3 —*

Where any party to a suit, to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act, necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits.

Order XVIII.

Add the following rules at the end of O. 18 :—

19. (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English and the issues shall be signed by the Judge and shall form part of the English proceedings.

Order XIX.

Add the following rules at the end of O. 19 —

4. Affidavits shall be entitled in the Court of _____ at _____ (naming such Court). If the affidavit be in support of or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *In the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless, it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" or "I make oath and say."

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such acts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression

"I am informed" and, if such be the case, "and verily believe to be true" and shall state the name and address of, and sufficiently described for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of document produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, the correct name and address of such person, and such further descriptions as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

Rules—All.

App. V.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

11A Such identification may be made by a person—

- (a) personally acquainted with the person to be identified, or
- (b) satisfied from papers in that person's possession or otherwise, of his identity

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified —

Form

I (name, address and description) declare that the person verifying this petition (or making this affidavit) and alleging himself to be A B has satisfied me (herestate by what means, e g, from papers in his possession or otherwise) that he is A. B

12 No verification of a petition and no affidavit purporting to have been made by a *pardah nashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her

13 The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he had read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made

14 The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place, when and where it was made and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made

Order XX.

Add the following rule at the end of O 20 —

21. (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such

decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

Order XXI.

5. For the word "District," where it occurs after the words "same" and "different" read "Province."

(Rule 6)

6. Rule 6 be re-numbered 6 (1) and the following sub rule 6 (2) be added —

(2) Such copies and certificates may, at the request of the decree holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the court to which they are to be sent.

11. For clause (f) of sub rule (2) of this rule substitute the following —

"(f) The date of the last application, if any." And add the following proviso to sub rule (2) —

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (d) need not be given in the application."

17. Between the words "been complied with" and "the court may insert the words, "and if the decree holder fails to remedy the defect within a time to be fixed by the court."

22. For the words "one year," wherever they occur in this rule, read the words, "three years."

Rules—All.

App. V.

To sub rule (2) of this rule shall be added the following proviso —

Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment debtor has sustained substantial injury by reason of such omission

24 (3). *After the words at the end of the sub rule, "be executed," add the words, "and a day shall be specified on or before which it shall be returned to court"*

Substitute the following for paragraph (2) in rule 25 —

25 (2). 2 Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result

26 (3). *For the words "the court may" read the words "the court shall, unless good cause to the contrary is shown"*

29 *After the words "the person against whom the decree was passed," insert the words, "or any person whose interests are affected by the decree, or by any order made in execution thereof"*

31 (2) and (3) *For the words wherever they occur in each sub rule "six months" read the words, "three months, or such extended time as the court may for good cause direct"*

32 (3). *For the words "one year" read the words "three months, and after the words at the end of the sub rule, "on his application," add the words "the court may for good cause extend the time"*

39 (5). *Delete the words "in the Civil Prison"*

40 (5). *Add the following proviso —*

"Provided that, in order to give the judgment debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding 10 days, or release him on his furnishing security to the satisfaction of the Court for his

custody, it shall be competent for the Court to require the decree holder, on his application for arrest being disallowed, to pay into Court such sum as the Judge deems sufficient to cover such costs including fees for process server, subsistence of the judgment debtor and cost of conveyance if any, and sums disbursed by the decree holder under this proviso shall be deemed to be costs in the suit"

53. In sub rule (1) (b) in the third line, and in sub rule (4) in the eighth line, *after the words "to such other court" add the words "and to any other court to which the decree has been transferred for execution"*

And in sub rule (6) for the words, "after receipt of notice thereof" read the words "after receipt of notice, or with the knowledge thereof"

54. *Add the following sub rule (51) (3) —*

The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment debtor from the date on which such order is made

Substitute the following for rule 55 —

55. (1). Notice must be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 73 (1) in respect of the property of the same judgment debtor by persons other than the holder of the decree for the execution of which the original order was passed

(2) Where—

- (a) the amount decreed (which shall include the amount of any decree passed against the same judgment debtor), notice of which has been sent to the sale officer under sub section (1), with cost and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree (including any decree passed against the same judgment debtor), notice of which has been sent to the sale officer under sub section (1), is otherwise made through the Court or certified to the Court, or
- (c) the decree (including any decree passed against the same judgment debtor), notice of which has been sent to the sale officer under sub section (1), is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule

58. *Add the following words to sub rule (58) (2) —*

Or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation And in no case shall the sale become absolute until the claim or objection has been decided

68. *For the words ' fifteen days ' read the words " seven days."*

69. (2). *For the word " seven " read the word " fourteen," and add the following proviso —*

Provided that the Court may dispense with the consent of any judgment debtor who has failed to attend in answer to a notice issued under rule 66

72. In sub rule (2) for the words ' with such permission ' read the words ' property sold, ' and re number this sub rule " 72, ' and delete sub rules (1) and (3)

89. In sub rule (1) of this rule for the words ' any person . . . before such sale,' read the words ' the judgment debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property "

90. *For the words " Provided that no " read the words, ' provided that—*

- (a) no . . . irregularity or fraud, "

and add the following proviso —

- (b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up

92. In sub rule (1) after the words ' the Court shall ' insert the words ' subject to the provisions of rule 58 (2) "

Rules—All.

App. V.

98 After the words "at his instigation," wherever they occur, add the words "or on his behalf," and after the words at the end of the rule, "thirty days" add the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the decree holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

99 For the words in brackets, "(other than the judgment debtor)" read the words in brackets, (other than the persons mentioned in rules 95 and 98 hereof) "

Add the following rules at the end of O 21 —

101 When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room

105 Every attachment of movable property under rule 43 of Negotiable Instruments under rule 51, and of immovable property under rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the hand writing of the presiding Judge himself in the order for attachment

106 When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree holder shall file with his application a certificate from the sub registrar within whose sub district such property is situated, showing that the sub registrar has searched his book nos I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property

107. Where an application is made for the sale of land or of any interest in land the Court shall, before ordering sale thereof, call upon the parties to state whether such and is or is not ancestral land within the meaning of Notification No 188711—238 10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question

On the day so fixed, or on any date to which the enquiry may have been adjourned the Court may take such evidence, by affidavit or otherwise, as it may deem necessary and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting

108 When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government

109 The certificate of the sub registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry

No fees are payable in respect of the report by the Collector

Rules—All.

App. V.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry.

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall wholly or in part be omitted therefrom.

113. Whenever any Civil Court has sold in execution of a decree or other order, any house or other building situated within the limits of a Military Cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act (Act No VI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

115. When an application is made for the attachment of live stock or other movable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs or such further period as the Court may direct be not paid into Court, the Court on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

116. Live stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

117. If the custody of live stock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act 1871, and committed to the custody of the pound keeper, who shall enter in a register—

- (a) the number and description of the animals,
- (b) the day and hour on and at which they were committed to his custody,
- (c) the name of the attaching officer or his subordinate by whom they were committed to his custody, and shall give such attaching officer or subordinate a copy of the entry.

Rules—All.

App. V.

118. For every animal committed to the custody of the pound keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No 1 of 1871

And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act

119. The pound keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed

120. The charges herein authorized for the maintenance of live stock shall be paid to the pound keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound keeper shall be refunded by him to the attaching officer

121. Animals attached and committed as aforesaid shall not be released from custody by the pound keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals, on their being so released shall sign a receipt for them in the register mentioned in rule 118

122. For the safe custody of movable property other than live stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical

123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property

124. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than two annas and shall ordinarily not be more than three and a half annas per diem. The Court may at its discretion allow a higher fee, but if it do so, it shall state in writing its reasons for allowing an exceptional rate

125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him, and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge

Provided that, where the amount does not exceed Rs 5 it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with

126. When in consequence of an order of attachment being withdrawn or for some other reasons, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

127. Fees paid into Court under the foregoing rules shall be entered in the Register of petty Receipts and Repayments.

128. When any sum levied under rule 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

129. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree holder to the attaching officer. In the event of the decree holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment debtor simultaneously the notices required by Order XXI, rules 22, 66 and 107.

Add the following rules —

“ Garnishee order ”

131. The Court may, in the case of any debt due to the judgment debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument or a debt recoverable only in a revenue court) or any movable property not in the possession of the judgment debtor issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

132. If the garnishee does not forthwith or within such time as the Court may allow pay or deliver into Court the amount due from or the property deliverable by him to the judgment debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such movable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

Rules—All.

App. V.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment debtor, or any other person ordered to appear as aforesaid, for the amount paid delivered or realized although such order or the judgment may be set aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction. Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

138. The cost of any application under these rules and of any proceedings arising therefrom or incidental thereto or any order made thereon, shall be in the discretion of the Court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

Illustration—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

Add the following rule 140—

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or section 47.

The following form shall be used under the provisions of rule 131 of Order XXI—

Suit No. of 19

versus

Plaintiff

Defendant

To

WHEREAS it is alleged that a debt of Rs
you to the judgment-debtor

is due from

Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached, Take notice that you are hereby required on or before the day of 19 to pay into this Court the said sum of Rs

Or

of the said property may be passed against you

Dated this

day of

19

Munsif

Subordinate Judge

At

Order XXII.

12. At the end of the rule add the words—

or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit.

Order XXV.

1. After the words in lines 6 and 7, "property in suit" insert the words "or that the plaintiff is being financed by a person not a party to the suit"

Order XXVI.

18. In clause (1) after the words "agents and pleaders" substitute a comma for the full stop, and add the following words, "and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues"

Order XXVII.

Add the following rule at the end of O 27 —

9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be as nearly as may be, in the terms of the following form

TITLE OF THE SUIT, ETC

1. A B Government Pleader, appears on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) Respondent (or &c), in the suit

or, on behalf of the Government [which under Order 27 rule 8 (1) of Act No. 1 of 1903 has undertaken the defence of the suit] respondent (or &c), in the suit

Order XXXII.

3. Add the following proviso to rule 3 (4) —

Provided that if the minor is under ten years of age no such notice shall be issued to him

Substitute the following for rule 4 —

4. (1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend except by leave of the Court

(2) Subject to the provisions of sub rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act

(3) Every next friend shall, except as otherwise provided by clause (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor

(4) The Court may in its discretion, for reasons to be recorded, award costs of the suit, or compensation under section 35A or section 95 against the next friend personally as if he were a plaintiff

(5) Costs or compensation awarded under clause (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable

Add the following rule 4A —

4A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be appointed

Rules—All.

App. V.

(2) Where there is no such guardian, or where the Court considers that no guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified; or where there is no such guardian the person in whose care the minor is; or any other suitable person who has notified the Court of his willingness to do so; or failing any such person an officer of the Court.

Explanation—An officer of the Court shall file for the purposes of this sub-rule in a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian of the suit, provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to accept.

(4) Where an officer of the Court is appointed guardian for the suit, unless otherwise ordered by the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

Order XXXIII.

(5) In rule 5 (a) *add the words* and the applicant on being required by the Court to make any amendment within a time to be fixed by the Court fails to do so *"between the figure "3" and the word "or"*

Add the following general notice to rule 5 at the end—

Explanation—An application shall not be rejected under clause (d) merely on the ground that the proposed suit appears to be barred by any law.

Order XXXIV.

Rule 4 (2).

4. (2) *After the words* the Court may *insert the words* of its own motion, or "

Order XXXVII.

1 *Add the following clause (c)*—

(c) any Court in the Province of Agra exercising the powers of a Small Cause Court

Order XXXIX.

1. In clause (a) *delete* the words or wrongfully sold in execution of a decree and

Delete the words sale *after the words* "damages alienation."

Order XLI.

Section 3 of the following rule 3 (1)—

3. (1) Where the memorandum of appeal is not drawn up in the manner herein before prescribed, or accompanied by the copies mentioned in rule 1 (1), it may be rejected, or where the memorandum of appeals is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(*) For the tenth word "and" substitute a comma and between the figure 6 and the word "shall" *add the word* and figure "and 1)

Rules—All.
App. V.10 (1) *Add the following proviso —*

Provided also that in case of every appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant or in respect of costs, the appellant shall, within two weeks of the admission of the appeal, or within such time as the Court may for special reasons allow, deposit in the Appellate Court security for the costs of the appeal, and for all costs ordered by the courts below to be paid by him which remain unpaid.

2 *Add (2) —*

(2) In the second proviso to clause (1) of this rule 'costs of the appeal' means advocate's fee calculated on the valuation of the appeal together with a sum of Rs 2 for Court fee on Vakalatnama to be filed by the respondent, Re 1 inspection fee, and in case of second of appeals outside the jurisdiction of a single Judge a further sum of Rs 10 for printing charges payable by Respondent

3 Clause (2) of the rule shall be numbered as (3)

14. *Add the following sub rule (3) —*

(3) Notwithstanding anything in sub rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower appellate Court or has appeared in the appeal

37 Delete the words "and shall be filed with the original proceedings in the suit in lines 4 and 5 of the rule

and

Add a new paragraph as follows

Where the appellate court is the High Court the copies aforesaid shall be filed with the original proceeding in the suit

Add the following rule at the end of O 41 —

38 (1) An address for service filed under Order VII, rule 10, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII rule 12 shall hold good during all appellate proceedings arising out of the original suit or petition

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses

(3) Rules 21 22 23 and 24 of Order VII shall apply so far as may be, to appellate proceedings

Order XLII.

Substitute the following for r 1 —

1 The rules of Order XLI shall apply, so far may be, to appeals from appellate decrees subject to the following provision —

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded and also of the judgment of the Court of first instance

Order XLIII.

1. (u) For the words "an order under rule 23 of Order XLI read any order"

Add the following rule at the end of O 43 —

3 In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination

Rules—All.

App. V. of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid

Order XLIV.

1. *To rule 1 add another proviso as follows —*

Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents

Order XLV.

For Order XLV, rule 15 (1), substitute —

15 (1) Whoever desires to obtain —

(a) execution of any order of His Majesty in Council, or,

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs,

shall apply to the said Court by a petition, accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof

Order XLVI.

Add the following rule at the end of O 46 —

8 Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order

Order XLVII.

Add the following rule at the end of O 47 —

10 Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this order

Order XLVIII.

1. *Before the words "Every process issued" prefix the words "Except as provided in Order IV, rule 1 (2)"*

Order LII.

1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code

FORMS.**APPENDIX B****No 7**

Form No 7—an order for transmission of summons for service in the jurisdiction of another Court (Order 5, rule 21) is hereby cancelled

APPENDIX B**No 10**

Form No. 10—a form to accompany return of summons of another Court (Order 5, rule 23), is cancelled.

Rules—All.
App. V.

APPENDIX B

No 20

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS

No. of suit

Name of parties

In the Court of the

Date fixed for hearing

| 1 | 2 | 3 | 4 | | 5 | | 6 |
|------------------------------------|---|--------------------|----------------------------------|------|---------------------|---------------|---|
| Number of witnesses to be summoned | Name and full address of each person to be summoned | Rank or occupation | Distance of residence from Court | | Cash paid for | | Name and address of person to whom unpaid travelling expenses and diet money should be returned |
| | | | Rail | Road | Travelling expenses | Diet expenses | |
| | | | | | | | |

APPENDIX E

No 29

In form no 29 (Proclamation of Sale) of Appendix E to the Code of Civil Procedure, 1908, delete the sentence 'No bid by _____ previously given in the paragraph above' conditions of sale

No 43

The security to be furnished under section 55 (4) shall be, as nearly as may be by a bond in the following form —

In the Court of

at

Suit No

of 19

against

Plaintiff

Defendant

C D of

WHEREAS in execution of the decree in the suit aforesaid, the said C D has been arrested under a warrant and brought before the Court of

, and whereas the said C D has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III of 1907, to be declared an insolvent, and the said Court has ordered that the said C D shall be released from custody if the said C D furnish good and sufficient security in the sum of Rs _____

that he will appear when called upon, and that he will within one month from this date apply under section 5 of Act No III of 1907, to be declared an insolvent. Therefore I E F, inhabitant of _____

have voluntarily become security, and do hereby bind myself, my heirs and executors to _____

as Judge of the said Court and his successors in office that the said C D will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court, on its order, the sum of Rs. _____

Witness my hand at

this

day of _____ 19

(Sd) E. F.

Surety

Witnesses

Rules—All.
App. V.

APPENDIX F.

No 11.

The security to be furnished under Order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form —

In the Court of _____ at _____
Sunt No _____ of 19 ____
.. Plaintiff
.. Defendant

Amount of suit, Rupees _____

WHEREAS in the suit above specified the plaintiff _____ aforesaid, has applied to the said Court that the said defendant, _____ may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant _____, may be attached

And whereas, on the failure of the said defendant _____, to furnish such security or, show cause why it should not be furnished, the property aforesaid of the said defendant, _____ has been attached by order of the said Court

Therefore I _____, inhabitant of _____, have voluntarily become security and hereby bind myself, my heirs and executors, to as Judge of the said Court, and his successors in Office, that the said defendant, shall produce and place at the disposal of the said Court, when required, the property herein below specified, namely, (*here give description of property or refer to an annexed schedule*), of the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to _____ as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (*here enter a sufficient sum to cover the amount of suit which costs and the costs of the attachment*) as the said Court may adjudge against the said defendant

Witness my hand at _____ this _____ day of 19 ____ (Signed)

Witnesses _____ Surety
(Signed)

No 12

The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form —

In the Court of _____ at _____
Sunt No _____ of 19 ____
.. Plaintiff
.. Defendant

WHEREAS, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant, _____, from (*here state the breach of contract*), _____ of the said plaintiff, _____ or the continuance of the said breach of contract, _____
from the said defendant against such repetition (*or continuance*)

Rules—All.

App. V.

Therefore I, _____, inhabitant of _____, have voluntarily become security and do hereby bind myself, my heirs and executors to _____ as Judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (or continuance) of the breach of contract aforesaid, (or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself, my heirs and executors to pay into Court, on the order of the Court such sum to the extent of rupees _____, as the Court shall adjudge against the said defendant

Witness my hand at _____ this _____ day of _____ 19 _____

Witnesses _____

Surety

APPENDIX H

No 4

Notice to show cause (General Form)

IN THE COURT OF

AT

DISTRICT

CIVIL SUIT No

OF 19 .

Miscellaneous No

OF 19 .

resident of

VERSUS

resident of

To

WHEREAS the abovenamed _____ has made application to this Court that you are hereby warned to appear in this Court in person or by a pleader duly instructed on the _____ day of _____ 19 _____, at _____ o'clock in the forenoon to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*, and it will be presumed that you consent to be appointed guardian for the suit

Given under my hand and the seal of the Court this _____ day of _____ 19 _____ *Judge*

APPENDIX H

No 5

(List of documents produced by plaintiff defendant Order 13, rule 1)

IN THE COURT OF

AT

DISTRICT.

SUIT No

OF 19 .

Plaintiff

versus

Defendant.

ules—All.

pp. V. List of documents produced with the plaint (or at first hearing) on behalf of plaintiff (or defendant)

| This list was filed by | | this | day of | 19 |
|------------------------|--|---|--------|---|
| 1 | 2 | 3 | 4 | |
| Serial number | Description and date if any, of the document | What became of the document. | | Remarks. |
| | | If brought on the record the exhibit mark put on the document | | If rejected date of return to party, and signature of party or pleader to whom the document was returned If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III the date of enclosure in the envelope |

Signature of party or pleader producing the list.

APPENDIX II

No. II

Notice to minor defendant and guardian

IN THE COURT—AT—DISTRICT

Suit No—of 19

resident of—Plaintiff,

vs.

resident of—Defendant,

Rules—All.

App. V.

To—

(1) _____ Minor defendant,
and

(2) _____ Or ^{* Natural}
Certificated guardian, the person in whose

 Ω_T

care the minor is alleged to be. Wherein an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the said minor defendant, you said minor, and you (2) ————— the ^{4 natural} _{certificated} guardian or the person in whose care the minor is alleged to be are hereby required to take notice that unless within ————— days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the said minor, the Court will proceed to appoint the person named below or some other person to act as the guardian of the minor for the purposes of the said suit.

Proposed guardian

son of

resident of

Given under my hand and the seal of the Court, this day of 19
Judge

NOTE —* Cut out the word "natural" if the certificated guardian is named, cut out the word "certificated" if the natural guardian be intended, and cut out both "natural" and "certificated" and the word "OR" if the guardian be of neither class but one with whom the minor lives.

APPENDIX II

No. 16

The security to be furnished under Order XXX, rule 1, shall be, as nearly as may be, by bond in the following form —

In the Court of

at

Surt. No.

of 19

Pluribus

De fendant

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant.

the sum of rupees and the said plaintiff is residing
out of British India (or is a woman) and does not possess any sufficient immovable
property within British India independent of the property in the suit

Therefore, I, inhabitant of _____, have voluntarily become security and do hereby bind my-self my heirs and executors, to _____ as Judge of the said Court and to his successors in office that the said plaintiff _____, his heirs and executors shall whenever called on by the said Court pay all costs that may have been or may be incurred by the said defendant _____, in the said suit, and in default of such payment I bind my-self, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at this day of 19

(Signed)

Witnesses

Surety

Rules—All.
App. V.

APPENDIX H

No 17

ADDRESS FOR SERVICE

Under Order VII, rules 19 to 26, Order VIII, rules 11 and 12, Order XLI, rule 38, Order XLVI, rule 8, Order XLVII, rule 10, Order LII rule 1

IN THE COURT OF THE

OF

ORIGINAL $\frac{\text{Suit}}{\text{or Case}}$ No OF 19

Plaintiff

VERSUS

Defendant

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh but not within the limits of any other province —

| Name, parentage and caste | Residence | Pargana or tahsil | Post office | District |
|---------------------------|-----------|-------------------|-------------|----------|
| | | | | |

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed shall forthwith file a notice of change containing all the new particulars

Signature of party

{ Plaintiff
Defendant
Appellant
Respondent

Or

I file the above address according to the instructions given by my client,
(name) ————— (and capacity) —————

Signature of pleader

A B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter

Rules—All.

App. V.

APPENDIX H

No 18

NOTICE OF CHANGE OF ADDRESS FOR SERVICE

Under Order VII, rules 19 to 26, Order VIII, rules 11 and 12, Order XII, rule 28, Order XVI, rule 8, Order XVII rule 10, Order LII, rule 1.

IN THE COURT OF THE

OF

SUIT
ORIGINAL— No
or Case

OF 19

Plaintiff

versus

Defendant

This address shall be within the local limits of the district Court within which the suit is filed, or of the district Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other provinces —

| Name, parentage and caste | Residence | Pargana or tahsil | Post Office | District |
|---------------------------|-----------|-------------------|-------------|----------|
| | | | | |

Dated

Any summons notice or process in the case may henceforward be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars

Signature of party { Plaintiff
Defendant
Appellant
Respondent

Or

I file the above address according to the instructions given by my client,
(name) ————— (and capacity) —————

Signature of pleader

N B—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter

APPENDIX VI.

Rules made by the High Court of Madras, under s 122

Order III.

4. *Insert the following words at the commencement of sub rule (3) of rule 4 of Order III in the First Schedule .*

No Government or other Pleader appearing on behalf of the Secretary of State for India in Council and

Add the following as sub rule (4) to O 3, r 4 —

(4) Notwithstanding the termination of all proceedings in the suit so far as regards the client, the appointment of a pleader shall unless otherwise provided therein or determined by the death of the client or the pleader or by revocation in accordance with the provisions of clause (2) of this rule, be deemed to authorise him to appear or to make any application or to do any act in connection with getting copies of documents and obtaining return of documents produced or filed in the suit or refund of money paid into Court in the suit

Order IV.

2. *In O 4, r 2, number the present rule 2 (1), and add as rule 2 (2)—*

Registers in accordance with Forms Nos 14, 15, 16, 17 and 18 in Appendix here prescribed for use in all Civil Courts having jurisdiction over the classes of suits and cases specified therein

[NOTE.—For the New Forms Nos 14, 15, 16, 17 and 18, see below *Appendix H*]

Order V.

In Order I, insert the following as rule 18 A —

18A. "A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board "

Chief Ministerial Officer
District Courts may be
empowered to order issue
of fresh summons

Substitute the following for rr 25 and 26 in O 5 —

25. Where the defendant resides out of British India and has no Agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate

Service where defendant
resides out of British India
and has no Agent

Provided that, if, by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon

26. Where—

(a) In the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

Service in foreign territory through Political Agent or Court or by special arrangement.

(b) the Governor General in Council has, by notification in the *Gazette of India* declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

Substituted by Act XVIII of 1914

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant, and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner herein before directed, such endorsement shall be deemed to be evidence of service

Make the following amendments and additions to O 5 —

27. In rule 27 after the words send it insert the words ' by registered post prepaid for acknowledgment

28. In rule 28 after the words shall send insert the words ' by registered post prepaid for acknowledgment

29A. Insert as rule 29A—

Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons

Order IX.

13.—Make the following amendments to Order 13 —

(1) Re number rule 13 as rule 13 (1)

(2) Add the following as sub rule (2) to rule 12 —

(2) The provisions of section 5 of the Indian Limitation Act 1908, shall apply to applications under sub rule (1)

Add the following as rule 15 of Order IX of the Code of Civil Procedure

15. (1) Rules 6, 13 and 14 shall apply mutatis mutandis to the proceedings in execution falling within section 47 of the Code in which the setting aside ex parte orders in execution to the opposite party is required under the provisions of the Code

Setting aside ex parte orders in execution

Rules—Mad.

App. VI.

(2) Subject to the provisions of sub rule (2) of rule 13, an application under this rule shall be made within thirty days of the date of the order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order

Order XIII.

7—*Add the following proviso to rule 7 (2) —*

Provided that no document shall be returned which by force of the decree has become wholly void or useless

9—*Add the following as sub rule (3) —*

Every application under the first proviso to sub rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application including any costs ' incidental to the preparation of the certified copy to be substituted for the original ' and may further direct that any party against whom any order for costs is made shall have such costs if paid, ' included as costs in the cause '

Order XVI.

Insert as rule 4 A —

4 A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under rule 4 according to the same scale, and the money so deposited or paid shall be credited to Government

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance

Order XX.

1.—*Make the following amendments to O 20, r 1 —*

1 (1) The Court after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders

(2) The judgment may be pronounced by dictation to a shorthand writer in open Court

3—*For O 20, r 3, substitute the following rule —*

(3) The judgment shall bear the date on which it is pronounced and shall be signed by the Judge after it has been read and altered or added to, save as may be necessary, and the original script of the judgment shall be signed by the Judge

6—*Substitute the following for sub rule 1 of Rule 6 of Order X V —*

(1) The decree shall agree with the judgment, it shall contain the number of the suit the names and descriptions of the parties, *their addresses for*
Contents of decree. *service and particulars of the claim, and shall specify clearly*

the relief granted or other determination of the suit

12.—*Add the following to O 20, r 12 —*

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry, and in every case the Court of first instance shall, on the application of the decree holder, inquire and pass the final decree

Order XXI.

2.—*Substitute the following for Rule 2 (2) —*

"Any party to the suit or his legal representatives or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

17.—*In O 21, r 17, add as r 17 (5) —*

(5) Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein

[NOTE.—For the new Forms Nos. 19, 20 and 21 see below Appendix H]

25 (2)—(1) *Amend O 21 r 25 (2) as follows —*

Insert the words "or cause him to be examined by any other Court" after the words "examine him"

(2) *Add the following proviso to r 25 (2) —*

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause

39 *Delete the present sub rules 4 and 5 of rule 39 of Order XVI and substitute the following —*

(4) (Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment debtor for his journey from the Court house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub rule (3) for such portion of the current months as remains unexpired, shall be paid to the proper officer of the Court before the judgment debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree holder for the subsistence and cost of conveyance (if any) of the judgment debtor shall be deemed to be costs in the suit

40. *Add the following as a proviso to O 21, r 40 (5) —*

Provided that, in order to give the judgment debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

Rules—Mad.

App. VI.

Add the following as sub rule (6) to O 21, r 40 —

(6) No judgment debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub rule (2) unless and until the decree holder pays into Court such sum as the judge may think sufficient to meet the travelling and subsistence expenses of the judgment debtor and the escort for the journey to and from the prison.

Sub rule (5) of rule 39 shall apply to such payments

For O 21, r 43, substitute the following rules, viz —

43 (1) Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

provided that, when the property seized is subject to speedy and natural decay or when the expenses of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

provided also that when the property attached consists of live stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the form No 15 A of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment

Insert the following rules —

43 A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court house and delivered to the proper officer of the Court

43-B. (1) Whenever attached property kept in the village or place where it is attached is live stock, the person at whose instance it is retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court house

Nothing in this rule shall prevent the judgment debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the persons declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

[NOTE—An additional form, being form No 15 I, has been inserted in Appendix E]

53. Add the following as sub rule 1 (c) to O 21, r 53 —

(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

5. Add the following as a proviso to O 22, r 5 —

Provided that an appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons any may take such finding and reasons into consideration in determining the question.

11 A.—In O 22, after r 11, add the following as r 11 A —

11 A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction except in cases under appeal to the King in Council shall be deemed to be a quasi judicial act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar provided that contested application and applications presented out of time shall be posted before a Judge for disposal.

Order XXVI-A.

1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this Order the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be within a time to be fixed paid into Court by the party at whose instance or for whose benefit the commission is issued.

Order XXVII.

5.—For O 27, r 5, substitute the following rule —

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion.

Order XXIX.

1 A. Insert as Rule 1 A of Order 29 —

In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the day of summons and the date for appearance.

Rules—Mad.

App. VI.

Order XXXII.

3—For O 32, r 3, substitute the following rule —

3 (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff

(3) The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. The affidavit shall further state the name of the person or persons on whom notice has to be served under the provisions of sub rule (5)

(4) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representative of a deceased plaintiff or defendant. The application shall be by separate petitions

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or, where there is no guardian, upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub rule. The notice required by this sub rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in form No 11 set forth in Appendix II hereto

4—For O 32, r 4, substitute the following rule —

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend a defendant or, in the case of a guardian for the suit a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority no person other than the guardian shall act as the next friend of the minor or be appointed as guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be

(3) No person shall without his consent be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in form No 11 A set forth in Appendix II hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested and may give directions for the repayment or allowance of the costs as justice and the circumstance of the case may require

Rules—Mad.
App. VI.

(5) When a guardian for the suit of a minor defendant is appointed, and it is made to appear to the Court that the guardian is not in possession of any, or sufficient funds for the conduct of the suit on behalf of the defendant, and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for the purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him.

6.—*Add the following proviso to sub rule (2) —*

“ Provided that the Court may, in its discretion, dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the karnavan of a Malabar tarwad and the decree is passed in favour of the joint family or the tarwad ”

7.—*Add the following in O 32, r 7 —*

Rule —(1 A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise, as in the following form which shall be numbered as Form No 21 in Appendix D to this Schedule.

14A.—*In O 22 after r 14, add the following as rule 14A —*

within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar provided that contested applications and applications presented out of time shall be posted before a judge for disposal.

17.—*Add as rule 17 of Order 32 —*

In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance.

Order XXXIV.

5.—*Substitute the following for rule 5 (3) —*

“ Where payment in accordance with sub rule (1) has not been made the Court shall on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub rule (1) of Rule 4 ”

Rules—Mad.

App. VI.

Order XL.

4—*Substitute the following for rule 4 of Order XL of the Code of Civil Procedure —*

4 (1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry, as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under rule 3, or by attachment and sale of his property, or, if his property has been attached under sub rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver

Order XLI.

1—(1) *Add the following sentence to sub r (1) of r 1 —*

The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal

Add the following as a proviso to O 41, r 1 (1) —

Provided that, in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act IX of 1908 do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court

(2) *Add the following sentence to sub r (2) of r 1 —*

The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act

... of this Order
... deal with the
... for not prefer
... the facts on
... limitation prescribed therefore
... appeal in any way (otherwise than by such prescribed manner) as may be prescribed by the Court of this Order

or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice had been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act of 1908 have been heard

5.—*Code of Civil Procedure, Order XLI, rule 5 (1)*

Substitute the following for the existing sub rule (1) to rule 5 of Order XLI —

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of any such final decree, as already made

9.—*Substitute the following for r 9 (2) —*

Registers in accordance with Forms Nos 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein

[NOTE.—For the new forms Nos 22, 23, 24 and 25, see Appendix H below]

18 In O 41, r 18 after the words cost of serving the notice insert the word ' or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice

23. *Substitute the following for Order VLI, rule 23 —*

23 Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate

a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

31.—*Substitute the following for r 31 —*

31 The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination,
- (b) the decision thereon,
- (c) the reasons for the decision, and
- (d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled,

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein, provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge

ules—Mad.
pp. VI.

Order XL.

4—*Substitute the following for rule 4 of Order XL of the Code of Civil Procedure —*

4 (1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered

a m c

such a
what
either

any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs.

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under rule 3, or by attachment and sale of his property, or, if his property has been attached under sub rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver.

Order XLI.

1—(1) *Add the following sentence to sub r (1) of r 1 —*

The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal.

Add the following as a proviso to O 41, r 1 (1) —

Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court.

(2) *Add the following sentence to sub r (2) of r 1 —*

The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court Fees Act.

1. ... after the period of limitation prescribed therefore
the facts on

for not prefer
deal with the

apical in any way (otherwise than by dismissing it either under rule 11 of this Order

or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice had been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act of 1908 have been heard

5.—Code of Civil Procedure, Order XLI, rule 5 (1)

Substitute the following for the existing sub rule (1) to rule 5 of Order XLI —

5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed on any ground, except on an appeal by a decree preferred from the decree, but execution of such decree and by the making of a final decree of any such final decree, is already made

9.—Substitute the following for r 9 (2) —

Registers in accordance with Forms Nos 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein

[NOTE.—For the new forms Nos 22, 23, 24 and 25, see Appendix II below]

18 In O 41, r 18 after the words cost of serving the notice insert the word ' or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice '

23 Substitute the following for Order XLI, rule 23 —

23 Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case, and may further direct what issues or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit, and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

31.—Substitute the following for r 31 —

31 The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination,
- (b) the decision thereon,
- (c) the reasons for the decision, and
- (d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled,

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein, provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the transcript of the judgment so pronounced shall after such revision as may be deemed necessary, be signed by the Judge

Rules—Mad.

App. VI.

35 — *Substitute the following for sub rule 2 of rule 35 of Order XLI —*

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, *their addresses for service* and a clear specification of the relief granted or other adjudication made

Order XLIA (new.)

Appeals to the High Court from original decrees of Subordinate Courts

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court

(2) Notwithstanding anything contained in rule 22 of Order XLI the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of Cross Objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him

3. (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub rule above, he shall not be allowed to translate or print any part of the record

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application

4. (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the City of Madras at which service of any notice order or process may be made on the party filing such memorandum

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the City of Madras, and shall give notice thereof to each party who has appeared

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court. Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address

Rules—Mad.
App. VI.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a m and 5 p m at the address for service of the party to be served

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs, be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service

8. If there are several respondents, and all do not appear by the same pleader they shall give notice of appearance to such of the other respondents as appear separately

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered

10 (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers

11. When costs are awarded unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court, shall be Rs 15, and the cost of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs 30 At the request of any party, the Registrar shall cause the order to be drawn up and the said costs to be inserted therein

Memorandum of Objections

12. (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar

13 If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22 (3) of Order XLI, the respondent may file an affidavit stating the facts and the Registrar may dispense with service of the copies mentioned in Rule 12 (1)

14 Rule 31 of Order XLI shall not apply to the High Court If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary

Order XLI-B (new)

1. The rules of Order XLI A shall apply so far as may be to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court

Provided that it shall not be necessary to file copies of the judgment and decree appealed from

Rules—Mad.

App. VI.

2. Notice of the appeal shall be given in manner prescribed by Order XLI A, Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said order

Order XLII (new).*Appeals from appellate decrees*

1. The rules of Order XLI and Order XLI A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order

2. (1) The memorandum of appeal shall be printed or type written and shall be accompanied by the following papers —

A copy thereof, one certified copy and one plain printed or type written copy of the decrees of Court of first instance and of the Appellate Court, and four printed copies of each of the judgments of the said Courts, one copy of each judgment being a certified copy

(2) If any ground of appeal is based upon the construction of a document, a printed or type written copy of such document shall be presented with the memorandum of appeal

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented

(3) If the appellant fails to comply with this rule, the appeal may be dismissed

Order XLIII.*Substitute the following for rule 1 (d) of Order XLIII of the Code of Civil Procedure —*

1. (d) An order under rule 13 or rule 15 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed ex parte

Substitute the following for sub rule (s) of rule 1 of Order XLIII of the Code of Civil Procedure —

(s) An order under rule 1 or 4 of Order XL, except an order under the proviso to sub rule (2) of rule 4

2.—Substitute the following for r 2 —

2. The rules of Order XLI and of Order XLI A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court

3.—Substitute the following for rule 3 of O XLIII —

Appeals from Appellate
Orders

3 (1) The provisions of Order XLII shall apply, so far as may be, to appeals from Appellate Orders

(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order of the Appellate Court

(3) If any ground of appeal is based upon the construction of a document, a printed or type written copy of such document shall be presented with the memorandum of appeal

Rules—Mad.

App. VI.

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented

Order XLVII.

7. In sub rule (1) of Rule 7, Order XLII, *substitute* the word "order" for the word "application" occurring after the words 'on the ground that the

Appendix B to Schedule I.

Form No 1—*Insert the following note in red ink in form No 1, namely —*

Also take notice that in default of your filing an address for service before the day before mentioned you are liable to have your defence struck out

Form No 13 A—*Insert the following as form No 13 A after form No 13 in Appendix B of Schedule I —*

No 13 A

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party

(ORDER XVI r 4 A)

(CASE TITLE)

This is to certify that (name) (designation) being a Government servant from the Province of (name) was summoned to give evidence in his official capacity on behalf of the plaintiff/defendant in the above suit/matter and was in attendance in this Court from the day of to the day of 193 , (inclusive) and that a sum of Rs has been paid into Court by the plaintiff/defendant towards his travelling and subsistence allowance for days according to the scale prescribed by the Government of the Province of (name) and that the said amount has been/will be remitted to the Government treasury at to be credited to Government under the head XVI A—Miscellaneous Fees and Fines

Dated the day of 193

Presiding Judge or Chief Ministerial Officer

Appendix D to Schedule I.

Form No 10 A—*Insert in Appendix D the following as Form No 10 A —*

FORM No 10 A

FINAL DECREE FOR SALE [ORDER 34, RULE 5 (2) OR ORDER 34 RULE 8 (4)]

(Title)

Upon reading the preliminary decree passed in the above suit and the application of the plaintiff dated and upon hearing Mr

for plaintiff and Mr

for defendant and it appearing that the payment directed by the said decree has not been made,

Rules—Mad.

App. VI.

It is hereby decreed as follows —

(1) that the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be applied in payment of what is declared due to the $\frac{\text{plaintiff}}{\text{defendant}}$ in the aforesaid preliminary decree together with subsequent interest and subsequent cost and that the balance, if any, be paid to the $\frac{\text{defendant}}{\text{plaintiff}}$ or other person entitled to receive it, (2) that if the net proceeds of the sale is insufficient to pay such amount and such subsequent interests and costs in full the $\frac{\text{plaintiff}}{\text{defendant}}$ be at liberty to apply for a personal decree for the amount of the balance, and (3) that the $\frac{\text{defendant}}{\text{plaintiff}}$ do also pay $\frac{\text{plaintiff}}{\text{defendant}}$ Rs for the costs of this application

(Here enter description of mortgaged property in English or in the language of the Court)

NOTE—(1) In the case of a decree under Order 34, rule 5 (2) score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34, rule 8 (4) score out the same words occurring above the lines

(2) Direction No (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist

Form No 10 B—Insert in Appendix D the following as Form No 10 B—

FORM No 10 B

FINAL DECREE FOR REDEMPTION [ORDER 34, RULE 3 (1) ORDER 34 RULE 5 (1)
AND ORDER 34, RULE 8 (1)]

(Title)

Upon reading the preliminary decree in the above suit on _____ and
the application of the $\frac{\text{defendant}}{\text{plaintiff}}$ —I A No _____, dated _____
and after hearing Mr _____, leader for the
and Mr _____, pleader for the
and it appearing that the payment directed by the
aforesaid decree has been made —

It is hereby decreed as follows —

That the $\frac{\text{plaintiff}}{\text{defendant}}$ do deliver up to the $\frac{\text{defendant}}{\text{plaintiff}}$ or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the $\frac{\text{defendant}}{\text{plaintiff}}$ free from the mortgage and from all incumbrances created by the $\frac{\text{plaintiff}}{\text{defendant}}$ or any person claiming under him (or by those under whom he claims) and do also put the $\frac{\text{defendant}}{\text{plaintiff}}$ in possession of the property

SCHEDULE

Description of the mortgaged property

The costs of the $\frac{\text{defendant}}{\text{plaintiff}}$ in these proceedings —

Particulars

Amount

NOTE—(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines, in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines.

Rules—Mad.

App. VI.

(2) The words "or by those under whom the claims" will be inserted only if the mortgagee derives title from an original mortgagee

Form No. 24 —Add the following as Form No 24 in Appendix D —

FORM No 24

[DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC]

(Title)

This suit coming on this day for final disposal in the presence of, etc , and C D the defendant, a minor by E F, his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the _____ day of _____ and made between A B, the plaintiff of the one part, and the said C D by the said guardian *ad litem* of the other part, (or, on terms hereafter set forth) and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto It is ordered as follows —

(Set out of the terms of the compromise)

Appendix E to Schedule I.

Form No. 15 —For the word Dated substitute the words given under my hand and the seal of the Court, this _____ day of _____

Form No 15 A —Add the following as Form No 15 A in Appendix E —

FORM No 15 A

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT
IN CHARGE OF PERSON INTERESTED AND SURETIES

(Order XXI, rule 43)

In the Court of _____ at _____

Civil Suit No _____ of _____

A B of _____

against _____

C D of _____

Knowall men by these presents that we, I J of _____ etc , and K L of _____ etc, and M N of _____ etc , are jointly and severally bound to the Judge of the Court of _____ in Rupees _____ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us in the whole our and each of our heirs, executors and administrators jointly and severally, by these presents

Dated this _____ day of _____ 19 _____

AND WHEREAS the movable property specified in the schedule hereunto annexed had been attached under a warrant from the said Court, dated the _____ day of _____ 19 _____, in execution of a decree in favour of _____ in suit No _____ of _____ 19 _____ on the file of _____ and the said property has been left in the charge of the said I J

Rules—Mad.**App. VI.**

Now the condition of this obligation is that, if the above bounden I J shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force

I J

A. L.

M N

Signed and delivered by the above bounden _____ in the presence of _____

Form No 17—*Add the following as a 'Note' to Form No 29—(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure 1908 —*

" Note —The title deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title deeds, or mortgages not disclosed in the encumbrance certificate "

Form No 39—*Substitute the following for Form No. 39 —*

FORM No 39

ORDER FOR DELIVERY TO CERTIFY PURCHASER OF LAND AT A SALE IN EXECUTION
(ORDER 21 RULE 95)

(Title)

To

THE BAILIFF OF THE COURT

WHEREAS _____ has become the certified purchaser of
at a sale in execution of decree in suit No _____ of 19 _____, you are hereby ordered
to put the said _____, the certified purchaser, as aforesaid, in possession of the
same, and you are hereby further required to state in your return whether there are crops on
the land and whether you have delivered them to _____, the certified purchaser

Given under my hand and the seal of the Court this _____ day of _____, 19 _____

Judge

Appendix F to Schedule I.

Form No 9—*For Form No 9 of Appendix F substitute—*

FORM No 9**APPOINTMENT OF A RECEIVER.**

(O. XL, r 1)

(Title.)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the _____ day of _____ 19 _____ in favour of _____)

It is hereby ordered that A B be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents issues and profits thereof under Order XL of the Code of Civil Procedure, 1908 with all power under the provisions of that order, except that he shall not without leave of the Court

(1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs 1,000

And it is further ordered that the ^{parties} ~~defendant~~ to the above suit and all persons claiming under them to deliver up quite possession of the properties, movable and immovable, specified below together with all leases, agreements for lease, khabulats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the receiver do take possession of the said property, movable and immovable, and collect the rents, issues and profits of the said immovable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipts or receipt of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said _____ and shall be entitled to retain in his hands the sum of Rs _____ for current expenses but subject thereto shall pay his net receipts, as soon as the same come to his hands into Court to the credit of this suit. He shall once in every _____ months file his accounts and vouchers in Court, the first account to be filed on the _____ day of _____ and to be passed on the _____ day of _____. He shall be entitled to commission at the rate of Rs _____ per cent on the net amounts collected by him or to the sum of Rs _____ per month (or as the case may be) as his remuneration (or he shall act without any remuneration)

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the State in addition to his own office establishment the following further establishment —

(Here enter specification of property)

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Appendix G to Schedule I.

Form No. 6.—Insert the following note in red ink in Form No 6, namely —

“Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance”

Form No. 6 A.—In Appendix G, insert the following as Form No 6-A —

FORM No 6-A (Order VLI 4, rule 2)

NOTICE TO RESPONDENT

(Cause title)

Appeal from the

of
of

dated the

of the Court
day

Rules—Mad.

App. VI.

To

Respondents

Take notice that an appeal from the above decree (order) has been presented by the abovenamed appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence

The address for service of the appellant is that of his pleader Mr. A. B. of (insert address) Madras

(If the appellant appears in person, insert his address for service.)

Given under my hand and the seal of the Court, this
day of 19 .

Registrar

[Interlocutory application No of 19 has been made by appellant, and execution has been stayed (or other order made) by order dated the day of 19]

Form No. 6 B.—In Appendix G, insert the following as Form No. 6 B—

FORM No. 6 B (Order XLI A, rule 3)

MEMORANDUM OF APPEARANCE.

(Cause title)

Take notice that the Respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (insert address)

The said respondent requires a list of the papers which the appellant proposes to translate and print

Dated the day of 19

(Signed) C. D.,
Attorney for Respondent

To the Registrar, High Court of Judicature, Madras

APPENDIX G

No. 9

Omit from Form 9 in Appendix G to the First Schedule to the Code of Civil Procedure the entire portion beginning with the words 'Memorandum of Appeal' and ending with the words 'the following reasons namely'

CODE OF CIVIL PROCEDURE, 1908

APPENDIX G.

No. 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

O XLV, r. 7, C. C. P.

(In cases where the subject matter of the appeal is of sufficient value and the findings of the courts are not concurrent)

Read petition presented under O XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the ^{decree} _{final order} of this Court in suit No of 19 .

Rules—Mad.

App. VI.

The petition coming on for hearing upon perusing the petition and the ground of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject matter of the suit in the court of first instance is $\frac{\text{Rs } 10\,000}{\text{upward of Rs } 10\,000}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs } 10\,000}{\text{upwards of Rs } 10\,000}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed from involved $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs } 10\,000}{\text{upwards of Rs } 10\,000}$ and that the $\frac{\text{decree}}{\text{final order}}$ appealed from does not affirm the decision of the lower court

APPENDIX G

No 12-B

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

O XLV, r 7, C C P

(In cases where the subject matter is of sufficient value and the findings of the court are concurrent)

Read petition presented under O XLV, r 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this court in suit No _____ of 19 _____

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject matter of the suit in the court of first instance is $\frac{\text{Rs } 10\,000}{\text{upwards of Rs } 10\,000}$ and the $\frac{\text{amount}}{\text{value}}$ of the subject matter in dispute on appeal to His Majesty in Council is also of the value of $\frac{\text{Rs } 10\,000}{\text{upwards of Rs } 10\,000}$ or that the $\frac{\text{decree}}{\text{final order}}$ appealed against involves $\frac{\text{directly}}{\text{indirectly}}$ some claim or question $\frac{\text{to}}{\text{respecting}}$ property of the value of $\frac{\text{Rs } 10\,000}{\text{upwards of Rs } 10\,000}$ and that the affirming $\frac{\text{decree}}{\text{final order}}$ appealed from involves the following substantial question (s) of law, viz:—

(1)

(2)

APPENDIX G

No 12 C

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL

O XLV, r 7, C. C P

(In cases where the subject matter in dispute is either not of sufficient value or if incapable of money valuation.)

Read petition presented under O XLV, r 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the $\frac{\text{decree}}{\text{final order}}$ of this court in suit No _____ of 19 _____

Rules—Mad.

App. VI.

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this court doth certify that the $\frac{\text{am. amt.}}{\text{vs.}} \frac{\text{amt.}}{\text{vs.}}$ of the subject-matter of the suit both in the court of first instance and in this court is $\frac{\text{bel. w. P. 10000 in value}}{\text{insupportable in new situation}}$ this court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below viz:—

(1)

(2)

Appendix H to Schedule I.

Form No. 11—*Substitute the following for Form No. 11 of Appendix H—*

FORM N. 11

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN OR TO THE PERSON IN CHARGE OF THE MINOR.

[Order XXXII rule 3 (a)]

(Title)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor

Whereas an application has been presented on the part of the _____ in the above suit for the appointment of a guardian for the suit for the said minor, you are hereby required to take notice that, unless within _____ days from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as $\frac{\text{his}}{\text{her}}$ guardian for the purposes of the said suit, the Court will proceed to appoint some other person to act as guardian of the said minor for the purposes of the said _____

Given under my hand and the seal of the Court this _____ day of _____ 19 _____

Form No. 11 A.—*In Appendix H, insert the following Form as Form No. 11 A—*

FORM No. 11 A.

NOTICE TO PROPOSED GUARDIAN OF A MINOR $\frac{\text{DEFENDANT}}{\text{RESPONDENT}}$

[Order XXXII, rule 3 (a)]

To

(Y. Z.)

(Name, to description and place of residence of proposed guardian)

Take notice that X $\frac{\text{plaintiff}}{\text{applicant}}$ in _____ has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ and that the same will be heard on the _____ day of _____ 19 _____

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said $\frac{\text{defendant (s)}}{\text{respondent (s)}}$ you are requested to *sign* (or affix your mark to) the declaration on the back of this notice

4 In the event of your failure to signify your express consent in the manner indicated above, take further notice that the Court may proceed under Order XXXII, r 3, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor ^{defendant (s)} _{respondent (s)} aforesaid

Dated the _____ day of _____ 19 .

(Signed)

(To be printed on the reverse)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor ^{defendant (s)} _{respondent (s)} therein mentioned

Witnesses

(Signature)

Y Z

1

2

Form No 14 — *For Form No 14 of Appendix II, substitute —*

FORM No 14

REGISTER OF ORDINARY SUIT INSTITUTED

Court—

Year—

Instructions

If the suit has been received by transfer, or instituted under Order XXXII, Schedule I C C P a note should be made to that effect at the head of the page

2 If a suit is remanded under rule 23 Order XLI, or restored to file under rule 9 or rule 13, Order IX, Schedule I, C C P, note under item 2, the date of restoration to, file

3 Under the head “*Particulars of claim*” enter particulars required by clauses (g) and (h) of rule 1, Order VII, Schedule I, C C P, and also the value of the suit as required by clause (i) of that Order and with special reference to Judicial Statements Nos VII and VIII and H C Circulars Nos 1054 of 1870 and 2253 of 1894 Entries under heads 3 4 and 5 should be full for embodiment in the decree, as required by rule 6, Order XX, Schedule I, C C P

4 Note carefully the new heads 8 and 10 and fresh additions to heads 9 and 12

5 The certified copies of Judgment and Decree in Second Appeal sent to the lower Appellate Court should be forwarded by it to the Court of First Instance which will return them to the former Court after recording the necessary entries under head 9 of this Register

6 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C C P, and also of any withdrawal of the claim or a portion of the claim against any of the defendants.

7 Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1 Ordinary Suit No.

of 19

2 Date of { Presentation.
Filing

3 PLAINTIFF—Name, description and place of abode

Rules—Mad.
App. VI.

Form No 15—*Add the following as Form No 15 in Appendix II —*

FORM No 15

REGISTER OF SMALL CAUSE SUITS INSTITUTED

Court—

Year—

Instructions

If the suit has been received by transfer or remanded or restored to file, a note should be made to that effect at the head of the page

2 Under the head 5 *Particulars of claim* enter particulars required by clauses (g) and (h) of Rule 1, Order VIII Schedule I, C C P, and also the *value* of the suit as required by clause (i) of that order Entries under heads 3 4 and 5 should be full for embodiment in decrees, as required by Rule 6 Order XX, Schedule I, C C P

3 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C C P

4 Any amendments or alterations made during the progress of the suit in the value or particulars of the claim or as to the date or place of cause of action should appear under head 5

1 *Small Cause Suit No* of 19

2 Date of { Presentation.
Filing

3 PLAINTIFF—Name, description and place of abode

4 DEFENDANT—Name, description and place of abode

5 PARTICULARS OF CLAIM—*Claim for*
Cause of action arose at on

6 Date for *Defendant's first appearance*

Valid for { Plaintiff
Defendant

7 JUDGMENT, date and result

8 Number of application for review (or re hearing) with result and date
Fresh Judgment, if any, with date

9 Revision Case No. of 19 with result and date.

10 Note proceedings, if any, taken under Rule 11, Order XX, Rule 2, etc.,
Order XXI, Schedule I, C C P

Rules—Mad.

App. VI.

11 *Execution —*

| No | Date of application | Order and date | Against whom. | For what, and amount, if for money | Amount of costs | | |
|----|---------------------|----------------|---------------|------------------------------------|-----------------|---|---|
| | | | | | Rs | A | P |
| | | | | | | | |

12 *Return of Execution —*

| Amount paid into Court | | | Persons arrested | Minute of other return than payment or arrest, and date of every return |
|------------------------|---|---|------------------|---|
| Rs | A | P | | |
| | | | | |

Rules—Mad.

App. VI.

Form No. 17—Add the following as Form No. 17 in App. II —

FORM No. 17

REGISTER OF CIVIL MISCELLANEOUS CASES RECEIVED

(ON THE

SIDE)

Court—

Year—

Instructions

1 In this register must be entered all cases ordered by H. C. Circular No. 557 of 1889 to be shown as miscellaneous applications for purposes of Judicial Statement No. IX, Part 2, as well as cases of contempt of Court (vide H. C. Circular No. 2028 of 1892)

2 In the matter of references under the Land Acquisition Act, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference, in column 5 of the name of the claimant, and in column 6 whether the reference is under section 18, 29 or 30 of the Act

3 In the matter of references under section 10 of Madras Regulations III of 1802, enter in column 3 the number and date of letter of reference, in column 4 the designation of the officer making the reference and the name of the deceased, in column 5 the name of the claimant, if any, in column 6 the words "Section 10 Madras Regulation III of 1802," and in the last column the number and date of reference, if any, made to Government and its result

| Number of miscellaneous cases | Date of presentation | Number of connected cases if any | Name of petitioner if any and of his vakil | Name of defendant and of his vakil | Purpose of case and section of law | Final order with date | Number of appeal with res. it and date |
|-------------------------------|----------------------|----------------------------------|--|------------------------------------|------------------------------------|-----------------------|--|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| | | | | | | | |

Form No. 18.—Add the following as Form No 18 in App. II —

FORM No 18
REGISTER OF MISCELLANEOUS CASES DISPOSED OF

Court—
Year—

Instructions

1 This register will show all miscellaneous cases of every kind whether instituted on the application of parties or of the Court on motion including cases of contempt of Court (H C Circulars Nos 557 of 1898 and 2928 of 1902)

2 The date to be entered in column 3 will always be the latest date. In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

| Disposed of | | | | | | | | | | | | | | | | | Actual number of days intervening between institution and disposal | Remarks. | Corresponding columns to Statement No IX, Part 2 (a) | | | | | |
|------------------|----|-----------------------------------|----|----|--------------|----|--------------|----|----|---------------------------------------|----|----|----|----|----|----|--|----------|--|----|----|----|----|----|
| Without contest. | | | | | With contest | | | | | Party committed for contempt of Court | | | | | | | | | | | | | | |
| Ex parte. | | Order on reference to arbitration | | | On oath | | After trial. | | | | | | | | | | | | | | | | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 |

APP. VI.

Form No. 19 — Add the following as Form No. 19 in App. H. —

FORM No. 19

REGISTER OF EXECUTION PETITIONS RECEIVED

(ON THE

Singh

Court—

1 car—

Instructions

Applications for transmission of decree for execution beyond the jurisdiction of the Courts passing them should not be entered in this Register but must be entered in the Register of Miscellaneous Cases Received (Form No. 17).

| | |
|---|---|
| 1 | Number of Executive petitions. |
| 2 | Date of presentation. |
| 3 | Number of executive suit and if last peti- tion application. |
| 4 | Name of execu- tive and if his leader. |
| 5 | Name of judicial district and of the judge. |
| 6 | Terms of decree or order to be execut- ed with date of any precedence from which time runs for this application. |
| 7 | Made of audience and order of table or law presiding it. |
| 8 | Order with reasons for closing of exe- cutions under this application and date. |
| 9 | Number of judicial. |

Form No 20—Add the following as Form No 20 in App II:—

FORM No 20

REGISTER OF DECREES OF OTHER COURTS RECEIVED FOR
EXECUTION UNDER SECTIONS 38 AND 39, C C P

Court—

Year—

[illegible]

Rules—Mad.
App. VI.Form No. 22.—*All the following as Form No. 21 (a) (p) H —*

FORM No. 21

REGISTER OF EXECUTION PETITION DROPPED (F

Court—

Year—

Instr. No. 22.

1 The date to be entered in column 4 will always be the latest date. In the case of petitions restored to file, the date of original institution should be entered, and the date of restoration noted in the column of remarks.

2 Note in the remarks column the number of judgment debtors imprisoned in each case, the value of decree under which judgment-debtor was imprisoned and date when sent to jail and date of release, for the purposes of columns 34 to 37 of Statement No. VI.

| Serial Number | Number of the execution petition dropped (F) | Number of connected case | Date of institution or receipt of the order of transfer | Date when proceedings were finally closed | Withdrawn or prosecuted | Transferred | Application on which proceedings were finally closed | | | Amount | | How the Judgment debt | |
|---------------------|---|--------------------------|---|---|--------------------------------|---|--|--|---|--|---|------------------------|----|
| | | | | | | | Satisfaction obtained | Execution wholly discontinued | Indev. in execution application disposed of | Realised | In prisoned. | Arrested but released. | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | In full. | In part. | 10 | 11 | 12 | 13 | 14 |
| | | | | | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| | | | | | | | | | | 14 | 14 | | |
| decree was executed | | | | | | | | | | | | | |
| Movable Property | | Immovable Property | | | Process in given (F) | | Execution effected (Section 54 C.C.P.) | | | Actual number of days difference between institution and disposal. | | | |
| Sold | Attached but released (Rule 55 or 60 (Order XXI)) | Added | Attached but released (Rule 55 or 60 (Order XXI)) | With section 2 or (Rule 53 Order XXI) scheduled date 1 or (Rule 53 (iii)) | Movable (Rule 51 (Order XXI)). | Immovable (Rule 52 and 56 (Order XXI)). | Specific performance ordered. | Partition effected (Section 54 C.C.P.) | Execution otherwise effected. | | | | |
| 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | REMARKS (If the petition is only for satisfaction of the decree, it to be noted) | | |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | | | |
| | | | | | | | | | | | REMARKS (If the petition is only for satisfaction of the decree, it to be noted) | | |

Rules—Mad.

App. VI.

Form No 22.—*Id* the following as Form No. 22 in Appendix II —

FORM No. 22

REGISTER OF APPEALS RECEIVED.

Court—

Year—

Instructions

Appeals from orders which have the force of decrees should be shown in this register and not in the Register of Miscellaneous Appeals Received (Form No. 21) in which appeals from other orders should be entered—rule II. C. Circular No. 3400, dated 22nd December 1893, and section 2 (2) and Rule 5, Order XXXVI, Schedule I, C. C. P.

2 Under item "5. Particulars of suit and decree appealed from" enter also *Nature and Value* of appeal with special reference to the information required by annual statement No. A, Parts 3 and 4 and H. C. Circulars Nos. 1051 of 1870 and 2253 of 1894. In cases of appeals against orders having the force of decrees substitute the word "Order" for "Decree" and add after date the words "*passed under* C.C.P. on *11 P. No.* of 19 "

3 If the appeal has been received by transfer, a note should be made to that effect at the head of the page

4 If an appeal is remanded under Rule 23, Order XLI, Schedule I, C. C. P., note under head 2 the date of restoration to file

5 A note should be made of all parties brought on or struck off the record under Order I or XXII, Schedule I, C. C. P.

1 Appeal No of 19 .

2 Date of { Presentation.
Filing

3 APPELLANT—Name, description and place of abode

4 RESPONDENT—Name, description and place of abode

5 PARTICULARS OF SUIT AND DECREE APPEALED AGAINST *Decree of*
the Court of *dated* 19
in Original Suit No *of 19*
Value of relief

Particulars of relief

| Claimed | Decreed | Appealed against |
|-----------|-----------|------------------|
| Rs. A. P. | Rs. A. P. | Rs. A. P. |

6 Hearing, if any, under Rule 11, Order XLI, Schedule I, C. C. P., with result with date

7 Date for respondent's first appearance

Valid for { Appellant
Respondent

8 JUDGMENT, result and date

9 Objections, under Rule 22, Order XLI, Schedule I, C. C. P., if any, filed by whom and value

10. Number of Application for review (re hearing) with result and date
Fresh Judgment, if any, with date

11. Second Appeal No of 19 . Result with date

Form No. 23.—Add the following as Form No. 23 in Appendix II.—

Year—

Instructions

Court—

1. There must be three separate registers of appeals disposed of, viz. (1) for money or movables, (2) under the Indian Estates Land Act 1903 and (3) for title and other appeals. In the case of appeals restored to file the date of original institutions should be entered.

[illegible]

Rules—Mad.

App. VI.

Form No 24—*Add the following as Form No. 24 in App II —*

FORM No 24

REGISTER OF MISCELLANEOUS APPEALS RECEIVED

Court—

Year—

Instructions

Appeals from orders which have the force of decree *should not be shown* in this register. Appeals from other appealable orders only should find place in this register.

2 If necessary, give value of appeal under head.

3 A note should be made of all parties brought on or struck off the record under Order I or XVII, Schedule I, C.C.P.

1 *Miscellaneous Appeal No.* _____ of 19 _____

2 Date of {

3 APPELLANT—Name, description and place of abode

4 RESPONDENT—Name, description and place of abode

5 PARTICULARS OF ORDER APPEALED AGAINST—Order of the _____ Court of
dated _____ 19 _____ passed
on M P No. _____ of 19 _____, in Original Suit No

Appeal under _____ of

6 Hearing, if any, under Rule 11, Order XII, Schedule I, C.C.P., and result with date

7 Date for Respondent's first appearance

Vakil for { Appellant
Respondent

8 JUDGMENT—Result and date

9 Objections under Rule 22, Order XII, Schedule I, C.C.P., if any, filed by whom

10 Number of applications for review (or re-hearing) with result and date

Fresh Judgment, if any, with date.

Form No 25—Add the following as Form No 25 in App II —

car-

Count

Instructions

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file the date of original institution should be entered.

[illegible]

APPENDIX VII.

Rules made by the High Court of Lahore under s. 122.

Order II.

8.—After rule 7 of Order II, insert —

8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court Fees Act.

Order V.

10 Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

Provided that in any case if the plaintiff so wishes the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule.

15 Where in any suit the defendant cannot be found or is absent from his residence and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Where service may be on male member of defendant's family

Explanation — A servant is not a member of the family within the meaning of this rule.

Order VII.

2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed.

But where the plaintiff sues for mense profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaint shall state approximately the amount or value sued for.

19 Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20 An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

Rules—Lahore.

App. VII.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served

23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so

Order VIII.

1. (1) The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence, and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set off

11. Every party, whether original, added or substituted who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just

12. Rules 20, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule

Order IX.

9. (1) Where a suit is wholly or partly dismissed under rule 8 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside and if he satisfies the Court that there was sufficient cause for his non appearance when the suit was called on for hearing the

Decree against plaintiff by default bars fresh suit

Rules—Lahore.**App. VII.**

Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

Order XIII.

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same—

Return of admitted documents

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred, or, if an appeal has been preferred, when the appeal has been disposed of.

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so.

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

Order XVI.

1. At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Summons to attend to give evidence or produce documents

Provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor.

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

Expenses of witness to be paid into Court on applying for summons

Exception—When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1)

Rules—Lahore.

App. VII.

(2) In determining the amount payable under this rule the Court may, in the case of any person summoned to give evidence as an expert allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case

Experts.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of expenses the scale of such expenses, to any rules made in that behalf

3 (1) The sum paid into a Court shall, except in the case of a Government servant, be tendered to the person summoned at the time of serving the summons if it can be served personally

Tender of expenses to witness

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government

Exception (1)—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

Exception (2)—A Government servant, whose salary does not exceed Rs 10 per mensem, may receive his expenses from the Court

4. (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned or when such person is a Government servant, to be paid into Court as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons or the Court may discharge the person summoned without requiring him to give evidence or may both order such levy and discharge such person as aforesaid

Procedure where insufficient sum paid in

Order XVII.

1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant Court may grant time and adjourn hearing time to the parties or to any of them, and may from time to time adjourn the hearing of the suit

(2) In every such case the Court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occasioned by the adjournment

Provided that, when the hearing of evidence has once begun the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

(3) Where sufficient cause is not shown for the grant of an adjournment under sub rule (1) the Court shall proceed with the suit forthwith.

Order XXI.

Modes of paying money under a decree

1. (1) All money payable under a decree shall be paid as follows, namely—

(a) into the Court whose duty it is to execute the decree or

(b) out of Court to the decree holder or

(c) otherwise as the Court may direct the decree holder to.

Rules—Lahore.

App. VII. *Explanation*—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose.

(2) Where any payment is made under clause (a) of sub rule (1), notice of such payments shall be given to the decree holder.

10. Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof

Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non satisfaction by the holder of the decree pending the receipt of an order of transfer under section 33

16. Where a decree or if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree holder

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transfer, and the decree shall not be executed until the Court has heard his objections (if any) to its execution

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others

17. (1) On receiving an application for the execution of a decree as provided by rule 11, sub rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time may reject the application

(2) Where an application is amended under the provisions of sub rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented

(3) Every amendment made under this rule shall be signed or initialled by the Judge

“ ” “ — the proper register shall, subject to the ruling to the nature of the application

Provided that, in the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree

Rules—Lahore.

App. VII.

22. (1) Where an application for execution is made

(a) more than two years after the date of the decree,
or(b) against the legal representative of a party to the
decree,Notice to show cause
against execution in certain
cases

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution

judgment debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient

When Court may stay
executioncause being shown, stay the execution of such decree for
a reasonable time, to enable the judgment debtor to apply
to the Court by which the decree was passed, or to any Court

having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto

(2) Where the property or person of the judgment debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the Court shall, unless sufficient cause is shown to the contrary, require such security from, or impose such conditions upon, the judgment debtor as it thinks fit.

31. (1) Where the decree is for any specific movable, or for any share in a specific

Decree for specific
movable propertymovable, it may be executed by the seizure, if practicable,
of the movable or share, and by the delivery thereof to the
party to whom it has been adjudged, or to such person as he

appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property, or by both

(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application

Rules—Lahore.

Apr. VII.

Provided that the Court may in any special case, according to the special circumstances thereof, extend the period beyond three months; but it shall in no case exceed six months in all

(3) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of three months or such other period as may have been prescribed by the Court from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused the attachment shall cease

32- (1) When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for an injunction, has been passed has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property, or, in the case of a decree for the specific performance of a contract or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof or by both attachment and detention

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for three months, if the judgment debtor has not obeyed the decree and the decree holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

Provided that the Court may for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months but it shall in no case exceed one year in all

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where at the end of three months or such other period as may have been prescribed by the Court from the date of the attachment, no application to have the property sold has been made, or if made has been refused the attachment shall cease

(5) Where a decree for the specific performance of a contract or for an injunction has been passed, the Court may, in addition to all or any of the proceedings which may be done so far as practicable by the Court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree

Illustration

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings

33. (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any), shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree holder for the subsistence of the judgment debtor shall be deemed to be costs in the suit.

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

43. (1) Where the property to be attached is movable property, other than attachment of movable property other than agricultural produce in possession of judgment-debtor, agricultural produce in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof.

Provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once, and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule he may at the instance of the judgment debtor or of the decree holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached.

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15 A of Appendix B to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(c) in the charge of a village *lambardar* or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15 B of Appendix B with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule is vacated on any of the reasons specified in rules 55, 57 or (a) of this Order, the Court may at its discretion return the attached property to the person in whose possession it was first attached.

Rules—Lahore.

App. VII.

(3) When property is made over to a custodian under sub-clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate and dated and signed by

- (a) the custodian and his sureties,
- (b) the officer of the Court who made the attachment,
- (c) the person whose property is attached and made over,
- (d) the two respectable witnesses

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian

43 A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court

(3) A custodian appointed under the second proviso to rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him

(4) When any property is taken back from a custodian he shall be granted a receipt for the same

43 B. (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is retained shall provide for its maintenance and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the court house

Nothing in this rule shall prevent the judgment debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he received the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

43 C. When an application is made for the attachment of live stock or other movable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days of the date of the attachment the amount of such costs for such further period, the Court, on receiving a report from the attaching officer, shall order the withdrawal of the attachment to be paid.

43 D. Any person who has undertaken to keep attached property under rule 43(1) shall be liable to be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him

45 (1) Where agricultural produce is attached the Court shall make such arrangements for the custody thereof as it may deem sufficient, and for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend cut, gather and store the produce and *do any other act necessary for maturing or preserving it*, and if the judgment debtor fails to do all or any such acts, the decree holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered the Court may suspend the execution of the order for such time as it thinks fit and may, in its discretion make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) *A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered*

53 (1) Where the property to be attached is a decree either for the payment of money or for sale in enforcement of a mortgage, or charge, the attachment shall be made —

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court then by the issue to such other Court and to the Court to which it has been transferred for execution of a notice by the Court which passed the decree sought to be executed requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment debtor applies to the Court receiving such notice to execute the attached decree with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(2) Where a Court makes an order clause (a) of sub rule (1) or receives an application under sub head (ii) of clause (b) of the said sub rule it shall on the application of the creditor who has attached the decree or his judgment debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

Rules—Lahore.

App. VII.

(1) When property is made over to a custodian under sub-clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate and dated and signed by .

- (a) the custodian and his sureties,
- (b) the officer of the Court who made the attachment,
- (c) the person whose property is attached and made over,
- (d) the two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian.

43 A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian he shall be granted a receipt for the same.

43 B. (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is retained shall provide for its maintenance and, if he fails to do so and if is in charge of an officer of the Court, it shall be removed to the court house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

- (2) The Court may direct that any sums which have been expended by the attaching officer from the proceeds received in pursuance of the rules be

recovered as costs of the attachment from any party to the proceedings.

43 C. When an application is made for the attachment of live stock or other movable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days before the expiry of any such period of 15 days the amount of such costs for such further period is paid to the Court, on receiving a report from the proper officer of the Court, on receiving a report of the removal of the attachment.

43 D. Any person who has undertaken to keep attached property under rule 43(1) (c) shall be liable to be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him.

Rules—Lahore.

App. VII.

45. (1) Where agricultural produce is attached the Court shall make such arrangements for the custody thereof as it may deem sufficient, and for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment debtor may tend cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment debtor fails to do all or any such acts, the decree holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf and the costs incurred by the decree holder shall be recoverable from the judgment debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil

(4) Where an order for the attachment of a growing crop has been made at a
order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered

53 (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage, or charge
Attachment of decrees the attachment shall be made —

(a) if the decrees were passed by the same Court, then by order of such Court, and

(b) if the decree sought to be attached was passed by another Court then by the issue to such other Court and to the Court to which it has been transferred for execution of a notice by the Court which passed the decree sought to be executed requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment debtor applies to the Court receiving such notice to execute the attached decree with the consent of the said decree holder expressed in writing or with the permission of the attaching Court

(2) Where a Court makes an order clause (a) of sub rule (1) it receives an application under sub head (ii) of clause (f) of the said rule and all on the application of the creditor who has attached the decree or his judgment debtor proposed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

Rules—Lahore.

App. VII.

(3) When property is made over to a custodian under sub-clauses (a) or (c), of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate and dated and signed by—

- (a) the custodian and his sureties,
- (b) the officer of the Court who made the attachment,
- (c) the person whose property is attached and made over,
- (d) the two respectable witnesses

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian

43 A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the court house and delivered to the proper officer of the Court

(3) A custodian appointed under the second proviso to rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him

(4) When any property is taken back from a custodian he shall be granted a receipt for the same

43 B. (1) Whenever attached property kept in the village or place where it is attached is live stock the person at whose instance it is retained shall provide for its maintenance and, if he fails to do so and if is in charge of an officer of the Court, it shall be removed to the court house

Nothing in this rule shall prevent the judgment debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he received the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings

43 C. When an application is made for the attachment of live stock or other movable property, the decree holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days of the expiry of the period of 15 days the amount of such costs for such further period is reported to Court, the Court, on receiving a report from the attaching officer, shall order for the withdrawal of the attachment and the costs are to be paid

43 D. Any person who has undertaken to keep attached property under rule 43(1) (c) shall be liable to be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him

45. (1) Where agricultural produce is attached the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it, and if the judgment-debtor fails to do all or any such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit and may in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

53. (1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge the attachment shall be made—

(a) if the decrees were passed by the same Court, then by order of such Court and

(b) if the decree sought to be attached was passed by another Court then by the Court to which it has been transferred for execution of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the decree or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute the attached decree with the consent of the said decree holder expressed in writing to the permission of the attaching Court

(2) Where a Court makes an order clause (a) of sub-rule (1) or clause (b) of sub-rule (1) of clause (1) of this rule, the creditor who has attached the decree or his judgment-debtor may proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed

Rules—Lahore.

App. VII.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) When the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order with the knowledge thereof, either through the Court or otherwise, shall be recognised by any Court so long as the attachment remains in force.

54. (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

Attachment of immovable property

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

(3) The order shall take effect, as against persons claiming under a gratuitous

58. (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit.

Investigation of claims to and objections to attachment of attached property

the Court considers that

the same decree, unless he can prove a title acquired subsequent to the attachment

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale

63 A. (1) Where the property attached is a debt the Court executing the decree shall investigate the claims of the judgment debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of section 47, and subject to the provisions of that section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie.

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the sale to be made in the language of such Court

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

- (a) the property to be sold,
- (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,
- (c) any incumbrance to which the property is liable,
- (d) the amount for the recovery of which the sale is ordered, and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property, provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

68. Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment debtor, take place until after the expiration of at least fifteen days in the case of immovable property, and of the least one week in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the court house of the Judge ordering the sale.

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment.

Provided that, where the sale is made in or within the jurisdiction of the court, no such adjournment shall be made without the leave of the court.

Rules—Lahore.

App. VII.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than three days a fresh proclamation under rule C* shall be made unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

75. (1) Where the property sold is a living crop and the crop from its nature is a unit of being stored it has not yet been stored, the day of the sale shall be set aside as a unit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not consist of being stored or can be sold to great advantage in an unripe state, such as green wheat or gram, it may be sold before it is cut or gathered, and the purchaser shall be entitled to enter on the land and do all that is necessary for the purpose of cutting and cutting or gathering it.

80. (1) Where immovable property has been sold in execution of a decree and a person claims any interest in the property at the time of the sale or at the time of making the application under this rule, or acting thereon in the interest of such a person, may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser a sum equal to five per cent of the purchase-money; and

(b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such proclamation of sale, have been received by the decree-holder.

(2) When a person applies under rule 80 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

81. (1) Where any immovable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted.—

82. Where the Court is satisfied that the sale was occasioned without any just cause by the judgment-debtor or by some other person acting in or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still restrained or obstructed in obtaining possession, the Court

Endorsement or objection by judgment-debtor

Rules—Lahore.

App. VII.

may also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days. Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance.

104. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order.

(NOTE—Rule 29 A, which was added by Chief Court notification No 2212 G, dated the 12th May 1909, has been omitted by High Court notification No 563 G, dated the 24th November 1927.)

Order XXX.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Explanation—This rule applies to a joint Hindu family trading partnership.

Order XXXII.

1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. Such person may be ordered to pay any costs in the suit as if he were the plaintiff.

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons, with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub rule (2) above.

(4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit above, that of the minor and that each person proposed is a fit person to be appointed.

Rules—Lahore.

App. VII.

O 5, r 18.—Form No 11 of Appendix B

No 11

Affidavit of Process-server to accompany return of a Summons or Notice (O 5, r 18)

(TITLE)

The Affidavit of _____, son of _____
 _____ J _____ make oath and
 say as follows—

(1) I am a process-server of this Court

(2) On the _____ day of _____ 19____ I received a ^{summons} notice
 issued by the Court of _____ in suit No _____ of
 19____ in the said Court, dated the _____ day of _____ 19____
 for service on _____

(3) The said _____ was at the time personally known to
 me, and I served the said ^{summons} _{notice} on ^{him} _{her} on the _____ day of _____ at
 about _____ o'clock on the _____ noon at _____ by
 tendering a copy thereof to ^{him} _{her} and requiring ^{his} _{her} signature to the original ^{summons} _{notice},—

(a) _____

(b) _____

(a) Here state whether the persons served signed or refused to sign the process and in whose presence

(b) Signature of process-server

Or,

(3) The said _____ not being personally known
 to me _____ and pointed out to me a person
 whom he stated to be the said _____, and I
 served the said ^{summons} _{notice} on ^{him} _{her} on the _____ day of _____
 19____ at about _____ o'clock in the _____ noon at
 _____ by tendering a copy thereof to ^{him} _{her} and re
 quiring ^{his} _{her} signature to the original ^{summons} _{notice}

(a) _____

(b) _____

(a) Here state whether the person served signed or refused to sign the process and in whose presence

(b) Signature of process-server

Or,

(3) The said _____ and his house in
 which he ordinarily resides being ^{personally known to me} _{pointed out to me by} _____
 _____ I went to the said house in _____
 and there on the _____ day of _____
 19____, at _____ o'clock
 in the ^{fore} _{after} noon I did not find the said _____

I enquired { (a) _____ } neighbours
 { (b) _____ }

Rules—Lahore.

App. VII.

I was told that _____ had gone to _____ and _____
would not be back till _____

Signature of process-server

Or,

If substituted service has been ordered, state fully and exactly the manner in which the
summons was served with special reference to the terms of the order for substituted service

^{Served}
~~Assured~~ by the said _____ before me this _____
_____ day of _____ 19____

Empowered under section
139 of the Code of Civil Procedure to administer the oath to
deponents

Appendix E.—Form No. 15-A.

To Appendix 'E' to Schedule I, add the following as Form No. 15 A —

Form No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND
LEFT IN CHARGE OF PERSON INTERESTED AND SURETIFS

(Order XXI, rule 43)

IN THE COURT OF _____ AT _____
Civil Suit No _____ of _____

A. B. of _____

against

C. D. of _____

Know all men by these presents that we, I J. of _____, etc., and
K. L. of _____, etc., and M. N. of _____, etc., are jointly and
severally bound to the Judge of the Court of _____ in rupees

to be paid to the said Judge, for which payment to be made we bind ourselves, and
each of us in the whole, our and each of our heirs, executors and administrators, jointly
and severally, by these presents

Dated this _____ day of _____ 19____

AND WHEREAS the movable property specified in the schedule hereunto annexed has
been attached under a warrant from the said Court, dated _____ day
of _____ 19____, in execution of a decree in favour of
in suit No _____ of _____ 19____
on the file of _____ and the said property has been left in the charge of
the said I J.

Now the conditions of this obligation is that, if the above bounden I J. shall duly
account for and produce when required before the said Court all and every the property
aforesaid and shall obey any further order of the Court in respect thereof then this
obligation shall be void otherwise it shall remain in full force

I J.

K. L.

M. N.

Signed and delivered by the above bounden
of _____

1509

Rules—Lahore.

App. VII.

O 5, r 18—Form No 11 of Appendix B
No 11Affidavit of Process server to accompany return of a Summons or Notice (O 5, r 18)
(TITLE)The Affidavit of _____ son of _____
_____ I _____ make oath
_____ affirm and
say as follows—

(1) I am a process server of this Court

(2) On the _____ day of _____ 19____ I received a ^{summons}_{notice}
issued by the Court of _____ in suit No _____ of
19____ in the said Court, dated the _____ day of _____ 19____
for service on _____(3) The said _____ was at the time personally known to
me, and I served the said ^{summons}_{notice} on ^{him}_{her} on the _____ day of _____ at
about _____ o'clock on the _____ noon at _____ by
tendering a copy thereof to ^{him}_{her} and requiring ^{his}_{her} signature to the original ^{summons}_{notice},
(a) _____
(b) _____(a) Here state whether the person served signed or refused to sign the process and in whose
presence

(b) Signature of process-server

Or,

(3) The said _____ not being personally known
to me _____ and pointed out to me a person
whom he stated to be the said _____, and I
served the said ^{summons}_{notice} on ^{him}_{her} on the _____ day of _____
19____ at about _____ o'clock in the _____ noon at
_____ by tendering a copy thereof to ^{him}_{her} and re
quiring ^{his}_{her} signature to the original ^{summons}_{notice}
(a) _____
(b) _____(a) Here state whether the person served signed or refused to sign the process and in whose
presence

(b) Signature of process-server

Or,

(3) The said _____ and his house in
which he ordinarily resides being ^{personally known to me}
pointed out to me by _____
I went to the said house in _____
and there on the _____ day of _____
19____, at _____ o'clock
in the ^{fore}_{after} noon I did not find the said _____I enquired { (a) _____ } neighbours
(b) _____ }

Rules—Lahore.
App. VII.

I was told that _____ had gone to _____ and
would not be back till _____

Signature of process-server

Or,

If substituted service has been ordered, state fully and exactly the manner in which the
summons was served with special reference to the terms of the order for substituted service

^{Sworn}
^{Affirmed} by the said _____ before me this _____
_____ day of _____ 19____

Empowered under section
139 of the Code of Civil Procedure
to administer the oath to
deponents

Appendix E.—Form No. 15-A.

To Appendix 'E' to Schedule I, add the following as Form No 15 A —

Form No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND
LEFT IN CHARGE OF PERSON INTERESTED AND SUBSTITUTES

(Order XVI rule 43)

IN THE COURT OF _____ AT _____

A. B. of _____ Civil Suit No _____ f

against

C D of _____

Know all men by these presents that we, I J of _____ etc, and
K. L. of _____, etc, and M N of _____, etc, are jointly and
severally bound to the Judge of the Court of _____ in rupees

to be paid to the said Judge, for which payment to be made we bind ourselves and
each of us in the whole, our and each of our heirs, executors and administrators jointly
and severally, by these presents.

Dated this _____ day of _____ 19____

AND WHEREAS the movable property specified in the schedule hereunto annexed has
been attached under a warrant from the said Court, dated _____ day
of _____ 19____, in execution of a decree in favour of _____
in suit No _____ of _____ 19____
on the file of _____ and the said property has been left in the charge of
the said I J

Now the conditions of this obligation is that, if the above bounden I J shall duly
account for and produce when required before the said Court all and every the property
aforesaid and shall obey any further order of the Court in respect thereof, then this
obligation shall be void otherwise it shall remain in full force

I J
K. L.
M N

Signed and delivered by the above bounden _____ in the presence
of _____

APPENDIX VIII.

Rules made by the High Court of Patna under s. 122.

Order III.

4. Notwithstanding anything contained in Order III, rule 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf, or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person

Order V.

Add the following to rule 10, Order V —

(1) Provided that in any case the Court may, of its own motion, or on the application of the plaintiff send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service

Order VII.

Add the following Rules to Order VII —

19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiffs or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement

20. An Address for service filed under the preceding rule shall state the following particulars —

- 1 the name of the street and number of the house (if in a town),
- 2 the name of the town or village,
- 3 the post office,
- 4 the district, and
- 5 the munsiff (if in Bihar and Orissa) or the district Court (if outside Bihar and Orissa)

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit

Order VIII.

(1) *To Order VIII, rule 6 (1), should be added the words*

“and the provisions of Order VII, rules 14 to 18, shall, *mutatis mutandis*, apply to a defendant claiming set off as if he were a plaintiff”

Rules—Patna.

App. VIII. *Add the following Rules to Order XIII —*

11. Every party, whether original, added or substituted who appears in any suit or other proceedings shall at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order VII shall apply, so far as may be to addresses for service filed under the preceding rule

Order XII.

Substitute the following for rule 6 in Order XII —

6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just

Order XIII.

1. In Order XIII, Rule 1, after the words, "at the first hearing of the suit," should be added the words—

"or, where issues are framed, on the day when issues are framed, or within such further time as the Court may permit"

Add the following as sub rule (1A) in rule 9, Order XIII —

9. (1A) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided

Order XVI.

2. (1)—*Add the following proviso to O 16, r 2 (1) —*

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity

(3)—*Add the following proviso to rule 3 —*

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of facts, which have come to his knowledge, or of matters with which he has had to deal in his public capacity, then

(i) if the officer's salary does not exceed Rs 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury,

(ii) if the officer's salary exceed Rs 10 a month and the Court is situated not more than 5 miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred,

(iii) if the officer's salary exceed Rs 10 a month and the Court is situated more than 5 miles from his headquarters no payment shall be made to him by the Court. In such cases any expenses paid into Court under Rule 2 shall be credited to Government

Rules—Patna.
App. VIII.

8. *Add the following to Rule 8, Order XVI —*

Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner.

Order XXI.

43. *Substitute the following for rule 43 of Order XXI —*

43. Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

43A.—*Insert the following as rule 43A below rule 43 in Order XXI :—*

43A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either —

- (a) in his own custody in any suitable place provided by the judgment debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere,
- (b) in the case of livestock, and provided the decree holder furnishes the necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon;
- (c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree holder's expense. In the event of the decree holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid, the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by rule 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in rule 68, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When property is removed to the Court it shall be kept by the Nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Nazir, he may, subject to approval by the Court, make such

Rules—Patna.

App. VIII. arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers, of the Court, in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (8), the attaching officer shall inform the debtor, or, in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment debtor, the officer shall if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever livestock is kept in the village or locality where it has been attached, the judgment debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer, but the latter shall, if required by the decree holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment debtor failing to feed the attached livestock in accordance with sub-rule (8), the officer shall call upon the decree holder to pay forthwith for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2), and shall report the matter to the Court without delay.

(10) When attached livestock is brought to Court, the Nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held the Nazir shall be at liberty to place in it such attached livestock as can be properly there kept, in which case the pound keeper will be responsible for the property to the Nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The Nazir will in all cases remain responsible for the custody of the property.

When the property is kept in the custody of persons and not in the custody of the Nazir, the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court.

Add the following rule to Order XXI—

101. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 22, provided that this rule shall not apply to the notice prescribed by rule 22 of this Order.

Order XXVI.

14 *Substitute the following for sub rules (2) and (3) of rule 14 of Order XXVI —*

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours the plots or portions of plots allotted to each party. In the event of a plot being sub divided, the area of each sub plot shall be given in the schedule, and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. Where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

Order XXXII.

4 (4) *In sub rule (4) to rule 4 of Order XXXII for the words "where there is no other person fit and willing to act as guardian for the suit," in the first sentence of the sub rule substitute the following —*

Where the person whom the Court, after hearing objections, if any, under sub rule (4) of rule 3, proposes to appoint as guardian for the suit, fails, within the time fixed in a notice to him, to express his consent to be so appointed.

Order XLI.

Add the following as rule 14 (A) in Order XLI —

14. (A) The Appellate Court may, in its discretion, dispense with the service of notice hereinbefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal.

Add the following rule to Order XLI —

38. (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 22 or Order VIII, rule 12 shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

Rules—Patna.
App. VIII.

Appendix D—Form No. 1.

Substitute the following for the schedule of costs of suits in the form of decree, No Appendix D to the First Schedule of the Code of Civil Procedure, 1909 (Act V of 1908) —

| Plaintiff | Amount | Defendant. | Amount |
|-----------------------------------|--------|------------------------------------|--------|
| 1 Stamp for plaint | | Stamp for power | |
| 2 Stamp for power | | Stamp for petition of affidavit .. | |
| 3 Stamp for petition of affidavit | | Costs for exhibits | |
| 4 Costs for exhibits | | Plender's fee | |
| 5 Plender's fee on 11s | | Subsistence— | |
| 6 Subsistence— | | (a) for defendant or his agent | |
| (a) for plaintiff or his agent | | (b) for witnesses | |
| (b) for witnesses | | Commissioner's fee | |
| 7 Commissioner's fee | | Service of process | |
| 8 Service of process | | Copying or typing charge | |
| 9 Copying or typing charge | | | |
| Total | | Total | |

Appendix E—Form No. 38.

Substitute the following form for Form No 38 of Appendix E to the First Schedule of the Code of Civil Procedure —

CERTIFICATE OF SALE OF LAND (ORDER XXI, RULE 94)

District _____
 In the Court of _____ at _____
 Execution Case No _____ of 19 _____
 Decree holder,
 versus _____
 Judgment debtor

This is to certify that _____
 son of _____, by caste _____,
 by occupation _____, resident of _____,
 Thana _____, District _____,
 has been declared the purchaser at a sale by public auction on the
 day of _____ 19 _____, of the property specified below in execution of the
 decree in suit No _____ of this Court (1) and that the said sale has been duly
 confirmed by this Court

Given under my hand and the seal of the Court,
 this _____ day (2) of _____ 19 _____

Judge.

Specification and price of properties (3)

- (1) If the decree has been received by transfer from other court, enter the name of that court.
- (2) The date when the sale became absolute
- (3) Particulars sufficient to identify the property including the name of each registration sub district in which any part of the property is situated should be fully stated.

Rules—Patna.
App. VIII.

Appendix F—Form No. 9.

In the schedule of costs in the form of Decree in Appeal, No. 9, Appendix G, to the first Schedule of the Code of Civil Procedure, Act V of 1908 add "copying or typing charges" below the item "Pleader's fee on Rs. . ." in the Columns for Appellant and Respondent, and number the new entry in the first column as "5"

Appendix H—Form No. 7.

Add the following note at the foot of Form No. 7 of Appendix H, First Schedule to the Code of Civil Procedure (Act V of 1908) —

NOTE—The Commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses

Appendix H—Forms Nos. 11, 11-A, 11-B.

For form No. 11 of Appendix H to the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908) substitute the following forms —

No. 11

Notice to minor defendant and guardian of application for appointment of the guardian to be guardian for the suit.

(ORDER 32, RULE 3, CODE OF CIVIL PROCEDURE)

District

In the Court of

SUIT No

OF 193 .

at

Plaintiff

versus

Defendant

To

Minor defendant,

Guardian (appointed by authority,
or natural, or the person
in whose care the minor
is, as the case may be)

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of you*

as guardian for the suit to the minor defendant, you the said minor and you*—

are hereby required to take notice that unless within 21 days from the service upon you of this notice you*

give your consent to be appointed to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint an officer of the Court to act as guardian to you the minor for the said suit

Given under my hand and the seal of this Court, this
day of

19

Judge

* Here insert name of guardian

Rules—Patna.

App. VIII.

No 11 A.

Notice to minor defendant and guardian of application for appointment of another person to be guardian for the suit.

(ORDER 32, RULE 3, CODE OF CIVIL PROCEDURE)

District

In the Court of

at

Suit No

of 193 .

Plaintiff

versus

Defendant

To

Minor defendant.

Guardian (appointed by authority,
or natural, or the person
in whose care the minor
is)

Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of *

as guardian for the suit to the minor defendant, you the said minor and you †

are hereby required to take notice that unless within 21 days from the service upon you of this notice you †

make an application for the appointment of yourself or of some friend of you the minor to act as guardian, the Court will proceed, subject to the demand of any objection that may be raised, to appoint *

or an officer of the Court to act as guardian to you the minor for the said suit.

Given under my hand and the seal of this Court, this
day of 19 .

Judge

* Here insert name and description of proposed guardian

† Here insert name of guardian upon whom the notice is to be served

Rules—Patna.
App. VIII.

No. 11 B

Notice to the proposed guardian for the minor defendant, when the person proposed is not the guardian appointed by authority or the natural guardian or the person in whose care the minor is

(ORDER 32, RULE 4, CODE OF CIVIL PROCEDURE)

District

In the Court of

at

Suit No

o 193

Plaintiff

versus

Defendant

To

Proposed Guardian.

Whereas an application has been presented by the plaintiff in the above case for the appointment of you*

as guardian for the suit to the minor defendant you are hereby required to take notice that unless within days from the service upon you of this notice you make an application to the Court intimating your consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

Given under my hand and the seal of this Court, this
day of 193 .

Justice

* Here insert the name of the proposed guardian

Rules—Patna.
App. VIII.

Appendix H—Form No. 14,

Substitute the following for Form No 11 of Appendix II in the First Schedule of the Code of Civil Procedure, 1908 (Act 5 of 1909).—

DEPARTMENT OF CIVIL SERVICE—(O. R. 2)

Court of the

al

Register of Civil suits in the year 19

| Date of presentation of placit. | | No. of suit | | Plaintiff | | Defendant | | Claim | | Judgment | | Appeal | | Adjustments of satisfactions if decrees otherwise finally ascertained | | Particulars | | Date | | Number and date of application to | | Date of final order | | Against whom | | For what and amount if money | | Amount of costs | | Amount paid into court | | Name of person if any detained in civil prison | | Minute of order made with date | | (If for in arrears provision of writ of habeas corpus, with date and name of court) | | Level of amount still due. | | MARKS | |
|---------------------------------|--|-------------|---|-----------|---|-----------|---|-------|---|----------|----|--------|----|---|----|-------------|----|------|----|-----------------------------------|----|---------------------|----|--------------|----|------------------------------|----|-----------------|----|------------------------|----|---|----|--------------------------------|----|--|----|----------------------------|----|-------|--|
| 1 | | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | |

Note 1.—Where there are numerous claimants or defendants, the names may be given in a separate list, and the names of the parties may be given in a separate list, and the names of the parties may be given in a separate list.

Note 1.—Where there are numerous plaintiffs or numerous defendants, the name of the first defendant only, as the case may be, need be inserted in the return.
Note 2.—The complaint by a civil court to lower courts under Order XII, rules 23, 24, & 25, will be so limited as to be entered in the General Register of Bulls and Orders of Appointment.
Note 3.—In return it should be remembered that the plea shall be set on to the answer to be entered in column 2.
Note 4.—When the Court of Session is other than the court which passed the decree, the name of the attending court should be given in column 2/a.

INDEX

Abandonment—

- of issue by pleader, 17.
- of point in lower Court, 1074
- of issue by guardian ad litem, 935
- of part of claim by plaintiff, 882 [O 23, r 1 (1)]

Abatement, 849 882 [O 22]—

- appeal, of, 880 [O 22, r 11]
- appeal in execution proceedings, of, 881 882
- appeal in representative suit, of, 467 852
- application for probate, of, 852
- application to set aside, 873 [O 22, r 9 (2)]
- death of party, no abatement by, if right to sue survives, 849 [O 22, r 1]
 - if after hearing and before judgment, 870 [O 22, r 6]
 - either party pending appeal, 852, 853
 - party pending suit relating to public charities, 312, 313
- effect of abatement or dismissal under O 22, p 873 [O 22, r 9]
- execution proceedings, no abatement in, 881 [O 22, r 12]
- executors or trustees, suit by or against, of, 853
- extent of abatement, 854 [O 22, r 3 (2)], 861 [O 22, r 4 (3)]
- inherent power to add legal representative after abatement, 866
- insolvency of plaintiff, suit not abated by, 871 [O 22, r 8]
 - defendant, procedure on, 872
- legal representative of deceased appellant, when to be made a party, 856
- legal representatives, when two or more, whether all to be made parties, 857
 - effect of decree against person alleged to be, 866
 - determination of question as to, 869 [O 22, r 5]
- marriage of female party, suit not abated by, 871 [O 22, r 7]
- mesne profits, ascertainment of, and, 882
- objection as to representative character, when to be taken, 870
- partial, 851
- pauper applicant, death of, 859
- plaintiff or defendant, 853 [O 22, r 2], 853 854 [O 22, r 3], 861 [O 22, r 4]
- representative suit, 467
- revision, when High Court may interfere in, 859
- right to sue, survival of, 849 851
- setting aside for sufficient cause, 874, 875
- suit by reversioner, of, 853
- suit or appeal, when to abate as a whole, 851 863

Abuse of process—

- inherent jurisdiction to stay suit which is an, 438
- inherent powers of Court to prevent, 433 [s. 151]
- witness summons, in case of, 648

Accounts—

- account books cannot be attached, 215 [s. 60 (1) (d)].
 - in current use, receiving in evidence copies of, 637 [O 13, r 5].

Adjustment of suits—§91 904 [O 23, r 3] *See* Compromise of Suits

Administration suit—

cause of action, in, 121

costs in, 145

decree in, 679 [O 20, r 13]

43]

nature of, 679

preliminary decree in, 680

who can maintain, 680

Administrator—

claims by or against, not to be joined with claims by or against him personally,
502 [O 2, r 5]

letters of administration, when necessary, before filing suit, 556 558

res judicata, decrees against, 67

suits by or against, 939, 941 [O 31] *See* Executor

Admiralty—See Chartered High Courts

appeal from decision of a single judge exercising jurisdiction, 1356

assessors in admiralty cases, 408 [s 140]

fees to be paid to assessors in admiralty cases, 408 [s 140 (2)]

saving of matter of, 370 [s 112]

summoning assessors in, 408 [s 140]

Admissibility—

of documents produced before commissioner, 917

evidence taken on commission, 916 [O 26, r 8]

statements made on belief in affidavits, 666 [O 19, r 3]

Admission—630 635 [O 12]

co defendants, between, 630

constructive what are, 632, 633

costs of proving document in certain cases 630 [O 12, r 2] 635 [O 12, r 9]

counsel, pleader or solicitor by, 17

interpleader suits admissions of parties in, 1025 [O 35 r 4 (2)]

judgment on, 631 [O 12 r 6], 631 634

mistake, made by, in pleadings, may be allowed to be withdrawn, 545

notice to admit documents, 630 [O 12, r 3]

opponent, made by need not be pleaded, 528

pleadings, in, 572 573 632, 633

procedure to obtain, from opposite party, 608, 609

withdrawal of, 634

Adoption—

valuation of suit to set aside 102

Advertisement—

notice by public, where numerous parties 460, 41 [O 1 r 8 (1)]

proclamation of sale, of 700 707 [O 21, r 6]

Advocate—See Barrister, Counsel and Chartered High Courts

when not required to file fresh vakalatnamah 707 [O 2 r 4 (3)]

Advocate General—

- affidavit of documents cannot be required from, 622
- appointment of, 1521
- information, power of, to exhibit, 273 [s. 79 (2)] 274
- limitation as against, in suits relating to public charities, 313
- nuisance, suit relating to public, may institute, 289 [s. 91]
- public charities, suit relating to, may institute, 293 [s. 92]
- review by High Court on certificate of, in criminal trials, 1302 [Charter, cl. 29]
- suit by, ex officio or at the relation of private parties, 211

Affidavits—605 606 [O 19]. See Affidavit of documents

- affidavits, when and how allowed 605
- belief, grounds of, to be set forth in, 606
- documents, of—See Affidavit of Documents
- interrogatories as to, 613 [O 11, r 6], 615 616 [O 11, rr 8 11].
 - form of, in answer to, 616 [O 11, r 9]
 - objections to, in answer, 613 [O 11, r 6]
- oath on, by whom to be administered, 408 [s. 139]
- pleader, of, about signature of admissions, 634 [O 12, r 7]
- power to order any fact to be proved by, 136 [s. 30 (c)] 605 [O 19, r 1].
 - attendance of deponent for cross-examination, 606 [O 19, r 2]

Affidavit of documents—616 622 [O 11 rr 12 13]. See Discovery

- Advocate General, from, 622
- conclusiveness of, 620
- co-defendants, from, 622
- contents of, 617, 618
- description of documents in, 621
- further affidavit, 620
- inspection of documents referred to in, 624 [O 11, r 15]
- lunatic, from, 620 [O 11, r 23]
- marine insurance cases 622
- minor from 620 [O 11 r 23]
- non-compliance with order for, 625 [O 11 r 21]
- objections, grounds of, to production of documents disclosed in, 618 620
- Official Liquidator, from, 622
- order for, 136 [s. 30] 616, 617 [O 11, r 12]
- plaintiffs or defendants, two or more, by whom to be made, 622
- privileged communications protected from production and inspection 618 619
- public official document, and ground of objection to produce, 619
- relators, from, 622

Agency—

- Contract of, and place of suing, 118

Agent—

- answers as to matters done by agent of party interrogated, 615
- business, carrying on, through, and jurisdiction 114 115
- foreigner carrying on business through and jurisdiction, 123, 920
- Government, agents authorised to act for, 924 [O 27, r 2]
 - agents authorised to receive process for, 924 [O 27, r 4]
- interpleader suit by, 1026 [O 30, r 5]
- Political Agent, service in foreign territory through, 521, 522 [O 5, r 26]
- principal and agent, confidential communication between, when privileged, 618, 619
- suit for accounts between, 634 [O 20, r 16]

Agent—*contd*

- recognised agent, appearance and application by, 503 507 [O 3, rr 1 3].
- applications to sue *in forma pauperis* cannot be made by, 507
- in suits by or against Princes and Chiefs, 252 [s. 85].
- service of process on recognised agent, 506 [O 3, r 3]
- special agent to accept service of process 510 [O 3, r 6]
- service of summons on agent of defendant, 514 515 [O 5, rr 12 14]
- when defendant resides out of British India and has no agent to accept service, 521 [O 5, r 25]

Agreement—

- adjustment of suit by, 894 [O 23, r 3]
- appeal, not to, 320
- arbitration, and "adjustment of suit by agreement," 895-897
- agreement to refer to, 955, 956
- case for opinion of Court, to state, 1027 [O 36, r 1]
- decree, not to execute, 171
- decretal amount, to pay more than, 691 693
- disability, persons under, agreement on behalf of 428 [s. 147]
- guardian *ad litem*, compromise by, 952 [O 32, r 7].
- judgment debtor, to give time, to 692
- minor, agreement to refer to arbitration on behalf of, 955
- next friend, agreement by, to be bound by oath under Oaths Act, 935
- compromise by, 952 957 [O 32, r 7]
- Oaths Act, to take oath under 897, 898
- pleaded how to be, 532
- power of Court to appoint new arbitrator or umpire may be limited by, 1265
- receiver, restricting powers of, 1059
- to state questions of law or fact in form of issues, 615 [O 14, r 6]

Agriculturist—See Agricultural Produce

- Deccan Agr. Relief Act, splitting of remedies by mortgagor under, 491
- exemption from attachment of houses belonging to, 215 [s. 60 (1) (c)]
- of implements and cattle, 215 [s. 60 (1) (b)]
- firm as, 930, 931

Agricultural produce—

- attachment of, 752 [O 21, r 44]
- under, provisions as to, 757 [O 21, r 45]
- exemption of, from attachment, 215 [s. 60 (1) (b)], 227 [s. 61]
- growing crop, attachment of, which cannot be stored, 751 [O 21, r 45 (5)]
- order prohibiting removal of, 757 [O 21, r 45 (4)]
- place of sale of, 803, 804 [O 21, r 74 (1)]
- special provisions relating to sale of, 801 [O 21, r 75]
- not attachable before judgment, 1013 [O 28, r 12]
- Sale of, 803 804 [O 21, r 74]

Airmen—See Military men**Alienation—**

- of attached property, how far void, 270 271 [s. 81]
- with leave of Court, 807 808 [O 21, r 81]
- restricted, pending execution of decree, 1754 [s. 111] [s. 112] [s. 113] [s. 114]
- temporary of attached land 255

Agent—*contd*

- recognised agent, appearance and application by, 503 507 [O 3, rr 1 3]
 - applications to sue *in forma pauperis* cannot be made by, 50.
 - in suits by or against Princes and Chiefs, 282 [s 85]
- service of process on recognised agent, 508 [O 3, r 3]
- special agent to accept service of process, 510 [O 3, r 6]
- service of summons on agent of defendant, 514, 515 [O 5, rr 12 14]
 - when defendant resides out of British India and has no agent to accept service, 521 [O 5 r 25]

Agreement—

- adjustment of suit by, 894 [O 23, r 3]
- appeal, not to, 320
- arbitration, and "adjustment of suit by agreement," 895 897
 - agreement to refer to, 935, 936
- case for opinion of Court, to state, 1027 [O 36, r 1]
- decree, not to execute, 171
- decretal amount, to pay more than, 691 693
- disability, persons under, agreement on behalf of 428 [s 147]
- guardian *ad litem*, compromise by, 952 [O 32, r 7]
- judgment debtor, to give time, to 692
- minor, agreement to refer to arbitration on behalf of, 935
- next friend, agreement by, to be bound by oath under Oaths Act, 955
 - compromise by, 952 957 [O 32, r 7]
- Oaths Act, to take oath under, 897, 898
- pleaded, how to be, 532
- power of Court to appoint new arbitrator or umpire may be limited by, 1263
- receiver, restricting powers of, 1059
- to state questions of law or fact in form of issues, 645 [O 14, r 6]

Agriculturist—See Agricultural Produce

- Deccan Agr Relief Act, splitting of remedies by mortgagor under, 491
- exemption from attachment of houses belonging to, 215 [s 60 (1) (c)]
 - of implements and cattle, 215 [s 60 (1) (b)]
- firm as, 930, 931

Agricultural produce—

- attachment of, 752 [O 21, r 44]
 - under, provisions as to, 753 [O 21 r 45]
- exemption of, from attachment, 215 [s 60 (1) (b)], 227 [s 61]
- growing crop, attachment of, which cannot be stored, 753 [O 21, r 45 (5)]
 - order prohibiting removal of, 753 [O 21, r 45 (4)]
 - place of sale of, 803, 804 [O 21, r 74 (1)]
 - special provisions relating to sale of, 804 [O 21, r 75]
- not attachable before judgment, 1043 [O 38, r 12]
- Sale of, 803, 804 [O 21, r 74]

Airmen—See Military men**Allienation—**

- of attached property, how far void, 230 231 [s. 64]
 - with leave of Court, 807, 808 [O 21, r 83]
- restricted, pending execution by Collector, 1303 [Sch. III, I]
- temporary, of attached land, 255

Allens—

- suit against non resident foreigner, 123
- by alien enemies 281 [s 83]
- by alien friends, 281 [s 83].

Allegations—

- ascertainment whether pleadings are admitted or denied, 601 [O 10, r 1].

Allowance—

- attachment of of public officer, railway servant, 753, 759 [O 21, r 18]
- exemption from attachment of, of public officer, etc 215 216 [s 60 (1) (A) and (i)]
- 224
- judgment-debtor, subsistence allowance of, in jail, 212 [s 57] 748 [O 21, r 39]

Alteration—

- of judgment, 438 [s 152].

Alternative—

- claim, 152
- costs, where relief against defendants in the 4th
- relief 561
- relief in suits for delivery of movable property, 671 [O 20 r 10].

Ambassador— See Foreign State

- exemption from arrest, 283 [s 86 (3)].
- suit against, 283 284 [s 86].

Amendment—

- accidental omission, 440
- answers to interrogatories, of, 444
- application for amendment of decree and res judicata, 90, 91
- execution, of, 722 [O 21, r 17].
- decree, of, 438 [s 152]
- by which Court 441 442
- where third parties have acquired rights under erroneous decree, 441
- failure to amend pleadings within time specified by Courts 554, 555 [O 6, r 18]
- general powers of Court to amend proceedings in a suit, 443 [s 153]
- inherent powers of Court to amend decrees or orders, 439
- issues, power of Court to amend, 644 [O 14 r 5 (1)]
- leave to amend pleadings when given 544 546
- when refused, 546 553
- limitation, and amendment of application for execution, 723
- decree, 441
- memorandum of appeal of, 1074 [O 41, r 3]
- mistake arising from accidental omission, 438 [s 152] 440
- multifariousness, amendment of plaint defective for, 497
- notice of motion of, 444
- opponent's pleadings of, 542
- particulars, of, 535
- plaint, of, and notice under sec 80, p 279
- of, by adding new reliefs, 553
- of, in suit for specific performance and compensation in addition or substitution, 553, 554
- pleadings of, 544 554 [O 6, r 17]
- proceedings in suit, of, 443 [s 153]
- judicata and application for amendment of decree, 90, 91

Amendment—*contd*

- revision of order granting application for, 442
- sale certificate, of, 841.
- title of appeal, of, 444

Ancestral property—

- liability of, in execution, 204 [s 53]
- suit to recover, and joinder of parties, 451

Anticipation—

- attachment of property subject to restrain upon, 218 219

Appeal—319 351 [Ss 96 105] 1070 1118 [O 41], Appeal

- abatement of, 852, 855, 856, 860 866, 880 [O 22, r 11]
- additional evidence in appeal, 1106 [O 41, r 27]
- agreement not to appeal, 320
- appellate decrees, appeal from, 1118 [O 42, r 1]
- assignment of interest before final decree in, 878
- award, decree based on, appeal from, 1277 1282
- British India, where appellant resides out of, and security for costs, 1083 [O 41, r 10 (1), proviso]
- case, making of new, in appeal, 1074
- consolidation of appeals, 435
- costs, direction as to, in decree in appeal, 1118 [O 41, r 35 (3)]
 - direction as to, appeal from, 147, 148
- Court, appellate, to have same powers as original Court, 350 [s 107 (2)]
 - arbitration, can refer matters in dispute in appeal to, 1260, 1261
 - execution, stay of, by, 1076, 1077 [O 41, r 5]
 - inherent power of, to consolidate appeals, 435
- credibility of witnesses, 1072
- cross objections—*See* Cross objections against appellant, 1093, 1094 [O 41, r 22]
 - by respondent against co respondent, 1096
 - consequence of not filing, 1094
 - effect of withdrawal or dismissal of appeal on, 1094 [O 41, r 22 (4)] who may file, 1093 [O 41, r 22 (1)] 1096

death of either party pending appeal, and abatement of appeal, 852, 853

one of several appellants, 855

decree, amendment of appellate 441, 442

appeal from, 319 [s 96]

appeal from consent decree, 319 [s 96 (3)] 323, 324

appeal from *ex parte* decree 319 [s 96 (2)] 320

appeal from preliminary decree, 9, 324 [s 97]

when not drawn up 325

" — — — summary decree, 324 [s 97]

, 37].

O 41, r 35]

dismissal of—*See* Dismissal of appeal

evidence additional—*See* Additional evidence

on record where sufficient Court may determine case 1103 [O 41, r 24]

further documentary admission of facts and grounds of appeal 1106

where lower Court has refused to admit 1106 [O 41, r 27 (1) (i)]

execution of orders of Privy Council appeal from, 1117 [O 41, r 10]

stay of by appellate Court 1076 1077 [O 41, r 5]

exhibits copies of when appeal preferred 1088 [O 41, r 17 (1)]

Appeal—*contd.*

appeal, *see* *appeal*—*contd.* *appeal* to set aside, 1101
appeal to set aside, 1101

fact, new questions of, raised for first time in appeal, 1074

final decree, appeal from, where no appeal from preliminary decree, 324 [s. 97].
 passing of, during pendency of appeal from preliminary decree, 326.
 forum of, 320, 321

fixing day of hearing of appeal, 1080 [O. 41, r. 12].

form of appeal, 1070 [O. 41, r. 1]

former appeal, meaning of, 38

fraud, case of, other than that alleged in pleadings, 531

general power to pass any proper decree or order, 1113 [O. 41, r. 33]

grounds which may be taken in appeal, 1073 [O. 41, r. 2]

hearing of appeal, 1089 1110 [O. 41, rr. 16-29].

High Court in second appeal may refer issues of fact to lower appellate Court, 1106

inherent powers of, to remand in second appeal, 1119

powers of, in appeal from orders of remand, 1102.

power of, to determine issues of fact in second appeal, 343 [s. 103]

immovable property stay of sale of, pending appeal, 1081 [O. 41, r. 6 (2)].

inherent power of court, appeal from order passed under, 438.

appellate Court to consolidate appeals, 435.

appellate Court to remand, 1102

High Court to remand in second appeal, 1119

order made in exercise of, 438

Insolvency Act, right of appeal to Privy Council, in cases under Provincial, 331

insolvent or poor appellant, and security for costs, 1081

irregularity, appellate Court cannot interfere in cases of mere, 329 [s. 89], 329-331

issues for trial to lower Court, when appellate Court may refer, 1104 [O. 41, r. 25].

of fact in second appeal, power of High Court to determine, 343 [s. 103].

of fact, High Court in second appeal may refer, to lower appellate Court, 1106.

joinder of appellants, 327

claims, appeal from order granting leave of, 501-502

judges, difference of opinion among, and appeal under Letters Patent, 327, 328.

disent of any, from the decision of Court, to be recorded, 1117 [O. 41
 r. 34]

disenting from judgment need not sign decree, 1118 [O. 41, r. 35, proviso].

where appeal is heard by two or more, 326 [s. 98]

judgment, furnishing copies of, to parties, 1118 [O. 41, r. 36]

in appeal, 1110 1117 [O. 41, rr. 30-34]

contents date and signature of, 1111 [O. 41, r. 31].

writing of, whether necessary when appeal dismissed under O. 41, r. 11,
 pp. 1086-1087

jurisdiction, of appellate Court, valuation for determining, 320, 321

leave of Court to urge objections not set forth in memo. of appeal, 1073 [O. 41, r. 2].

leave to amend pleadings may be granted in appeal, 534

Letters Patent appeal, 319, 328, 346.

limitation period of, for appeals, 1073.

for appeal from order of remand, 1101, 1102

dismissal of appeal on ground of, effect of, on cross objections, 1093.

Appeal—*contd*

- memorandum of appeal, appeal from decision rejecting, 1074, 1075
 - contents and accompaniments of, 1070 [O 41, r 1]
 - grounds not set forth in, 1073 [O 41, r 2]
 - procedure on rejection of, 567
 - registry of, 1082 [O 41, r 9]
 - rejection or amendment of, 1074 [O 41, r 3]
- mesne profits, appeal from preliminary decree directing inquiry as to, 678
- mortgage suits, effect of appeal on time fixed for payment in, 935
- notice of appeal to lower Court, 1087 [O 41, r 13 (1)]
 - of day of hearing, 1038 [O 41, r 14]
- objection, grounds of, in appeal, 1071, 1072
 - to findings on issues referred, 1103 [O 41, r 26]
- Orders, appeal from—*See* Appeal from Orders
- pauper appellant and security for costs, 1081
 - application for leave to appeal as, 1122 [O 44, r 1]
 - appeal to Privy Council by, 1124
 - order allowing applicant to sue as, whether questionable in appeal, 969
- plaint, order rejecting, 5 [s 5 (2)] 10
- pleadings, leave to amend, may be granted in appeal, 554
- point, deliberately abandoned in lower Court, 1074
 - for determination to be stated in judgment, 1111 [O 41, r 31]
- powers of appellate Court, 350 [s 107], 1113 [O 41, r 33]
- preliminary decree from, 324 [s 97]
 - when not drawn up, 325
- Privy Council, appeal to—*See* Privy Council
- re admission of appeal dismissed for default, 1090 [O 41, r 19]
- reasons for decision to be stated in judgment, 1111 [O 41, r 31]
- remand case to lower Court, 1097 [O 41, r 23]
 - appeal from order of, 347 [s 105 (2)], 1101, 1102
 - in appeal from order refusing to set aside ex parte decree, 1101
 - inherent power to, 1099 1101
 - of case by consent for trial on issues not raised in appeal, 1103
- res judicata, appeals lying in different Courts, and, 77
- restoring of appeal heard ex parte, 1092 [O 41, r 21]
 - dismissed for default, inherent power, 1091
 - rejected for failure to furnish security for costs, 1035
- respondents, cross objections by, 1033, 1094 [O 41, r 22]
 - power to add persons interested as 1091 [O 41, r 20]
- re transfer of, from one Court to another, 130 [s 24 (1) (iii)]
- reversal of whole decree in appeal on grounds common to all plaintiffs or defendants, 1075 [O 41, r 4]
- revision, whether allowed where appeal lies, 373
- right of appeal must be given by statute, 319
 - to begin, 1093 [O 41, r 16]
- sale, stay of, of immovable property pending 1081 [O 41 r 6 (2)].
- saving of present right of appeal 444 [s 154]
- second appeal from appellate decree, 331, 332 [s 100]—*See* Second Appeal.
- security for costs, appeal from order as to—*See* Appeal from Orders.
 - appellant from 1083 [O 41 r 10] 1087 1044
 - dismissal of appeal for failure to furnish and appeal to Privy Council 764
 - restoring of appeal rejected for failure to furnish, 1085

Appeal—*could*

- set-off, appeal from decree relating to, 686 [O 20, r 19 (2)].
- stay of execution by appellate Court, 1076, 1077 [O 41, r 5].
 - proceedings under decree, appeal does not operate as, 1076, 1077 [O 41, r 5(1)].
 - sale of immovable property pending appeal, 1081 [O 41, r 6 (2)].
- transfer of appeal by High Court from one Court to another, 1315
 - by Governor General in Council, to another High Court, 134 [s. 27].
 - of suit, appeal of other proceeding, 130, 131 [s. 24].
- transmission of papers to appellate Court, 1088 [O 41, r 13 (2)].
- who may appeal, 321, 322.
- withdrawal of appeal, effect of, on cross objections, 1094 [O 41, r 22 (4)].
- witness, examination of, by appellate Court, 1110 [O 41, r 28].

Appeal from Orders—344-349 [ss. 104-105], 1119-1121 [O 43].

- abandon part of claim, granting leave to plaintiff to, 691.
- abatement of suit, refusing to set aside, 875, 1120 [O 43, r 1(1)].
 - setting aside, 875.
- accounts, directing to be taken, 6.
- adjustment of decree allowing or refusing application to record, 702.
- Administrator General, allowing commission to, 1355.
- amendment returning plaint for, 10.
- appeal, re-admitting, 1090-1091 [O 41, r 19].
 - refusing to re-admit, 1120 [O 43, r 1(1)].
 - refusing to enlarge time for referring, 1355.
 - leave to appeal as a pauper, 1124.
 - to restore an, rejected for failure to furnish security for costs, 1085.
 - re-hear appeal refusing to, 1120 [O 43, r 1(1)].
 - rejecting appeal, for failure to furnish security for costs, 1085.
- arbitration, arising out of agreement to refer to, 344 [s. 104 (1) (d)].
 - superseding, 344 [s. 104 (1) (a)], 1277.
- arrest, declining to order, for disobedience of interlocutory injunction, 1083.
 - awarding compensation for wrongful, 317.
- assets, for distribution of, under s. 73, 270.
- attachment, allowing or disallowing objections to, under s. 47, p. 776.
 - awarding compensation for wrongful, 317.
 - of property of witness, directing, 651, 1120 [O 43, r 1(g)].
- award, filing or refusing to file, [s. 104 (1) (f)], 1293.
 - modifying or correcting, [s. 104 (1) (e)], 1270.
 - order on, stated in the form of a special case, 344 [s. 104 (1) (b)], 1269.
 - remitting for reconsideration of arbitrator, 1272.
 - setting aside or refusing to set aside, 1277.
- certificate to appeal to P.C., refusing grant of, 1121 [O 43, r 1(1)], 1188.
- claim, rejecting application to join, with claim for immovable property, 302.
- Collector, orders passed by, in execution proceedings transferred to him, 282 [s. 70 (2)], 283.
- commission, directing or refusing issue of, 914.
- compensation awarding, for wrongful arrest, attachment or injunction, 317.
- compromise of suit, recording or refusing to record, 1120 [O 43, r 1(m)].
- contempt, directing or refusing commitment for, 1256.
- costs, awarding or refusing, 147, 148.
 - security for, dismissing petition praying Court to receive, 1088.
- Court to which appeal lies from orders, 350 [s. 106].
- decree, rejecting application for transfer of, for execution, 161.

Appeal from Orders—*contd*

- decree-holders, orders made on questions between, 712, 713
 - refusing permission to, to purchase at Court sale, 803
- default, dismissing suit or appeal for, 11, 12
- discovery, order made on non-compliance with order for, 1120 [O 43, r 1 (f)]
- dismissal of suit refusing to set aside, 1120 [O 43, r 1 (k)]
- execution, determining questions in, 185
 - made in enforcing claim against surety, 427
 - refusing to stay, pending appeal to Privy Council, 1134
 - refusing to transmit for, order of Privy Council, 1137
 - refusing stay of, under O 41, r 5, p 1050
- ex parte*, decree passed, granting application to set aside, 605
 - rejecting application to set aside, 605, 1119 [O 43, r 1, cl (d)]
- failure of party to perform acts for which adjournment granted, on, 658.
- guardian ad litem, directing receiver in a suit to advance moneys to, 1066
- habeas corpus, deciding claim to the custody of a minor on a writ of, 1355
- High Court, order made by, in original criminal jurisdiction 1361 1362 [Charter, cl 23]
- immovable property, rejecting application to join claim with claim for, 502
- injunction, awarding compensation for wrongful, 317.
 - discharging or setting aside, 1053 [O 39, r 4], 1120 [O 43, r 1 (r)].
 - temporary, refusing or granting, 1047, 1120 [O 43, r 1, cl (r)]
- inspection, allowing or disallowing, 627
- interpleader suits, orders made in, 1025 1026, 1027, 1120 [O 43, r 1 (p)]
- issues, referring, for trial by lower court, 1104 1105
 - refusing to frame, 643
- judgment on failure to file written statement 582 1119 [O 43, r 1 (b)].
 - on refusal to give evidence, 654, 1025 [O 43, r 1 (h)]
 - on failure of pleader to answer, 607, 1028 [O 43, r 1 (e)].
- judgment debtor, determining question between, and representative of decree holder, 721
 - disallowing objection by, to draft of document for execution of which decree is passed, 742, 1120 [O 43, r 1 (i)]
 - refusing simultaneous execution against property & person of, 728
 - setting aside or refusing to set aside sale of immovable property where, has no saleable interest, 833
- leave, giving or refusing, for assignee to be joined as party, 850, 1120 [O 43, r 1 (h)]
 - granting to withdraw suit with liberty to bring a fresh suit, 7
 - granting, to plaintiff to withdraw suit or abandon part of claim, 891.
 - granting or refusing, to appeal to Privy Council, 1126
- leave to sue under cl 12 of the Charter, refusing to grant, 1355.
 - refusing to set aside order granting, 1355.
- legal representative, determining question as to, 870.
- limitation, dismissing appeal on ground of, 11
- mandamus, directing issue of, to a public body, 1355, 1356.
- memorandum of appeal, rejecting, 11
 - returning for being presented to proper Court, 10
- mortgage-debt, refusing to extend time for payment of—
 - in foreclosure suit, 992 1120 [O 43, r 1 (o)], 1121
 - in redemption suit, 1011, 1120 [O 43, r 1 (o)], 1121
- objection, allowing or disallowing, to attachment, 777
- orders from which appeals lie, 344 [s. 104], 1119 1121 [O 43].
- pauper, refusing leave to sue as, 7
 - refusing leave to appeal as, 1124

Appeal from Orders—*contd*

- pauper, rejecting application for leave to sue as, 968.
 - refusing to make order for payment of Court fees to Government, 973.
- payment out of Court, allowing or refusing application to record, 702.
- plaint, directing, to be taken off the file, 913.
 - order rejecting, 567
 - returning, for amendment, 10
 - to be presented to proper Court, 363, 1119 [O 43, r. 1 (a)], 1121
- plaintiff's appearance, dismissing suit for default of, 587
 - non-appearance, rejecting application to restore suit dismissed for, 592, 593, 1119 [O 43, r. 1 (c)].
 - granting application to restore suit dismissed for, 592, 593.
- pleading, order refusing to strike out, as scandalous, and, 544
- Privy Council appeal—See Privy Council Appeal
- procedure in appeals from orders, 351 [s. 108] 1121 [O 43, r. 2].
- re-admit, refusing to, an appeal, 1090, 1091, 1120 [O 43, r. 1, cl. (t)].
- re admitting an appeal, 1090-1091
- receiver, directing, in a suit to advance moneys to a guardian *ad litem*, 1066.
 - granting application to appoint, 1065, 1120 [O 43, r. 1, cl. (s)].
 - rejecting application to appoint, 1065, 1120 [O 43, r. 1, cl. (s)].
- refusing leave under cl. 12 of the Charter, 1355
- rehear, refusing to, an appeal, 1093, 1120 [O 43, r. 1, cl. (t)].
- Religious Endowment, order to appoint a new member on Committee of, 7
- rejecting application to set aside order granting leave under cl. 12 of Charter, 1344, 1345.
- remand, order of, 347 [s. 105 (2)]
- remand of case, 1101, 1121 [O 43, r. 1 (w)]
- re sale, allowing or disallowing application for recovery of loss on, 800.
- restitution, directing, 412 [s. 144], 421
- review, granting application for, 1121 [O 43, r. 1 (w)], 1152, 1154
 - rejecting application for, 1154
- revision, orders made in, 391, 392
- rules relating to appeals from orders, 1121 [O 43, r. 2].
- sale certificate, allowing or refusing amendment of, 841
- sale of immovable property, setting aside or refusing to set aside—
 - on deposit of decretal amount, 817, 818.
 - on ground of irregularity or fraud, 831
 - where judgment-debtor has no saleable interest, 833.
 - under O 21, r. 92, p. 835, 1120 [O 43, r. 1 (j)]
 - when decree-holder purchases without leave of Court, 803, 1120 [O 43, r. 1 (j)]
- second appeal—See Second Appeal
- security for costs, dismissing petition praying Court to receive, 1085.
 - directing plaintiff to give, 910
 - refusing to extend time for furnishing, and directing appeal to Privy Council to be struck off, 1130
 - refusing to set aside order of dismissal for failure to furnish, 911, 1120 [O 43, r. 1 (u)]
 - refusing to restore appeal rejected for failure to furnish, 1085.
 - rejecting appeal for failure to furnish, 1085.
- set off, disposing defendant's claim to, 581
- stamp, rejecting memorandum of appeal on ground of insufficiency of, 10
 - stay of execution, refusing, under O 41, r. 5, p. 1080

Appeal from Orders—*contd*

- suit, compromise of, recording or refusing to record, 903, 1120 [O 43, r 1(m)]
- to restore, granting application, dismissed for plaintiff's non appearance, 592
- to restore, rejecting application, dismissed for plaintiff's non-appearance, 592, 1119 [O 43, r 1(c)]
- to withdraw, granting leave, with liberty to bring a fresh suit, 7
- granting leave to plaintiff to abandon part of claim or withdraw from, 891
- surety, orders against, 427
- time, enlarging or refusing to enlarge under s 148, p 428
- transfer of decree, rejecting application for, 161
- Vice admiralty jurisdiction, orders made in exercise of, 1356
- witness, directing attachment of property of, 651, 1120 [O 43, r 1(g)]

Appeal under cl 15 of the Charter—

- meaning of "judgment" in cl 15 of the Charter, 1349 1352
- what decisions are "judgments" and appealable, 1354 1356
- wrong exercise of discretion may be a ground of appeal, 1354

Appellate Court—*See* Appeal.**Appearance—**

- agent, by recognised, 505 [O 3, r 1]
- mere presence of recognised, in Court, is not appearance in suit, 505
- defendants, appearance of one of several for others, 478 [O 1, r 12]
- dismissal of suit for default bars fresh suit, 588 [O 9, r 9], 590
- remedies in case of, 589
- exemption of certain persons from personal appearance, 402 [ss 132, 133]
- exemption of public officer in certain cases, 280 [s 81]
- firm, appearance of partners, where suit brought in firm name, 935 [O 30, r 6]
- Government, fixing of time for appearance on behalf of, 924 [O 27, r 5]
- inherent powers of Court to restore suit dismissed for default, 592, 593
- meaning of, 589, 590
- next friend, non appearance of, at hearing, 591
- non appearance of claimant defendants in interpleader suit, 1026
- parties, 583 595 [O 9, rr 2 12]
- at adjourned hearing, 655 [O 17, r 2]
- parties to appear on day fixed in summons, 582 [O 9, r 1]
- partners, where sued in firm name, appearance of, 935 [O 30, r 6]
- person, appearance of party in, 589
- Court may order appearance of party in, 512 [O 5, r 3], 607 [O 10, r 4 (1)]
- consequence of non attendance in, 595 [O 9, r 12]
- pleader, appearance of party by, 505 [O 3, r 1], 589 590
- procedure where defendant has good cause for previous non appearance, 586 [O 9, r 7]
- res judicata*, and dismissal of suit for default, 70
- restoration of suit when sufficient cause shown for non appearance, 594 [O 9, r 9]
- women, exemption of, from personal appearance, 402 [s 132]

Application—*See* head under which application is made e.g. Amendment Decree *ex parte*, Execution of decree, sub head (1)**Arbitration—**

- agreement to refer—*See* sub head 1 Order of reference to Arbitration to refer
- appeal from decree passed on award, 1275
- orders about arbitration awardable by Appeal from decrees
- Appellate Court at what stage can refer matters to High Court appeal to, 1,001

Arbitration—*contd*

- application by parties to suit for order of reference, 1258 1260 [Sch II, para 1].
- arbitrator, appointment of 1265 [Sch II, para 2]
 - of new, 1264, 1265 [Sch II, para 5], 1265, 1266
- consequence of disobedience to summons to attend before, 1266 [Sch II, para 7 (2)].
- arbitrator, corruption or misconduct of, 1272 [Sch II, para 15 (1) (a)], 1273
 - death of, 1264 [Sch II, para 5 (b) (i)].
 - decision of majority of, 1264
 - delegation of duty by, 1264
 - difference of opinion among 1263 [Sch II, para 4]
 - distinction between valuer and, 1292.
 - empowering, to appoint an umpire, 1263 [Sch II, para 4].
 - form of order for appointment of new, 1295, 1296
 - is the sole and final judge of all questions of fact and of law, 1278
 - Judge may be made, by consent, 125
 - leaving British India, 1264 [Sch II, para 5 (b) (iii)].
 - necessity of presence of, at meetings 1268
 - notice for appointment of new, 1264, 1265 [Sch II, para 5].
 - power of Court to appoint new, may be limited by agreement, 1265
 - powers of, 1266 [Sch II, para 6]
 - refusing to act, 1264 [Sch II, para 5 (b) (ii)] 1266
 - revocation of arbitrator's authority, 1261
 - sign award, need not, in presence of each other, 1268
 - statement of special case by, 1268, 1269 [Sch II, para. 11].
 - summoning of witnesses before, 1266, 1267 [Sch. II, para. 7].
 - umpire cannot be, 1264
 - where Court acts as, 1282.
- award—
 - arbitrators need not sign award in presence of each other, 1268
 - decree based on award modified by Court, 1278
 - provisions relating to, apply to awards, 735
 - delivery of, 1268
 - documents and depositions to be filed with, 1268
 - estoppel, from impeaching validity of, 1267
 - execution, where award indefinite, 1270 [Sch II, para 14 (b)]
 - of, against a firm, 765
 - expiration of period fixed by Court, where award is made after, 1272
 - [Sch II, para 15 (1) (c)] 1275
 - extension of time for making, 1267 [Sch II, para 8]
 - fixing of time for making, 1262 [Sch. II, cl 3 (1)].
 - form of, 1296
 - illegal, patently, 1271, 1272
 - invalid award 1279, 1280
 - judgment on award, 1277 [Sch. II, para. 16]
 - making of award, 1263
 - modify or correct award, power to, 1269 [Sch. II, para 12].
 - notice of filing of award, 1268 [Sch II, para. 10]
 - part of award upon matter not referred to arbitration, 1269 [Sch II, para. 12 (a)]
 - remit, power to, 1270 [Sch II, para 14]
 - revision, whether decree passed on an award, is subject to, 1281
 - whether order setting aside or refusing to set aside an award is subject to, 1277.

Arbitration—*contd*

award—

- res judicata*, and refusal of Court to file a private award, 1294
- second appeal, when lies on a decree passed on an award, 1281
- setting aside award, grounds for, 1272 [Sch. II, para 15]
- signing and filing award of, 1268 [Sch. II, para 10]
- stay of execution of, 735
- suit to set aside*, 1277
- superseding arbitration, where award is made after order, 1272 [Sch. II, para 15 (1) (c)], 1275
- time within which application to set aside an award should be made, 1277, 1278
- where award has left undetermined any of the matters referred to arbitration, 1270 [Sch. II, para 14 (a)],
- costs of arbitration, 1270 [Sch. II, para 13]
- death of arbitrator or umpire, 1264 [Sch. II, para 5 (b) (i)]
 - party after application, but before order of reference, 1261
- decree on award against Hindoo widow, how far binding on reversioners, 69
- estoppel from award*, 1271 [Sch. II, para 14 (a)]
- execution when award indefinite, 1270 [Sch. II, para 14 (b)]
- form of application for order of reference, 1295
 - order of reference, 1295
 - order for appointment of new arbitrator, 1295, 1296
 - special case stated for Court's opinion 1296
- fraudulent concealment of matter which ought to have been disclosed, 1272 [Sch. II para 15 (1) (b)] 1275.
- Indian Arbitration Act IX of 1899, application of, 288 289
- minor*, whether agreement to refer to arbitration on behalf of, requires sanction of Court, 955, 956
- order of reference in a suit 1262 [Sch. II, para (3)]
 - appointment of arbitrator, 1262 [Sch. II, para (2)]
 - effect of, 1262 [Sch. II, para 3 (2)], 1263
 - form of application for, 1296.
 - form of, 1295
 - superseding 1265 [Sch. II, para 5 (2)], 1266, 1272 [Sch. II, para. 15 (2)]
 - who may apply for, 1258 1260
 - future differences to arbitration, 1284
 - matter in difference, 1260
 - notice of application to file, 1283 [Sch. II, para. 17 (3)],
 - revocation of, 1285
 - validity of, 1287
 - where no provision for appointment of umpire in, 1285
 - on an agreement to refer, 1282 1288 [Sch. II, paras 17 and 18]
 - appeal from order filing or refusing to file agreement to refer, 1285
 - staying or refusing to stay suit 1288.
 - application to file agreement 1282, 1293 [Sch. II para. 17].
 - appointment of arbitrator 1283 [Sch. II, para. 17 (4)]
 - stay of suit 1283 [Sch. II para. 18].

Arbitration—*contd*

- application by parties to suit for order of reference, 1258-1260 [Sch. II, para. 1].
- arbitrator, appointment of, 1265 [Sch. II, para. 2]
 - cf new, 1264, 1265 [Sch. II, para. 5] 1265, 1266
- consequence of disobedience to summons to attend before, 1266 [Sch. II, para. 7(2)].
- arbitrator corruption or misconduct of, 1272 [Sch. II, para. 15 (1) (a)] 1273
 - death of, 1264 [Sch. II, para. 5 (b) (i)].
 - decision of majority of, 1264
 - delegation of duty by, 1264
 - difference of opinion among, 1273 [Sch. II, para. 4].
 - distinction between valuer and, 1282.
- award—
 - Judge may be made, by consent, 125
 - leaving British India, 1264 [Sch. II, para. 5 (b) (iii)].
 - necessity of presence of, at meetings, 1268
 - notice for appointment of new, 1264-1265 [Sch. II, para. 5].
 - power of Court to appoint new, may be limited by agreement, 1265
 - powers of, 1266 [Sch. II, para. 6]
 - refusing to act, 1264 [Sch. II para. 5 (b) (ii)] 1266
 - revocation of arbitrator's authority, 1261
 - umpire cannot be, 1264
 - where Court acts as, 1282
- arbitrators need not sign award in presence of each other, 1268
- decree based on award modified by Court, 1278
 - provisions relating to, apply to awards, 735
- delivery of, 1268
- documents and depositions to be filed with, 1268
- estoppel, from impeaching validity of, 1267
- execution, where award indefinite, 1270 [Sch. II, para. 14 (b)].
 - of, against a firm, 765
- expiration of period fixed by Court, where award is made after, 1272
 - [Sch. II, para. 15 (1) (c)], 1275
- extension of time for making, 1267 [Sch. II, para. 8]
- fixing of time for making, 1262 [Sch. II, cl. 3 (1)].
- form of, 1296
- illegal, patently, 1271, 1272
- invalid award, 1279, 1280
- judgment on award, 1277 [Sch. II, para. 16]
- making of award, 1263
- modify or correct award, power to, 1269 [Sch. II, para. 12].
- notice of filing of award, 1268 [Sch. II, para. 10]
- part of award upon matter not referred to arbitration, 1269 [Sch. II, para. 12 (a)]
- remit, power to, 1270 [Sch. II, para. 14]
- revision, whether decree passed on an award, is subject to, 1281
 - whether order setting aside or refusing to set aside an award is subject to, 1277

Arbitration—*contd*

award—

- res judicata*, and refusal of Court to file a private award 1294
- second appeal, when lies on a decree passed on an award, 1281
- setting aside award, grounds for, 1272 [Sch II, para 15]
- signing and filing award of, 1268 [Sch II, para 10]
- stay of execution of, 735
- suit to set aside, 1277
- superseding arbitration, where award is made after order, 1272 [Sch. II, para. 15 (1) (c)], 1275
- time within which application to set aside an award should be made, 1277, 1278
- where award has left undetermined any of the matters referred to arbitration, 1270 [Sch. II, para 14 (a)],
- costs of arbitration, 1270 [Sch II, para 13]
- death of arbitrator or umpire, 1264 [Sch II, para 5 (b) (i)]
 - party after application, but before order of reference, 1261
- decree on award against Hindoo widow, how far binding on reversioners, 69
- estoppel from impeaching validity of award, 1267
- modified by Court, 1278, 1279
- evidence of arbitrator where charged with misconduct, 1274
- execution when award indefinite, 1270 [Sch II, para 14 (b)]
- form* of application for order of reference, 1295
 - order of reference, 1295
 - order for appointment of new arbitrator, 1295 1296
 - special case stated for Court's opinion 1296
- fraudulent concealment of matter which ought to have been disclosed, 1272 [Sch. II para 15 (1) (b)] 1275.
- In . i
- in
- order of reference in a suit, 1262 [Sch II, para. (3)]
 - appointment of arbitrator 1262 [Sch II, para (2)]
 - effect of, 1262 [Sch. II, para 3 (2)] 1263
 - form of application for 1296.
 - form of 1295
 - superseding 1265 [Sch II, para 5 (2)] 1266 1272 [Sch. II, para. 15 (2)]
 - who may apply for, 1258 1260
 - future differences to arbitration, 1284
 - matter in difference 1260
 - notice of application to file, 1283 [Sch. II, para. 17 (3)],
 - revocation of, 1285
 - validity of, 1287
 - where no provision for appointment of umpire in, 1285
 - on an agreement to refer, 1282 1285 [Sch. II, paras. 17 and 18]
 - appeal from order filing or refusing to file agreement to refer, 1285
 - staying or refusing to stay suit, 1285.
 - application to file agreement, 1282, 1283 [Sch. II, para. 17].
 - appointment of arbitrator, 1283 [Sch. II, para. 17 (4)]
 - stay of suit, 1285 [Sch. II, para. 18].

Arrest and detention—*contd.*

- interim protection order and re arrest, 213,
- judgment-debtor, *immediate* arrest of, on decree for payment of money, 705, 706
[O 21, r. 11 (1)]
 - insolvent, procedure when judgment debtor expresses his intention to be declared an, 209, 210 (s 55, cl 4)
 - procedure on appearance of, in obedience to notice or after arrest, 208-209 [s 55], 749, 750 [O 21, r 40]
 - re arrest of, 213 [s 58 (2)] 213, 750 [O 21, r 40(4)]
 - release of, 212-214 [ss 58, 59]
 - when unable to pay, Court may disallow application for arrest, 749 [O 21, r 40 (1)]
- jurisdiction, where person to be arrested is outside—
 - (1) and arrest is to be made in execution of a decree, 159 [s 39]
 - (2) where it is to be made under other provisions of the Code, 406 [s 136]
- notice before arrest, 746, 747 [O 21, r 37]
- notice to, before entry of room, 209
- pardanashin women, when not exempt from arrest, 402 [s 132 (2)]
- period of detention, 212, 213 [s 58]
- public, inconvenience to and arrest of certain persons, 209 [s 55 (2)]
- re arrest, 213 [s 58 (2)] 213, 750 [O 21, r 40 (4)]
- release not a discharge of debt, 213 [s 58 (2)]
- release on ground of illness, 214 [s 59]
- subsistence allowance, 212 [s. 57] 748 [O 21, r 39]
- surety, discharge of, 211, 212
- surety for appearance of judgment debtor under arrest 209-210 [s 55 (4)]
- warrant for arrest, 748 [O 21, r 38]
- to whom addressed, 747
- without warrant, illegal, 733
- witness, arrest of defaulting 651 [O 16, r 10 (3)]
- woman, and a, for money decree, 212 [s 56]

Arrest before Judgment 315 [s 94], 1034-1037 [O 38 rr 1-4]

- appeal from orders relating to 1036-1037, 1120 [O 37 r 1 (j)]
- compensation for wrongful arrest 315-316 [s 95]
- defendant, when, may be arrested before judgment, 1034-1035 [O 38, r 1]
- period of detention in prison 1037 [O 38 r 4]
- security, order to furnish, for appearance 1036 [O 38 r 2]
- where defendant fails to furnish, 1037 [O 38 r 4]
- surety, procedure on application by to be discharged 1036-1037 [O 38 r 3]

Assessors—

- Admiralty and Vice admiralty cases in 408 [s 140].

Assets—See Rateable distribution**Assignment—**

- lis pendens* doctrine of 850
- of decree 713-721 See Transfer of Property
- of interest in suit 876 [O 22 r 10] 877-879
 - of mortgage after judgment 877-879
 - pending appeal 878
- of cross-decree and execution 724 [O 22 r 18 (f)]
- pendente lite*, 876 [O 22 r 10]

Attachment—

- actual seizure of movable property in possession of judgment-debtor, 751 [O. 21, r. 43].
- adjudication order, effect of, on attachment, 238, 239
- adjustment of attached decree when ineffectual, 768, 769 [O. 21, r. 53 (6)], 771.
- adverse possession, effect of, 789.
- agricultural produce—*See* Agricultural produce.
 - attachment of, 752 [O. 21, r. 44]
- agriculturists houses occupied by, 222
- alienation, temporary, of attached land, 255
- allowances, being less than salary, of a public officer while absent from duty, 224
- anticipatory attachment, 766
- appeal from order of compensation for wrongful attachment before judgment, 317
- assets, claims for rateable distribution of are claims enforceable under attachment, 231 [s. 64, Explan.], 235, 236
- before judgment—*See* sub head " Attachment before judgment "
- bonds sanctioned by Railway Company to its servant, 219
- charge, attachment does not create a, 238
- claims, enforceable under, 233
- claims, investigation of—*See* sub head " Investigation of claims "
- Collector application for attachment of land registered in office of, 709 [O. 21, r. 14]
- compensation for wrongful, 315, 316 [s. 95]
- compulsory deposits in Provident fund, 216 [s. 60 (1) (4)], 224, 225
- contract of sale, and, 232, 772, 783.
- contrary to such attachment, 234, 235
- cooking vessels, 221.
- current coin or currency notes where property attached is, 774 [O. 21, r. 56].
- damages, attachment of right to sue for, 215 [s. 60 (1)(c)]
- debt, attachment of, 220, 221, 754 [O. 21, r. 46], 755
- decrees, attachment of, 767, 769 [O. 21, r. 53]
- default in proceeding with execution after, 774 [O. 21, r. 57]
- dwelling house, seizure of property in, 227, 228 [s. 62]
- easement, transfer of, pending attachment, 232
- effect of, 238.
- execution proceedings, struck off, effect of, 237, 238
- exemption from, of stipends and gratuities of certain family pension funds, 223
- firm, in case of decree against, 761, 762 [O. 21, r. 50]
- garnishee's debt, 756—*See* Garnishee

r. 45 (5)}.

- immovable property, particulars in application for attachment of, 709 [O. 21, r. 13]
- irregularity in attaching property, 824
- judgment debtor, examination of, as to his property, 730 [O. 21, r. 41]
- jurisdiction, Court has no, to sell property without attachment, 242
- jurisdiction, where property to be attached is outside—
 - (1) and it is to be attached in execution of a decree, 159, 160 [s. 39]
 - (2) where it is to be attached under other provisions of Code, 406 [s. 136]
- labourer, wages of, 216 [s. 60 (1) (4)], 225
- land assigned for maintenance, 218
- land burdened with service of public nature, 218
- land paying revenue to Government, attachment of, 772 [O. 21, r. 54]

Attachment—*contd*

- life policy, 757.
- liquidator of registered company, position of, 239
- maintenance, right to future*, 216 [s 60 (1) (n)], 223
- mesne profits, before determination of amount of, 751 [O 21, r 42]
- money decrees and mortgage decrees, 770
 - value of property attached in case of, 722 [O 21, r 17, proviso]
- mortgage debt, attachment of, 755, 756
- movable property in possession of judgment debtor, 751 [O 21, r 43]
- movable property not in judgment debtor's possession, 769 [O 21, r 12]
- native army, pay and allowances of soldiers and followers of, exempt, 216 [s 60 (1) (j)], 224
- negotiable instruments, attachment of, 765 [O 21, r 51]
- notice in case of decree passed by another Court, 768 [O 21, r 53 (1) (b)]
- objection to, on ground that property is not saleable, when to be raised, 226, 227
- objections to attachment—*See sub head "Investigation of claims and objections"*
- Official Assignee, attaching creditor has no priority over, 238, 239
- partition after, 779
- partnership property, when attachable, 759 [O 21, r 49 (1)], 761 [ib, 50 (1) (a)]
- pensions, private attachment of, 223
 - political, attachment of, 223
- policy effected by married man for benefit of his wife and children, 220
- precept, attachment under, 166 [s 46]
- preliminary decree for possession and rents, attachment under, 761 [O 21, r 42]
- priority, where fund in Court is attached by several decree holders 766 767
- property attached in execution of decrees of several Courts, 228 [s 63]
 - liable or not liable to attachment, 214 217 [s 60]
 - in custody of Court or public officer, 765 [O 21, r 52]
 - in custody of receiver, and, 766.
 - of defaulting witness, 651 [O 16, r 10 (3)] 652 [O 16, r 12]
 - of person disobeying order granting injunction 1050 [O 39, r 2 (3)]
 - of receiver in enforcement of his duties, 1069 [O 40, r 4]
- Provident fund, compulsory deposits in 216 [s 60 (1) (k)], 224, 225
- raising of, and subsequent restoration of, 236
- removal of, 773 [O 21, r 55]
- salary of officer of His Majesty's regular forces, 226
 - private servant, 224
 - public officer or railway servant or servant of local authority 215, 216 [s 60 (1), cl (i)], 758 759 [O 21, r 45].
- service right of personal 222, 223
- shares in a corporation, 754 [O 21, r 46 (1) (b)] 757
- share of judgment debtor in movables, 754 [O 21, r 47].
- Strikhan ornaments* 221
- succession, expectancy of, 216 [s 60 (1) (m)] 225
- title or priority questions of, by what Court to be determined, 765 [O 21, r 52, proviso].
- transfer of easement pending attachment, 772
 - attached property 270 271 [s 64] 271 274
- vesting order effect of on attachment 238 239
- warrant of 772 773 [O 21, r 24]
- winding up and effect of on attachment 231

Attachment—*contd*

Attachment before judgment—715 [s. 94 (b)], 1037-1043 [O 38, rr. 5-12]

agricultural produce not attachable before judgment, 1043 [O 38, r. 12].

appeal from orders relating to, 1120 [O 43, r. 1 (7)].

compensation for wrongful attachment, 315, 316 [s. 95]

contract of sale, and, 1042

decree holders, does not bar rights of other, 1042.

determination of attachment for decree holder a default, inapplicable, 774.

divorce proceedings, no attachment before judgment in, 1039

effect of, on alienation of property, 232.

investigation of claims to property attached before judgment, 1041 [O 38, r. 8].

jurisdiction, Court may attach before judgment property situate outside, 1040

mode of making, 1040 [O 38, r. 7]

partnership property in suit for partnership accounts, whether liable to, 1038

power of provincial small cause court, in, 23

property to be attached, specification of, 1038, [O 38, r. 5 (2)]

re attachment not necessary after decree, 1047 [O 38, r. 11].

removed when may be, 1041 [O 38, r. 9].

sale of property under, person holding decree may apply for, 1042 [O 38, r. 10].

security for production of property, when defendant should furnish, 1037, 1038 [O 38, r. 5].

third parties does not affect rights of, 1042 [O 38, r. 10]

transfer private, of property, pending, 1039

vesting order, effect of, on attachment before judgment, 1038, 1042

when ordered, 1037, 1038 [O 38, r. 5], 1040 [*ib.*, r. 6]

where cause not shown or security not furnished, 1040 [O 38, r. 6].

withdrawal of, when ordered, 1040 [O 38, r. 6 (2)]

wrongful, suit for, 1040

Investigation of claims and objections—775-790 [O 21, rr. 58-63]

appeal from order made on application of third party objecting to attachment, 776, 778

burden of proof in suit to establish right to attached property, 789

claim, when to be allowed, 779-780 [O 21, r. 60]

disallowed, 781 [O 21, r. 61]

evidence in support of claim or objection, 778 [O 21, r. 59]

mortgage claim, continuance of attachment subject to, 782 [O 21, r. 62].

mortgaged property, objection by third party to sale of, under a mortgage decree, 777

mortgagee in possession, objection by, 783

objection by third party to attachment, of debt, 777

after sale, 777

sale of mortgaged property under mortgage decree, 777

to attachment by third party, 775, 776 [O 21, r. 58].

after sale, 777

to attachment by a party to suit, where, 176, 177

when allowed, 779, 780 [O 21, r. 60]

disallowed, 781 [O 21, r. 61]

order allowing or disallowing claim, when conclusive, 783 [O 21, r. 63]

party, judgment debtor necessary, to suit by unsuccessful claimant, 784

payment by claimant under protest, 788

purchaser, rights of, when property is sold subject to a mortgage, 782, 783

when notice of mortgage given in proclamation, 783

release from attachment, effect of order of, 780, 781.

Attachment—*cont'd***Investigation of claims and objections—*cont'd***

- sale, postponement of, pending inquiry into claim, 776 [O 21, r 58 (2)]
- suit, declaratory, by defeated party, 783 [O 21, r 63]
 - may claim consequential relief, 785
 - value of, for pecuniary jurisdiction 789
- suit to set aside fraudulent transfer by judgment debtor, 789
 - Revenue Court attachment, 790
- third party, where objection to attachment is made by, 775 [O 21, r 58]
 - objection by, to attachment of debt, 776
 - to sale under a mortgage decree 777
 - remedies open to, for releasing property from attachment 776
- time within which suit under O 21, r 63, should be brought, 784, 785
- title, Court not to go into question of, 778, 779
- transfer, private, of property by claimant after release from attachment, 780, 781
- trust, property held upon, 779 [O 21, r 60]

Attendance—

- corporation, officer of, power to require personal attendance of, 928 [O 29, r 3]
- duty of witness to attend at each hearing, 653 [O 16 rr 15, 16]
- of person able to answer questions in suit against Government, 924 [O 27, r 6]
- witnesses before Commissioner, 921 [O 26, r 17 (1)]
 - to give evidence or produce documents power to compel, 136 [s 30 (b)]
- witness, when not required to attend in person, 654 [O 16 r 19]

Attorney—

- admissions by, 17
- authority of, in suits, 16
- bill of costs when privileged from inspection, 619
- compromise without client's express authority effect of 16
- is an officer of Court, and amenable to disciplinary jurisdiction 1336
- lien of, for costs, 579 581
 - and rateable distribution, 270
- processes of Chartered High Courts that may be served by attorneys 1157 [O 49 r 1]
- powers of Chartered High Courts *See* Chartered High Courts

Auction—

- court sale as a rule to be held by public auction, 791 [O 21 r 65].

Auction purchaser—*See* Possession Sale sub head Purchaser's title

- amendment of sale certificate 841
- appeal from order allowing or refusing amendment of sale certificate 841
- benami purchase, 244 [s 66] 245
- benami purchases at execution sales for benefit of judgment-debtor, 243
- benamidar, where certificated purchaser is, 245 247
- certificate of sale to 839 [O 21 r 94].
 - variance between proclamation and 840 841
- compensation to on setting aside sale 811 [O 21 r 80] 815
- default in payment of deposit by at court sale 801 [O 21 r 84]
- delivery of possession to 842 843 [O 21 rr 90 (b)] *See* Possession
 - property in occupation of judgment-debtor 842 [O 21 r 90 (b)]
 - of tenants 843 [O 21 r 90 (b)]
- deposit by, at court sale 801 [O 21 r 84]
- dispossession by, 846 [O 21 r 100]

Auction purchaser—*contd*

- execution proceedings, questions between auction purchaser, decree holder and judgment debtor, 177 183
- limitation, as to, for application for delivery of possession, 842
- mine profits, right of purchaser to, 242
- mortgage, where property is sold subject to or with notice of, 782.
 - what passes to purchaser on Court sale of immovable property, 839, 840
 - mortgaged property, 841
- party, necessary, to application under O 21, r 89, p 817
 - to application under O 21, r 90, pp 828, 829
- "representative of parties to suit, whether is a, under s 47, p 175
- re sale, defaulting purchaser answerable for loss on, 798, 799 [O 21, r 71]
- resistance to delivery of possession to, 813 [O 21, r 97] See Possession
- restitution against, 418
- sale, application to set aside, where judgment debtor has no saleable interest, 832 [O 21, r 91]
 - certificate of, to, 839 [O 21 r 91]
 - in execution of decree, when void and when voidable, 242, 243
 - setting aside, compensation to purchaser on, 811 [O 21, r 89] 815
- suit by, after confirmation of sale and before issue of certificate of sale, 241, 242 for possession n 241
- title of 239 [s 65], 242 See Sale sub head Purchaser's title "
- vesting of property in, 239 [s 65] 240

Award—(Schedule II)—See Arbitration

- Land Acquisition Act, appeal from award under, 328

Bankers' Books Evidence Act, 569**Barrister—See Counsel**

- admissions by, 15 17
 - to bind client by authority of, 17
- arbitration, to refer to, authority of, 17
- authority limited to acts coram judice, 16
 - to the issues in the suit 16
- compromise, authority to, 15, 16
- High Court Judges, one third of to be Barristers 1306 [High Courts Act, s 2]
 - judgeship, what Barristers eligible for, 1306 [High Courts Act, s 2]
- omission by, to argue a question of law or abandoning same, 17
- professional etiquette affecting, 1337
- who included in term ' barrister,' 1310 [High Courts Act, s 19]
- withdraw suit, to, authority of, 17

Benami—

- purchase, meaning of, 245

Benamidar—

- beneficial owner, suit by, against benamidar, 247
- execution, application for, by, 716
 - sales, benami purchases at, for benefit of judgment debtors, 248
- Hindu family, joint, and benami purchaser, 248, 249
- mortgage, whether benamidar can maintain suit on, 981
- suit by benami purchaser for declaration that he purchased on his own behalf, 246
 - by benami purchaser against real owner for possession, 248
 - by third person alleging certified purchaser is a benamidar, 244 [s 66 (2)], 247
- waiver by benami purchaser of right of possession, 249

Eid—

liberty to, 800 [O 21, r 72]

restriction on bidding by officer, 803 [O 21, r 73]

Bill of Exchange—See Negotiable Instrument, summary suits

costs, recovery of, of noting non acceptance of dishonoured, 1034 [O 37, r 6]

definition of, 1031

joinder of parties liable on same, 459 [O 1, r 6] 460

summary suit upon, 1029, 1030 [O 37, r 2] *See Summary suits*

Breach of trust—

particulars of, to be stated in pleadings, 530 [O 6, r 4] 531

British India—

Aden is within, 4

administrators, etc, outside, need not be made parties, 940 [O 31, r 2]

arbitrator leaving, 1264 [Sch II, para 5 (1) (b) (iii)]

arrest before judgment of defendant about to leave 1034 1035 [O 38, r 1 (b)]

commission to examine witness residing out of, 915 [O 26 r 5]

definition of, 4

firms, suits by and against, carrying on business in, 928 [O 30, r 1]

foreign firm, when said to carry on business in, 930

judgment, how enforced in 92, 93

Kathiawad States, whether part of, 4, 909

Rajkot Civil Station is not within, 909

Secunderabad, Cantonment of, is not within, 909

security for costs, and residence outside, 907 [O 25, r 1 (1)], 908

where appellant resides outside, 1083 [O 41, r 10 (1) proviso]

Singapore is not within, 4

summons, service of, where defendant resides outside, 521 [O 5, r 25]

tort, committed beyond, and place of suing, 110, 111.

trustees outside, need not be made parties, 940 [O 31, r 2]

umpire leaving, 1264 [Sch II, para 5 (1) (b) (iii)]

Wadhwan, Cantonment of, is not within, 909

Burden of proof—

in suit to establish right to attached property, 759

mesne profits and, 678

rules as to, 659

Business—

agent, service of summons on, by whom defendant carries on, 514 [O 5, r 15]

carrying on business through, 114, 115

business books, verified copies of entries in, instead of inspection, 627 [O 11, r 10]

"carrying on business," meaning of, 114 115

corporation, where deemed to carry on 112 [s 20 (1) (a) (ii)]

Court, transfer of business from one, to another, 432 433 [s 150]

foreign firm, when said to carry on, in British India, 930

foreigner carrying on, through agent, 125

non resident, carrying on, within jurisdiction of court, 41 42 [s 20 (1) (a) (ii)]

jurisdiction, from place of business 104 [s 10 (1) (a) (ii)] 114 [s 20 (1) (a) (ii)] [Charter, cl 12].

meaning of "carrying on business" 114 115

receiver, debts contracts 114 115 [s 10 (1) (a) (ii)]

Certificate—contd

Chiefs or Princes, sanctioning suit against, 283 285 [s. 86]

Court, granting of, by, as to fitness to appeal to Privy Council, discretionary, 1125

execution, on transfer of decree for, 703 [O. 21, r. 6 (b)]

judgment debt, of payment of, out of Court 631, 672 [O. 21 r. 2]

judgment-debtor, authorising to mortgage, &c, his attached property 807 [O. 21, r. 83 (2)]

leave, for, to appeal to Privy Council 1125 [O. 45, r. 3].

legal representative, certificate of sale to, 839

Privy Council.—*See* Privy Council

sale, certificate of, to bear date on which sale becomes absolute, 833 [O. 21, r. 94].

to legal representative 831

to purchaser at court sale, 830 [O. 21, r. 94]

sale-certificate, amendment of, 841

variance between, and proclamation of sale, 840, 841

Certifying payment—

limitation for, 701 702

payment of judgment debt out of Court to be certified to Court, 691, 692 [O. 21, r. 2].

Certiorari—

writ of, 372 373

Charge—

interpleader suits when plaintiff entitled to a charge for costs in 1027 [O. 35, r. 6].

pauper suits, of Government for court fees in, 971, 972 [O. 33, r. 10]

suits to realize charge on immovable property, 1023 1024 [O. 34, r. 15]

Charging order, 766**Charities—**

suits relating to public 213 313 [s. 92] *See* Public Charities

Charter—*See* Chartered High Courts.**Chartered High Courts—393, 394 [ss. 116 120], 1157 [O. 49]—**

Aden Court of Political Resident at, power to remove suits from, 1346.

Admiralty and Vice admiralty jurisdiction, 1364 [Charter, cl. 32, 33]

Advocate General grant of certificate in criminal cases, 1362 [Charter, cl. 26].

Advocates, vakils and attorneys—

powers of, in admitting, 1335 [Charter, cl. 9].

to make rules for admission of, 1335.

to remove or suspend, 1336

Allahabad High Court has no original jurisdiction, 99, 101.

appeal under cl. 15, 1348 1358

from Courts in the Province, 1358 [Charter, cl. 16]

Court of original jurisdiction to High Court in its appellate jurisdiction, 1348 [Charter, cl. 15].

from criminal Courts in the Province, 1362 [Charter, cl. 27], 1377 [All. cl. 20].

1385 [Pat., cl. 20], 1395 [Lah., cl. 20], 1404 [Bang., cl. 26].

order refusing leave under cl. 12 of the Charter, 1345, 1355.

rejecting application to set aside order granting leave under cl. 12 of the Charter, 1345 1355

no, from High Court exercising original criminal jurisdiction, 1361, 1362 [Charter, cl. 25].

to Privy Council—*See* Privy Council.

Char

cause of action in suits on contracts within meaning of cl. 12 of the Charter, 1343, 1344

Charters of, 1331 1409

Calcutta, Bombay and Madras High Courts, 1331 1374.

Allahabad High Courts, 1375 1379

Lahore, 1391 1398

Patna, 1350 1360

Rangoon, 1369 1409

civil jurisdiction of, 1337 1360 [Charter, cl. 11 21]

Costs

35

contempt, arrest of defendant guilty of, 1337, 1338

costs, execution of decree before ascertainment of, 393 [s. 118].

criminal jurisdiction, 1360 1363 [Charter, cl. 22 30], 1376, 1377 [All., cl. 15 23], 1385, 1386 [Pat., cl. 16 23], 1394, 1395 [Lah., cl. 15-22], 1403 1405 [Rang., cl. 21 29].

as to persons, 1361 [Charter, cl. 23] 1377 [All., cl. 16], 1385 [Pat., cl. 16], 1394 [Lah., cl. 16], 1404 [Rang., cl. 22].

extraordinary original 1361 [Charter, cl. 24] 1377 [All., cl. 17], 1385 [Pat., cl. 17], 1394 [Lah., cl. 17], 1404 [Rang., cl. 23]

decree contingent upon decision of High Court, 1139 [O. 46, r. 2]

despatch from Secretary of State forwarding Charter, 1322 1330

extent of jurisdiction of, governed by their respective Charters, 104

extraordinary original civil jurisdiction, 372, 373, 1346 [Charter, cl. 13], 1376 [All., cl. 9] 1383 [Pat., cl. 9], 1393 [Lah., cl. 9], 1401 [Rang., cl. 11].

criminal jurisdiction, 1361 [Charter, cl. 24], 1377 [All., cl. 17], 1385 [Pat., cl. 17], 1394 [Lah., cl. 17], 1404 [Rang., cl. 23]

foreigner, non resident, jurisdiction over, 1344

Holkar v. Dadabhai discussed, 1339 1341

infants, jurisdiction as to, 1358 [Charter, cl. 17], 1376 [All., cl. 12], 1384 [Pat., cl. 12], 1394 [Lah., cl. 12], 1403 [Rang., cl. 15]

inherent powers of 433, [s. 151]

Insolvent Court, provisions with respect to, 1359 [Charter, cl. 18], 1403 [Rang., cl. 16]

issues of fact for trial to Lower Courts, High Court may refer, in second appeal, 1366

joinder of several causes of action under the Charter, 1347 [Charter, cl. 14], 1402 [Rang., cl. 12]

judges, clerks, and ministerial officers of High Court, 1333 [Charter, cl. 3, 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl. 5], 1376 [All., cl. 3], 1382

[Pat., cl. 3], 1391 [Lah., cl. 3], 1400 [Rang., cl. 4]

Act ss. 2 6],

Chartered High Courts—*contd*

judgment, meaning of, as used in cl 15 of the Charter, 1349 1352

jurisdiction—*See* different items, Civil, etc

and powers of, 1303 [High Courts Act, s 9], 1315 [Government of India Act, s 107], 1315 1318

appellate, as to appeals from original suits, 1348 [Charter, cl 15]

from Courts in the Province, 1358 [Charter, cl 16]

exercise of, not at usual place of sitting 1364 [Charter, cl 31], 1378

[All, cl 24] 1389 [Pat, cls 35, 36] 1398 [Lah., cl 33], 1408 [Rang, cls 41 43]

Lahore High Court has no original jurisdiction, 99, 104

Land Acquisition Act, no appeals to Privy Council from certain award, 1369

land suits for, within the meaning of, cl 12 of the Charter, what are, 1338 1342.

law to be administered by the Chartered High Courts, 1350, 1360 [Charter, cls 19 21],

1376 [All, cls 13, 14], 1384 [Pat, cls 13, 14], 1394 [Lah, cls 13, 14], 1403
cls 17 20]

leave of Court under cl 12 is a condition precedent to jurisdiction, 1343

revocation of, 1343

112],

matrimonial jurisdiction, 1366 [Charter, cl 35]

offenders to be punished under the Indian Penal Code, 1363 [Charter, cl 30]

officers, appointment of, 1334, 1335 [Charter, cl 8]

opinion of High Court, power to refer case for, 371 [s 113]

orders in proceedings other than suits and appeals, 1355, 1356

ordinary jurisdiction, meaning of, 1344

original civil jurisdiction, local limits of, 1337 [Charter, cl 11], 1401
[Rang, cl 9]

original civil jurisdiction as to suits, 1338 [Charter, cl 12], 1401 [Rang, cl 10]
provisions of Code how far applicable, 394 [s 120]

partition, suit for, of movable and immovable property, the latter being situated
wholly outside jurisdiction, 1342

Patna High Court has no original jurisdiction, 99, 104.

powers of Indian legislature preserved, 1372 [Charter, cl 44]

powers of single judges and Division Courts, 1366 [Charter, cl 36]

power to extend time for security and deposit in Privy Council appeals, 1129

powers of, to provide for exercise of jurisdiction by single judges or Division Court,
1318 [Government of India Act, s 108]

power to grant leave to appeal to Privy Council, *in forma pauperis*, 1124, 1125

Presidency Small Causes Court, reference to High Court by, 1139

transfer of suits from, to High Court, 1346

Privy Council, appeals to, 1368 1372 [Charter, cls 39 42], 1379 [All, cls 30 33]

1388, 1389 [Pat, cls 31 34], 1396 1393 [Lah., cls
29 32], 1407, 1408 [Rang, cls 37 40].

from decree or final orders of, 351 [s 109].

interlocutory judgment, 1370, 1371

in criminal cases, 1371 [Charter, cl 41].

decisions appealable to, under cl 39 of the Charter, 1369

rules as to transmission of documents to, 1371 1372 [Charter, cl 42]

reference of questions as to jurisdiction in Small Causes, 1140 [O 46, r 6]—

See Reference

Chartered High Courts—*cont*

appearance for suitors, 1375 [Charter, cl 9]

arrest of defendant guilty of contempt, 1377 1338

cause of action in suits on contracts within meaning of cl 12 of the Charter, 1343 1344

Charters of, 1371 1409

Calcutta, Bombay and Madras High Courts, 1331-1374

Allahabad High Courts, 1375 1376

Lahore, 1391 1398

Patna, 1350 1390

Rangoon, 1399 1409

civil jurisdiction of, 1377 1360 [Charter, cls 11 21]

constitution of, 1306 [High Courts Act, s 2]

contempt, arrest of defendant guilty of, 1377, 1338

costs, execution of decree before ascertainment of, 393 [s 118]

criminal jurisdiction, 1360 1367 [Charter, cls 22 30] 1376, 1377 [All, cls 15 23],

1385, 1386 [Pat, cls 15 23], 1394, 1395 [Lah, cls 15-22],

1403 1405 [Rang, cls 21 29].

as to persons, 1361 [Charter, cl 23] 1377 [All, cl 16], 1385

[Pat, cl 16], 1394 [Lah, cl 16], 1404 [Rang, cl 22]

extraordinary original, 1361 [Charter, cl 24] 1377 [All, cl

17] 1385 [Pat, cl 17], 1394 [Lah, cl 17], 1404 [Rang,

cl 23]

decree contingent upon decision of High Court, 1139 [O 46, r 2]

despatch from Secretary of State forwarding Charter, 1322 1330

establishment of, in several Presidencies in India, 1306 [High Courts Act, s 1]

extent of jurisdiction of, governed by their respective Charters, 104

extraordinary original civil jurisdiction, 372, 373, 1346 [Charter, cl 13] 1376 [All,

cl 9] 1383 [Pat, cl 9], 1393 [Lah, cl 9] 1401 [Rang,

cl 11]

criminal jurisdiction, 1361 [Charter, cl 24], 1377 [All, cl 17]

1385 [Pat, cl 17], 1394 [Lah, cl 17], 1404 [Rang, cl 23]

foreigner, non resident, jurisdiction over, 1344

Holkar v Dadabhai discussed, 1339 1341

infants jurisdiction as to 1358 [Charter, cl 17], 1376 [All, cl 12] 1384 [Pat, cl

12] 1394 [Lah, cl 12] 1403 [Rang, cl 15]

inherent powers of 433, [s 151]

judges, clerks, and ministerial officers of High Court, 1333 [Charter, cls 3, 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl 5], 1376 [All, cl 3]

1382

[Pat, cl 3] 1391 [Lah, cl 3], 1400 [Rang, cl 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl 5], 1376 [All, cl 3]

1382

[Pat, cl 3] 1391 [Lah, cl 3], 1400 [Rang, cl 4]

[Rang, cl 12]

judges, clerks, and ministerial officers of High Court, 1333 [Charter, cls 3, 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl 5], 1376 [All, cl 3]

1382

[Pat, cl 3] 1391 [Lah, cl 3], 1400 [Rang, cl 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl 5], 1376 [All, cl 3]

1382

[Pat, cl 3] 1391 [Lah, cl 3], 1400 [Rang, cl 4]

judges of, declaration to be made by, 1333, 1334 [Charter, cl 5], 1376 [All, cl 3]

1382

Charter,

of 1406

See Reference

Chartered High Courts—*contd*

- referred cases, hearing of, 1362, 1363 [Charter, cl 28], 1377 [All., cl 21] 1385, 1386 [Pat., cl 21], 1395 [Lah., cl 21], 1401 1405 [Rang., cl 27].
- regulation of criminal proceedings, 1368 [Charter, cl 38], 1378, 1379 [All., cl 29] 1387 [Pat., cl 30], 1396 [Lah., cl 28], 1408 [Rang., cl 36].
- remand, inherent power of High Court to, in second appeal, 1110
 - power of High Court in appeals from orders of, 1099, 1102
- requestion for records by Government to be complied with, 1372 [Charter, cl 43], 1379 [All., cl 34] 1390 [Pat., cl 40] 1393 [Lah., cl 36], 1409 [Rang., cl 46]
- reserving points of law for opinion of, in criminal trials before High Courts in its original criminal jurisdiction, 1361, 1362 [Charter, cl 25], 1377 [All., cl 18], 1385 [Pat. cl 18], 1394 [Lah., cl 18], 1404 [Rang., cl 24]
- re-training a party from proceeding with suit in another Court, 1047, 1048
- review by High Court in criminal cases [Charter, cl 26], 1362
- revision, powers of High Court as to, 371, 372 [s. 115].
 - true function of High Court in, 372
 - whether High Court can call for record of its own motion in, 378
- revocation of Letters Patent of, 1862 [Charter, cl. 1], 1332
- Rules in Sch. I of the Code how far applicable to, [O 49, r. 3], 1157
- rules as to transmission of copies of evidence to Privy Council, [Charter, cl. 42] 1371, 1372
 - of practice for subordinate Courts to be framed by High Court, 1315 [Government of India Act, s. 107]
 - power of Chartered High Courts to make, as to their original civil procedure 400 [s. 129], 1367 [Charter, cl 37]
- rulings of different High Courts, when different, judge to follow ruling of High Court to which he is subordinate, 19
- saving in respect of, [O 49, r. 2] 1157
- seal of High Courts, [Charter, cl. 6], 1334
- service of certain processes of, [O 49, r. 1], 1157
- ship, jurisdiction in respect of necessities supplied to, 1364, 1365
- Small Cause Courts are subordinate to, 19 [s. 3]
- special provisions in Code relating to, 393, 394 [ss. 116 120]
- suits for land of which a part is within jurisdiction, 1342, 1343
 - within meaning of cl. 12 of the Charter, 1338 1342
 - partition of movable and immovable property, the latter being situated wholly outside jurisdiction, 1342
 - triable by, in exercise of ordinary original jurisdiction, 1338
 - transferred under Charter, cl. 13, powers of High Court in dealing with, 1347
- superintendence, power of, 372, 1315, 1316
- Supreme Courts, provisions applicable to, to apply to Chartered High Courts, 1305 [High Courts Act, s. 11]
- stay of suit pending in a subordinate Court, 1047 1049
- testamentary and intestate jurisdiction, 1365 [Charter, cl. 34], 1378 [All., cl. 25] 1386 [Pat., cl 26], 1395 [Lah., cl 24] 1405 [Rang., cl 32]
- time limit for execution of decrees of, 188 190
- transfer of criminal case or appeal, 1363 [Charter, cl. 29], 1377 [All., cl. 22] 1380 [Pat., cl. 22], 1395 [Lah., cl. 22] 1405 [Rang., cl 28]
 - of suits from Presidency Small Cause Court, 1346
 - of suits or appeals by, 130, 131[s. 24], 1309 [High Courts Act, s. 15], 1346 [Charter, cl. 13]
 - of suit from Court in which it is filed to another Court, where such Courts are under different High Courts, 130 [s. 23 (3)]

Chartered High Courts—*cont'd*

- unauthorised persons not to address, 793 [s. 119].
- writs, etc., to issue in name of the Crown, 1331 [Charter, cl. 7]

Cheque—

- attachment, liable to, in execution of decrees, 214 [s. 60 (1)].

Chiefs (ruling) and Princes—

- agents, recognised, who may act as, for, 242, 243 [s. 85].
- arrest, exemption from, 243 [s. 86 (1)].
- attachment of property of, 243 [s. 86 (1)].
- consent of G. G. in Council and suits against, 243 [s. 86].
- execution of decrees in territories of foreign Prince or State, 164 [s. 43].
 - passed by Courts of Native States, 165 [s. 44].
- limitation, and, time spent for obtaining certificate for filing suit against, 245.
- Political Agent, whether, can sue on behalf of a Prince, 245.
- private capacity, suit against, in their, 245.
- provisions of Code as to minors and lunatics do not apply to, 902 [O. 32, r. 16].
- style of Princes and Chiefs as parties to suits, 246 [s. 87].
- suits against, 243-245 [s. 86].
 - by, 241, 242 [s. 84].
- waiver of objection to, want of consent by G. G. in Council, 244.

Civil nature—*See* Caste

- suits of a, 24 [s. 9].
 - declaration of a, right, to worship is a, 30-31.
 - of burial, interference with is a, 31.
 - for setting aside election of directors is a, 31.

Claims—*See* Attachment, sub head Investigation of claims—

- investigation of claims to attached property, 775-776 [O. 21, r. 28].

Client—*See* Pleader

- act of pleader how far binds, 15-17.
- confidential communications between client and legal adviser when privileged, 614.
- death of client or pleader determines pleader's appointment, 507 [O. 3 r. 4 (2)].

Club—

- members of, whether can be sued collectively through their secretary, 463.
- suits against secretary of, 463.
- suits by or against, 463.

Code of Civil Procedure—

- application of, 1 [s. 1].
- Chartered High Courts Code applies to, 314 [s. 120], 1157 [O. 4] r. 3].
- Code includes Rules, 5 [s. 2 (1)].
- exhaustive, is not, 433.
- inherent powers of Courts, provisions of Code not to affect, 433 [s. 131].
- miscellaneous proceedings, procedure in Code for suits to apply to, 408 [s. 141].
- Presidency Small Cause Courts, extent of application of, to, 23 [s. 8, 1158 [O. 51].
- Provincial Small Cause Courts, extent of application of, to, 22 [s. 7], 1158 [O. 50].
- retrospective operation of, 3.
- Revenue Courts application of Code to, 40 [s. 5].

Collector—

- accounts, rendering of, to Court, 1301 1303 [Sch III, para 9]
- alienation, prohibition as to, pending execution by, 1303 [Sch III, para 11]
- appeal to High Court from order passed by, in execution proceedings, 253
 - assets, inquiry as to in execution proceedings, 1298, 1299 [Sch III, para 4]
- attachment of land, and certified extract from Collector's register, 709 [O 21, r 14]
- Bombay Mamlatdar & Courts Act II of 1906, Collector's Court and revision, 380
- Civil Court & jurisdiction, to control, 252, 253
- debts, inquiry as to, in execution proceedings, 1298, 1299 [Sch III, para 4]
- decree, powers of Collector in executing, transferred to him, 1297 [Sch III, para 1]
 - procedure for liquidation of money, 1300, 1301 [Sch III, para 7]
- decrees transfer of, for execution by, 251 [s 68]
- decree holders, notice in certain cases to, 1298 [Sch III, para 3]
- dispossession under order of, 817
- districts, where property to be sold is in several, 1304 [Sch III, para 12]
- District Court, when may issue notices and enquire instead of, 1299 [Sch III, para 5]
- execution proceedings, in, orders by, and appeal, 252 [s 70 (2)], 253
 - revision, 251, 254 [s 70 (2)]
- instalments no power to allow payment of debt by, 1297
- judicially, deemed to be acting in executing transferred decrees, 254 [s 71]
- jurisdiction of civil Courts barred as to Collector's powers, 252 [s 70 (2)]
- Land Acquisition Act Collector acting under s 11 of not a 'Court', 380
- Local Government rules for execution of decrees by Collector, to be made by, 251, 252 [s 70]
- money realised in execution of decree sent to Collector for execution 252, 253
- mortgage by judgment debtor pending execution by, 1304
- notices of suit to Collector under s 80, p 279
- nuisance, consent of Collector to suit relating to, 314 [s 93]
- objections whether Collector has power to hear, to execution of decree, 1298
- order made by in execution proceedings, and revision, 253, 254
- owner, when Collector may exercise power of, 1300 [Sch III, para 7 (2)]
- partition by, of estate paying revenue to Government, 206 207 [s 54]
- pauper suit, when copy of decree in, to be sent to 976 [O 33, r 14]
- powers of, to compel attendance and production, 1304 [Sch III, para 13]
- public charities, consent of Collector to suit relating to, 314 [s 93]
 - and sanction of Local Government, 314
- visitation powers of, as to, 314
- public sale of land, stay of, 254 [s 72]
- receiver, when Collector may be appointed, 1070 [O 40, r 5]
- refusal of, to sanction suit under sec 93, p 314
- revenue to Government partition by Collector of estate paying, 206, 207 [s 54]
- sales in execution, how to be conducted by, 1303 [Sch III, para 10]
 - decree holder may bid with leave of Collector, 802
 - decree holder may set off with leave of Court, 802
- scheme for liquidation of decrees for payment of money, 1300, 1301 [Sch III, para 7]
- stay in certain cases of public sale of land, 254 [s 72]
- sustenance of judgment debtor, providing for, 1302 [Sch III, para 9 (3) (c) (iv)]
- suit for setting aside orders made by Collector in execution proceedings, 253
- transfer of certain decrees for execution by, 251 [s 68]

Commission—

- commissioner, powers of, 921 [O 26, r 16]
- Court may issue commission to another Court, 271 [s 76]

Commission—*contd*

ex parte, when commissioner may proceed, 922 [O 26, r 18 (2)]
 expenses of, to be paid into Court before issue of, 921 [O 26, r 16]
 foreign Courts, commissions issued by, 272 [s. 78], 922, 923 [O 26, rr 19 22]
 letter of request in lieu of, 271 [s. 77]
 parties, appearance of, before commissioner, 922 [O 26, r 18 (1)]
 pauper applicant, when, may be ordered to be examined on, 906 [O 33, r 4 (2)]
 power of Court to issue, 271 [s. 75]
 purposes for which commissions may be issued, 271 [s. 75]
 witness, attendance and examination of, before commissioner, 921 [O 26, r 17 (1)]
 issue of process to, on application of commissioner, 921 [O 26, r 17 (2)]

To examine witness—912 923 [O 26, rr 1 8].

appeal from order directing issue of, 914
 refusing issue of, 914
 arbitration, commission may be issued pending reference to, 913
 cases in which commission may be issued, 912
 cross-examination of witnesses on commission, 915
 documents, admissibility of, produced before commissioner, 917
 duty of Court receiving commission to examine witnesses, 915 [O 26, r 6]
 evidence, admissibility of, taken on, of a person residing outside British India, 915
 reading of, taken on commission, 916
 exempted, persons from attending Court, 912
 order for issue of commission when made, 913 [O 26, r 2]
 persons who can be examined on, 913, 914
 return of commission with deposition of witnesses, 915 916 [O 26, r 7]
 returned, Court to direct where commission to be, 913 [O 26, r 4 (3)]
 revision, order refusing issue of, outside British India, not subject to, 915

For Local Investigation—917, 918 [O 26, rr 9, 10]

commissioner, procedure of, 918 [O 26, r 10 (1)]
 evidence, further, after commissioner's report, 919
 examination of commissioner by Court, 918 [O 26, r 10 (2)]
 inquiry, further when Court dissatisfied with proceedings, 918 [O 26, r 10 (3)]
 market value of property, to ascertain, 917 [O 26, r 9]
 mesne profits, to ascertain, 917 [O 26, r 9]
 report, commissioner's, to be evidence in suit, 918 [O 26, r 10 (2)]
 several commissions, issue of, improper, 918
 when issued, 917 [O 26, r 9]

To examine accounts—919 [O 26, rr 11 12]

evidence, proceedings and report to be, 919 [O 26, r 12 (2)]
 instructions, Court to give commissioner necessary, 919 [O 26, r 12 (1)]
 inquiry, when Court may direct further, 919 [O 26, r 12 (2)]
 when issued, 919 [O 26, r 11]

To make partitions—919, 920 [O 26, rr 13, 14]

commissioner, procedure of, 920 [O 26, r 14]
 report, Court to confirm, vary or set aside, 920 [O 26, r 14 (2)]
 when set aside, Court may issue new commission, 920 [O 26, r 14 (3)]
 resistance to commissioner, 920
 when issued, 919 [O 26, r 13]

Commissioner—See Commission

delegation of power by Court to, to try material issue, not allowed, 917
 documents, admissibility of, produced before, 917

Collector—

- accounts, rendering of, to Court, 1301-1303 [Sch III, para 9]
- alienation, prohibition as to, pending execution by, 1303 [Sch III, para 11]
- appeal to High Court from order passed by, in execution proceedings, 253
 - assets, inquiry as to, in execution proceedings, 1298, 1299 [Sch III, para 4]
- attachment of land, and certified extract from Collector's register, 709 [O 21, r 14]
- Bombay Mamlatdar's Courts Act II of 1906, Collector's Court and revision, 380
- Civil Court's jurisdiction, to control, 252, 253
- debts, inquiry as to, in execution proceedings, 1298, 1299 [Sch III, para 4]
- decree, powers of Collector in executing, transferred to him, 1297 [Sch III, para 1]
 - procedure for liquidation of money, 1300, 1301 [Sch III, para 7]
- decrees, transfer of, for execution by, 251 [s 68]
- decree holders, notice in certain cases to, 1298 [Sch III, para 3]
- dispossession under order of, 847
- districts, where property to be sold is in several, 1304 [Sch III, para 12]
- District Court, when may issue notices and enquire instead of, 1299 [Sch III, para 5]
- execution proceedings, in, orders by, and appeal, 252 [s 70 (2)] 253
 - revision, 253, 254 [s 70 (2)]
- instalments, no power to allow payment of debt by, 1297
- judicially deemed to be acting in executing transferred decrees, 254 [s 71]
- jurisdiction of civil Courts barred as to Collector's powers, 252 [s 70 (2)]
- Land Acquisition Act Collector acting under s 11 of, not a 'Court', 380
- Local Government, rules for execution of decrees by Collector, to be made by, 251, 252 [s 70]
- money realised in execution of decree sent to Collector for execution, 252, 253
- mortgage by judgment debtor pending execution by, 1304
- notices of suit to Collector under s 80 p 279
- nuisance, consent of Collector to suit relating to, 314 [s 93]
- objections, whether Collector has power to hear, to execution of decree, 1298
- order made by in execution proceedings, and revision, 253, 254
- owner, when Collector may exercise power of, 1300 [Sch III, para 7 (2)]
- partition by, of estate paying revenue to Government, 206, 207 [s 54]
- pauper suit, when copy of decree in, to be sent to, 970 [O 33, r 14]
- powers of, to compel attendance and production 1304 [Sch III, para 13]
- public charities, consent of Collector to suit relating to, 314 [s 93]
 - and sanction of Local Government, 314
- visitatorial powers of, as to, 314
- public sale of land, stay of, 254 [s 72]
- receiver, when Collector may be appointed, 1070 [O 40, r 5]
- refusal of, to sanction suit under sec 93, p 314
- revenue to Government partition by Collector of estate paying, 206, 207 [s 54]
- sales in execution, how to be conducted by, 1303 [Sch III, para 10]
 - decree holder may bid with leave of Collector, 802
 - decree holder may set off with leave of Court, 802
- scheme for liquidation of decrees for payment of money, 1300, 1301 [Sch III, para 7]
- stay in certain cases of public sale of land, 254 [s 72]
- subsistence of judgment debtor, providing for, 1302 [Sch III, para 9 (3) (c) (iv)]
- suit for setting aside orders made by Collector in execution proceedings, 253
- transfer of certain decrees for execution by, 251 [s 68]

Commission—

- commissioner, powers of, 921 [O 26 r 16]
- Court may issue commission to another Court, 271 [s 76]

Commission—*contd*

ex parte, when commissioner may proceed, 922 [O 26, r 18 (2)].
 expenses of, to be paid into Court before issue of, 921 [O 26, r 15].
 foreign Courts' commissions issued by, 272 [s. 75], 922, 923 [O 26, rr 19-22].
 letter of request in lieu of, 271 [s. 75].
 parties, appearance of, before commissioner, 922 [O 26, r 18 (1)].
 pauper applicant, when, may be ordered to be examined on, 920 [O 33, r 4 (2)].
 power of Court to issue, 271 [s. 75].
 purposes for which commissions may be issued, 271 [s. 75].
 witness, attendance and examination of, before commissioner, 921 [O 26, r 17 (1)].
 issue of process to on application of commissioner, 921 [O 26, r 17 (2)].

To examine witness—912-923 [O 26, rr 1-5].

appeal from order directing issue of, 914
 refusing issue of, 914
 arbitration, commission may be issued pending reference to, 913
 cases in which commission may be issued, 912
 cross-examination of witnesses on commission, 915
 documents, admissibility of, produced before commissioner, 917
 duty of Court receiving commission to examine witnesses, 915 [O 26, r 6].
 evidence, admissibility of, taken on, of a person residing outside British India, 915.
 reading of, taken on commission, 916
 exempted, persons from attending Court, 912
 order for issue of commission when made, 913 [O 26, r 2].
 persons who can be examined on, 913, 914
 return of commission with deposition of witnesses, 915, 916 [O 26, r 7].
 returned, Court to direct where commission to be, 913 [O 26, r 4 (3)].
 revision, order refusing issue of, outside British India, not subject to, 915

For Local Investigation—917, 918 [O 26, rr 9, 10]

commissioner, procedure of, 918 [O 26, r 10 (1)].
 evidence, further, after commissioner's report, 919
 examination of commissioner by Court, 918 [O 26, r 10 (2)].
 inquiry, further, when Court dissatisfied with proceedings, 918 [O 26, r 10 (3)].
 market value of property, to ascertain, 917 [O 26, r 9].
 net-net profits, to ascertain, 917 [O 26, r 9].
 report, commissioner's, to be evidence in suit, 918 [O 26, r 10 (2)].
 several commissions, issue of, improper, 918
 when issued, 917 [O 26, r 9].

To examine accounts—919 [O 26, rr 11-12].

evidence, proceedings and report to be, 919 [O 26, r 12 (2)].
 instructions, Court to give commissioner necessary, 919 [O 26, r 12 (1)].
 inquiry, when Court may direct further, 919 [O 26, r 12 (2)].
 when issued, 919 [O 26, r 11].

To make partitions—919, 920 [O 26, rr 13, 14].

commissioner, procedure of, 920 [O 26, r 14].
 report, Court to confirm, vary or set aside 920 [O 26, r 14 (2)].
 when set aside, Court may issue new commission 920 [O 26, r 14 (3)].
 resistance to commissioner, 920
 when issued, 919 [O 26, r 13].

Commissioner—See Commission

delegation of power by Court to, to try material issue, not all wed, 917
 documents, admissibility of produced before, 917

Commissioner—*contd*

- ex parte*, when, may proceed, 922 [O 26, r. 18 (2)].
- parties, appearance of, before, 922 [O 26, r. 18 (1)].
- powers of, 121 [O 26, r. 16].
- witnesses, attendance and examination of, before, 921 [O 26, r. 17 (1)]
- issue of process to, on application of, 921 [O 26, r. 17 (2)].

Company—See Corporation**Compensation—**

- appeal from order awarding, for wrongful arrest, attachment or injunction, 317, 318.
- arrest or attachment before judgment, in case of, 315 [s 95], 316, 317
- award of, for wrongful arrest, attachment or injunction, 315 [s 95 (1)].
- costs, compensatory in respect of vexatious claim or defence, 149, 150 [s. 35 A].
- counterclaim for, in a summary suit, 317
- injunction, interim, in case of, 315, 316 [s 95], 317.
- undertaking by plaintiff on grant of, 318
- suit, award of compensation under s 95 bars, 316 [s 95 (2)], 317

Compromise of Suit—

- agreement to take oath under the Oath s Act, not an adjustment, 897, 898
- must be one *adjusting a suit*, 897.
- appeal from order recording or refusing to record, 903, 904, 1120 [O 43, r 1, cl (m)].
- client, binding on, by solicitor or counsel, 15, 16, 90;
- compromise of probate proceedings, 899, 900
 - when court should record, 894, 898, 899
 - where fact of, is denied, 895
- decree in terms of, 894 [O 23, r 3]
 - passed on unlawful compromise, 898, 899, 902
 - which comprises matters not relating to suit, 900, 902, 903
- fraud practised upon Court consent decree obtained by, 324
- guardian of minor, by, 952 [O 32, 7].
- Hindu widow, by, how far binding on reversioners, 63, 69
- joint Hindu family, compromise by adult members of how far binds minor members, 956, 957
- minor, by guardian or next friend of, 952 [O 32, r 7]
- parties, by, out of Court, 894 [O 23, r 3], 891, 896, 901, 902. *See Adjustment*
- probate proceedings, of, out of Court, 899, 900
- registration, whether necessary when compromise affects land not in suit, 903
- representative suit, and compromise, 466
- submission and award as constituting adjustment of suit, 895, 897

Compulsory deposits—

- attachment of, 216 [s 60 (1) (i)], 224, 225
- definition of, 224, 225

Concise statement—562 [O 7, r 9 (1)]**Condition precedent—**

- when to be pleaded, 535, 536 [O. 6, r 6]

Conduct of suit—

- where parties numerous, 478 [O 1, r 11]

Conjugal rights—See Restitution of conjugal rights

Consent—

- Advocate General, of, to suits relating to, public charities, 297, 291 [s. 92] 297, 298.
to public nuisance, 289 [s. 91].
- alien enemies, of Governor General in Council to suits by, 281 [s. 83 (1)].
- ambassadors, of Governor General in Council to suits against, 281-284 [s. 86].
- Chiefs (ruling) of Governor General in Council to suits against, 283, 284 [s. 86].
- disability, consent to proceedings in suits on behalf of persons under, 428 [s. 147].
- enlargement of time, and consent order, 428, 430
- guardian *ad litem*, no person to be appointed, without his consent, 618 [O 32, r 4 (3)].
- judge may be made an arbitrator by, 125
- jurisdiction cannot be conferred by, 125
- next friend, no person to be added as, without his consent, 469 [O 1, r 10 (3)]
- plaintiff, no person to be added as, without his consent, 469 [O 1, r 10 (3)]
- remand of case by, for trial of issues not raised in appeal, 1103
- withdrawal of suit by one plaintiff without consent of others, 883 [O 23, r 1 (4)] 893.
with consent of defendant, 890

Consent decree—

- appeal from, 319 [s. 96 (7)], 323, 324
- consent should appear on face of, 324
- decree by consent of parties on a compromise, 891 [O 23, r 3].
- estoppel, and, 84
- execution, of, 902, 903
- form of, when matters not in suit included, 900
- Hindu widow, against, how far binding on reversioners, 68
- set aside, when a consent decree may be, 84
- setting aside of, procedure for, 324

Consolidation of suits—

- inherent power of Court as to, 435, 1126
- on appeal to Privy Council, 1126 [O 45, r 4]

Construction—

- of Code, 24
- of decree by executing Court, 159
- of deed is a question of law, and second appeal will lie, 334, 335

Contempt of Court—

- appeal from order of committal or refusing committal, for, 1356
- arrest for, no exemption from, 403 [s. 135 (2)]
- discovery or inspection, non compliance with order for, and, 628, 629
- imprisonment for, §58 does not apply, 214
- inherent power of High Court to punish summarily for, 435
- receiver, interference with, and, 1057, 1064
- witness proceedings against, 652

Contract—

- agency, of, and place of suing 118
- breach of, and place of suing 116 118
- cause of action in suits on 116 118, 1343 1344
- denial of in pleadings, 538 [O 6, r 8]
- discharge of, defendant pleading, and particulars in pleadings, 532, 533
- illegal, Court ought not to enforce, 538
- implied, averment of, 540 [O 6, r 12]
- injunction, temporary, to restrain breach of, 1049, 1050 [O 39, r 2], 1050 1053.

Contract—*contd*

- joinder of parties liable on same contract, 459 [O 1, r 6]
- joint liability on, 459, 460
 - and several liability on, 459
- letters, contract constituted by, and pleadings, 540 [O 6, r 12]
- performance of, defendant pleading, and particulars in pleadings, 532, 533
- place of suing, contract as to, 36
- pre-emption by, 683
- sale, of, and attachment, 232, 787
- several liability on, 459
- specific performance of, decree for, mode of execution of, 737, 738 [O 21, r 32]
- wagering, defence of, must be specifically pleaded, 538.

Contribution—

- suit for, by one judgment-debtor against another, in respect of costs, 148

Conveyance—

- execution of, by Judge or officer of Court, 741 [O 21, r 34 (4)]

Copy—

- execution, application for, and copy of decree, 707 [O 21, r 11 (3)].
 - transfer of decree for, and copy of decree, 703 [O 21, r 6 (a)]
- exhibits, copies of, when appeal preferred, 1088 [O 41, r 13 (3)]
- judgment and decree in appeal, copies of, furnished to parties, 1118 [O 41, r 36]
- memo of appeal, copies of judgment and decree to accompany, 1070, 1071 [O 41, r 1]

Corporation—

- attendance, personal, of officer of, power to require, 928 [O 29, r 3].
- business, where deemed to carry on, and place of suing, 112 [s. 20, Explan II]
- decree against, company in liquidation, transfer of, 721
 - mode of executing, 737 [O 21, r 32 (2)]
- examination of officer of, as to property of, 750 [O 21, r 41]
- foreign corporation, 927
- Indian Companies Act, procedure of Code applies to certain petitions under, 410
- injunction against, 1053 [O 39, r 5]
- interrogatories, to, delivery of, 613 [O 11, r 5]
- liquidator of registered, and attachment of property of, 239
- place of suing, 112 [s. 20, Explan II]
- pleadings, subscription and verification of, 926 [O 29, r 1].
- principal officer of corporation, who is 927
- shares in, attachment of, 754 [O 21, r 46]
 - delivery of, in execution, 806 [O 21, r 79 (3)]
 - sale of, in execution, 804 [O 21, r 76]
 - transfer of, sold in execution, 806, 807 [O 21, r 80]
- suits by or against, 926 928 [O 29]
- summons, service of, upon, 928 [O 29, r 2]
- unregistered or unincorporated society, suit by, 927
- verification by principal officer of, 927

Co sharer—

- bid of, to have preference in sale of property, 805 [O 21, r 77 (3)] 811 [O 21, r 88]
- right of, to apply for setting aside sale of immovable property in execution, 811.

Costs—

- action for costs against a person not a party to suit, 146
- adjournment, costs of, 655 [O 17, r. 1 (2)]
 - payment, condition precedent to, 655

Costs—*contd*

- administration suit, costs in, 145
- affidavit containing hearsay or argumentative matters, 664 [O 10, r 3 (2)].
- alternative, relief claimed against defendants, in the, and costs, 457
- appeal, whether it lies for costs, 147, 148
- application, of, to set aside sale, 801 [O 21, r 72 (3)].
- applications in suits, 142, 143
- arbitration, costs of, 1270 [Sch 11, para 17]
- arbitration, refusal to go to, no ground for refusing costs, 143
- bankruptcy, assignee in, suit continued by, and costs of defendant, 872
- co-defendants, and, 145, 147
- compensatory, in respect of vexatious claim or defence, 149, 150
- compromise, offer of, and right of successful plaintiff to, 143
- contribution, suit for, in respect of costs, 148
- costs, costs in the cause, meaning of, 142
- costs of the suit, meaning of, 142
- decree to give directions as to, 670 [O 20, r 6 (2)]
- delegation, of discretion of Court to award, 146
- direction for, in decree in appeal, 1118 [O 41, r 35 (3)]
- disallowing costs to a successful plaintiff, 144
- discretion of Court, costs to be in, 141 [s 35 (1)], 142, 144
- dishonoured bill, costs of noting non acceptance of, 1034 [O 37, r 6]
- documents, of proving, when notice to admit not given or complied with, 630 [O 12, r 2]
- event, costs, as a rule to follow, 141 [s 35 (2)] 143, 144
- execution of decree before ascertainment of costs, 393 [s 118]
- facts, of proving, when notice to admit not complied with, 631 [O 12, r 4]
- Gaming Act, defence under, and costs, 144
- guardian *ad litem*, costs incurred by officer of court acting as, 948 [O 32, r 4 (4)]
- incidental to suit, 142
- insolvency, costs of suit payable by plaintiff prior to his, 872
- interest on, 141 [s 35 (3)] 1137
- interpleader suits, in, 1025 [O 35, rr 3, 4], 1027 [ib, r 6]
- interrogatories, of, 612, 613 [O 11, r 3]
- issues, costs of particular, 144
- joint defence by two defendants, one of whom is successful, and question of, 145
- judgment in favour of one plaintiff against another plaintiff, and question of, 145
- jurisdiction, absence of, no bar to exercise by Court of power as to, 141 [s 35 (1)].
- Letters Patent, order as to costs not appealable under cl 15 of, 148
- lien of pleader for, where set off claimed by defendant, 574 [O 8, r 6 (2)]
- solicitor's, for costs, 579, 581
- limitation, defendant pleading, and question of, 144
- matrimonial causes, in, 148
- mortgage suits, costs in, 987 [O 34, r 2(a)], 991, 997 [ib, r 4], 1008, 1010 [ib, r 7]
- costs subsequent to decree, 1014 [O 34, r 10].
- next friend liability of, for, 941, 942
- notice for admission or production of unnecessary documents, of, 635 [O 12, r 9]
- notice to admit, proof of documents after, 630 [O 12, r 2]
- officer of Court, incurred by, as guardian *ad litem*, 948 [O 32, r 4 (4)]
- partition suit, in, 145
- partnership suit, costs in, 146
- party to suit, costs cannot be ordered against person who is not, 146
- pauper partly succeeds and partly fails, 974

Costs—contd

- pauper, of application for leave to sue, as, and of inquiry, 977 [O 31, r 16]
- suit, in, whether Court may award a successful defendant his, 975.
- payment made into Court, costs where, 906, 907 [O 21, r 4].
- penalty, whether costs could be awarded as, 141, 142
- pleader, liability of, for costs, in suit on behalf of minor, 913 [O 32, r 2 (1)], 944.
- plaintiff only partially successful, and, 144, 145
 - successful, disallowing costs, to, when, 144, 145
 - successful against one defendant, but not against another, 453
- postponement, of, occasioned by plaintiff's default as to summons, 586 [O 9, r 6 (2)].
- probate court, proceedings in, costs of, 146
- proclamation of sale, costs not covered by, 811 [O 21, r 89 (3)]
- reference to High Court, cost of, 1140 [O 46, r 4]
- relief against defendants in the alternative and, 453
- refund of costs, order for, on variation or reversal of decree, 412 [s 144 (1)].
- representative suit, and costs, 467
- second appeal, whether lies on a matter of costs only, 148
- Secretary of State, against, 148
- security for costs of suit—See sub head "Security for costs of suit"
- security for costs in appeal—See sub head "Security for costs in appeal"
- separate costs, question of, when defendant common to all defendants, 145
- set off, and lien of pleader for costs, 574 [O 8, r 6 (2)]
- Court may direct costs payable to party to be, 670 [O 20, r 6 (3)]
- solicitor's lien for, 579 581
- subsistence allowances, sums disbursed for, to be costs in suit, 748 [O 21, r 39 (5)]
- suit, withdrawal of, payment of costs on, 887.
 - separate, for costs, 146
- summary suit, costs in, 1029, 1030 [O 37, r 2 (2)]
- stay of execution costs of application for, 1020
- taxation, review of, rules as to, 148, 149
- trustee, costs of, 146
- unnecessary matter in pleadings affects question of, 542
- variation or reversal of decree, order for refund of costs on, 412 [s. 144 (1)]
- withdrawal of suit, payments of costs on, 887
- witnesses of successful party guilty of exaggeration, and costs, 145

Security for costs of suit—907 911 [O 25]

- appeal from order made by High Court requiring plaintiff to give, 910
 - refusing to set aside order of dismissal of suit for failure to give, 911, 1120 [O 43, r (1) (a)]
- cross claim by defendant residing out of British India, and, 910
- failure to furnish, effect of, 911 [O 25, r 2]
- insolvency of plaintiff, security for costs to be given on, 871, 872 [O 22, r 8]
- instances, where security for costs required, 911
- minor, where plaintiff is a, 910
- next friend retiring, to give security for costs already incurred, 957 [O 32, r 8 (1)]
- pauper, where leave is granted to plaintiff to sue as, 909, 910
- plaintiff, security for costs from, 907, 908 [O 25, r 1]
- poverty of plaintiff, 909
- res judicata*, and dismissal of suit for failure to furnish, 911
- setting aside of order of dismissal for failure to furnish, 911 [O 25, r 2 (2)]
- suit for payment of money, 908 [O 25, r 1 (3)] 910
- woman, where plaintiff is a, 908 [O 25, r 1 (3)] 910

Costs—*contd*

Security for costs in appeal—

- appellant, security for costs from, 1083 [O 41, r 10].
- at what stage respondent should apply for, 1084
- consequence of not furnishing, 1083 [O 41, r 10 (2)]
- effect of failure to comply with order for further, to Privy Council, 1131 [O 45, r 11]
- further security for costs of appeal to Privy Council, 1131 [O 45, r 10]
- insolvent or poor appellant, and, 1084
- pauper appellant, whether, can be called upon to furnish, 1034
- Privy Council, appeal to, on dismissal of appeal for failure to furnish, 368
- security for costs of, 1128 1130 [O 45 rr 7 9]
- time, extension of, for giving, 1085

Counsel—*See* Advocate Barrister

- case for opinion of, and brief for, privileged from discovery and inspection, 619

Counterclaim—

- Code does not provide for, 581
- rules as to joinder of claims (O 2, r 4) apply to, 501
- security for costs in case of, made by defendant residing out of British India, 910
- summary suits, in, for arrest before judgment, 317.

Courts—

- Additional and Assistant Judge's Courts subordinate to District Court, 131 [s 24 (3)]
- amend issues, to, powers of, 614 [O 14, r 5]
- appellate, powers of, 350 [s 107], 1113 [O 41, r 33]
- arbitrator, where a judge may act as, 1282
- attachment of property in custody of Court, 763 [O 21, r 52]
- Chartered High Courts, 393 394 [ss 116 120], 1157 [O 49]—*See* Chartered High Courts
- civil Courts to try only suits of a civil nature, 24 [s 9]
- Collector's jurisdiction, civil Court's barred as to matters within, 252 253
- competent jurisdiction, of, and, *res judicata*, 72, 73
- "Court which passed a decree," definition of, 153 [s 37]
- English Courts, jurisdiction of, over British Indian subjects in British India, 94
- executing Court bound by, but, may construe decree, 158 159
- jurisdiction of, 156, 157
- foreign judgment on a decree of British Indian Court, 96
- Prince or State, Courts established by Governor General in territories of and execution of decrees 164 [s 43] 165 [s 45]
- grades of, outside Presidency towns, 99 100
- High Court, power to refer case for opinion of, 371 [s 113]
- immovable property, sale of, in execution, what Courts can order, 807 [O 21, r 82].
- inherent powers of Courts, 433 [s 151], 433 439
 - to restore suit dismissed for plaintiff's non appearance, 592
 - to strike out scandalous matter from pleadings, 542
- inspection of property by Court 66 [O 18 r 18]
- issues, Court to frame, 640 [O 14, r 1 (5)]
 - power of Court to amend or strike out, 644 [O 14, r 5]
- jurisdiction Court of concurrent, 73
 - exclusive, 72
 - of English Courts over British Indian subjects in British India, 94
 - of Courts executing decrees, 156 157
- language of Courts subordinate to High Courts, 407 [s 137]

Courts—*contd*

- name of Court in which suit brought to be stated in plaint, 555 [O 7, r 1 (a)].
- Native State, of, and execution, 165 [s 44].
 - British Indian Court has no power to restrain party from proceeding with suit in, 1018
- negotiable instruments, Courts empowered to try summary suits on, 1029 [O 37, r 1].
- opinion of, power to state case for, 289 [s 90].
- papers from its own records or from other Courts, may be sent for, 630, 640 [O 13, r 10].
- payment into Court, 905-907 [O 24].
- plaint, duty of Court to examine, before issue of summons, 564.
- Presidency Small Cause Courts, 23 [s 8], 1155 [O 51].
- Privy Council, application for execution of orders of, 1134, 1135 [O 45, r 15].
 - powers of Court pending appeal to, 1132 [O 45, r 13].
- Provincial Small Cause Courts, 22 [s 7], 1158 [O 50].
- public charities, Courts competent to try suits relating to, 308.
- receiver, what Courts can appoint, 1057.
- reference to High Court, 371 [s 113], 1138 1142 [O 46].
- restore suit dismissed for plaintiff's non-appearance, inherent power of Court to, 592.
- Revenue Courts 20 21 [s 5].
- review Court to which application for, to be made, 371 [s 114], 1142, 1143 [O 47, r 1].
- sale of immovable property, in execution, what Courts can order, 807 [O 21, r 82].
- setting aside decree *ex parte*, application for, pending appeal from decree, 597, 598.
- stay of execution, application for, to be made to which Court, 1078.
 - of decree, when Court may order, 734 [O 21, r 26].
- subordination of, 19 [s 3].
- time, power of, to enlarge 428 [s 148].
- transfer of business of one Court to another, 432 [s 150].
 - suits 129 131 [ss. 22 24].
- transferred decrees, power of Courts in executing, 162 [s 42].

Court Fees—

- appeal from order refusing to order payment of, in pauper suits, 975.
- cases in which Court will allow party to make up 431.
- Court fees Act, s. 149 applies to all documents chargeable with court fees under 431.
- deficiency of, power of Court to allow party to make up, 430 [s 149].
- Government, right of, to apply for payment of, in pauper suits, 975 [O 33, r 12].
- mesne profits, decrees as to, and, 673, 674, 675, 676.
- pauper suits, exemption from payment of, in, 971 [O 33, r 8].
 - Crown a prerogative of precedence in respect of court fees under, 973.
 - recovery of court fees in, 971, 972 [O 33, r 10].
- plaint must show value of subject matter of suit for purpose of, 555 [O 7, r 1 (n)].
 - rejection of, or return of, and, 563 567.
- res judicata, and dismissal of suit for failure to pay additional, 79.
- revision, directing plaintiff to make up deficiency, 567.
- valuation of suits, 101 103.

Creditor—

- Administration suit, when creditors may institute 680.
- debtor must find his, 119 120.
- Insolvent Debtors Acts, right of secured creditors under, 680.
- judgment-debtor, definition of, 13 [s 2 (10)].

Criminal Court—

adjustment, uncertified, and criminal proceedings, 702
 decision of, and *res judicata*, 75

Crop—See Agricultural produce

attachment of, 752 [O 21, r 44 (a)].
 which does not admit of being stored, 753 [O 21, r 45 (5)].
 growing crop is movable property, 15 [s 2 (13)]
interim order prohibiting removal of growing crop, 753 [O 21, r 45 (4)]
 sale of growing crop, 807, 801 [O 21, rr 74, 75]

Cross-claims—

execution in case of, 727 [O 21, r 19]
 mortgage suits, in, 728 [O 21, r 20]

Cross-decrees—

assignment in case of, 724 [O 21, r 18], 727
 execution in case of, 724 [O 21, r 18]
 for payment of two sums of money, 726
 mortgage suits, in, 728 [O 21, r 20]
 parties must fill same character in both suits, 726
 setting off cross-decrees against each other, conditions necessary for, 725, 726

Cross-objections—

consequence of not filing, 1094
 co respondent, when cross objections may be filed against, 1096, 1097
 dismissal of appeal, effect of, on, 1094 [O 41, r 22 (4)], 1095
 form of, 1033 [O 41, r 22 (2)]
 Letters Patent appeal, and, 1097
 limitation, dismissal of appeal on ground of, bars hearing of, 1095
 non joinder of party in mortgage suit, dismissal of appeal for, effect of, 1095
 second appeal from decree of first appellate Court disallowing cross objections, 1037
 cross objections may be filed in, 1097
 time within which to be filed, 1093 [O 41, r 22 (1)], 1097
 withdrawal of appeal, effect of, on, 1094 [O 41, r 22 (4)], 1095
 who may file, 1033 [O 41, r 22 (1)], 1096

Cy-pres doctrine—

power of Court to apply, in setting schemes of public charities, 313

Damages—

attachment, mere right to sue for damages not liable to, 215 [s 60 (1) (c)].
 commission to ascertain, 917 [O 26, r 9]
 defendant need not plead to, 570, 571 [O 8, r 3]
 deposit by defendant in Court in suit, to recover damages, 905 [O 24, r 1]
 interest recoverable as, in mortgage suits, 1016 1018
 pleadings, and matters affecting, 526, 527, 570, 571 [O 8, r 3].
 public nuisance, no special damages necessary for instituting suit relating to, 289
 [s 91]
 reversal of decree, and order for payment of damages, 412 [s 144 (1)]
 variation of decree, and order for payment of damages, 412 [s 144 (1)]

Damdapat—

meaning and rule of, 140, 141
 mortgage, how far rule of *damdupat* applies in case of, 140, 141.

Death—See Abatement

- abatement of suit, and death of party, 819 [O 22, r. 1]
- arbitrator, or umpire, death of, 1261 [Sch II, para 5 (1) (b) (i)]
- appeal, death of either party pending and abatement, 852
- appellants, death of one of several, and abatement, 855, 1076
- client, death of, determines pleader's appointment, 507 [O 3, r 4 (2)]
- defendant, death of, after preliminary decree, 868.
- guardian *ad litem*, death of, 959 [O 32, r 11]
- hearing, death of party after, but before judgment, 870 [O 22, r 6]
- judge, death of, before completion of trial of suit, 664 [O 18, r 15]
- next friend, death of, stay of proceedings on, 958 [O 32, r 10 (1)]
- proper applicant, death of, and abatement, 859
 - pending hearing of application, 965
- public charities, death of party in suit relating to, 312, 313
- reference, order of, death of party after application but before, 1261.
- stay of proceedings on death of next friend, 958 [O 32, r 10 (1)]

Debt—

- attachment, application by alleged debtor for removal of, 777
 - mode of, of debt, 754 [O 21, r 46]
 - of debt, after same is paid by cheque, 756
 - of debt, no bar to judgment debtor suing for it, 755.
 - liability of debt to, 214 [s 60 (1)] 220, 221.
 - whether debt enforceable by foreign Courts only is liable to, 220
- definition of, 220
- delivery of, in execution, 806 [O 21, r 79 (3)]
- deposit by defendant in Court in suit to recover debt, 905 [O 24, r 1]
- discharge of, on passing of foreclosure decree, 993 [O 34, r 3 (3)], 995
 - final decree in redemption suit, 1012 [O 34, r 8 (3)]
- exact amount of, need not be stated for purposes of attachment, 755
- garnishee, debt and procedure for attachment of, 756
- instances of attachable debts, 221
- receiver, debts contracted by, in course of business [Case 3] 1059

Debtor—

- must find his creditor, 119, 120
- place of suing, 119, 120

Decree—See Preliminary decree Final decree Decree *ex parte*

- accounts, in suits for, 684 [O 20, r 16]
 - order directing accounts, whether a decree, 8
- act of State is not a decree, 352
- adjudication which is appealable as an order is not a decree, 11
- adjustment of, 691, 692 [O 21, r 2]
- administration suit, decree in, 679 [O 20, r 13]
- agreement not to execute, 171
- alienee from trustee, decree for possession against, 307, 308
- amendment of decree, inherent power of Court as to, 439 440
- amendment of decree, application for, and *res judicata*, 90, 91
- amendment of decree, 438 [s 152] 439 443
- appeal—See Appeal
- appeal from original decree, 319 [s 96]

Decree—*contd*

- benamidar, how far decree against, binds real owner, 68
- certified copies of, furnishing, 687 [O 20, r 20], 1118 [O 41, r 30]
- Collector, transfer of certain decrees for execution by, 231 [s 6s]
- compromise, decree in terms of, 891 [O 23, r 3]
- conflicting decrees, and *res judicata*, 91
- conjugal rights, decree for restitution of, and *res judicata*, 46
- consent decree, 319 [s 96 (3)], 323, 324, 891-904 [O 23, r 3]
 - and estoppel, 84
 - procedure for setting aside, 324
- construction of, by executing Court, 88, 159
- contents and date of original decree, 670 [O 20, rr 6, 7]
 - appellate decree, 1117-1118 [O 41, r 35]
- "Court which passed a decree," meaning of, 153 [s 37]
- Courts by which decrees may be executed, 156 [s 3s]
- cross-decrees, execution in case of, 724 [O 21, r 18]
- dead per on, decree for or against, a nullity, 168, 475, 808
- decisions under certain acts when not decrees, 7
- declaratory, execution of, 168
- decree to agree with judgment, 670 [O 20, r 6 (1)]
- default, decree against plaintiff by, bars fresh suit, 688 [O 9, r 9]
- definition of decree, 5 [s 2 (2)]
- drawn up, decree must be, before an appeal from it can be entertained, 320, 3-5
- executed, what decrees may be, 151-153
- executor who has not proved, and decree against, 204
- execution of—*See* Execution of Decree
- execution, application for—*See* Execution of Decree, Sub head (1)
 - in case of cross decree, 724 [O 21, r 18]
 - in case of declaratory decree, 168
 - pending reference to High Court, not allowed, 1139 [O 46, r 2]
 - property attached in execution of decrees of several Courts, 228 [s 63]
 - only decree capable of execution is decree of Court of last instance, 151
 - questions relating to, 170-173 [s 47]
 - transfer of decree for execution, 159 [s 39], 160
- final for foreclosure, 993 [O 34 r 3] sale, 1000, 1001 [*ib*, 5] redemption, 1011, 1012 [*ib*, r 8]
 - decree, passing of, during pendency of appeal from preliminary decree, 326
- finality of decree in redemption suit, 82
- finding on an issue is not, 8
- firm, decree in suit against, 936
- foreign Court, execution of decree of passed without jurisdiction by, 93-94
- fraud, suit to set aside decree obtained by, or sale in execution of decree obtained by, and place of suing, 122
- Government, decree in suit for partition of estate paying revenue to, 206, 207 [s 51]
- heir, decree against a wrong person as and execution, 204
- High Court, decree passed by, on second appeal and execution, 154
- Hindu widow, decree against, how far binding on reversioners, 68, 69
- immovable property, for recovery of, 671 [O 21 r 9]
- inherent power of Court to amend, 439
- injunction decree for, and *res judicata*, 46
- instalments, decree may direct payment by, 671 [O 20, r 11]

Decree—*contd*

- interest, rate of, when decree is for the payment of money, 137 [s. 34].
 - where decree awards means profits but silent about, 677
- irregularity, decree not to be interfered with in appeal for, mere, 329 [s. 99].
- joint decree, and application for execution, 710 [O 21, r 15]
 - when cannot be executed by one of several decree holders, 710
- judge, procedure where, has vacated office before signing decree, 670 [O 20, r 8].
- judgment, decree on, 117 [s. 33].
 - decree to agree with, 670 [O 20, r 6 (1)].
- jurisdiction, decree of foreign Court passed without, 93-94
 - decree passed without, 128
- Karnaran of Irrad* how far decree against, binds members of *Irrad*, 68
- land, decree for possession of, 671
- legal representative, decree against, 202 [s. 52]
 - application for execution of decree, against, 199
 - liability of, and satisfaction of decree, 198.
- letters of administration, when necessary before passing decree, 556, 558
- limitation decree to be executed must not have been barred by, 152
- maintenance, for, no bar to subsequent suit for maintenance at enhanced rate, 45
- merger of, 153
- means profits, decree for and possession, 673-674 [O 20, r 12]
 - silent as to, 674
- minor, for or against, when invalid, 947
 - procedure to set aside decree against, 70-917, 954
- mode of paying money under decree, 690-691 [O 21, r 1]
- mortgagor, personal decree against, for balance due after sale, 1004 [O 34, r 6], 1005
- movable property, decree for delivery of, 671 [O 20, r 10]
- omission accidental, and amendment of decree, 440
- order of dismissal for default is not a decree, 5 [s. 2 (2) (b)]
- order rejecting plaint is a decree, 5 [s. 2 (2)] 10
 - under s. 47 (execution proceedings) is a decree, 5 [s. 2 (2)].
 - under s. 144 (for restitution) is a decree, 5-421
- partition, decree in suit for, 685 [O 20 r 18]
 - of estate paying revenue to Government, 206, 207 [s. 54].
- partnership, in suit for dissolution of, 684 [O 20, r 15]
- pauper, refusal of leave to sue as how far a decree, 7
- payment of dower, conditional on, 47
 - out of Court of money payable under, 691-692 [O 21, r 2]
 - to decree holder, directing, 691
- possession of land, decree for, 671
- postponement of payment of amount of, 671 [O 20, r 11 (1)]
- pre-emption suit, decree in, 681 [O 20 r 14]
- preliminary decree, appeal from, 324 [s. 97]
 - when not drawn up, 325
 - definition of, 5 [s. 2 (2) Expln.]
- probate when necessary before passing of decree, 556-558
- receiver after decree, 1064
- redemption suit, finality of decree in, 83
- reference to High Court, decree not to be executed pending, 1139 [O 46, r 2]
- rejection of plaint, whether, 5, 10
- relief, decree for larger, than what is claimed when given, 559, 560
 - providing for events after institution of suit, 561, 562
- Religious Endowments Act whether order under is a decree, 7

Decree—*contd*

- interest, rate of, when decree is for the payment of money, 137 [s 34]
 - where decree awards mesne profits but silent about, 677
- irregularity, decree not to be interfered with in appeal for, mere, 329 [s 99].
- joint decree, and application for execution, 710 [O 21, r 15]
 - when cannot be executed by one of several decree holders, 710
- judge, procedure where, has vacated office before signing decree, 670 [O 20, r 8].
- judgment, decree on, 137 [s 33]
 - decree to agree with, 670 [O 20, r 6 (1)]
- jurisdiction, decree of foreign Court passed without, 93, 94
 - decree passed without, 128
- Karnarun* of *tarrad* how far decree against, binds members of *tarrad*, 68
- land, decree for possession of, 671
- legal representative decree against, 202 [s 52].
 - application for execution of decree, against, 199
 - liability of, and satisfaction of decree 198
- letters of administration, when necessary before passing decree 506, 553.
- limitation, decree to be executed must not have been barred by, 153
- maintenance, for, no bar to subsequent suit for maintenance at enhanced rate, 45
- merger of, 153
- mesne profits, decree for, and possession 673 674 [O 20, r 12].
 - silent as to, 674
- minor, for or against, when invalid, 947
 - procedure to set aside decree against, 70, 947, 954
- mode of paying money under decree, 690 691 [O 21, r 1]
- mortgagor, personal decree against, for balance due after sale, 1004 [O 34, r 6], 1005
- movable property, decree for delivery of, 671 [O 20, r 10]
- omission, accidental, and amendment of decree, 440
- order of dismissal for default is not a decree 5 [s 2 (2) (b)]
- order rejecting plaint is a decree, 5 [s 2 (2)] 10
 - under s. 47 (execution proceedings) is a decree 5 [s. 2 (2)].
 - under s. 144 (for restitution) is a decree, 5, 421
- partition, decree in suit for, 685 [O 20, r 18]
 - of estate paying revenue to Government, 206, 207 [s 54].
- partnership, in suit for dissolution of, 684 [O 20 r 15]
- pauper, refusal of leave to sue as, how far a decree, 7
- payment of dower, conditional on, 47
 - out of Court of money payable under, 691, 692 [O 21, r 2]
 - to decree holder, directing, 691
- possession of land, decree for, 671
- postponement of payment of amount of 671 [O 20 r 11 (1)]
- pre-emption suit, decree in, 681 [O 20, r 14]
- preliminary decree appeal from, 324 [s 97]
 - when not drawn up, 325
 - definition of 5 [s 2 (2) Expln.]
- probate when necessary before passing of decree, 556 558
- receiver after decree, 1064
- redemption suit, finality of decree in, 82
- reference to High Court, decree not to be executed pending 1139 [O 46, r 2]
- rejection of plaint, whether, 5, 10
- relief, decree for larger, than what is claimed when given, 559 560
 - providing for events after institution of suit, 561, 562
- Religious Endowments Act, whether order under is a decree, 7

Decree—*contd.*

- representative suit, decree in, 466, 467
- res judicata*, and decree for restitution of conjugal rights, 46
 - and application for amendment of decree, 90, 91
- restitution of uncertified payment on reversal of decree, 700
- Revenue Court, decision of, when operates as a decree, 74, 75
- reversal of, before confirmation of auction sale, 244
 - after confirmation of auction sale, 243, 244
- sale in execution of, effect of reversal of decree upon, 244
- satisfied decree when said to be fully, 198, 199
- second appeal, amendment of decree passed in, 441
 - from appellate decree, 331, 332 [s 100]
- set off, decree in suit where, is allowed, 680 [O 20, r 19]
- setting aside consent decree, procedure for, 324
 - of decree in suit which is either over valued or under valued, 101.
- slip, accidental and amendment of, 440
- stay of execution of, 734 [O 21, r 26] 1076 1077 [O 41, r 5]
 - pending appeal to Privy Council, 1132 [O 45, r 13 (2) (c)]
 - proceeding pending reference to High Court, 1139 [O 46, r 2]
- suit, decree against plaintiff for default bars fresh, 79
 - to set aside decree obtained by fraud, and place of suing, 122
- summons when decree may be passed without issue of, 512
- surety for the performance of a decree, 422 [s 145 (a)]
- transfer of decree for execution, 159, 160 [s 39] See Transfer of Decree
 - for execution by Collector, 251 [s 65] See Collector
 - against a company in liquidation, 721
- transferee of decree, application for execution by, 713 [O 21, r 16]
 - pending attachment, 721
 - execution, 720
- trustee, how far decree against, binds his successor, 68
- withdrawal of suit, granting of leave for, is not a decree, 891

Decree *ex parte*—585, 586 [O 9, r 6]

- appeal from, 319 [s 96 (2)]
- Court to which application to set aside, to be made, when appeal filed, 597, 598
- fraud, setting aside decree *ex parte* obtained by, 598, 599
- inherent power to set aside, 600
- legal representative of defendant, right to apply to set aside, 599
- minor defendant *ex parte* decree against, 600 601
- notice to opposite party, no decree to be set aside without 606 [O 9 r 14]
- property taken in execution of, set aside, 170
- remand in appeal from an order refusing to set aside an *ex parte* decree, 1101
- remedies open to defendant against whom *ex parte* decree, passed, 593, 596
- res judicata*, how far, 45
 - set aside 605
 - (2)]
 - set aside 604
- setting
 - effect of, 603
 - “sufficient cause” for setting aside *ex parte* decree, 599, 600
 - surety, liability of, and, 423

Decree ex parte—*cont*

terms on which *ex parte* decree may be set aside, 600
 time within which application should be made to set aside, 593, 596, 603
 when passed, 585, 586 [O 9, r 6]

Decree-holder—

adjustment, suit by decree holder upon an uncertified, 695
 appeal as to question between judgment-debtor and representative of, 721.
 assignment of decree by, and execution, 713 [O 21, r 16].
 bid or buy property, not to, without leave of Court, 803, 804 [O 21, r 72].
 definition of, 5 [s 2 (3)].
 dispossession by, 816 [O 21, r 100].
 execution, application for, by, 705 [O 21, r 10]
 joint decree holder, 710 [O 21, r 15], 711.
 in case of assignment of decree by, 713 [O 21, r 16].
 joint decree holder, application for execution by, 710 [O 21, r 15], 711
 joint mortgage decree, property purchased by one of several holders of, at execution
 sale with use of joint funds, 248
 notice to before final order for stay of execution is made, 1079
 by Collector, in certain cases, 1298 [Sch III, para 3]
 why payment or adjustment should not be certified, 692 [O 21, r 2 (2)]
 party, necessary, to application to set aside sale of immovable property in execu-
 tion, 811 [O 21, r 89], 818 [O 21, r 90].
 payment out of Court to, 691, 692 [O 21, r 2].
 one of several decree holders, 711, 712
 priority where fund in Court is attached by several decree holders, 766, 767.
 purchase by decree holder at court sale, 800 [O 21, r 72]
 rateable distribution among decree holders, 255, 256 [s 73].
 receiver decree holder cannot bid or buy at Court sale, 803
 representative of decree holder, who is, for purposes of execution, 174 176
 sale on ground of irregularity or fraud, may apply to set aside, 810.
 stay of execution pending suit by judgment debtor against, 735 [O 21, r. 29]
 suit by, against party obstructing execution of decree, 844
 upon an uncertified adjustment, 696
 transferee of decree when, 12, 721

Defamation—

exact words alleged to be libellous must be set out in action for, 539
 interrogatories in suits for, 614, 615,
 particulars of, to be stated in pleadings, 532

Default—

dismissal of application under O 21, r 100, for 847
 of suit for, 587, 588 [O 9, rr 8 9]
 of appeal for appellant's default, 1086 [O 41, r 11 (2)], 1089 [O 41,
 r 17]

execution, default in proceeding with, after attachment, 774 [O 21, r 57]

Default—ccw:1

receiver, loss occasioned by default of, 1064 [O 40, r 3 (d)].
re-sale on default of deposit by purchaser, 509 [O 21, r 84].
res judicata, and dismissal of suit for default of plaintiff's appearance, 70.
restoration of appeal, dismissed for default, inherent power, 1011.
second appeal from order dismissing appeal for, 339.
willful default, particulars of, to be stated in pleadings, 530 [O 6, r 4].

Defect or error—

instances of defect, error or irregularity not affecting merits, 330.
judgments, decrees or orders, errors in, arising from accidental slips, 435 [a. 152].
remand in case of error, omission or irregularity, 1090 1101.
second appeal, defect in procedure when a ground of, 332 [a. 100 (1) (c)].
withdrawal of suit, leave for, because of formal defect, 852 [O. 23, r. 1 (2) (a)].

Reference—

alternative and inconsistent defences, 520
distinct grounds of, to be stated separately, 581 [O 8, r. 7].
facts to be specially pleaded in, 570 [O 8, r. 2].
firm, in suits brought against, in firm name, 933, 936.
Government, defence of suit against public officer undertaken by, 923 [O 27, r. 4].
new ground of, how raised, 581, 582 [O 8, r. 8].
particulars of, in pleadings, 532, 533.
questions under s. 47 may not be raised in a suit, in, 170.

Defendant—

acquiescence in suit by defendant residing outside jurisdiction, 111 [s. 20 (8)], 113.
addition of parties as defendants and limitation, 467, 470 [O 1, r. 10] 472, 473, 478.
adjourned hearing, procedure at, when defendant assigns good cause for previous
non appearance, 586 [O 9, r. 7].
admissions between co defendants, 630
affidavit of documents, by several defendants or co defendant, 622
appeal by a defendant against co defendants 322.
appearance by one defendant for others 478, 479 [O 1, r. 12].
arrest before judgment, 1034, 1035 [O 18 r. 1]
causes of action, joinder of, and of defendants 492 [O 2 r. 3].
co-defendants, res judicata as between 111-114
costs as between, 146.
commission to examine, 914
common interest, defendant may be sued on behalf of all having, 400-401 [O 1, r. 8]
death of defendant—See Death
defend on behalf of all, when one defendant may, 400-401 [O 1, r. 8], 463.
deposit in court by defendant in a suit for money or damages, 903 [O. 24, r. 1].
defences may be alternative and inconsistent, 529
documents relied on by, an order in summons to produce, 513 [O. 5, r. 7].

Defendant—*contd.*

- ejectment suit, who may be joined as defendants in, 498
- foreigner, non resident, where defendant is a, 123
- hearing, procedure where defendant only appears at, 587 [O 9, r 8]
- improper addition of, 475
- insolvency of, result of, 872, 877
- interrogatories, when a defendant may administer, to a co defendant, 611.
- issue, where one of several defendants not at, with plaintiff, 646 [O 15, r 2]
- issues, where defendant born after settlement of, 479
- joinder of defendants, 452, 453 [O 1, r 3], 459 [O 1, r 6]
- joint defendants, Court may give judgment against one or more of, 458 [O 1, r 4 (b)]
- jurisdiction, leave of Court to sue where all defendants not within, 111 [s 20 (b)], 115
- legal representative of, *see* legal representative
- liability of, plaintiff must disclose, 558 [O 7, r 5]
- limitation where persons added or substituted as defendants, 471, 475
- marriage of female defendant, no abatement of suit by, 871 [O 22, r 7]
- misdescription of, its effect, 477
- negotiable instrument, joinder of defendant liable on same, 459 [O 1, r 6]
- newly added defendant, service of summons and plaint on, 469 [O 1, r 10 (4)]
- non appearance of, and *ex parte* decree, 585-586 [O 98, r 6]
- non-attendance of one of several defendants, 594 [O 9, r 11], 595 [O 9, r 12]
- non joinder of, objection as to, when to be taken, 479 [O 1, r 13]
- Official Assignee, joinder of, on insolvency of defendant, 877
- pauper defendant, 964
- personal appearance of, when can be ordered, 512 [O 5, rr 3, 4]
- place of suing, and residence of defendant, 111, 112 [s 20]
- plaint, defendant's name, description and residence to be put in 555 [O 7, r 1 (c)]
- pleader, defendant may appear by, 511 [O 5, r (1) (2)]
- procedure where are several sets of defendants and their interests similar, 660
- reliefs claimed, defendant need not be interested in all, 458 [O 1, r 5]
- res judicata* as between co defendants, 63, 64
 - and *pro forma* defendant, 64-65
- right to begin, when defendant has, 659 [O 18, r 1]
 - when preliminary issue raised by, that suit does not lie, 659
- security for production of property, defendant, giving 1037, 1038 [O 38, r 5]
 - for appearance 315 [s 94 (a)] 1034, 1035 [O 38 r 1], 1036 [O 38, r 2]
- service of summons to be on defendant in person or his agent, 514 [O 5, r 12]
- set off, when may be claimed by, 575
- ship, suit may be instituted against, as a defendant, 456
- suit, defendant in fresh, after abatement and withdrawal, 889
- summary suit, defendant cannot defend without prior leave, 1029, 1030 [O 37, r 2 (2)]
- summons not issued if claim admitted by, when plaint presented, 511 [O 5, r 1]
- unnecessary parties added as defendants, 498
- withdrawing suit without leave of Court, but with consent of defendant, 890
- written statement, when to be filed, 57 [O 8, r 1]

Definition of—

- | | |
|---|----------------------------------|
| bill of exchange, 1031 | decree, 5 [s 2 (2)] |
| cause of action, 116 | decree holder, 5 [s 2 (3)] |
| charge, 1024 | district, 12 [s 2 (4)] |
| Code, 5 [s 2 (1)] | foreign Court, 13 [s 2 (6)] |
| compulsory deposits, 224 | foreign judgment, 13 [s 2 (6)] |
| Court which passed a decree, 153 [s 37] | Government pleader, 13 [s 2 (7)] |

Definition of—*contd*

- immovable property, 107
- judge, 13 [s. 2 (8)].
- judgment, 13 [s. 2 (9)]
- judgment debtor, 13 [s. 2 (10)]
- legal representative, 13 [s. 2 (11)].
- mesne profits, 14 [s. 2 (12)]
- movable property, 15 [s. 2 (13)]
- negotiable instrument, 1031
- order, 15 [s. 2 (14)].
- pauper, 902 [O 33, r 1 Expln.]
- pleader, 15 [s. 2 (15)]
- prescribe, 17 [s. 2 (16)]
- promissory note, 1031
- public nuisance, 289 290
- public officer, 17, 18 [s. 2 (17)].
- Rules, 19 [s. 2 (18)]
- share in a corporation, 19 [s. 2 (19)]
- signed, 19 [s. 2 (20)]

Delegation—

- of authority to execute, 733
- of duty by arbitrator, 1204
- power by Court to commissioner to try material issue, not allowed, 917
- power by receiver, 1066

Demeanour—

- of witness, remarks on, 663 [O. 18, r 12]

Departure—

- in pleadings, 537 [O 6, r 7]

Deposit—

- Court, deposit in, by defendant in suit for money or for damages, 905 [O 24, r 1]
- court sale at, by purchaser, 809 [O 21, r 84]
 - whether a voluntary payment, 816
- Court sale, to set aside, 811 [O 21, r 89]
- money or movables of, in Court, 1055 [O 39, r 10]
- Privy Council, on appeal to, 1128, 1129 [O 45, r 7]
 - order for further deposit on appeal to, 1131 [O 45, r 10]
- summary suit, order for deposit of bill, hundi, or note in, 1034 [O 37, r 5]

Despatch accompanying Charter of, 1862—1322 1330

Detention—*See* Arrest and Detention.

- of subject matter of suit, 1054 [O 39, r 7]

Disability, persons under—

- consent to orders on behalf of, 428 [s. 147]

Discharge—

- decree, questions relating to discharge of, and execution proceedings, 167 [s. 47], 170 171
- foreclosure decree, discharge of debt on passing of 903 [O 34 r 3 (3)] 903
- injunction, discharge of order for, 1053 [O 39 r 4]
- redemption suit discharge of debt on passing of final decree in 1012 [O 34, r 3 (3)] 1013, 1014 [O 34, r 84].

Discovery—*See* Affidavit of documents Interrogatories Inspection

- confidential communications protected from 618 619
- documents, discovery of, 616 627 [O 11 rr 12 19] *See* Affidavit of documents.
- ejectment suit, and discovery by interrogatories of documents, 603, 610
- foreign State, whether exempt from 287
- interrogatories, discovery by, 608 616 [O 11, rr 1 11] *See* Interrogatories.

Discovery—*cont*

- non compliance with order for discovery, 628 [O 11, r 21]
- particulars, when discovery may be ordered before, 533, 534
- power of Court to order discovery, 136 [s 30 (a)]
- premature discovery, 628 [O 11, r 20]
- public official documents, when protected from discovery, 619
- specific documents, power of Court to order discovery of, 627 [O 11, r 19 (3)]

Dismissal of appeal—

- costs of paper book, for failure to deposit, 1091
- cross* objections, effect of dismissal of appeal on, 1094 [O 41, r 22 (4)]
- hearing, preliminary, for appellant's default at, 1086 [O 41, r 11 (2)]
 - regular, for appellant's default at, 1089 [O 41, r 17 (1)]
- notice, for non service of, because of failure to deposit costs, 1090 [O 41, r 18]
 - without serving on respondent, 1086 [O 41, r 11 (1)]
- Privy Council, for default in furnishing security for costs, and appeal to, 369
- re admission of appeal dismissed under O 41, rr 11 (2), 17 and 18*, 1090 [O 41, r 19]
- second appeal when appeal dismissed for default, 339

Dismissal of suit—*See* Default Dismissal of appeal

- appeal from order made on application to restore suit dismissed for default, 592
- attachment before judgment to be withdrawn when suit dismissed 1041 [O 33 r 9]
- decree, order dismissing a suit where neither party appears is not, 583
 - for plaintiff's non appearance is not 587
- discovery dismissal for non compliance with order for, 628 [O 11, r 21]
- effect of dismissal under O 22, p 873 [O 22, r 9]
- inherent power to restore suit dismissed for plaintiff's non appearance, 592
 - power to restore suit dismissed for default in certain cases, 436
- party, where neither appears 583 [O 9, r 3]
- pauper, dismissal of suit brought by, and court fees, 974 [O 33 r 11]
- plaintiff, dismissal of suit for non appearance of, 587 [O 9, r 8]
- receiver, whether Court can give fresh powers to after dismissal of suit, 1064
- res judicata* dismissal of suit for failure to furnish security for costs and 911
- restoration of suit dismissed for non appearance of both parties, 584 [O 9, r 4]
 - plaintiff's default 588 [O 9, r 9]
- security for costs, for failure to furnish, 911 [O 25 r 2]
- summons*, where not served owing to non payment of charges, 533 [O 9 r 2]
 - where plaintiff fails for three months to apply for fresh, 584 [O 9 r 5]
- suit, when a bar to fresh, 588 [O 9 r 9] 590
 - when not a bar to fresh 584 [O 9, rr 4 5]

Disposing power—

- what is within meaning of s 60, pp 219, 220

Dispossession—

- Collector, under order of, 847
- decree holder, by, 846 [O 21, r 100]

Distribution of assets—255, 256 [s 73] *See* Rateable distribution.**District—**

- definition of, 12 [s 2 (4)]

District Court—

- Additional and Assistant Judges, Courts of, when subordinate to, 131 [s 24 (3)]
- definition of, 12 [s 2 (4)]
- High Court, District Court is subordinate to, 10 [s 3]
- issuing of notices and inquiry by, for Collector, 1299 [Sch III, para. 5]
- jurisdiction of, 100
- power of, to submit for revision proceedings, in Small Causes, 1140 1141 [O 46, r 7]
- to transfer and withdraw suits, appeals, and proceedings, 130 131 [s 24]
- Small Causes, Court of, subordinate to, 10 [s 3]
- Subordinate Judge's Court is a Court of inferior grade to, 100

Documents—

- admission of further documentary evidence not a good ground of appeal, 636
- affidavit of documents, 617 [O 11, r 13] See Affidavit of documents
- affidavits, documents to which reference is made in, 624
- business books, giving copies of entries in, in lieu of inspection, 627 [O 11, r 19]
- costs of notice for admission or production of unnecessary, 635 [O 12, r 9]
- custody of documents, usual place of, 626
- discovery and production of, 617—See Discovery
- endorsement on, admitted in evidence, 636 637 [O 13, r 4]
- examination of, before framing issues, 644 [O 14, r 4]
- evidence when additional documentary, allowed in appeal, 1106, 1107 [O 41 r 27]
- execution of, mode of execution of decree for, 741, 742 [O 21, r 34]
- failure to produce, under O 7, r 14, consequence of, 569 [O 7, r 18]
- hearing, documentary, evidence to be produced at first, 635 636 [O 13, rr 1, 2]
- impounding of, 638 [O 13, r 8], 136 [s 30 (a)]
- incriminating documents and discovery, 620
- inspection of, 626 [O 11, r 18 (2)]—See Inspection
 - power of Court to order, 136 [s 30 (a)], 616 629 [O 11, rr 11 21]
- issues, examination of documents before framing, 644 [O 14, r 4]
- letter book, shop book or account book, copies of entries in, 637 [O 13, r 5 (1)]
- list of, relied on, 568 [O 7, r 14 (2)]
- loss of, after production under O 7, r 14, consequence of, 568
- non disclosure of, consequence of, 621
- non production of, consequence of, 635 636 [O 13, r 2]
- notice to admit, 630 [O 12, rr 2, 3]
 - produce, 635 [O 12, r 8]
 - for inspection 624 [O 11, r 15], 625 [O 11, r 16]
- party to take, 623
- pleadings, effect of documents to be stated in, 558 559 [O 6, r 9]
- power of Court to inspect documents when privilege claimed, 627 [O 11, r 19 (2)]
 - to order production of documents before it, 623 [O 11, r 14]
 - to send for papers from its own records, etc., 639 640 [O 13, r 10]
- privilege, waiver of, 623
- production of, on which plaintiff sues, 568 [O 7, r 14]
- referred to in pleadings, 624 [O 11, r 15]

Documents—*contd*

- provisions as to documents apply to material objects produced, 610 [O 13, r 11]
- public official document and objection to produce for inspection, 619
- record, receiving copies of entries in, 637 [O 13, r 5 (2)]
- receiver, power of, to execute document, 1056 [O 40, r 1 (d)]
- recording of documents admitted in evidence, 638 [O 13, r 7 (1)]
- registration of documents by judge or officer of Court, 742 [O 21, r 34 (6)]
- rejection of irrelevant or inadmissible documents, 636 [O 13, r 3]
- relied on by defendant, and order in summons to produce, 513 [O 5, r 7]
 - plaintiff, but not in his possession, 568 [O 7, r 15]
 - in plaint, 568 569
- return of admitted documents, 638, 639 [O 13, r 9]
 - rejected documents, 638 [O 13, r 7 (2)]
 - power of Courts to order return of documents, 136 [s 30 (a)]
- sealing up parts of documents, 622
- summons to attend and to produce, 647 [O 16, r 1]
 - to produce, 650 [O 16, r 6]
- waiver of privilege, 623
- witness apprehended cannot produce, procedure where, 653 654 [O 16, r 18]

Door—

- arrest breaking open of, outer door for, 209 [s 55 2nd proviso]
- breaking open of, for delivery of possession, to decree holder, 742 [O 21, r 33 (3)]
- movable property, breaking open of outer door for seizure of, 227, 228 [s 62 (2)]
- proclamation, affixing copy of, on outer door of house of witness 651 [O 16, r 10 (2)]
- summons, affixing copy of, on door of defendant's house, 515, 516 [O 5, r 17]

Dwell—See Reside

- meaning of "dwells" in cl 12 of the Charter, 113 114

Dwelling House—

- arrest, entry by serving officer into dwelling house for 209 210 [s 55]
- property, entry by serving officer into dwelling house for seizing 227, 228 [s 62]

Easement—

- transfer of easement is a transfer of interest in immovable property, 232

Enactments—

- amended by the Code, 1305

Envoy—

- suits against, 283, 284 [s 86]

Equity—

- acts in personam, 106
- judgment debtor, and, 197

Error—See Defect or error**Estoppel—**

- consent decree, and 84
- statute, against, 62

Evidence—

- additional in appeal, 1106 1110 [O 41, rr 27 29]
- adjourned hearing failure to produce evidence at, 657 [O 17, r 3]
- admissibility of, of a foreign witness taken on commission, 915
 - questions of, to be decided as they arise, 636
- admitted without objection in Court of first instance, 643

Evidence—*cont.*

appeal, not a good ground for, mere admission of further documentary evidence, 636.

appealable cases, how taken in, 661 [O 18, r 5].

attachment, evidence in support of claim or objection made to, 778 [O 21, r 59]

Chartered High Court, saving of rules for taking of evidence by, 1157 [O 49, r 2]

commission, admissibility of evidence taken on, of foreign witness, 915

on, 912-917 [O 26, rr 1-5] See Commission

de bene esse, 664, 665 [O 18, r 16]

demeanour of witnesses, remarks on, 663 [O 18, r 12].

document, when a party may compel his opponent to exhibit, 623

documentary evidence, production of, 635, 636 [O 13, rr 1, 2].

English, when evidence may be taken down in, 663 [O 18, r 9]

hearing, production of evidence at, 660 [O 18, r 2]

failure to produce evidence at adjourned, 657 [O 17, r 3]

failure to produce evidence at first, 647 [O 15, r 4]

interpreted, when to be, 662 [O 18, r 6]

interrogate, party not entitled to, about evidence of other side, 610

interrogatories, answers to, may be used as evidence, 629 [O 11, r 22]

issues, production of evidence where there are several, 660 [O 18, r 3]

judge, power to deal with evidence taken before another, 654 [O 18, r 15]

when unable to make memorandum of, to record reasons, 664 [O 18, r 14]

judgment, when given upon evidence recorded by other judge or person, 667

by one of a class, 668 [O 41, r 25]

particular question and answer may be taken down, 663 [O 18, r 10]

pleading to state facts and not evidence, 524 [O 6, r 2], 528

production of documentary evidence, 635, 636 [O 13, rr 1, 2]

questions objected to and allowed by Court, 663 [O 18, r 11]

refusal,

review

summons to give evidence, 647 [O 16, r 1]

Evidence Act—

document, notice to produce, 623

Examination—*See Evidence Witnesses*

appeal from order pronouncing judgment against party under O 10, r 4 (2), p 607

commission, examination by, 912-917 [O 26, rr 1-8] See Commission

corporation, examination of officer of, as to its property, 750 [O 21, r 41]

de bene esse, 664, 665 [O 18, r 16]

executing officer, examination of, as to his inability to execute process, 734 [O 21,

r 25 (2)]

issues, examination of parties in order to frame, 610 [O 14, r 1 (5)]

of witness before framing 644 [O 14, r 4]

judgment debtor, examination of, as to his property, 750 [O 21, r 41]

parties, examination of, by Court, at first hearing, 606-608 [O 10]

pauper, examination of applicant for leave to sue as, 966 [O 33, r 4]

proclamation for sale, for settling, 792 [O 21, r 66 (4)]

serving officer, examination of, touching service of summons, 518 [O 5, r 19].

examination of, when witness fails to attend, 651 [O 16, r 10 (1)]

witnesses, examination of, 660-663 [O 18, rr 4-12], 664-665 [ib, rr 16, 17].

before commissioner, 921 [O 26, r 17 (1)].

- Execution of decree**—*See* Arrest Attachment: Sale Execution proceedings
 ambassadors, against, 243 [s. 86 (3)]
 appeal to Privy Council, no bar to, 1132 [O 45, r 13 (1)]
 from orders in execution, 185
 application for execution—*See* sub head (1) below
 arrest in execution—*See* Arrest and Detention
attachment of property in execution—*See* Attachment.
 benami purchases at execution sales, 214, 215 [s. 66]
 British decree in foreign territory, 165, 166.
 British Indian Court, when may refuse execution of decree of Native State, 93,
 94
 Chiefs, or princes, execution against, 243 [s. 86 (3)]
 claims, investigation of—*See* Attachment, sub head, "Investigation of Claims"
 Collector, execution by, 251 [s. 68]—*See* Collector
 compromise in execution whether enforceable, 193, 697
 consent decree, execution of, 902, 903
 co partners, execution in suits between, 938 [O 30, r 9]
 costs, execution of decree before ascertainment of, 393 [s. 118]
 Courts by which decrees may be executed, 166 [s. 34]
 executing decrees—*See* sub head (2) below
 Court to which application for stay of execution should be made, 1078
 when it ceases to have jurisdiction to execute its decree, 153 [s. 37 (b)]
 Court which passed the decree, meaning of, 153
 decrees, what, may be executed, 151, 152
 exercise of powers in appeal from orders made in, 1082 [O 41, r 8].
firm, execution of decree against, 761, 762 [O 21, r 50]
 foreign judgment, when enforceable by proceedings in execution, 92, 165 [s. 41]
 limit of time for execution—*See* sub head (3) below
 mode of execution—*See* sub head (4) below
 mortgaged property of judgment debtor liable to be seized in, 751
 Native State, decree of, and execution of, 165
 limitation for, 165
 Native State, when a British Indian Court may refuse execution of decree of, 93
 orders, execution of, 151 [s. 36] 153
 partner, execution of decree against, 759, 760 [O 21, r 49]
 and insolvency of firm, 765
 Privy Council, in appeal to, 1132 [O 45, r 13 (1)]
 possession, delivery of—*See* Possession
 proceedings in execution, provisions of O 23, do not apply to, 904
 procedure in execution—*See* sub head (5) below
 property attached in execution of decrees of several Courts, 228 [s. 63]
 liable to attachment and sale, 214 217 [s. 60]
 provisions of O 9, whether apply to proceedings in, 533
 public officer, execution of decree against, 280 [s. 82]
 purchaser at Court sale and his inquiry into correctness of decree or order of sale,
 243
 questions relating to execution—*See* sub head (6) below
 reference to High Court, no execution of decree pending, 1139 [O 46, r 2]
 resistance to execution, 270 [s. 74]
 restitution of property, security for, 1081 [O 41, r 6]
 sale in execution, application for order for, 792 [O 21, r 68 (3)] *See* Sale
 when void and when voidable, 242, 243
 sale of immovable property in, and purchaser's title, 239 [s. 65]

Execution of decree—*contd*

Secretary of State, execution of decree against, 250 [s. 82]
 simultaneous execution, against person and property of judgment debtor, 201
 stay of, when may be granted, 1078 *See* Stay
 in summary suit, 1034 [O. 37, r. 4]
 on appeal, 1076, 1077 [O. 41 r. 5]
 pending appeal to Privy Council, 1172 [O. 45, r. 13 (2) (c)].
 successive purchasers at sale in execution of money decrees, 241
 suit to set aside execution—sale obtained by fraud, and place of suing, 122
 surety for restitution of property taken in execution, 422 [s. 145 (b)]
 transfer of decree for execution—*See* Transfer of decree for Execution.
 transferee of decree—*See* sub head (7) below
 uncommunicated order staying execution, effect of, 1079
 vesting, of property sold in execution, in purchaser, 239 [s. 65]

(1) Application for execution—

amendment of, 722 [O. 21, r. 17]
 assignment, who may apply for execution of decree transferred by, 714 716
 bxnamidar, application for execution by, 716
 Collector's register, certified extract from, when to be produced, 709 [O. 21, r. 14],
 contents of application for execution, 706, 707 [O. 21, r. 11 (2)]
 coparceners, decree in favour of, 711
 court has ceased to exist, where, 154
 court has ceased to have jurisdiction, 155
 cross claims—*See* Cross claims
 cross decrees—*See* Cross decrees
 decree holder, application by, for execution, 705 [O. 21, r. 10]
 delegation of authority to execute process, 733
 dismissal of application for execution for default, 410
 fresh, presented after expiration of twelve years, 189, 190
 immediate execution, oral application for, of money decree, 705, 706 [O. 21,
 r. 11 (1)]
 joint decree holder, application by, 710 [O. 21, r. 15]
 legal representative of party to the decree, against, 202 [s. 52], 728 [O. 21, r. 22
 (1) (b)]
 limitation, and amendment of application for execution, 723
 and application by transferee for substituting his name, 718
 and issue of notice to show cause against execution 732
 successive applications for execution of decrees of
 Chartered High Courts, 188, 189
 Courts other than Chartered High Courts, 188
 mode of execution to be specified in application, 706, 707 [O. 21, r. 11 (2) (j)] 708
 mortgage suits, cross decrees and cross claims in, 728 [O. 21, r. 20]
 movable property not in judgment debtor's possession as to, 709 [O. 21, r. 12].
 notice to transferor of decree and judgment debtor, 717
 legal representative of a party to the decree 728 [O. 21 r. 22], 730
 when decree more than a year old, 728 [O. 21, r. 22] 730
 particulars in application for attachment of immovable property, 709 [O. 21, r. 13].
 payment out of Court to one of several decree holders, 711
 precept, issue of, for attachment, 166 [s. 46]
 privilege from arrest, none when order made for immediate arrest, 403 [s. 135 (3)].
 procedure on receiving application for execution 722 [O. 21, r. 17].
 regarding suits does not apply to application for execution, 409

Execution of decree—*contd***(1) Application for execution—*contd***

- process for execution, 732 [O 21, r 24]
- rejection of application for execution, 722 [O 21, r 17 (1)]
- reliefs, decree awarding two distinct, and application for execution, 410
- res judicata*, and application for execution, 87 90
- share of judgment debtor in property to be specified in, 709 [O 21, r 13 (b)]
- simultaneous execution against person and property, 728 [O 21, r 21]
- successive applications for execution, 188, 189
- transfer of interest in a joint money decree to one of several judgment debtors, 718
- transferee of decree, application by, 713 [O 21, r 16], 714, 717
 - to hold subject to equities of judgment debtor, 196 [s 49]
 - pending execution, 720
- value of property attached, under a money decree, 722 [O 21, r 17, provi o]
- verification of, 708
- withdrawal of, 410, 884

(2) Courts executing decrees, their powers and functions—

- Courts by which decrees may be executed, 156 [s 38]
 - decree, executing Court cannot go behind, 158
 - may construe, 159
 - discretion to issue notice under O 21 r 37, p 747
 - whether executing Court has to refuse or suspend attachment of judgment debtor's property, 747, 748
 - documents to be sent to Court to which decree transferred, 703 [O 21, r 6]
 - execution by Court to which decree is sent for execution, 704 [O 21, r 8]
 - foreign judgment passed without jurisdiction, 165
 - High Court, execution by, of decree sent by other Courts, 705 [O 21, r 9]
 - jurisdiction of Courts, executing decrees, 156, 157
 - when lands, situate in more than one, 702 [O 21, r 3]
 - of Court passing decree, executing Court cannot inquire as to, 704
 - obstructing execution of decree, 162 [s 42]
 - procedure where Court desires execution by another Court, 703 [O 21, r 6]
 - questions as to execution to be determined by executing Court, 167 [s 47],
 - salary of public officer or railway servant, and jurisdiction, 758, 759 [O 21, r 48]
 - transfer for execution, mode of, 703 [O 21, r 5]
 - to Presidency Small Cause Courts of decrees for execution, 703 [O 21, r 4]
 - transferred decree, powers of Court executing, 162 [s 42]
- (3) Limit of time for execution—156-196 [s 48]**
- Chartered High Courts, of decrees of, 188, 189
 - combined mortgage decree and, 192
 - compromise effected in execution, and, 193, 194
 - Courts other than Chartered High Courts, of decrees of, 188
 - fraud, where execution of decree is prevented by 187 [s 48 (2) (a)]
 - what amounts to, within meaning of, s 48, p 195
 - fresh application for execution presented after expiration of twelve years, 194
 - what amounts to, to execute the same decree, 189, 190
 - injunction, execution of decree granting and limitation, 186 [s 48 (1)] 194
 - Limitation Act, s 4, application of, 194
 - s 15 (1) does not apply, 195
 - maintenance ascertained in execution, and, 192
 - mesne profits ascertained in execution, and limitation, 192

Execution of decree—*contd***(3) Limit of time for execution—185 186 [s 48]—*contd***

minority and time limit for execution of decree, 195, 196,
 Provincial Insolvency Act, see 78 (2), and, 196.
 subsequent order and, 193
 successive applications for execution of decrees, 188 189

(4) Mode of execution—

building or enclosure, for delivery of possession of, 742 [O 21, r 35 (3)]
 corporation, against, 737 [O 21, r 32 (2)]
 documents, for execution of, 741 742 [O 21, r 34]
 immovable property, for delivery of, 742 [O 21, r 35]
 for joint possession of, 742 [O 21, r 35 (2)]
 injunction, for, 737, 738 [O 21, r 32]
 joint possession of immovable property, for, 742 [O 21, r 35 (2)]
 money, for payment of, 736 [O 21, r 30]
 negotiable instrument, for endorsement of, 741, 742 [O 21, r 34]
 partner, against, 759, 760 [O 21, r 49]
 partnership firm, against, 761, 762 [O 21, r 50]
 possession, actual and formal delivery of, 743 746
 restitution of conjugal rights, for, 737, 738 [O 21, r 32], 740 [ib, r 33].
 specific movable property, for, 736 [O 21, r 31]
 specific performance, for, 737, 738 [O 21, r 32]

(5) Procedure in execution—

ancestral property, enforcement of decree against, 204 [s 53]
 Collector effecting partition, Court's control over, 207, 208
 cross claims under same decree, 727 [O 21, r 19]
 cross decrees, 724 [O 21, r 18]
 Government, for partition of an undivided estate paying revenue to, 206, 207
 [s 54]
 Hindu father, where money decree has been passed against, and—
 (1) father dies after attachment of ancestral property, 206
 (2) father dies before issue of execution, 205
 legal representative, enforcement of decree obtained against, 202 [s 52]
 partition of an undivided estate paying revenue to Government, 206, 207 [s 54]
 powers of Court to enforce execution, 200, 201 [s 51]

(6) Questions relating to execution—170 172 [s 47]

agreement not to execute decree, 171 [Case 7]
 discharge of decree, questions relating to, 167 [s 47 (1)], 170 172
 execution of decree, questions relating to, 167 [s 47 (1)], 170 172
 lessee of property under attachment, 175 [Case 3]
 maladministration of debtor's estate, 172 [Case 2]
 mortgagee of property under attachment, 175 [Case 3]
 notice to judgment debtor before issue of execution, 728, 729 [O 21, r 22], 746,
 747 [O 21, r 37]
 objection that property attached is not liable to attachment, 176
 "parties to the suit," meaning of, 167 [s 47, Explan]. 172, 173
 payment of money, notice of payment into Court, 691
 under a decree, modes of, 690, 691 [O 21, r 1]
 purchaser at a Court sale, whether representative of parties, 175
 of equity of redemption at Court or private sale, 175 [Cases 4, 5].
 of property regarding which injunction granted, 176 [Case 6].
 under attachment, 175 [Case 3]

Execution of decree—*contd*

- (6) *Questions relating to execution*—170 172 [s 47]—*contd*
 questions as to validity of decree, 172 [Case 1]
 between auction purchaser and a party or his representative, 179 183
 decree holder and judgment debtor, 177 179
 decree holders inter se, 172, 173
 judgment debtors inter se, 173
 party and his own representative, 173
 held not to relate to execution of decree, 172
 representative of party, inquiry as to who is, 167 [s 47 (3)] 187
 restitution of property when decree amended or sale set aside, 170 [Cases 2 3]
 satisfaction of decree, question relating to, 167 [s 47 (1)], 170 172
 uncertified payment or adjustment, 170 [Case 6]
 waste by judgment debtor, 171 [Case 10]
- (7) *Transferees and legal representatives*—
 accounts, power to compel legal representative to produce, 197 [s 50 (2)]
 application by transferee, 713 [O 21, r 16] 714, 717
 deaths, successive, of judgment debtor and his legal representative, 200
 execution against legal representative of deceased judgment debtor, 197 [s 50], 198
 notice to transferor and judgment debtor, 713 [O 21, r 16]
 transfer during pendency of appeal in execution, 721
 pending execution, 727
 of transferred decree, 721
 transferee of decree to hold subject to equities of judgment debtor, 196 [s 49].
- Arrest of judgment debtor*—See *Arrest and detention*
Attachment of property—See *Attachment*
Delivery of possession and resistance thereto—See *Possession*
Execution by Collector—See *Collector*
Investigation of claims—See *Attachment*
Sale in execution—See *Sale*
Stay of execution—See *Stay*
Transfer of decree for execution to another Court—See *Transfer of decree for execution*.

Execution proceedings—

- abatement, rules as to how far apply to, 881 [O 22, r 12]
 ancestral property, and liability of, in, 204 [s 53]
 compromise of, in case of minors, 935
ex parte order in execution and res judicata, 90
 interlocutory orders in, 186
 legal representative, execution against, 197 [s 50] 202 [s 52]
 minor and compromise of execution proceedings 935
 appointment of guardian ad litem in, 948
 order in, when appealable, 11
 whether a decree, 11
 procedure of suits does not apply to, 408, 409
 receiver in, 201
 res judicata, and, 87 90
 striking off, effect of, 237, 774 [O 21, r 57]
 suit, execution proceeding not a, 11
 transfer of, 130 [s 24]
 unlawful agreement, when decree passed on, 898, 899
 withdrawal of, 130 [s 24], 133
 rules as to, and compromise of suits do not apply to, 904 [O 23, r 4]

Executive purchaser—*See* Auction purchaser

Executor and Administrator—

administration suit by, 680

beneficiaries, representation of, in suits as to property vested in trustees, etc., 939,
940 [O 31, r 1].

when may be added as parties, 940

decree against, who has not intermeddled or proved, 204

joinder of claims in suit, by or against, 502 [O 2, r 5]

of executors, etc., in suits concerning property vested in them, 940
[O 31, r 2]

letters of administration before suit, 556 558

married executrix, husband of, need not be joined as party, 941 [O 31, r 3]

probate or letters of administration before decree, 556 558

receiver, appointment of, when executor is in possession, 1060

Exemption—

appearance, pardanishin women exempt from personal, 402 [s 132]

persons of rank, exempt from personal, 402 [s 133]

public officer, exempt from personal, 280 [s 81 (b)]

commission to examine exempted persons, 912 [O 26, r 1], 402 [s 133 (3)]

from arrest, 403 [s 135 (3)]

of judicial officer, parties, pleaders and witnesses, 403 [s 135]

of members of legislative bodies, 405 [s 135 ½]

of Princes, Chiefs and ambassadors, 283 [s 86 (3)]

— *See* 920 [s 81 (a)]

summary su

Exhibits—

appeal, furnishing copies of, in, 1088 [O 41, r 13 (3)]

endorsement on, 636 637 [O 13, r 4]

return of, 638 639 [O 13, r 9]

Ex parte—*See* Decree *ex parte*—

appeal, hearing, of, 1089 [O 41, r 17 (2)]

re hearing of appeal disposed of *ex parte*, 1092 1093 [O 41, r 21]

commissioner, when may proceed *ex parte*, 922 [O 26, r 18 (2)]

suit, hearing of, 585 586 [O 9, r 6]

Expenses—

witnesses of, 648 [O 16, r 2]

Expert witnesses—

fee payable to, 648 [O 16, r 2 (2)]

Extraordinary jurisdiction—*See* Chartered High Courts

Facts—

appeal, findings of fact and, 1072

appeal new questions of fact raised for the first time in, 1074

arbitrator is the sole and final judge of all questions of fact and law, 1278

burden of proof, and right to begin, 660 [O 18, r 3]

concurrent findings of, in appeals to Privy Council, 366 367

facta probanda and *facta probantia*, distinction between, 524

illegality, showing must be specially pleaded in defence, 570 [O 8, r 2].

inconsistent allegations of, to be raised only by way of amendment, 537 [O 6, r 7].

Facts—*contd.*

issues, questions of fact may by agreement be stated in form of, 645 [O. 14, r. 6]
 issues of fact, what are, 640 [O. 14, r. 1 (4)]
 not denied, to be taken as admitted, 572 [O. 8, r. 5]
 notice to admit facts, 631 [O. 12, rr. 4, 5]
 not yet material to a case, and pleadings, 527
 omitting to plead a material fact, 526
 pleadings to state material facts only, 524 [O. 6, r. 2], 526
 presumed by law need not be alleged in pleadings, 540 [O. 6, r. 13]
 Privy Council, concurrent findings of fact in appeals to, 366, 367.
 res judicata and issues of fact, 58
 second appeal when lies on ground of erroneous finding of fact, 335-336
 specially pleaded, what facts to be, 570 [O. 8, r. 2]

Female—

decree against wife when may be executed against husband, 871 [O. 22, r. 7 (2)]
 marriage of female party, suit not to abate by, 871 [O. 22, r. 7]

Final decree—

administration suit in, 679 [O. 20, r. 13]
 agent, in suits between principal and, 654 [O. 20, r. 16]
 appeal from, where no appeal preferred from preliminary decree, 324 [s. 97]
 definition of, 5 [s. 2 (2) Expln.]
 foreclosure suit, in, 993 [O. 34, r. 3]
 mesne profits, in respect of, 674 [O. 20, r. 12 (2)]
 partnership suit, in, 684 [O. 20, r. 15]
 redemption, in suit for, 1011, 1012 [O. 34, r. 8]
 rent, in respect of, 674 [O. 20, r. 12 (2)]
 sale, in suit for, 1000, 1001 [O. 34, r. 5]
 superseded if preliminary decree set aside, 9

Fine—

witness, imposing of fine on defaulting, 648 [O. 16, r. 12]

Firm—928-939 [O. 30] See Partners

928 931.

ex parte, against, effect of, upon partners, 605

definition of, 929

dissolution of, when suit may be brought after, in firm name, 930

execution of decree against firm, 761, 762 [O. 21, r. 50]

foreign firm, suit by or against, 930

foreigner, non resident, suit against, 939

insolvency of, and execution of decree against partner, 765

joint Hindu family, O. 30 not applicable, 929

persons entitled to appear in a suit against firm, 935

928-939 [O. 30]

[O. 30, r. 10]

manager or owner of, 920

is own, 938

Firm—*contd.*

- between a firm, and one or more of its partners, 979 [O 30, r 9]
- two firms having one or more partners in common, 979 [O 30, r 9]
- by, on promissory note passed to member, 930
- by or against, 925 979 [O 30]
 - a foreign firm, 930
- written statement in suit brought against a firm in firm name, 936

Foreclosure—

- appeal, effect of, on time fixed for payment in decree in foreclosure suit, 995
- beneficiaries, whether necessary parties to suit for, brought by trustees, 981
- charge, no foreclosure in suits to enforce a, 1023 [O 34, r 15]
- decrees for, whether two can be passed in respect of one mortgage, 994 995
- discharge of debt on, 993 [O 34, r 3 (3)], 995
- final decree in foreclosure suit, 993 [O 34, r 3]
- mortgagee, right of mesne, to foreclose, 1015 [O 34, r 11]
- parties to suit for, 977 [O 34, r 1], 979, 980
- place of suing in suits for, in cases governed by the Code, 103 [s 16 (c)]
- preliminary decree, in 987, 988 [O 34 r 2]
- receiver of mortgaged property in suit for, 1061
- res judicata, and suits for, 56
- sale, power to decree, in foreclosure suit, 997 [O 34, r 4 (2)], 1000
- suits for, in cases governed by cl 12 of the Chapter, 1339
- time, enlarging of, for payment in foreclosure suit, 993 [O 34, r 3 (2) proviso], 995
- what is a proper suit for, 989

Foreign Court—*See* Foreign judgment

- agreement to submit to jurisdiction of, 95
- attachment, whether debt enforceable by a foreign Court only liable to, 240
- Ceylon Courts are 13
- decree of, passed without jurisdiction, 93, 165
- definition of, 12 [s 2 (5)]
- execution in British India of decrees of Courts of Native States, 165 [s 44]
- execution of decrees of Native States, when British Indian Courts may refuse, 93
- jurisdiction, when decree of foreign Court is passed without 93, 165
- High Court of Justice in England is a, 13
- Mauritius Court, 13
- Native States Courts of, 13
- pendency of suit in, no bar to suit in British Indian Court, 33 [s 10 Expln]
- persons carrying on business in foreign country through agents 96
- presumption as to jurisdiction of 98, [s 14]
- Privy Council is not a 13
- submission to jurisdiction of, 95

Foreign firm—

- foreign judgment against, 96
- suit by or against, 930

Foreign judgment—*See* Foreign Court

- British India, how enforced in 92
 - when no bar to suit in, 91, 92 [s 13]
- British Indian Courts, on a decree of, 96
- definition of, 13 [s 2 (6)]
- execution, enforcement of foreign judgment by proceedings in 92 165 [s 44]
- foreign firm, against a, 96
- jurisdiction, presumption of, 91, 92 [s 13]

Foreign judgment—*contd*

- jurisdiction, suit on judgment of foreign Court passed without, 93, 94
- execution of decree of foreign Court passed without, 165.
- limitation, period of, for, 98
- merits of the case, where foreign judgment not given on, 92 [*s* 13 (*b*)]
- res judicata*, how far operates as, 92 96

Foreign State—*See* Chiefs (ruling) and Princes

- consent of Governor General in Council in suit against ambassador of, 283, 294 [*s* 86].
- discovery, not exempt from, 283
- execution of decree against ambassador of, 283 [*s* 86 (3)]
- execution in British India of decrees of Courts—
 - (1) established by Governor General in Council in territories of, 164 [*s* 43].
 - (2) of Native States, 165 [*s* 44]
- service of summons in, through Political Agent, 521, 522 [*O* 5, *r* 26]
- suit against, 283, 294 [*s* 86]
 - by, 281, 282 [*s* 84]
- transfer of decrees of Courts in British India for execution to Courts in, 165 [*s* 45]

Foreign summons—

- service of, 135 136 [*s* 29]

Foreigner—*See* Aliens

- absent or non resident suit against and jurisdiction under the Code, 123
- evidence, admissibility of of a foreign witness taken on commission, 915
- jurisdiction over non resident foreigners under cl 12 of the Charter, 1314.
- non resident, carrying on business in name other than his own, 939

Forms in general—

- miscellaneous forms, 1251 1257 [App H] *See below*
- of appeals, reference and review, 1246 1250 [App G] *See below*
- decrees, 1197 1223 [App D] *See below*
- description of parties, 1159
- discovery, inspection and admissions, 1193 1196 [App C] *See below*
- particulars, 1183
- plaints, 1160 1178 *See below*
- pleadings, 1159 1183 [App A]
- proceedings in execution, 1224 1240 [App E] *See below*
- proceedings in arbitration 1293, 1296
- process, 1184 1192 [App B] *See below*
- supplemental proceedings, 1241 1245 [App F] *See below*
- title of suits, 1159
- written statements, 1179 1183 *See below*
- use of, in Appendices, to Schedule I of the Code 1156 [*O* 48 *r* 3]

Forms of Plaints—1160 1178 [Appendix A]

- Administration suits, 1174 1176
- Against surety for payment of rent, 1163
- Against a builder for defective workmanship, 1165
- Breach of contract, 1164 1165
- By tenant against landlord, with special damage, 1166
- Carrying on a noxious manufacture, 1067, 1068
- Deficiency upon a re sale (goods sold at auction), 1161
- Diverting a water course, 1168, 1169
- Execution of trusts, 1076
- Foreclosure or sale, 1176, 1177

Forms of Plaints—*cont.*

- Fraudulent acts, 1167, 1171.
- Goods sold and delivered, 1160
- Goods made at defendant's request, and not accepted, 1161
- Injunction, 1172
- Injuries caused by negligence, 1169 1170
- Interpleader, 1174
- Malicious prosecution, 1170
- Money lent, 1160
- Money overpaid, 1160
- Movables wrongfully detained, 1171
- Not delivering goods sold, 1164
- Obstructing right of way or water, 1168, 1169
- On an award, 1162, 1163
- On a foreign judgment, 1163
- On a bond for the fidelity of a clerk, 1163
- On an agreement of indemnity, 1166
- Partnership, 1178
- Polluting the water under the plaintiff's land, 1167
- Public nuisance, 1173
- Redemption, 1177
- Rescission of a contract on the ground of mistake, 1171, 1172
- Restoration of movable property threatened with destruction, and injunction, 1173
- Services or materials at a reasonable rate, 1162
- Specific performance (No. 1), 1177
- Use and occupation, 1162
- Wrongful dismissal, 1164

Forms of Decrees—1197 1223 [Appendix D]

- administration suit, preliminary, 1219, 1220
- administration suit by legatee, final, 1221
 - preliminary, when executor held personally liable, 1221
 - by next of kin, 1222
- Decree against mortgagor personally [O 34, r 6], 1211
 - for injunction against building higher than old level, 1219
 - private nuisance, 1219
 - restraining use of private road, 1219
 - for rectification of instrument, 1218
 - for recovery of land and mesne profits, 1223
 - in original suit [O 20, rr 6, 7], 1197
 - to set aside a transfer in fraud of creditors, 1218 [O 34, r 8]
- Final decree for foreclosure, 1200 [O 34, r 3]
 - sale, 1203 1204 [O 34, r 5], 1209, 1210 [O 34, r 8].
 - in an administration suit by a legatee, 1221
 - next of kin, 1222
 - in a suit for dissolution of partnership and partnership accounts, 1223
- foreclosure, final, 1200 [O 34, r 3 (2)]
 - in redemption suit in default of payment by mortgagor, 1209, 1210 [O 34, r 8 (3) (2)].
 - preliminary—
 - where accounts are to be taken, 1198, 1199 [O 3, r 2 (1)(a)] 44.
 - where the Court declares the amount due, 1199, 1200 [O 34 r 2 (1) (b)]
 - where there is a second mortgage, 1211 1214 [O 34, r 2 (3)].

Forms of Decrees—*contd*

- foreclosure, preliminary, of subsequent mortgage and redemption of prior mortgage, 1214 1216 [O 34, rr 2, 7]
- injunction, against building higher level, 1219
 - against private nuisance, 1219
 - restraining use of private road, 1219
- land and mesne profits, recovery of, 1223
- mortgagor personally, against, for balance after sale, 1211 [O 34, rr 6, 8A]
- Original Suit, in, 1197 [O 20, rr 6, 7]
- partnership, dissolution of, and accounts—
 - final, 1223
 - preliminary, 1222, 1223

- Preliminary decrees for foreclosure [O 34, r 2], 1198, 1199
 - for foreclosure or sale, 1211 1214 [O 34, rr 2, 4]
 - for sale [O 34, r 4], 1201, 1202, 1217, 1218.
 - for redemption [O 34, r 7], 1204 1209
 - for redemption of prior mortgage and foreclosure or sale on subsequent mortgage, 1214 1216 [O 34, rr 2, 4, 7]
 - in an administration suit, 1219, 1220
 - by legatee, where executor is held personally responsible 1221
 - in a suit for dissolution of partnership and partnership accounts 1222 1223

rectification of instrument for, 1218.

- redemption, final, in foreclosure suit, 1210 [O 34, r 3]
 - in redemption suit, 1210 [O 34, r 8 (1), (2)]
 - in suit for sale, 1210 [O 34, r 5 (1), (2)]
 - preliminary, where accounts directed to be taken—
 - and in default foreclosure, 1204, 1205, [O 34, r 7]
 - and in default sale, 1205 1207 [O 34, r 7]
 - the Court declares the amount, 1208, 1209
 - and in default foreclosure, 1207, 1208, [O 34, r 7]
 - and in default sale, 1205 1207 [O 34, r 7]

sale, final, 1203, 1204 [O 34, r 5 (3)]

in redemption suit in default of payment, 1209, 1210 [O 34, r 7].

preliminary—

- where accounts directed to be taken, 1201, 1202 [O 34, r 4]
- where Court declares the amount due, 1202, 1203 [O 34, r 4]
- where there is a second mortgage, 1211 1214 [O 34, r 4 (4)]
- where plaintiff is a sub mortgagee, 1217, 1218 [O 34, r 4]
- of subsequent mortgage and redemption of prior mortgage, 1214 1216 [O 34, rr 4, 7]

Simple money decree [s 34] 1197, 1198

suit for foreclosure, where mortgagor pays the amount, 1210 [O 34, r 3 (1)]

suit for sale where mortgagor pays the amount, 1210 [O 34, r 5 (1)]

suit for money 1197, 1198 [s 34]

Forms of Written Statements—[Appendix A], pp 1179 1183**General defences—**

Denial, 1179

Estoppel, 1179

Ground of defence subsequent to institution of suit, 1179

Insolvency, 1179

Jurisdiction, 1179

Limitation, 1179

Minority, 1179

Forms of Written Statements—*contd***General defences—*contd***

Payment into Court, 1179
 Performance remitted, 1179.
 Protest, 1179

Rescission, 1179
Res judicata, 1179

Defences in suits on or for—

Administration by pecuniary legatee, 1183
 Bonds, 1180.
 Debt, 1180
 Detention of goods, 1181
 Foreclosure, 1182
 Guarantees, 1180
 Goods sold and delivered, 1180
 Grant of probate, 1183
 Infringement of copyright, 1181

Infringement of trade mark, 1181.
 Injuries caused by negligent driving,
 1180, 1181
 Nuisances, 1181.
 Probate of will, 1183
 Redemption, 1182
 Specific performance, 1182
 Trade mark, 1181.
 Wrongs, 1181.

Forms of Process—[Appendix B], pp 1184 1192

Affidavit of process server [O 5, r 18], 1188
 Notice to defendant [O 9, r 6], 1189
 Notice to person proposed to be added as co plaintiff, 1186
 Order for transmission of summons for service to another Court [O 5, r 21], 1186.
 Order for transmission of summons to be served on a prisoner [O 5, r 24], 1187
 Order for transmission of summons to public servant or soldier [O 5, rr 27, 28],
 1187
 Proclamation requiring attendance of witness [O 16, r 10], 1190
 Summons for disposal of suit [O 5 rr 1, 5], 1184
 Summons for settlement of issues [O 5, rr 1, 5], 1184
 Summons in summary suit on negotiable instrument [O 37, r 2] 1185
 Summons to appear in person [O 5, r 3], 1185
 Summons to legal representative of a deceased defendant [O 22, r 4], 1186
 witness [O 16, rr 1, 5], 1189, 1190
 To accompany return of summons to another Court [O 5, r 23] 1187
 Warrant of arrest of witness [O 16, r 10], 1191
 Warrant of attachment of property of witness [O 16, r 10], 1191
 Warrant of committal [O 16, r 18], 1191, [O 16, r 18], 1192

Forms of Discovery, Inspection and Admission—[Appendix C], pp 1193 1196

Admission of fact pursuant to notice [O 12, r 5], 1195
 Affidavit as to documents [O 11, r 13] 1194
 Answer to interrogatories [O 11, r 9], 1193
 Interrogatories [O 11, r 4], 1193
 Notice to admit documents [O 12, r 3], 1195
 Notice to admit facts [O 12, r 5], 1195
 Notice to inspect documents [O 11, r 17], 1194, 1195
 Notice to produce documents [O 11, r 16], 1194
 Notice to produce (general form) [O 12, r 8], 1196
 Order for affidavit as to documents [O 11, r 12], 1193
 Order for delivery of interrogatories [O 11, r 1], 1193
 Order to produce documents for inspection [O 11, r 14], 1194

Forms relating to Execution—[Appendix E], pp 1224 1240

Application for execution of decree [O 21, r 11], 1226, 1227
 Attachment in execution [O 21, r 46], 1231
 Attachment in execution—Prohibitory orders, 1230

Forms relating to Execution—*contd*

Certificate of non satisfaction of decree [O 21, r 6], 1224

Certificate of execution of decree transferred to another Court [O 21, r 6], 1225

Certificate authorizing judgment debtor to mortgage, etc., property [O 21, r 83], 1238

Certificate of sale of land [O 21, r 94], 1239

Notice as to way payment or adjustment should not be recorded [O 21, r 2], 1224

Notice to show cause why execution should not issue [O 21, r 16], 1227

Notice to state objections to draft of document [O 21, r 34], 1228

Notice to show cause why warrant of arrest should not issue [O 21, r 37], 1229

Notice of attachment of decree to the Court which passed it [O 21, r 53], 1232

Notice of attachment of decree to the holder of decree [O 21, r 53], 1233

Notice to attaching creditor [O 21, r 58], 1233, 1234

Notice of the day fixed for settling a sale proclamation [O 21, r 66], 1234

Notice to person in possession of property sold in execution [O 21, r 79], 1237

Notice to show cause why sale should not be set aside [O 21, rr 90, 91, 92], 1238

Order sending decree for execution to another Court [O 21, r 6], 1224

Order for the release of a person imprisoned in execution of decree [ss 58, 59], 1230

Order to attach salary of public officer or servant of railway company or local authority [O 21, r 48], 1231

Order of attachment of negotiable instrument [O 21, r 51], 1232

Order for payment to the plaintiff, etc., of money, etc., in the hands of a third party [O 21, r 56], 1233

Order on the nazir for causing service of proclamation of sale [O 21, r 66], 1236

Order for delivery to certified purchaser of land in execution [O 21, r 95], 1239

Precept for attachment [s 46], 1224

Proclamation of sale [O 21, r 66], 1234, 1235

Prohibitory order against payment of debts [O 21, r 79], 1237

Summons to answer charge of obstructing execution of decree [O 21, r 97], 1239

Warrant of attachment of movable property under a money decree [O 21, r 30], 1227

Warrant for seizure of specific property adjudged by decree [O 21, r 31], 1228

Warrant to the bailiff to give possession of land, etc [O 21, r 35], 1228

Warrant of arrest in execution [O 21, r 38], 1229

Warrant of committal of judgment debtor to jail [O 21, r 40], 1229, 1230

Warrant of sale of property in execution of a decree for money [O 21, r 66], 1234

Warrant of committal [O 21, r 98], 1240

Forms of supplemental Proceedings—[Appendix F], pp 1241 1245

Appointment of a receiver [O 40, r 1], 1245

Attachment before judgment, with order to call for security for fulfilment of decree [O 38, r 5], 1242

Attachment before judgment on proof of failure to furnish security [O 38, r 6], 1243

Bond to be given by Receiver [O 40, r 3], 1245

Order for committal [O 38, r 4], 1242

Security for appearance of a defendant arrested before judgment [O 38, r 2], 1241

Security for the production of property [O 38, r 5], 1243

Summons to defendant to appear on surety's application for discharge [O 38, r 3], 1242

Temporary injunctions [O 39, r 1], 1243 1245

Warrant of arrest before judgment [O 38, r 1], 1241

Forms of Appeal, Reference and Review—[Appendix G], pp 1216 1250.

Application to appeal in *forma pauperis* [O 41, r 1] 1249

Decree in appeal [O 41, r 35], 1249

Intimation to lower court of admission of appeal [O 41, r 13] 1247

Memorandum of appeal [O 41, r 1] 1246

of cross objection [O 41, r 22], 1248

Notice to respondent of day fixed for hearing of the appeal [O 41, r 14], 1248

Notice of appeal in *forma pauperis*, 1249Notice to show cause as to grant of certificate of appeal to the King in Council
[O 45, r 3], 1250

Notice to respondent of admission of appeal to King in Council [O 45, r 8], 1250

Notice to show cause why a review should not be granted [O 47, r 4], 1250

Security bond to be given during the pendency of appeal [O 41, r 6] 1246, 1247

Security bond to be given on order to stay execution of decree [O 41, r 5], 1246

Security for costs of appeal [O 41, r 10], 1247

Forms, Miscellaneous—[Appendix H], pp 1251 1257

Agreement of parties as to issues to be tried [O 14, r 6], 1251

Commission to examine absent witness [O 22, rr 4, 18], 1253

for a local investigation, or to examine accounts [O 26, rr 9, 11] 1254
to make a partition [O 26, r 13], 1254

Letter of request [O 26, r 5], 1253

List of documents produced by plaintiff or defendant [O 13, r 1], 1252

Notice of application for transfer of suit to another court for trial [s 24] 1251

Notice of payment into Court [O 24, r 2] 1251

Notice to show cause (General form) 1252

Notice to parties as to examination of witness leaving the jurisdiction [O 18, r 16]
1252

Notice to minor defendant and guardian [O 32, r 3] 1254, 1255

Notice to opposite party of day fixed for evidence of pauperism [O 33, r 6], 1255

Notice to surety of his liability under a decree [s 145], 1255

Register of civil suits [O 4, r 2], 1256

Register of appeals [O 41, r 9], 1257

Frame of suit—479 505 [O 2] See Suits, sub head (2)

Fraud—

amendment of pleading by adding plea of fraud, 533

appellate Court can only entertain case of fraud specifically alleged in pleadings,
531

decree holder, fraud by, in not certifying adjustment to Court, 698 699

defence, fraud must be specifically pleaded in, 570 [O 8, r 2]

discovery in suits by principal against agent for accounts charging agent with, 534

execution of decree when prevented by fraud, and limitation, 187 [s 49 (2) (a)], 195
185

436

judgment obtained by, and *res judicata*, 78.

limitation in case of application to set aside sale on ground of, 830

minor, where decree against, is obtained by fraud, 70, 947

particulars of, to be stated in pleadings, 530 [O 6, r 4] 531

pauper, fraudulent disposal of property by and applying to sue in *forma pauperis*,
966 [O 33, r 5 (c)]

place of suing in suit to set aside decree obtained by, 122

sale in execution of decree obtained by, 122.

Fraud—*contd*

- pleading cannot be amended by substituting fraud of another kind, 550
- rejection of plaint when particulars of fraud not stated in plaint, 531
- res judicata and judgment obtained by, 78
- sale, fraud in publishing or conducting, 818 [O 21, r 90], 825, 826
- setting aside decree *ex parte* obtained by, 593, 599
- suit against certified purchaser for obtaining certificate of sale by, 244 [s 66 (2)]

Garnishee—

- company in liquidation, and garnishee order, 757
- debt to be attached must be actually due from, to judgment debtor, 754
- procedure where garnishee denies debt, 756, 777
- residing outside jurisdiction, and debt also payable outside jurisdiction, 756
- set off, garnishee's right of, 756

Government—See Secretary of State Public Officer Local Government

- appearance, fixing of day and extension of time for, 924 [O 27, r 5]
- attendance of person able to answer questions in suits against, 924 [O 27, r 6]
- execution of decree against, 280 [s 82]
- High Court to comply with requisition from, for records, etc., 1372 [Charter, cl 43]
- notice before institution of suit against, 274 [s 80]
- pauper suits, court fees in and, 971, 972 [O 33 r 10]
 - Government has no lien upon decree for court fees in, 972
 - right of, to apply for payment of court fees in, 975 [O 33, r 12]
- persons authorised to act for, 924 [O 27, r 2]
- place of suing where cause of action arises, and carrying on business, 274
- process, agent for Government to receive, 924 [O 27, r 4]
- public officer, where Government undertakes defence of suit against, 925 [O 27, r 8]
- rateable distribution of assets, and rights of, 256 [s 73, sub sec 3]
- recognized agents of, 924 [O 27, r 2]
- security not to be required from, under O 41, rr 5 6, p 1032 [O 41, r 7]
- signature and verification of plaint and pleadings, 923 [O 27, r 1]
- suit by or against, to be instituted by or against Secretary of State, 273 [s 79], 923
- time, extension of, to enable public officer to make reference to, 925 [O 27, r 7]
- title of suits by or against, 924 [O 27, r 3]

Government of India Act, 1915—pp 1311 1321—See High Courts Act**Government Pleader—**

- definition of, 13 [s 2 (7)]
- disparaging of plaintiff, on application by, 972 [O 33, r 9]*
- notice to, of day for hearing of application for leave to sue as pauper, 968 [O 33, r 6]
- suit against Government, and, 924 [O 27, r 4]

Government revenue—

- decree in suit for partition of immovable property paying 685 [O 20, r 18 (1)]
- dispossessing holder for default in payment of, 1055 [O 39, r 9]

Governor General in Council—

- consent of, suits against Princes, Ruling Chiefs and Ambassadors, 283 [s 86]
 - by alien enemies, 281 [s 83 (1)]

exempt from attachment, 213 [s. 60 (1) (g)], 223

memorandum of appeal, to be stated in, 1070 [O-41, r. 1 (2)]

where not stated in, 1073 [0-41, r. 2]

abandonment of issue by, whether amounts to a compromise, 935

adjustment of decree by, without Court's sanction, 701

adverse interest of, 949

affidavit in support of application for appointment of, 944 [O-32, r-3(3)].

appointment of, 944 (b) 32, r (3)

consent, no person to be appointed guardian without his, 948 [O 32, r 4 (3)], 950

costs incurred by officer of Court as, 918 (O 32, r 4 (4))

death of, 959 [O 32, r 11]

execution proceedings, and appointment of, 948

fraud of, decree against minor by, 947

leave of Court for compromise of suit by, 952 [O 32, r 7]

to receive money or movable on behalf of minor, 951 [O 32, r 6]

married woman ne. 918

minor, defendant where not represented by, 916, 951 [O 32, r 5]

title of suit against minor, 941

minor member of joint Hindu family, and, 915

non representation, 945-946.

notice of application for appointment of, to whom to be given, 911

[O 32, r 3 (4)]

object of having, 941

officer of Courts as, §18 [O 32, r 4 (4)], 950, 951

probate proceedings and appointment of, 917

removal of, 959 [O 32, r 11]

representation of minor by, 951 [O 32, r 5]

retirement of, 959 (O 32, r 11)

security, when guardian *ad litem* required to give, 951 [O 32, r 6 (2)]

service of summons in suits against minors, 917

substantial representation, 916, 917

who may be appointed, 948 [O 32, r 4]

procedure provided in Code in regard to suits to apply to proceedings in, 408

$$a = 1, \quad n = 17 \text{ or } 11$$

• [O 17, r 2], 656

100

disposal of special case, and, 1028 (O 36, r 5).

suit at first hearing, 616, 617 (O-15).

evidence, failure to produce, at adjourned, 637 (O 17, r 3), 638

at first, 047 (0 15, r 4)

interpleader suits, procedure at first hearing in, 1025 [O-35, r-4]

pauper applicant, death of, pending hearing of application, 965

procedure at hearing of application for leave to sue as, 908, 909 (O 33, r 7).

restoration of appeal heard *ex parte*, 1092, 1093 (C 41, r 21)

subordinate Court, High Court may stay further hearing of suit pending in, 1019

exit, hearing of, 659-665 [C-18]

to be continued from day to day, 655 (0-17, r-1)

Heir—

- decree against a wrong person as heir, effect of, 204
- execution against a Hindu or Mahomedan heir, 204
- joinder of claims in suits by or against heirs, 502 [O 2, r 5].
- suit by, to recover debt due to the deceased, and letters of administration, 556 558

High Court—See Chartered High Courts**High Courts Act—**

- existing provisions applicable to Supreme Courts to apply to High Courts, 1308 [s 11]
- High Courts, constitution and establishment of, 1306 [ss. 1, 2]
- interpretation of terms used in the Act, 1310 [s. 19]
- Judges of High Court—*See* Chartered High Courts, Judges of jurisdiction and powers of High Courts, 1308 [s 9]
 - exercise of, by single judges or Division Courts, provision for, 1309 [s. 13]
- Letters Patent, High Courts to be established by, 1306 [s 1]
- order made by a judge in excess of jurisdiction delegated to him, 1318
- provision as to pending proceedings in abolished Courts, 1309 [s 12]
- subordinate Courts, High Court to superintend and frame rules for, 1309 [s 15].
- superintendence, power of, by High Court, 1315, 1316, 1317
- Supreme Courts and Sudder Courts, abolition of, 1308 [s. 8]
- transfer of suit or appeal by High Court from one Court to another, 1309 [s. 15].

Hindu Law—

- ancestral property, liability of, for debts of father, 204 [s 53]
- attachment of *stridhan* ornaments, 221
- benami purchase at court sale, 245
- compromise made by Hindu widow, how far binding on reversioners, 68, 69
 - of suit made by adult male member, how far binding on minor, 953, 954.
 - “agent” for purposes of jurisdiction, 115
- reversioners, 68, 69
- execution, and Hindu heir, 204
- Hindu widow, can join claims for ornaments and share in husband's estate, 504
- Hindus not governed by Hindu Wills Act, and representation before suit, 507
- legal representative, of Hindu widow suing for husband's property, 856
 - reversioner contesting alleged adoption, 856
- letters of administration, when necessary before Hindu heir can sue, 557
- manager of joint Hindu family and receipt of property on behalf of minor, 952
 - how far, is an “agent” for purposes of jurisdiction, 115
- succession certificate, when necessary, in suits by Hindu heirs, 557
- suit against manager of joint Hindu family and *res judicata*, 68

Hindu Wills Act.

- to whom applies, 557

Hundis—See Bill of exchange Negotiable instrument**Husband—**

- execution against, of decree passed against wife, 871 [O 22, r 7 (2)]
- injunction against person preventing wife from returning to her husband, 739
- of married executrix, etc., need not join in suit by or against her, 941 [O 31, r 3]

Illustrations—

in an Act not to control plain meaning of the section, 3

Immovable Property—

attachment, liable to, 214 [s. 60 (1)].

of, 772 [O 21, r 54].

commission to make partition of, 919 [O 26, r 13]

counterclaim and suit for recovery of, 502

definition of, 105

delivery of possession in execution *See Possession*

dispossession of, by purchaser in execution, 846 [O 21, r 100]

by order of Collector, 847

distribution of assets on sale of immovable property, 255 [s 73 (1)]

easement, transfer of, is a transfer of interest in, 232

equity of redemption is, for purposes of attachment, 772

execution of decree for delivery of building or enclosure, 742 [O 21, r 35].

of, in possession of tenant, 746 [O 21, r 36]

where lands lie in more than one jurisdiction, 702 [O 21, r 3]

joinder of claim for recovery both of movable and, 500

jurisdiction, possession of immovable property in foreign country, and, 96

execution of decree where lands lie, in more than one, 702 [O 21, r 3]

in suits relating to immovable property, 103 [s 16]

situate in different, suit for immovable property, 107 [s 17]

particulars to be specified in application for attachment of, 709 [O 21, r 13]

partition of, decree in suit for, 685 [O 20, r 18]

estate or separate possession of a share, suit for, 206 [s 54]

plaint in suit for recovery of, 556 [O 7, r 3]

possession, delivery of, in execution *See Possession*

pre-emption, right of, can only be exercised in respect of, 682

recovery of, decree for, 671 [O 20, r 9]

restitution of, sold in execution, pending appeal to Privy Council, 1136, 1137

sale of, in execution, 807 843 [O 21, rr 82 96] *See Sale*

and purchaser's title, 239 [s 65]

service of summons on agent in charge, in suits for, 515 [O 5, r 14]

Small Causes Court cannot attach immovable property, 651 [O 16, r 10 proviso]

stay of sale of, pending appeal, 1081 [O 41, r 6 (2)]

suits for immovable property and jurisdiction, 103 [s 16]

land, within the meaning of cl 12 of the Charter, 1338 1342

partition of estate or for separate possession of a share, 206 [s 54]

property partly outside jurisdiction of Chartered High Court,
1342, 1343

recovery of, what are, within meaning of, 499 [O 2, r 4]

relating to several properties one within jurisdiction of Chartered High
Court, 1342, 1343

relating to immovable property situated in different jurisdictions, 107 [s 17]

Impounding—

documents of, 638 [O 13, r 8]

movable property, of, pending appeal to Privy Council, 1132 [O 45, r 13 (2) (a)]

Imprisonment—*See Arrest and Detention*Infant—*See Minor*

Information—

Advocate General, power, of, to exhibit, 273 [s 79 (2)] 274

Inherent powers—

- appeal from orders passed under, 438
- instances relating to exercise of, 435 438
- of Courts, 433 [s 151]
- of Chartered High Courts to stay proceedings in another Court, 1049
- to amend decrees and orders, 438 [s 152], 439
- to restore suits, decreed for default, 436, 592
- to set aside *ex parte* decree, 600

Injunction—

- compensation where undertaking given by plaintiff's counsel, 318
 - where injunction wrongfully obtained, 315, 316 [s 95]
- corporation, against, how may be enforced, 737 [O 21, r 32 (2)] 1053 [O 39, r 5]
- decree for, and *res judicata*, 46
- disobedience of decree for, 738 [O 21, r 32 (5)]
- execution of decree granting, 186 [s 48 (1)], 191
- inherent powers of Chartered High Courts, 1047 1360
- land, does not run with, 176 [Case 6]
- legal representative, injunction in suits for light and air binding on, 200
- limitation, and execution of decree granting, 186 [s 48 (1)]
- mortgagor, injunction restraining, from receiving income of mortgaged property, 1004
- notice, whether necessary, where suit against public officer is one for, 278
- perpetual, regulated by ss 55 57 of Specific Relief Act, 1044, 1045
- principles on which granted, 291, 292
- public nuisance, in suits respecting, 289 [s 91]
- special provisions for enforcing decree for, 738 [O 21, r 32 (5)]
- temporary—*See* sub head 'Temporary injunction'
- wife, prevented by third party from returning to her husband, and injunction, 737
- wilful failure to obey, what amounts to, 739
- Temporary Injunction—**315 [s 94], 1044 1053 [O 39, rr 1 5]
 - appeal from order discharging, varying or setting aside an injunction, 1053
 - granting, or refusing, 1047
 - appellate Court, power of, to grant, 1045
 - contract, to restrain party from committing breach of, 1049, 1050 [O 39, r 2]
 - corporation, injunction to, binding on its officers, 1053 [O 39, r 5]
 - disobedience of order granting injunction, 1050 [O 39, r 2 (3)]
 - duration of, 1045
 - effect of, 1046
 - granted, when, 1044 [O 39, r 1], 1045
 - injury to restrain party from committing, 1049, 1050 [O 39, r 2]
 - jail, whether Court can commit a party to, of its own motion, for disobeying, 1052
 - mandatory injunction, 1053
 - Native State, British Indian Court cannot restrain party from proceeding with suit in, 1048
 - notice to opposite party before granting injunctions, 1053 [O 39, r 3]
 - order for, may be discharged, varied, or set aside, 1053 [O 39, r 4]
 - principles governing temporary injunctions, 1045, 1050 1052
 - probate proceedings, whether injunction can be granted in, 1049
 - property in danger of being wrongfully sold in execution, 1044 [O 39, r 1 (a)], 1046, 1047
 - receiver, distinction between temporary injunction and appointment of, 1060, 1061
 - restraining party from proceeding with suit in another Court, 1047, 1048
 - revision of order made by lower appellate Court on application for, 1047
 - subordinate Court, power of Chartered High Courts to stay suits pending in, 1049

Insolvency—

- adjudication order, effect of attachment after, 238, 239
- annulment of, during pendency of suit, substitution of insolvent, 878
- Administration suits, how far provisions of Insolvency Acts applicable in, 680
- appeal to Privy Council, right of, under Provincial Insolvency Act, 351
- appellant, insolvent, and security for costs of appeal, 1084
- arrest of judgment debtor, and, 210
- attachment after judgment, effect of order of adjudication on, 238, 239
 - before judgment, effect of vesting order on, 1042
- charging order in favour of partner under O 21, r 49, pp 759 760
- Charter, provisions in, with respect to Insolvency Courts, 1359 [Charter, cl 18]
- costs of insolvent party to suit, 872
 - successful defendant in suit continued by Official Assignee, 872
- creditors, rights of secured, under Insolvency Acts, 680
- defendant, insolvency of, pending suit, 872, 877, 878
- firm, insolvency of, and execution against partner, 705
- judgment entered up under s 86 of Insolvent Debtors Act, is a money decree, 267
- Official Assignee, joinder of, on insolvency of defendant pending suit, 877, 878
 - substitution of insolvent in place of, on annulment of adjudication, 878
- plaintiff, insolvency of, and security for costs, 871 [O 22, r 8]
- reteable distribution, order for, and insolvency of judgment debtor 270
- receiver in, of mortgagor or mortgagee, necessary party to suits on mortgage, 980
- rights created by s 73 not affected by subsequent insolvency, 270
- security for costs of appeal and insolvent appellant, 1084
 - on insolvency of plaintiff, 871 [O 22, r 8]
- set off in insolvency proceedings, 579
- vesting order, effect of, on attachment after judgment, 238, 239
 - before judgment, 1042

Inspection—

- appeal from order for, 627
- banker's books and other books of account, inspection of, 625 [O 11, r 17]
- business books, giving copies of entries in, instead of inspection, 627, 628 [O 11, r 19]
- confidential communications, when protected from, 618, 619
- copies, right of inspecting party to take 623
- Court, by, of documents for which privilege claimed, 621.
- documents, of, not referred to in pleadings, and affidavits, 626 [O 11, r 18 (2)]
 - referred to in pleadings and affidavits, 624 [O 11, r 15]
 - power of Court to order inspection of, 136 [s 30 (a)]
 - public official documents when protected from, 619
 - which an adversary is entitled to inspect, 617, 618
- inspection by whom may be taken, 625
- issue, determination of, to decide upon right to inspection, 628
- non compliance with order for, 628 [O 11, r 21].
- notice to produce documents for, 624 [O 11, r 15], 625 [O 11, r 16].
- order for, of documents, 626 [O 11, r 18]
 - of property which is subject matter of suit, 1054 [O 39 r 7].
- photographs, right of inspecting parties to take, 623
- place, and time appointing, for inspection, 625 [O 11, r 17]
- privilege, 618 620
 - and power of Court to inspect documents for which, claimed, 621

Inspection—*contd*

property, inspection of, by Court, 665 [O 18, r 18]

property which is subject matter of suit, inspection of, 1054 [O 39, r 7]

Insurance—

policy of, for benefit of wife and children, when attachable, 220

Instalments—

decree or subsequent order, may direct payment by, 671 [O 20, r 11]

execution of decree payable by, 672, 673

interest, rate of, when decree made payable by, 672

limitation, period of, for application for payment by instalments, 673

Interest—

assignment of interest in pending suit, 876 [O 22, r 10], 877.

awarded by Court, when, 137 [s 34]

bill of exchange, when no rate of interest is specified in, 138

costs on, 141 [s. 35 (3)]

where not allowed by Privy Council, 1137

damdapat, rule of, 140, 141.

deposit in Court, interest not allowed to plaintiff after notice of, 906 [O 24, r 3]

devolution of, in representative suit 876, 877

foreclosure suit, interest in, 991, 1015, 1016 [O 34, r 11], 1017

instalments, rate of interest when decree made payable by, 672

Interest Act 32 of 1839, interest payable under, 138

jurisdiction, amount of interest how far affects, 157

keeping down interest on incumbrances of property, 1302 [Sch III, para 9 (3) (c) (i)]

limitation, and interest recoverable by way of damages in mortgage suits, 1017, 1019

mercantile usage, interest payable under, 138

mesne profits interest as forming part of, 677

mortgage, interest in suits for enforcement of, 1016, 1018

when suit for interest due on a, bars subsequent suit for principal, 486

mortgage deed, no express provision in, for payment of interest after due date, 1017

penalty, when rate of interest agreed on is in the nature of, 139

Privy Council, whether interest affects "the amount in dispute on appeal to," 358 359

proclamation of sale, liability for interest not covered by, 811 [O 21, r 89 (3)]

promissory note, when no rate is specified in, 138

rate of interest, in mortgage suits, 1015 [O 34, r 11], 1016

refused, when deemed to have been 137 [s 34 (2)]

restitution, interest payable by way of, 412 [s 144 (1)]

reversal of decree, order for payment of interest on, 412 [s 144 (1)]

suit, interest prior to date of, 137, 138

summary suit, no interest allowed in, unless specified in note or bill 1032

variation of decree, order for payment of interest on, 412 [s 144 (1)]

Interlocutory orders—

affecting decision of the case, may be impeached in appeal from the decree, 347 [s 105 (1)], 348

appeal from, of High Courts to Privy Council, 1370 1371 [Charter, cl 40]

of other Courts, 344 [s 104], 1119 1121 [O 43, r 1]

building, or land order authorising persons to enter into, 1054 [O 39, r 7 (1) (b)]

execution proceedings, in, 186

Interlocutory orders—*contd*

- immediate delivery of possession of certain lands, order for, 1055 [O 39, r 9]
- payment of money or delivery of movables, order for, 1055 [O 39, r 10]
- res judicata, and, 87
- revision, when subject to, 373 377
- sale, interim, of movable property subject to speedy decay, 1053 [O 39, r 6]
- of securities where state of market requires such sale, 1053
- stay of suit under sec 10, and, 35
- subject matter of suit, order for detention, preservation or inspection of, 1054 [O 39, r 7 (1)].
- trustee, order against, for deposit of moneys, etc, in Court, 1055 [O 39, r 10]

Interpleader—286 [s. 88], 1024 1027 [O 35].

- admissions of parties, Court may adjudicate title on, 1025 [O 35, r 4 (2)]
- agents may not institute interpleader suits, 1026 [O 35, r 5]
- appeal from orders under O 35, rr 3, 4 and 6, pp 1025, 1026, 1027
- charge for plaintiff's costs, 1027 [O 35, r 6]
- claimant other than plaintiff, joinder of, as plaintiff, 1025 [O 35, r 4 (3) (b)]
- costs in interpleader suits, 1025 [O 35, rr 3, 4], 1027 [ib., r 6]
- deposit of money or thing in dispute in Court, 1024 [O 35, r 2]
- hearing, procedure at first, 1025 [O 35, r 4]
- nature of, 286, 287
- non-appearance of claimant defendants in, interpleader suit, 1026
- plaint in interpleader suit, 1024 [O 35, r 1] p 1174 [Form No 40]
- railway company, interpleader suit by, 1026
- stay of suit brought against plaintiff (stakeholder), 1025 [O 35, r 3]
- suit, interpleader, when may or may not be instituted, 286, 287 [s. 88]
- tenants may not institute interpleader suits, 1026 [O 35, r 5]
- what is an interpleader suit, 286, 287

Interpretation—

- Act, of the, 2 4
- illustrations not to control plain meaning of sections, 3
- law, effect of new interpretation of, on sale, 841
- marginal notes to sections not to be referred to for construing sections, 3
- retrospective, alterations in procedure are, 3
- rules in Sch I as controlling sections, 4
- statement of Objects and Reasons, not to be referred to in interpreting the Code, 2 3,

Interrogatories—608 616 [O 11, rr 1 11]

- admissions from opponent, to obtain, 608
- affidavits in regard to, 615, 616 [O 11, rr 8 10]
- agent or servant of party interrogated, answers as to matters done by 615
- allowed, what interrogatories may or may not be, 609, 610
- amendment of answers to, 444
- answers when not sufficient, 616 [O 11, r 11]
- bona fide*, not exhibited, 613 [O 11, r 6]
- company refusing to register person as transferee of shares and as transferee
refusal 611
- confidential communications between party and his legal adviser 610
- consequence of failure to answer 612 [O 11, r 21]
- corporation, where party to be interrogated is 614 [O 11, r 8]
- costs of, 612, 613 [O 11, r 7]

Issues—640 646 [O 14]—

- abandon, power of pleader to, 17.
- additional, power of Court to frame, 644 [O 14, r 5 (1)]
- agreement to state questions of law or fact in form of, 645 [O 14, r 6]
- amend, power of Court to, 644 [O 14, r 5 (1)]
- appeal from order referring issues for trial to lower Court, 1104, 1105
 - refusing to frame an issue, 647
- burden of proof, 660 [O 18, r 3].
- Court to frame issues, 640 [O 14, r 1 (5)]
- decision on each issue, when Court to state, 703 [O 21, r 3]
- defence, where defendant at first hearing of suit makes no, 640 [O 14, r 1 (6)]
- delegation of power by Court to commissioner to try material issues, not allowed, 917
- documents examination of, before framing issues, 644 [O 14, r 4]
- evidence, where case disclosed in, is different from that disclosed in plaint, 643
- examination of documents, parties or witnesses before framing issues, 644 [O 14, r 4], 640 [O 14, r 1 (5)]
- fact, what is an issue of, 640 [O 14, r 1 (4)]
- framing of, by appellate Court, 1104 [O 41, r 25]
- guardian *ad litem*, or next friend, abandonment of issue by, effect of, 955.
- High Court, power of, to refer issues of fact for trial to lower appellate Court, 1106
- inspection, determination of issue to decide upon right to, 628
- judgment, Court may pronounce, at once, when, 646 [O 15, r 1, 2]
 - on questions stated by agreement in form of issues, 645, 646 [O 14, r 7]
- jurisdiction, objection to, to be taken at or before settlement of issues, 123 [s 21]
- law, what is an issue of, 640 [O 14, r 1 (4)]
 - when may Court try issues of, first, 642, 643 [O 14, r 2]
- material allegations in plaint effect of no denial or issue as to, 641
 - not denied in written statement, 641
- materials from which issues may be framed, 643 [O 14, r 3]
- minority, preliminary issue as to, 942
- new issue, raised before High Courts, 1104
- object of framing issues, 640, 641
- objection to place of suing must be taken at or before settlement of, 123 [s 21]
- objections to findings on issues referred to lower Court, 1105 [O 41, r 26]
- pleadings, issues not to be inconsistent with, 642
- preliminary issue raised that suit or appeal does not lie, 650
- procedure where parties are at issue, 646, 647 [O 15, r 3]
- remand of case by consent for trial on issues not raised in appeal, 1103
- resettling of, by appellate Court, 1103 [O 41, r 24]
- res judicata and issue of fact, law, or mixed law and fact, 58, 60
 - findings on issues, and, 80, 81
- second appeal, power of High Court to determine issues of fact in, 713 [s 404]
- strike out issues, power of Court to, 644 [O 14, r 5 (2)]
- summons may be for settlement of, 513 [O 5, r 5]
- wrong issue, where lower Court has framed a, 647

Jail—See Arrest and Detention Impulsiveness

service on defendant in, 521 [O 5, r 24]

Joinder—See Plaintiffs Defendants Causes of Action Miscellaneous Non Joinder

(1) of plaintiffs—

- ancestral property in suit to recover, 451
- appeal, misjoinder of plaintiffs as to, 450 [s 400]
- election, when plaintiffs may be joined, 453 [O 1, r 5]

Interrogatories—*contd*

- cross examination, distinguished from, 611.
- defendant may administer interrogatories to co defendant, 611.
- discovery by, 608 [O 11, r 1]
- ejectment suit and interrogatories, 610
- evidence, party not to interrogate about adversary's, 610
 - using answers to interrogatories in evidence at trial, 629 [O 11, r 22]
- failure to answer, 628, 629 [O 11, r 21]
- fishing, 614
- form of, 613 [O 11, r 4]
 - of affidavit in answer, 616 [O 11, r 9]
- irrelevant, 608 [O 11, r 1, proviso]
- issues, framing of, from answers to, 643 [O 14, r 3 (b)]
- leave of Court, can be delivered only by, 608, 609 [O 11, r 1] 612, [O 11, r 2]
- lunatic, or minor where opposite party is, 611, 629 [O 11, r 23]
- names of persons relating to, 610
- not material at the stage they are delivered, 613 [O 11, r 6]
- objection to answer, 611
- order to answer, or answer further, 616 [O 11, r 11]
- pleadings, distinguished from, 612
- power of Court to order delivery and answering of, 136 [s 30 (a)]
- privilege, where party claims, 616
- public interests interrogatories involving disclosures injurious to, 610
- scandalous or irrelevant, 613 [O 11, r 6]
- set of interrogatories, only one allowed, 608 [O 11, r 1, proviso]
- striking out prolix, unnecessary or scandalous interrogatories, 615 [O 11, r 7]
- submitting of interrogatories to Court before delivery, 612 [O 11, r 2]
- time for delivery of, 611
 - within which application lies for striking out, 615 [O 11, r 7]
- wagering, in cases where defence of, is set up, 614
- witness, cannot be administered to, 611

Investigation (local)—

- commission for, 917, 918 [O 26, rr 9, 10] See Commission

Investigations of claims and objections in execution—See Attachment and sub heads**Irregularity—**

- immovable property, in publishing and conducting sale of, 818 [O 21, r 90]
 - See Material Irregularity in conducting Sale
- instances of error, defect or irregularity not affecting merits, 330
- movable property, irregularity in sale of, not to vitiate sale, 805 [O 21, r 78]
- remand, irregularity may be a ground for, 1099, 1100
- revision, irregularity may be a ground for, if material, 372 [s 115 (c)], 382
- sale certificate, effect of, on irregularities, 841
 - of movable property, irregularity in not to vitiate sale, 805 [O 21, r 78]
- second appeal, irregularity may be a ground for, 332 [s 100 (1) (c)]
- set aside sale of immovable property on ground of, who may apply to, 819
- Suits Valuation Act VII of 1887, s 11, and irregularity affecting jurisdiction, 331
- time within which application lies to set aside sale on ground of, 830

s 105 (1)

Issues—C40 646 [O 14]—

- abandon, power of pleader to, 17
- additional, power of Court to frame, 644 [O 14, r 5 (1)]
- agreement to state questions of law or fact in form of, 645 [O 14, r 6]
- amend, power of Court to, 644 [O 14, r 5 (1)]
- appeal from order referring issues for trial to lower Court, 1104, 1105
 - refusing to frame an issue, 643
- burden of proof, 660 [O 18, r 3].
- Court to frame issues, 640 [O 14, r 1 (5)].
- decision on each issue, when Court to state, 703 [O 21, r 5]
- defence, where defendant at first hearing of suit makes no, 640 [O 14, r 1 (6)]
- delegation of power by Court to commissioner to try material issues, not allowed, 917
- documents examination of, before framing issues, 644 [O 14, r 4]
- evidence, where case disclosed in, is different from that disclosed in plaint, 643
- examination of documents, parties or witnesses before framing issues, 644 [O 14, r 4], 640 [O 14, r 1 (5)]
- fact, what is an issue of, 640 [O 14, r 1 (4)]
- framing of, by appellate Court, 1104 [O 41, r 23].
- guardian *ad litem*, or next friend, abandonment of issue by, effect of, 955
- High Court, power of, to refer issues of fact for trial to lower appellate Court, 1106
- inspection, determination of issue to decide upon right to, 628
- judgment, Court may pronounce, at once, when, 646 [O 15, rr 1, 2]
 - on questions stated by agreement in form of issues, 645, 646 [O 14, r 7]
- jurisdiction, objection to, to be taken at or before settlement of issues, 123 [s 21]
- law, what is an issue of, 640 [O 14, r 1 (4)]
 - when may Court try issues of, first, 642, 643 [O 14, r 2]
- material allegations in plaint effect of no denial or issue as to, 641
 - not denied in written statement, 641
- materials from which issues may be framed, 643 [O 14, r 3]
- minority, preliminary issue as to, 942
- new issue, raised before High Courts, 1104
- object of framing issues, 640, 641
- objection to place of suing must be taken at or before settlement of, 123 [s 21]
- objections to findings on issues referred to lower Court, 1103 [O 41, r 26]
- pleadings, issues not to be inconsistent with, 642
- preliminary issue raised that suit or appeal does not lie, 659
- procedure where parties are at issue, 646, 647 [O 15, r 3]
- remand of case by consent for trial on issues not raised in appeal, 1103
- resettling of, by appellate Court, 1103 [O 41, r 24]
- res judicata and issue of fact, law, or mixed law and fact, 58, 59
 - findings on issues, and, 80, 81
- second appeal, power of High Court to determine issues of fact in, 343 [s 103].
- strike out issues, power of Court to, 644 [O 14 r 5 (2)]
- summons may be for settlement of, 513 [O 5, r 5].
- wrong issue, where lower Court has framed a, 642

Jail—See Arrest and Detention Imprisonment

service on defendant in, 521 [O 5, r 24]

Joinder—See Plaintiffs Defendants Causes of Action Misjoinder Non Joinder

(1) of plaintiffs—

- ancestral property, in suit to recover, 451
- appeal, misjoinder of plaintiffs, and, 329 [s. 99].
- election, when plaintiffs may be put to, 452 [O 1, r 2].

Joinder—*cont.*(1) of plaintiffs—*cont.*

- joinder of plaintiffs, 446 [(O. 1 r. 1)]
 - at 1 cause of action, 442 [(O. 2 r. 3)]
 - having different interests in one suit, 440, 431
- joinder of one or more of the plaintiffs, 435 [(O. 1, r. 4) (a)]
- joinder—*See* Misjoinder
- in joinder—*See* Nonjoinder
- multiple plaintiffs having same interest, 440, 441 [(O. 1 r. 8)]
- provided in case of misjoinder of plaintiffs and causes of action, 442
- rel of right to exist (severally, jointly or alternatively), 431, 432
 - in two or more persons severally, 431
- separate trials, power to order, where joinder improper, 432 [(O. 1 r. 2)]
- who may be joined as plaintiffs, 441 [(O. 1 r. 1)]

(2) of defendants—

- apportion joinder of defendants and, 429 [s. 99]
- but not exchange parties, 430
- co-party as a third person, in case of a false and fraudulent prospectus, 431, 433
- contra joinder, on same, 433 [(O. 1, r. 1)]
- different suits when land claim of co-possessor vs. several defendants, 436
- joinder of defendants, 432, 433 [(O. 1 r. 3)]
- joint wrongdoers, 436
- joinder against one or more of the defendants, 435 [(O. 1 r. 4) (b)]
- joinder—*See* Misjoinder
- rel of various suits held to be, 433, 434
 - not to be, 437, 438
- separately different parties liable on same, 433 [(O. 1 r. 6)]
- in joinder—*See* Nonjoinder
- same cause of action having same interest, 430, 441 [(O. 1 r. 8)]
- plaintiff when in doubt in which a relief is to be sought, 440 [(O. 1 r. 7)]
- rel of claim every defendant need not be interested in the whole, 435 [(O. 1 r. 3)]
 - when claim is in the alternative, 436
- who may be joined as defendants, 432, 433 [(O. 1 r. 3)]

(3) of causes of action—442 [(O. 2 r. 3)]

- at 1 cause of action or executive joinder of causes of action for co-ownership, 442 [(O. 2 r. 3)]
- apportion number of causes of action and, 429 [s. 99]
- 3 causes of action, 434 [s. 134] (O'Shaughnessy, L. 14)
- for joinder of causes of action for co-ownership, 442 [(O. 2 r. 3)]
- in a valid property rights for recovery, 434 [(O. 2 r. 4)], 430
- joinder of causes of action, 442 [(O. 2 r. 3)]
- joinder—*See* Misjoinder
- separate trials of causes of action, 434 [(O. 2 r. 6)]

(4) of respondents—1021 [(O. 41, r. 20)]

(5) of trustees, executors and administrators—

- inward of a trust executor, et al., not to be joined as a party, 941 [(O. 31 r. 3)]
- when to be joined as parties, 940 [(O. 31 r. 2)]

Joist—

- attestation of share in joint property application for, 700 [(O. 21 r. 13) (b)]
- but of co-share at sale of share in joint property, 541 [(O. 21 r. 55)]
- contra, liability on a joint, 433
 - on a joint and several, 433

Joint—*contd*

- execution, application for, by joint decree holder, 710 [O 21, r 15].
- liability in, of ancestral property, 204 [s 35]
- joint-decree, what is, 710
- mortgage, suits on, and joint Hindu family, 985, 986.
- promisors, joint, 459 [O 1, r 6]
- separate debt cannot be set off against joint and several debt, 578
- wrong-doers, joint, 456

Judge—

- judge may be made, by consent, 125
- arrest, exemption of judge from, 403 [s 13a]
- decision where appeal is heard by two or more judges, 326, 327 [s 98]
- definition of, 13 [s 2 (8)]
- dissenting from judgment of Court, 1117 [O 41, r 34]
 - need not sign decree, 1118 [O 41, r 35, proviso]
- evidence, power of judge to deal with, taken before another judge, 664 [O 18, r 15]
 - when unable to make memorandum of, to record reasons, 664 [O 18, r 14]
- execution of document by, on failure of judgment debtor to do so, 741, 742 [O 21, r 34]
- High Court Judges—*See* Chartered High Court, Judges of
- judge not to act in matter in which he has an interest, 13
- judgment written by predecessor, power of, to pronounce, 667 [O 20, r 2]
- law, where judges hearing appeal differ on a point of, 326, 327 [s 98]
- memorandum when evidence not taken down by, 662 [O 18, r 8]
- procedure where judge has vacated office before signing decree, 670 [O 20, r 8]
- public officer, is a, 17 [s 2 (17) (a)]
- registration of documents by, 742 [O 21, r 34 (6)]
- review, application for, and, 1150 [O 47, r 2]
- single, of Chartered High Court and appeal from decree, 369
 - decision of and revision, 390
- single, of Chief Court of Oudh, decision of, and revision, 380, 381
- sitting of elsewhere than at usual place, 1364 [Charter, cl 31]
- view by, 665

Judgment—

- act of State is not a, 92
- admission, judgment on, 631 [O 12, r 6] 632, 633
- altered, not to be except under sec 152 or on review, 438 [s 152], 668 [O 20, r 3]
- amendment of, 438 [s 152]
- appeal dismissed without notice, whether necessary, 1056, 1087
- arrest before judgment, 1034, 1035 [O 38 r 1]
- attachment before judgment, 1037, 1038 [O 38 r 5] 1040 [ib, r 6]
- award judgment on, 1277 [Sch II, para 16]
- case submitted for opinion of Court by parties judgment in, 1028 [O 36 r 5 (2)].
- certified copy of, furnishing, 697 [O 20 r 20] 1114 [O 41, r 36].
- contents, date and signature of 608 [ib] [O 20 rr 3, 4] 1111 [O 41, r 31].
- Court, not competent to deliver, and *res judicata*, 77 78
- death of party after conclusion of hearing does not effect 870 [O 22, r 6].
- decree should conform with, 670 [O 20 r 6].
- definition of, 13 [s 2 (9)].
 - foreign, 13 [s 2 (6)] 102

Judgment—*contd*

- effect of judgment not pronounced in Court, 667.
- evidence recorded by other judge or person, judgment upon, 657.
- firm, judgment in suit against, 936, 937
- foreign judgment passed without jurisdiction, and execution of decree, 165
- fraud or collusion, judgment obtained by, and *res judicata*, 78
- in personam*, or *in rem*, what is, 70
- interlocutory, appeal to Privy Council from, 1370, 1371 [Charter, cl 40]
- issue, when Court to state its decision on each, 669 [O 20, r 5]
- issues, judgment on questions stated by agreement in form of, 645 [O 14, r 7]
- judgment when there are several plaintiffs or defendants, 458 [O 1, r 4]
- judgment " as used in cl 15 of the Charter, meaning of, 1349 1352
- Native State, suit in a British Indian Court on a judgment of a Court of, 92, 93
- object of, 669
- orders, what, are judgments under cl 15 of the Charter, 1355 1357
- predecessor, judgment written by judge s, 667 [O 20, r 2]
- probate, whether order granting, is a judgment, 1355
- remand, order of, by a judge of High Court in second appeal is a judgment, 1102
- res judicata*, delivered by Court not competent to deliver it, and, 77, 78
 - obtained by fraud or collusion, and, 78
 - of Revenue Court, and, 74 75
 - one judgment in two suits, and, 39
- separate judgments, two suits tried together, and *res judicata*, 40
- Small Causes Court, contents of judgment of, 663 [O 20, r 4 (1)]
- unintelligible, and appellate Court, 669
- when and where to be pronounced, 137 [s 33], 666 [O 20, r 1]

Judgment debtor—

- adjustment of decree out of Court, 632 [O 21, r 2 (2)]
 - suit by decree holder upon an uncertified, 696
- agreement to give time to, 692
- arrest of—See Arrest and Detention
- attachment of movable property not in possession of, 754 [O 21, r 46]
 - of share of judgment debtor in movables, 758 [O 21, r 47]
 - property liable to, 214 217 [s 60]
 - release from, of property held in trust by judgment debtor, 780
- certificate to, authorizing him to alienate attached property, 807, 808 [O 21, r 83 (2)]
- contribution, suit for, by one judgment debtor against another regarding costs, 148
- death of, before satisfaction of decree, 197 [s 50]
- definition of 13 [s 2 (10ff)]
- discharge of pending application for stay of execution, 734 [O 21, r 26 (2)]
 - when, 829
- execution against, when he is a legal representative, 202 [s 52]
- exemption from arrest under civil process, 403 [s 135]
- failure of, to execute document or endorse negotiable instrument, 741, 742 [O 21, r 34]
- insolvent, whether Official Assignee " representative " of, 176 [Case 7]
- instalments, satisfaction of decree by, 671 [O 20, r 11]
- legal representative, execution against, 202 [s 52]
- mortgaged property of, liable to be seized in execution, 751

Judgment debtor—contd

- negotiable instrument, failure of judgment debtor to endorse, 741, 742 [O 21, r 34]
- notice to, when execution applied for by transferee of decree, 717.
- objection by, that property attached is not liable to attachment, 176
- party, necessary, to suit by unsuccessful claimant under O 21, 61, p 781.
- payment by, out of Court to one of several holders of a joint decree, 711, 712
 - of decree out of Court, may inform Court of, 692 [O 21, r 2 (2)]
- postponement of sale to raise amount of decree, 807, 808 [O 21, r 83]
- purchaser of judgment debtor's equity of redemption at Court or private sale, 175, 176 [Cases 4, 5]
- questions between judgment debtors *inter se*, and, 173.
 - simultaneous, against person and property, 728 [O 21, r 21]
- receiver of future earnings of, 1063
- "representative" of, in execution proceedings, 174 176
- resistance by, delivery of possession in execution, 844 [O 21, r 98]
- satisfaction, application by judgment debtor to certify, 692 [O 21, r 2 (2)]
 - of decree by instalments, 671 [O 20, r 11]
- sale, setting aside where judgment debtor has no saleable interest, 832 [O 21, r 91].
 - on deposit of judgment debt, 811 [O 21, r 89]
 - for material irregularity or fraud, 818 [O 21, r 99]
- stay of execution, application for, 734 [O 21, r 26], 1076, 1077 [O 41, r 5] *See Stay*
 - pending suit between decree holder and, 735 [O 21, r 29]
- suit against decree holder, when judgment debtor can maintain, 693, 694
- transfer of money decree to one of several judgment debtors, 718, 719
 - pendente lite* by judgment debtor, 848 [O 21, r 102]
- transferee of decree to hold subject to equity of judgment debtor, 196 [s 49]

Jurisdiction—See Jurisdiction of Chartered High Courts

- acquiescence of defendant residing outside, 111 [s 20 (b)], 115
- agreement to submit to foreign jurisdiction, 95, 96
- appeal, irregularity not affecting jurisdiction, 329 [s 99]
- arbitrator, where a judge has no jurisdiction, but acts as, 125
- arrest before judgment of defendant leaving, or removing property—
 - (1) who has left or is about to leave jurisdiction, from, 1034 [O 38, r 1 (a)]
 - under provisions not relating to execution, of person residing outside, 406 [s 136]
- attachment before judgment of property outside jurisdiction, 1010 [O 38 r 6]
 - not in execution, of property outside jurisdiction, 406 [s 136]
- business, carrying on in foreign country through an agent, and, 96
- cause of action, and jurisdiction, 111 [s 20 (c)], 116
 - joinders of causes of action and jurisdiction, 492 [O 2, r 3 (2)]
 - several, against same defendant, and, 499

Central Provinces, jurisdiction of Courts, 100**Chartered High Court—See Chartered High Courts****Collector's action in executing decree for partition of estates, and jurisdiction of**

- Court to control, 207, 208
 - matters within and bar of jurisdiction of civil Courts, 232 [s 70 (2)]
- commission to examine witnesses—

- (1) about to leave jurisdiction, 913 [O 26, r 4 (1) (b)]
- (2) residing beyond jurisdiction, 913 [O 26, r 4 (1) (a)]
- (3) residing within jurisdiction, 912 [O 26, r 1], 913 [ib., r 3]
- compensation for wrongful arrest, etc., and, 316 [s 95, proviso]
- competent, Court of, and *res judicata*, 72.
 - not and *res judicata*, 77, 78
- concurrent jurisdiction and *res judicata*, 73 77
- consent of parties, and, 125.

Jurisdiction—*contd*

- continuance of, of Court executing transferred decree, 164
- contract, breach of, and place of suing, 116, 117
- corporation where deemed to carry on business, 112 [s 20, Explan II]
- costs, want of jurisdiction no bar to power of Court to award, 141 [s 35 (1)]
- decree of foreign Court passed without, 93, 94
 - passed without, 125
- decision, wrong, as to, and revision, 389
- dismissal of suit for want of, and *res judicata*, 79
- District Courts, jurisdiction of, 100
- England, jurisdiction of Courts of, over British Indian subjects in British India, 94.
- error not affecting, and appeal, 329 [s 99]
- examination of witness about to leave, 664 [O 18, r 16 (1)]
- executing Court cannot inquire as to jurisdiction of Court passing decree, 704
 - jurisdiction of, 156, 157
 - powers of, 158, 159
- execution of decree in case of foreign judgment passed without, 165
 - when lands situated in more than one, 702 [O 21, r 3]
- exercise of by Court, not vested in it, and revision, 381
- failure to exercise jurisdiction vested in Court, and revision, 371 [s 115 (b)], 381
- foreign country carrying on business in, through an agent, and, 96
 - possession of immovable property in, and, 96
- foreign Court, extent of jurisdiction of, 94
- foreign judgment, and presumption as to, 98 [s 14]
 - passed without jurisdiction, 91 [s 13 (a)], 164
- foreigners, non resident, and, 123
 - carrying on business, within, through an agent, 939
 - jurisdiction over, under cl 12 of the Charter, 1344
- garnishee* residing outside, and debt also payable outside, 756, 757
- High Court, jurisdiction and powers of, 1308 [High Courts Act, s 9]
- Hindu family, how far manager of joint, is an agent for the purposes of, 115
- inherent jurisdiction, 433 [s 151]
 - power of Court to decide questions of, 433-434
- irregular exercise of, and revision, 382 [s 115 (c)], 372
- irregularity affecting jurisdiction of Court and Suits Valuation Act, 331
- Jhansi, of civil Courts of, 100
- jurisdiction of Courts executing decrees, 156, 157
- land, suits for, under cl 12 of the Charter, 1338-1342
- leave of Court to sue under s 20 of the Code*, 115
 - under cl 12 of the Charter, 1343
- limitations on 124
- local limits of, uncertainty as to, 110
- material irregularity in exercise of, and revision, 372 [s 115 (c)]
- meaning of, 124-381
- Munsif a Court, no jurisdiction to decide on title, 74
- Munsif, jurisdiction of, 100
- Native States jurisdiction to entertain suits against subjects of, 123.
- objection as to jurisdiction, when to be taken, 127
- original and appellate jurisdiction of Courts explained, 99
- Oudh, of civil Courts of, 100
- over valuation and under valuation of suits, and, 101, 102
- place of suing, objection as to, 123 [s 21]

Jurisdiction—*contd*

- pecuniary jurisdiction, limits of, 21 [s. 6]
- principles regulating, 101
- plaint to contain facts showing Court has jurisdiction, 535 [O 7, r 1 (f)]
- Presidency Small Causes Courts, of, 100
- Probate Courts, no jurisdiction to decide on title, 70, 87
- protest against jurisdiction of foreign Court, 95
- Provincial Small Cause Courts, of, 100
- relief *in personam*, and, 103 [s. 16, proviso]
- relinquishment of part of claim to bring suit within, 480 [O 2, r 2 (1)]
- residence, more than one, and jurisdiction, 113, 114
- "resides," meaning of, 113
- res judicata, and, 72 78
- restitution of conjugal rights, suit for, and, 121
- review granted without jurisdiction, 1156
- revision, 371, 372 [s. 115 (a)].
 - as to non-exercise or wrong exercise of jurisdiction, 381
- second appeal, objection as to jurisdiction taken for the first time in, 339
- service of summons where defendant resides outside jurisdiction, 519 [O 5, r 21]
- submission to jurisdiction of foreign Court, 95, 96
- subordinate Judges, of, 100
- suits against corporations, and, 112 [s. 20, Exp II], 122, 123
 - Princes and Chiefs and, 283 [s. 86], 285
 - Secretary of State, and, 273, 274
- for "determination of any other right to or interest in immovable property," 103 [s. 16 (d)], 105, 106
 - for compensation for wrong to person or movables, 110 [s. 19]
 - immovable property situate in different jurisdictions, 107 [s. 17]
 - partition of property situated in different jurisdictions, 109
 - restitution of conjugal rights, 121
 - wrong to land, 103 [s. 16 (e)]
- immovable property, relating to, 103, 104 [s. 16], 107 [s. 17], 109 [s. 18]
- in personam*, 106, 107
- to set aside decree obtained by fraud, and place of suing, 122
 - sale in execution of decree obtained by fraud and place of suing, 122
 - where local limits of jurisdiction of Courts are uncertain, 109, 110 [s. 18]
- temporary residence of defendant, and cause of action, 111 [s. 20, Expl I], 113
- transfer of suits, and, 131
- uncertainty of local limits, as to, 109, 110
- under valuation of claim, and objection, as to jurisdiction, 124
- valuation for determining jurisdiction of appellate Court, 320
 - of suits, and jurisdiction, 100, 101
 - where subject matter of suit does not admit of valuation, 102
- waiver of plea as to jurisdiction, 125.

Justice, equity and good conscience—

- where no specific provision in the Code, Courts to act according to, 3.

Laches—

- revision, and, 392

Land—See Immovable property

- attachment, liable to, in execution of decree, 214 [s. 60 (1)].
- suits for, under cl 12 of the Charter, 1338 1342.

Land Acquisition Act—

appeal to P C from award of High Court on appeal from District Court under, 1369
Collector acting under s 11 of, not a Court for purposes of revision, 380

Land revenue—

neglect to pay, and delivery of possession to party who pays, 1055 [O 39, r 9]

Landlord—

interpleader suit by tenant against, 1026 [O 35, r 5].

savings of rights of, 20 [s 4 (2)]

special provisions for recovery of rent of agricultural land, 20 [s 4 (2)]

Language—

English, recording evidence in, 407 [s 138]

subordinate Courts of, 407 [s 137]

Law—

alteration of, and *res judicata*, 58, 59

and review, 1146

appeal from decree in pauper suits when decree contrary to law, 1122 [O 44, r 1]

arbitrator and questions of law, 1278

Chartered High Courts, law to be administered by—

in the exercise of ordinary original civil jurisdiction 1359 [Charter, cl 19]

appellate jurisdiction 1360 [Charter, cl 21]

extraordinary original civil jurisdiction, 1360 [Charter, cl 20]

court sale, effect of new interpretation of law on, 841

issue of, and *res judicata*, 58, 59

what is, 524

when may be tried first, 642 [O 14 r 2]

issues, questions of law may by agreement be stated in form of, 645 [O 14, r 6]

pauper appeal, Court may admit, when decree contrary to law, 1122 [O 44, r 1]

pleadings to state facts, and not law, 523

presumption of, and pleadings 540 [O 6, r 13]

Privy Council, appeal to and question of law, 357 [s 116]

reference to High Court on question of law, 1138 [O 46, r 1]

rejection of plaint where suit barred by any law, 564, 567 [O 7, r 11 (d)]

res judicata, alteration of law and, 58, 59

issue of law and 58

review, alteration of law and 1146

revision, erroneous decision of law, whether ground for interference in, 382

second appeal, questions of law and, 332 [s 100 (1) (a)]

usage having the force of law and, 331 [s 100], 336

special or local, saving of, 19 [s 4 (1)]

transfer of decree by operation of law, what is, 714

Leave of Court—

does not cover amendments unless formal, 1343

must be obtained before institution of suit, 1343

compromise by next friend or guardian, leave for, 952 [O 32, r 7]

concise statement, to amend, so as to make it correspond with plaint, 562 [O 7,
r 9 (3)]

decree holder, leave to, to bid at sale, 800 [O 21, r 72]

Leave of Court—cont'd

directors, for imprisonment of, 737 [O 21, r 32 (2)]
 disability, persons under, in cases of consent on behalf of, 428 [s 147]
 documents not produced when plaint filed, to adduce in evidence, 569 [O 7, r 18]
 execution, leave to issue, in suits between co partners, 938 [O 30, r 9]
 against person not served as partner, 761 [O 21, r 50
 (2)], 763
 guardian, or next friend for compromise by, 952 [O 32, r 7]
 husband, to execute against, decree obtained against wife, 871 [O 22, r 7 (2)]
 interrogatories, to deliver, 608 [O 11, r 1], 612 [O 11, r 2]
 joining claims for recovery of immovable property with other claims, and, 499
 [O 2, r 4]
 jurisdiction, to sue where all defendants do not reside within, 111 [s 20 (b)]
 minor, to receive money on behalf of, 951 [O 32, r 6]
 to compromise suits by or against, 952 [O 32, r 7]
 where, elects to proceed with suit in his own name, 959 [O 32, r 12 (2)]
 numerous parties having same interest, leave to sue or be sued, 460 [O 1, r 8]
 partner, to execute decree against, who has not been served and has not appeared,
 761 [O 21, r 50 (2)], 763
 pauper, to appeal as, 1122 [O 44, r 1]
 to sue as, 965 [O 33, r 2]
 persons to whom leave under O 1, r 8, can be granted, 465
 pleader, for discharge of, 507 [O 3, r 4 (2)]
 pleadings, to amend, 544 [O 6, r 17]
 may be granted at any stage of the proceedings, 554
 to present, subsequent to written statement, 562 [O 8, r 9]
 Privy Council, appeal from order granting or refusing leave to appeal to, 1126
 to appeal to, 1124 [O 45, r 2]

ven to review, 368

recovery of land, to join claims with suit for, 499 [O 2, r 4]
remedies, to omit one of several, 480 [O 2, r 2 (3)]
review, whether order granting leave to appeal to Privy Council is open to, 368

under O 2, r 4, p 500

under s 20, p 115

under cl 12 of the Charter, 1347

transfer pending suit, to continue suit in case of, 876 (O 22, r 10)

transfer pending suit, to continue suit in case of, 876 [O 22 r 1 (3)]
withdrawing suit, with liberty to bring fresh suit, for, 882 [O 23 r 1 (2)]

Legal maxims—

equity acts *in personam*, 100

Legal representative—*See* Abatement

abatement, power of Court to add legal representative as a party after—See

abatement, power of Court to add legal representative as a party after death of decedent, power of Court executing decree to compel legal representative to produce, 197 (a, 50 (2))

197 (a. 50 (2))
appellant, legal representative of, when to be brought on to stand 833

certificate of sale to, \$70

death, successive, if judgment debt remainable 200

debts of the deceased when legal representative previously holds it, and

Legal representative—*contd*

- decree against person *alleged* to be a legal representative, 560.
- wrong person as, 204.
- defendant, legal representative of, when to be brought on record, 51 [O 22, r 4 (1)].
- definition of, 13 [s 2 (11)], 14, 19.
- determination of question as to who is, 560 [O 22, r 5].
- enforcement of decree passed against, 202 [s 52].
- previous proceedings in, and, 200.
- execution when decree passed against deceased, 197 [s 50].
- when decree passed against legal representative, 202 [s 52].
- ex parte decree, application by legal representative to set aside, 500.
- extent of liability of, in execution, 197 [s 50 (2)].
- heir, decree against a wrong person as, 204.
- Hindu son, property in the hands of, liable, for father's debts, 204 [s 53].
- reversioner, or widow, continuation of suit on death of, 536, 537.
- injunction against, execution of decree for, 200.
- intermeddler with estate of deceased is a, 13, 14.
- joint decree-holder, legal representative of, and execution, 710 [O 21, r 15].
- notice where execution is applied against, 728 [O 21, r 22].
- objection by, that property attached is his own, 177.
- partner, of deceased, need not be joined in suit by or against firm, 934 [O 30, r 4].
- partly power of Court to add legal representative as, after abatement, 565.
- parties, whether all should be made, when there are two or more, 557.
- pauper, suit by legal representative of a deceased, 964.
- plaint in suit by, 506 [O 7, r 4].
- plaintiff, legal representative of, when to be brought on record, 533-534 [O 22, r 3 (1)].
- res judicata*, and determination of question as to, 570.
- surviving co-partner, whether a legal representative, 14.

Legislature—

- members of legislative bodies exempted from arrest under civil process, 40.
- proceedings of, in passing an Act not to be referred to in construing Act, 2.

Letter—

- substitution of, for summons, 523 [O 3, r 30].

Letters of Administration—

- dismissal of suit for failure to produce, and *res judicata*, 79.
- when necessary, 557.

Letter of Request—

- for examination of witness residing outside British India, 271 [s 77], 915 [O 26, r 5].

Letters Patent—

- Allahabad High Court, of, 1375-1379.
- appeal under cl. 15 of, 319, 346.
- cl. 15 of, from orders passed in revision, 591.
- Income Tax Act, reference under, and cl. 36 of, 329.
- Calcutta, Bombay and Madras High Courts, of, 1331-1374.
- Lahore High Court, of, 1391-1399.
- Patna High Court, of, 1390-1399.
- provisions of former, inconsistent with present, to be void, 1373, 1374 [Charter, cl. 45].
- Rangoon High Court, of, 1399-1409.
- revision, orders in, and appeal under cl. 15 of, 591.
- revocation of Letters Patent of, 1962, p. 1332 [Charter, cl. 1].

Liability—

ancestral property, of, and execution proceedings, 201 [s. 53], 205
joint and several, on contracts, 459 [O. 1, r. 6], 459
of joint tortfeasors, 459.
of legal representative, extent of, 198

Lien—

Attorney's, 579 581.
and rateable distribution, 270
Government, and first charge for court fees in pauper suits, 973
interpleader suit, lien of plaintiff in, 1027 [O 35, r 6]
pleader, lien of, for costs, and set off, 574 [O 8, r 6 (2)]
receiver, lien of, 1065

Limitation—

addition of parties, and, 470 [O 1, r 10 (5)], 471, 475
party interested as respondent and, 1092
Advocate General, as against, in suits relating to public charities, 313
amendment of application for execution, 723
appeal from decision rejecting memorandum of appeal on ground of, 1075
to Privy Council, application for leave to, to be made within what time, 354
appeals and limitation, 1072
assignment pending suit, effect of adding or substituting a party on, 880
award made on a reference without intervention of court, application to file, 1290
award, application to set aside, 1277
certificate for suing Ruling Chief, time spent in obtaining, and, 285
Collector, property in the management of, under s 72, and 255
compensation for wrongful arrest, attachment or injunction, suit for, 317
costs, plea of limitation and question of, 144
cross objections, dismissal of appeal on ground of limitation no bar to hearing of, 1095
delivery of possession, application or suit for, and, 842
dismissal of appeal on ground of, whether a bar to hearing of cross objections, 1095
execution, amendment of application for, and, 723
issue of notice to show cause against, and, 732
execution of decree, and, 152, 153, 161
of Court of native state, and, 165
granting injunction, and, 186 [s 48 (1)], 194
limit of time for, 186 196 [s 48]
foreign judgment, time within which suit to be filed in British India on, 92
legal representative of deceased defendant, application to bring on record, 861
plaintiff, application to be made a party, 834
memorandum of appeal, when plea of limitation not taken in, 1073
mesne profits and limitation, 678
minor, and appeal after period of, 908
mortgagor, period of limitation for obtaining personal decree against, 1007
Native State decree, when barred by, 165
newly added defendant, when suit deemed to be instituted against, 470 [O 1, r 10 (5)].
notice, issue of, to show cause against execution, and, 723.
- - - - -
return of purchase money, application for, and limitation, 835
review of judgment, for making application for, 1155

Limitation—contd.

- sale certificate, application for, and limitation, 841.
- set aside, abatement of suit, application to, 874
 - ex parte* decree, application to 595 606
 - order of dismissal for not furnishing security for costs, application, to, 911
- sale of immovable property for fraud or irregularity, under O 21, r 90, or 91, application to, 830
- sale in execution of decree, and, 180
- sale on deposit under O 21, r 89, application to, 811
- set off of claim barred by limitation, 577
- specially pleaded in defence limitation must be, 570 [O 8, r 2]
- step in aid of execution, suit under O 21, r 63, may be, 785.
- substitution of parties under O 1, r 10 (1) and, 469, 471
- suit for possession of property sold to decree holder in execution, and, 180.
 - to establish right to present possession, 848
 - to set aside sale of immovable property on ground of irregularity or fraud, 830
- under O 21, r 63 to establish right to attached property, 784
- summary suit, and period of limitation for, 1031
- under O 21, r 63 may be step in aid of execution, 785.
- symbolical possession and limitation, 745
- trustee *de son tort* of public charity, accounts against, and, 313
- uncertified adjustment of decree not to operate as a fresh starting point for, 690
- withdrawal of suit with permission to bring a fresh suit and, 893 [O 23, r 2]

Lis pendens—

- alienation by successful claimant before suit under O 21, r 63, and, 784
- assignment by either party pending suit, 876 [O 22 r 10]
 - judgment debtor, and execution, 848 [O 21, r 102].
- doctrine of, 880

Local Government—

- charities, suits relating to, and officers appointed by, 314 [s. 93].
- remission, by, of postage and registration fee, 412 [s. 143]

(2)}

Local Law—

- lunatics, in suits by or against, 962 [O 32, r 16]
- minors, in suits by or against, 962 [O 32, r 16].
- saving of, 19, 20 [s. 4 (1)].

Lunatic—

- decree against, 961
- documents, affidavit of, and, 622, 623 [O 11, r 23].
- interrogatories, affidavit in answer to, and, 611, 629 [O 11, r 23]
- Princes and Chiefs, provisions of Code as to lunatics not to apply to, 962 [O 32, r 16]
- saving of local law relating to suits by or against, 962 [O 32, r 16].
- suits by or against, procedure in, 961 [O 32, r 15].

Magistrate—

exemption of, from arrest under civil process, 403 [s 135 (1)]

receiver appointed by, 1059 [Case 7].

receiver appointed by a civil Court, Magistrate cannot interfere with, 1059 [Case 7].

Mahomedan Law—

execution, Mahomedan heir and, 204

mortgage suit and Mahomedan co heirs, 985.

* pre-emption under, 683

receiver where a Mahomedan executor is in possession, 1060

Maintenance—

right to future maintenance not attachable, 216 [s 60 (1) (n)], 225

transferee of decree awarding maintenance, whether entitled to execution, 716

right to future maintenance not attachable, 216 [s 60 (1) (n)], 225

transferee of decree awarding maintenance, whether entitled to execution, 716

Malice—

how pleaded in suits for libel, etc., 539

Manager—

notice to, as to in what capacity he is served, 934 [O 30, r 5]

not to appear though served, unless he is a partner, 937 [O 30, r. 7]

of business, and service of summons, 514 [O 5, r 13]

corporations, and sale of shares in execution, 806 [O 21, r 79 (3)]

joint Hindu family, and suits on mortgage, 985, 986

against, and *res judicata*, 68, 69

partnership business, and service of summons on firm, 932 [O 30, r 3 (b)]

Marginal notes—

not to be referred to for the purpose of construing section, 3

Market value—

commission to ascertain, of property, 917 [O 26, r 9]

Marriage—

of female party, and abatement, 871 [O 22, r 7]

Married executrix, administratrix, or trustee—

husband of, not a necessary party to suit by or against her, 941 [O 31, r 7]

Master of ship—

is agent of owner or charterer for service of summons, 514 [O 5, r 13 (2)]

Material irregularity in conducting sale—

omissions which are material, 821, 822

proclamation mis-statement of value of property in 822

sale before expiration of period prescribed by O 21, r 69 & 70

sale-certificate, cured by, 812

Matter—

affecting damages not pleaded in 640, 647

argumentative, in affidavits and in 414, 415, 416, 417, 418, 419

directly and substantially to issue a finding as to *res judicata* in 414

directly and substantially to issue a finding as to *res judicata* in 414

Memorandum of appeal—See Appeal

- contents and accompaniments of, 1070 [O 41, r 1 (2)]
- cross objection to be in the form of, 1097, 1094 [O 41, r. 22 (2)]
- defective vakalatnams, 1070.
- grounds of objections not set forth in, 1073 [O 41, r. 2]
- irregularity in orders may be made a ground of objection in, 317 [s 103 (1)]
- rejection or return of, whether appealable, 1074, 1075
- procedure on, 567

Mesne profits—

- appeal, and 678, 679
- attachment before determination of, 731 [O 21, r 42]
- attachment of right to sue for mesne profits, 222
- burden of proofs as to, 678.
- claim for, may be joined with suit for recovery of land 499 [O 2, r 4]
- commission to ascertain 917 [O 26, r 9]
- court-sale, right of purchaser at, to mesne profits, 242
- decree for possession and 673 [O 20, r 12]
- payment of, is a decree for payment of money, 260
- definition of, 14 [s 2 (12)], 673
- execution mesne profits subsequent to date of suit and jurisdiction in, 157 [Rule 4]
- inquiry into whether question in execution, 674
- interest on mesne profits how calculated, 677
- limitation, and, 192, 678
- plaint, statement of approximate amount in, 556 [O 7 r 2]
- Privy Council, how for mesne profits affect amount in dispute on appeal to, 337, 338
- purchaser *pendente lite*, how far liable for, 676
- reversal of decree, order for payment of mesne profits on 412 [s 144 (1)]
- restitution of, on reversal or variation of decree, 414 [Case 3]
- Small Cause Court, how far suit for mesne profits cognizable by, 341
- suit for possession, whether bars subsequent suit for, 486

Military men—923, 926 [O 28]

- authority to sue or defend, how given, 923 [O 28 r 1 (2)]
- commanding officer, meaning of, 926 [O 28, r 1 Explan]
- officers or soldiers who cannot obtain leave and authority, 923 [O 28, r 1 (1)]
- service on person authorized to sue or defend 926 [O 28 r 3]
- on soldiers, 522 [O 3 r 28]
- stipends and gratuities allowed by Government to, attachment of, 215 [s 60 (g)] 223
- suits by or against, 923, 926 [O 28]

Minor—941 962 [O 32] See Guardian *ad Litem* Next friend

- adjustment of decree by guardian without Court sanction, 701
- adult, sued as 942
- affidavit of documents by next friend or guardian, 622 629 [O 11, r 23]
- agreement by next friend not to appeal, how far binding on minor, 320
- attachment, minor partner and, 761 [O 21, r 30 (1)], 764
- bond, joint, by minor and adult, 937.
- Chartered High Courts, jurisdiction of, as to [Chartered, cl 17], 1338
- compromise by next friend or guardian, 932 [O 32, r 7], 933, 934
- of execution proceedings, 933
- of suit by adult male members of a joint Hindu family, 937.
- under authority of Court of Wards, 937.
- misapprehension of material fact, 934
- when deemed to be beneficial to minor, 933, 934

Minor—*contd.*

- consent of next-friend given on behalf of, 428 [s. 147.]
- co-plaintiff, 960 [O. 32, r. 13].
- decree for minor in suit instituted by him without a next-friend, effect of, 944.
- definition of, 941.
- election by minor plaintiff on attaining majority, 959, 960 [O. 32, r. 12].
- estopped from pleading minority, when, 942.
- execution of decree, time limit for, and minority, 195, 196.
- fraud of next-friend or guardian *ad litem*, decree against minor obtained by, 947.
- fresh suit, institution of, when suit dismissed for non-appearance, 591.
- guardian *ad litem*—*See* Guardian *ad litem*.
- interrogatories, affidavit in answer to, by next-friend or guardian of, 611.
- leave of Court for compromise of suit by or against minor, 952 [O. 32, r. 7], 953.
- to receive property under a decree on behalf of, 951 [O. 32, r. 6]
- limitation, appeal after expiry of period of, 958
- major, suit against, treating him as, 942.
- suings as minor, 942.
- married women as guardian *ad litem*, 918.
- minority, question of, in dispute, 942
- next-friend—*See* next-friend.
- notice of application for appointment of guardian *ad litem*, 944 [O. 32, r. 3 (4)].
 - to have plaint taken off the file where suit instituted without next-friend, 943 [O. 32, r. 2 (2)]
 - to next-friend, when minor elects to proceed with suit in his own name 960 [O. 32, r. 12, (5)]
- objection to authority of next-friend, 941
- officer of Court as guardian *ad litem*, 918 [O. 32, r. 4 (1)]
- order made in suit in which a minor is concerned when discharged, 931 [O. 32, r. 5 (2)]
- partner, and attachment, 761 [O. 21, r. 50 (1)]. 764.
- pauper, 964
- pleader, liability of, for costs in suit without next friend, 943 [O. 32, r. 2 (1)], 944
- plaint to state fact of minority, 555 [O. 7, r. (d)]
- Princes and Chiefs, provisions relating to minority do not apply to, 962 [O. 32, r. 10]
- probate proceedings and minority of party interested, 947
- property, receipt of, on behalf of minor under a decree, 931 [O. 32, r. 6]
- representation of, by next friend or guardian for suit, 931 [O. 32, r. 5]
- repudiation of suit by minor co plaintiff on attaining majority 960 [O. 32, r. 12]
- res judicata*, decree against minor and, 70
- saving of local law relating to suits by or against, 963 [O. 32, r. 10]
- service of summons on guardian *ad litem*, 917
- stay of proceedings on retirement, removed or it 4th of 1934 Act 1934 [O. 32, r. 10]
- suit against or on behalf of an alleged minor who took to take suit with a
 - by next-friend to recover portion of a share 943 [O. 32, r. 10]
 - unreasonable or improper, 960 [O. 32, r. 11]
 - when instituted without next friend proceeds 944 [O. 32, r. 2]
- title of suit by or against, 941
 - when minor elects to proceed with suit in his own name 963 [O. 32, r. 12 (5)]
- withdrawal of suit by next friend, effect of 946

Miscellaneous proceedings

- application of Code to, 404 [s. 144]
- procedure in regard to suits applicable to certain proceedings, 411

Misjoinder—See Joinder

non joinder included in, for purposes of appeal, 330

of parties—

appeal, no ground for reversing decree in, 329 [s 99], 470

dismissal of suit for misjoinder of parties, and *res judicata*, 79

effect of, 469

objection as to, when to be raised, 470 [O 1, r 13]

relief ancillary, and, 455

suit not to be defeated by reason of, 467 [O 1, r 9]

of plaintiffs—446 [O 1, r 1]

and causes of action, 447, 494

what is, 446

of defendants—452, 453 [O 1, r 3], 446

and causes of action, 447, 495

multifariousness, 495, 496

what is, 446, 453

of causes of action—

appeal, no ground for reversing decree in, 329 [s 99] 504

in suits by or against executors, administrators, or heirs, 502 [O 2, r 5]

for recovery of immovable property, 499, 500 [O 2, r 4]

misjoinder of causes of action, 447

of defendants and causes of action, 447, 495, 496

of plaintiffs and causes of action, 447, 493

multifariousness, 447, 497

objection as to, when to be raised, 504 [O 2, r 7], 501, 502

procedure in cases of, and plaintiffs, 494

and defendants, 497

separate trials of causes of action, 504 [O 2, r 6]

Misrepresentation—

particulars of, must be stated in pleadings, 530 [O 6 r 4], 531

Mistake—See Defect or Error

in calculating the amount to be deposited under O 21, r 89, p 815

in instituting suit in name of wrong plaintiff, 469 [O 1 r 10 (1)]

in judgments, decrees and orders, and amendment, 438 [s 152]

of law, and *res judicata*, 58 59

review, mistake apparent on face of record and 1142, 1143 [O 47, r 1 (1)]

Money—

assets, rateable distribution of, and decree for payment of, 255 [s 73]

attachment, liable to, 214, 215 [s 60 (1)]

of decree for payment of money, 767 768 [O 21, r 53]

cross claims in suits for payment of and execution 727 [O 21, r 19]

cross decrees in suits for payment of, and execution, 724 [O 21, r 18]

execution, and cross decrees in suit for payment of, 724 [O 21, r 18]

immediate in case of money decree, 705 [O 21, r 11 (1)]

instalments, decree for payment of money by, 671 [O 20, r 11], 672

interest, decree for payment of money and, 137 [s 34]

minor, receipt of money by next friend or guardian under a decree, 951 [O 32, r 6]

mode of executing decrees for payment of, 736 [O 21, r 30]

paying money under a decree, 60 [O 21, r 1]

money payable under a decree, what is, 691

raised by judgment debtor on his property, 802 [O 21, r 83, (2), proviso]

Money—*contd*

- notice, issue of, before arrest in execution of money decree, 746, 747 [O 21, r. 37].
- payment out of Court of money payable under decree, 691, 692 [O 21, r. 2]
- plaint in suits for recovery of money, 556 [O 7, r. 2]
- Privy Council, money payable under order of, how calculated, 1135 [O 45, r. 15 (3)]
- realization of an attached money decree, 770
- scheme for liquidation of decree for payment of money, 1300, 1301 [Sch III, para. 7]
- security for costs, in suit for money by female plaintiff, 908 [O 25 r. 1 (3)]
- set off in suit for recovery of, 575
- surety for payment of money under order of Court, 422 [s. 422 (c)] 424
- transfer of money decree, and execution, 713 [O 21, r. 16]
 - to one of several judgment debtors and execution, 718, 719
- transferee of money decree from mortgagee, rights of, 1023
- value of property to be attached in case of money decree, 722 [O 21, r. 17 proviso]

Mortgage—

- account against mortgagor, 990
- accretion to mortgage property, whether to be determined in execution proceed-
ings 171
- appeal, effect of, on time fixed for payment, 995
 - from order refusing to extend time for payment in foreclosure suit, 992
 - redemption suit, 1011
 - suit for sale, 1000
- assignment of mortgagee's interest after preliminary, but before final decree, 878
[Case 3]
- attachment, continuance of, subject to mortgage, 782 [O 21 r. 62]
 - equity of redemption to be attached like immovable property, 772
 - - - and 783

21, r. 53] 770

- chattels, mortgage of, 992
- charge, provisions respecting sale and redemption apply to 1023 [O 34 r. 15]
- costs against puisne mortgagee, 1008
 - of mortgagee subsequent to decree 1014 [O 34, r. 10]
- cross claims and cross decrees in suits on mortgage 728 [O 21, r. 20]
- dampnat rule of and interest claimed under a mortgage 140 141
 - where mortgagee in possession 141
- Deccan Agriculturists Relief Act and splitting of remedies by mortgagor 491

34 r. 5]

- redemption 1011, 1012 [O 34, r. 8]
- for balance due on mortgage 1004 [O 34 r. 6]
- where nothing found due to mortgagee 1014 [O 34 r. 9]
- effect of decree in foreclosure suit 993 [O 34 r. 3].
- equity of redemption to be attached like immovable property, 772
 - persons interested in as parties to suit 975
- estoppel of mortgagor as to receipt of consideration 991
- foreclosure decree discharge of liabilities on paying of 993 [O 34 r. 3 (2)].
- extending time for payment 995 [O 34 r. 2 (2)].
- final 993 [O 34 r. 3]

Mortgage—*contd*

- foreclosure preliminary, 987, 988 [O 34, r 2]
 - when may be passed in suit for redemption, 1012 [O 34, r 8 (3)].
- Hindoo family property, mortgage of, and parties, 985
- injunction restraining mortgagor from receiving income of mortgage property, 1004
- intangible property, mortgage of, 992
- interest in suit on mortgage, 1015, 1016 [O 34, r 11]
- interest subsequent to date fixed for payment, 1015, 1016 [O 34, r 11 (b)].
- limitation, for application for personal decree, 1005
- Mahomedan, co heirs and suits relating to, 985
- mortgagee, in possession, account against, 991.
- mortgage security, persons interested in as parties to suit, 977 [O 34, r 1], 978
- movables, mortgage of, 992
- non joinder of parties in suits on mortgage, 981, 982
- objection by third party to sale of mortgaged property under mortgage decree, 777
- parties, to suits on mortgage, 977 [O 34, r 1]
 - joint Hindu family, 985
 - Mahomedan co heirs, 985
 - Official Assignee*, 980
 - prior mortgagee, 977 [O 34, r 1, Expln.]
 - pursue mortgagee, 977 [O 34, r 1, Expln.]
 - persons claiming by paramount title, 979
 - to suits
 - by mortgagee for personal decree, 978
 - by sub mortgagee, 981
 - for foreclosure, redemption or sale, 980
- personal decree against mortgagor for balance due after sale, 1004 [O 34, r 6]
 - limitation for, 1007
 - not to be passed until after sale, 1005
 - whether, can be passed against transferee from mortgagor, 1007
- persons having interest in mortgage security or right of redemption, 978, 979
- property, accession to mortgaged, whether determined in execution proceedings, 171
- purchaser's rights, where property bought subject to mortgage, 782
 - where mere notice of mortgage given in proclamation 782
 - where purchase by one of several joint decree holders, 248
- realization of attached mortgage decree, 770
- receiver in suits on mortgage, 1061
- redemption suit, decree in—
 - final 1011
 - preliminary, 1008
- res judicata, in suits on mortgage, 56 58
- sale, application of proceeds of, 1018, 1019 [O 34, r 13]
 - decree in suit for—
 - final, 1000 [O 34, r 5]
 - preliminary, 977 [O 34, r 4]
- sale of property free from prior mortgage, 1018 [O 34, r 12].
- second mortgagee, non joinder of, 982
- specialty debt, is, 756
- sub-mortgagee, 981, 992
- successive purchasers at sales in execution of mortgage decrees, 241
- suit by mortgages and splitting of remedies, 491
 - by subsequent mortgagee for balance realized by sale under prior mortgage, 269

Mortgage—*contd.*

- suit for interest due on a mortgage, when, bars subsequent suit for principal, 486, 487
- for sale, when necessary, 1019 [O 34, r 14]
- what passes to purchaser of mortgaged property under a mortgage decree, 840

Movable property—

- attachment, liable to, 214 [s. 60 (1)].
- attachment of, in possession judgment debtor, 751 [O 21, r 47]
 - not in his possession, 709 [O 21, r. 12], 754 [O 21, r 46]
- attachment of, of share of judgment-debtor in movable property, 758 [O 21, r 47]
 - under, and place of suing, 103 [s 16 (f)]
- decree for delivery of, to state amount to be paid in alternative, 671 [O 20, r 10]
 - partition of, 685 [O 20, r 18 (2)]
 - specific movables, and execution, 736 [O 21, r 31]
- delivery of, order for, 1055 [O 39, r 10]
- deposit in Court of, order for, 1055 [O 39, r 10]
- distrain, under, and place of suing, 103 [s 16 (f)]
- execution, decree for specific movables, and, 736 [O 21, r 31]

- joinder of claims for recovery both of movable and immovable property, 501
- minor, receipt of movable property on behalf of, 951 [O 32, r 6]
- partition of, decree for, 685 [O 20, r 18 (2)]
- rent accrued due is, 105
- rent to accrue due is immovable property, 105
- sale of, in execution, 803 807 [O 21, rr 74 81] See Sale
 - where subject to speedy decay 751 [O 21, r 43]
- seizure of, in dwelling house, 227 [s 62]
- suits for partition of property, partly outside jurisdiction, 1342

Multifariousness—

- amendment of plaint when plaint defective for, 497
- appeal, no ground for reversing decree in, 379 [s 99], 497
- causes of action arising out of same transaction, and, 495
- procedure in case of 497
- res judicata dismissal of suit for multifariousness and, 79
- suits held to be multifarious, 495, 496
 - not multifarious, 497, 498
- what is, 447, 495

Munsif's Court—

- jurisdiction of, 100

Native State—See Chiefs (ruling) and Princes

- British Indian Court cannot restrain party from proceeding with suit in a, 1018
- execution of decree of, in British India, 163 [s 44]
 - when British Courts may refuse, 93, 94
- execution of decree passed by British Courts in, 164 [s. 43]
 - limitation for, 165
- judgment of Court of Native State, suit upon, 93
- subject of Native State, suit against, in British Indian Court 123

Negligence—

- meaning and pleading of, 525
- particulars of when to be stated in pleadings, 531
- receiver, loss occasioned by gross negligence of, 1065 1069 (O 40, r 3 (d)).

Negotiable instrument—*See* Bill of exchange : Hundi • Promissory note.

definition of, 1031

execution of decree for endorsement of, 741 [O 21, r 34]

lost, suit on, 568 [O 7, r 16]

place of suing, in suit on, 120

sale of, in execution, 804 [O 21, r 76]

summary suit on—*See* Summary suit

transfer of, in execution, 806 [O 21, r 80]

Newspaper—

whether proprietor of, can be sued in name of the newspaper, 939

Next Friend—*See* Minor Guardian *ad litem*

abandonment of issue by, whether amounts to compromise, 955

agreement not to appeal, how far binding on minor, 320

appointment of new, application for, 957 [O 32, r 8 (2)]

compromise by, 952 [O 32, r 7]

consent of, on behalf of persons under disability, 428 [s 147]

costs, liability of next friend for, 941

defendant cannot act as 946 [O 32, r 4 (1)]

duty, where next friend does not do his, 958

minor, decree against, by fraud of next friend, 947

decree for, in suit instituted by him without next friend 944

plaintiff, and dismissal of suit for non appearance of next-friend, 591.

representation of, by next friend, 951 [O 32, r 5]

to sue by next friend, 941 [O 32, r 1]

when interest of next friend adverse to that of, 957

when may sue without next friend, 941

non appearance of, 958

notice of application for taking plaint off file in suit without, 943 [O 32, r 2 (2)]

to, when minor elects to proceed with suit in his own name, 960 [O 32, r 12 (5)]

object of having next friend, 941

objection to authority of, 941

pleader, liability of, for costs, in suit for minor without, 943 [O 32, r 2 (1)], 944

receipt by, of property under a decree, 951 [O 32, r 6]

removal of, 957, 958 [O 32, r 9]

retirement of, 957 [O 32, r 8]

security for costs already incurred, retiring next friend to give, 957 [O 32, r 8 (1)]

when next friend required to give, 951 [O 32, r 6 (2)]

stay of proceedings on retirement, removal, or death of, 953 [O 32, r 10 (1)]

suit instituted without next friend, procedure where, 943 [O 32, r 2]

who may act as, 948 [O 32, r 4]

withdrawal from compromise by, before leave of Court is applied for, 953

withdrawal of suit by, 956

Non-appearance—*See* Appearance

Non joinder—*See* Joinder.

cross objections, dismissal of appeal for non joinder of party and, 1096

effect of non joinder of parties, 467, 468

jurisdiction, non joinder of necessary parties affects, 330.

Non-joinder—*contd.*

misjoinder includes, for purposes of appeal, 330
 mortgage suit, of parties in, 981 983
 objection as to, when to be taken, 479 [O 1, r 13]
 of parties, 447
 suit not to be defeated by reason of, 467 [O 1, r 9]

Notice—See Notice of suit

adjourned hearing of, to be given to defendant, 585 [O 9, r 6 (1) (c)]
 admission of opponent's case, of, 630 [O 12, r 1]
 amendment of plaint, and notice under s 80, p 279
 appellate Court to give to lower Court, when, 1087 [O 41, r 13 (1)]
 application of, for order for detention, preservation, or inspection of subject matter
 of suit, 1034 [O 39, r 8]
 arbitration, of application to file an agreement to refer to, 1283 [Sch II, para 17 (3)]
 arbitrator, to appoint new, 1264 [Sch II, para 5]
 arrest, issue of notice before, 746 [O 21, r 37]
 award made under an order of reference, of the filing of, 1268 [Sch II, para 10]
 on reference without intervention of Court, for filing, 1289 [Sch II,
 para 20]
 cause of action, notice as part of, and pleading, 539 [O 6, r 11]
 Collector, by, to decree holder in certain cases, 1298 [Sch III, para 3]
 Court, when property sought to be attached is in custody of, 765 [O 21, r 52]
 decree, notice to set aside, 606 [O 9, r 14]
 notice, to attach, 768 [O 21, r 53 (1) (b)]
 decree holder, to, before final order for stay of execution, 1079
 for recording payment to him out of Court, 692 [O 21, r 2 (2)]
 documents to admit, 136 [s 30 (a)], 630 [O 12, r 2]
 form of, 630 [O 12, r 3]
 to produce, 635 [O 12, r 8]
 for inspection, 624 [O 11, r 15], 625 [O 11, r 16]
 execution against legal representative, 728 [O 21, r 22 (1) (b)]
 by transferee of decree, 713 [O 21, r 16], 714
 more than one year after date of decree, 728 [O 21, r 22 (1) (a)]
 facts, to admit, 631 [O 12, r 4]
 form of, 631 [O 12, r 5]
 firm, notice to accompany summons in suit against, 934 [O 30, r 5]
 government, devolution of interest upon, pending suit, and, 275
 guardian *ad litem*, of application for appointment of, 944 [O 32, r 3 (4)]
 injunction, to opposite party before granting, 1053 [O 39, r 3]
 whether necessary where suit against public officer is one for, 78
 official assignee is one for, 279
 judgment-debtor, to prohibiting him from transferring his share in movables,
 758 [O 21, r 47]
 legal representative, notice before executing decree against, 728 [O 21, r 22]
 next friend, of application to have plaint taken off file in suit without, 913 [O 32,
 r 2 (2)]
 to, when minor elects to proceed with suit, 980 [O 32, r 12 (5)]
 notices to be in writing, 411 [s 142]
 pauperism, notice to take evidence of, 966 [O 31, r 6]
 payment into Court, of, 966 [O 21, r 2]
 pleading, allegation of notice in, 573, 580 [O 6, r 11]
 public officer, of suit against, 274 [s 80] 270, 277

Notice—*contd*

- purda lady, to, to withdraw at seizure of property in a dwelling house, 228 [s 62(3)]
- review, of application for, to opposite party, 1151 [O 47, r 4 (2) (a)]
- Secretary of State, of suit against, 274 [s 80] 275
- service, of, 1156 [O 48, r 2]
- sufficiency of, 275
- suit against Administrator General, and, 280
 - Official Trustee, and, 280
 - Official Assignee, and, 279
 - Manager under Bengal Tenancy Act, and 280
- for injunction and necessity of, 278
- on contracts and torts, and, 277
- surety, to, for enforcement of his liability, 422 [s 145, proviso], 426
- transfer of suit without, 132
- umpire, to appoint new, 1265 [Sch II, para 5]
- waiver of, by Secretary of State, 275

Notice of suit—

- against Administrator General 280
 - Cantonment Committee, 279
 - Collector, 270
 - Manager under Bengal Tenancy Act, 280
 - Municipal Council, 279
 - Official Assignee, 279
 - Official Trustee, 280
 - Public officer 274 [s 80] 276, 277
 - Receiver, 280
 - Secretary of State in Council 274 [s 80] 275, 276
- for an injunction, 278
- limitation, period of, notice excluded 280
- on contract or tort, 277
- necessary although notice given under s 77, Railways Act, 20, p 276
- s 80 applies to declaratory suits 278
- s 80 does not apply to application under Sch II, para 17, 279
- waiver of, by Secretary of State, 275

Nuisance—

- suits relating to public nuisance, 289 [s 91] *See* Public Nuisance

Oath—

- agreement by next friend of minor to be bound by under the Indian Oaths Act, 955,
- oath on affidavits by whom to be administered, 408 [s 139]

Obiter dicta—

- and res judicata 78

Objection—

- attachment, objection to 775, 776 [O 21, r 58]
- cross-objections by respondent, 1093, 1094 [O 41, r 22] *See* Cross-objections
- documents, grounds of objection to production of, 618 620

Objection—*could*

- joinder of claims under O 2, r 4, objection as to, 501
- jurisdiction, objection as to, when to be taken, 123 [s 21] 127
- misjoinder or non joinder of parties as to, when to be taken, 470 [O 1, r 13]
- particulars, objections to application for, 535

Office—

- religious, suits for, 27 29

Officer—*See* Public Officer Officer of Court

- arrest, judicial officer when exempt from, 403 [s 135 (1)]
- Chartered High Court, appointment of officers of, 1334, 1335 [Charter, cl 8]

Officer of Court—

- appointment of, 1334, 1335 [Charter, cl 8]
- C
- delegation to, of judicial, quasi judicial, and non official duties, 398 [s 128 (v)]
- execution of documents by, on failure of judgment debtor, 741 [O 21, r 34]
- guardian *ad litem*, Court may appoint its officer as, 948 [O 32, r 4 (4)]
- receiver is an officer of Court, 1057
- registration of documents by, 742 [O 21, r 34 (6)]
- registry by, of appeal on admission, 1082 [O 41, r 9]

Official Assignee—

- attaching creditor has no priority over, 238
- attachment after judgment, effect of vesting order on, 238
 - before judgment, effect of vesting order on, 1042
- insolvency of defendant pending suit, and joinder of, 877
- insolvent judgment debtor, whether Official Assignee represents, 176 [Case 7]
- notice to, in suit for injunction, 279
- party, whether necessary, to suit against insolvent, 474, 877
- plaintiff insolvency of pending suit, 871 [O 22, r 8 (2)]
- security for costs by, on plaintiff's insolvency, 871 [O 22, r 8]

Official Trustee—

- suit against and notice under s 80, p 280

Omission—*See* Irregularity Material irregularity in conducting sale

- to attached property before sale, 824
 - file written statement 573
 - frame, and try issues, by lower Court, 1104 [O 41, r 25]
 - plead a material fact, 526
 - sue in respect of a portion of a claim, 480 [O 2, r 2 (2)]
 - sue for one of several reliefs, 480 [O 2, r 2 (3)]
 - sue for portions of arrears of rent, 480 [O 2, r 2, III]

Onus—

- burden of proving some issues lies on the other party where 660 [O 18, r 3].
- party need not plead any fact as to which onus lies on other side, 519 [O 6, r 13].

Order—*See* Interlocutory Orders.

- affidavit of documents, for, 616, 617 [O 11 r 12].
- amendment of, 438 [s 152]
- appealable orders 11, 344 [s 101], 1119 [O 43 r 1].
- appeal from orders procedure in, 351 [s 105], 1121 [O 43 r 2].
- commission, order for issue of, 913 [O 26 r 2].

Order—*contd*

- decree, distinguished from, 5, 6
- definition of, 15 [s 2 (14)]
- dismissal for default, order for, is not a decree, 5 [s 2 (2) (b)]
 - of appeal for default, order for, and second appeal, 339
- distinguished from decree, 6, 7
- disposing defendant's claim to set off, and appeal, 581
- error in order may be ground of objection in appeal from final decree, 347 [s. 105].
- execution of orders, provisions relating to, 151 [s. 36]
- inherent power of Court to amend orders, 439, 440
- interlocutory—*See* Interlocutory Orders
- judgments under cl 15 of the Charter and appealable, what orders are, 1354, 1355
- memorandum of appeal, order returning, 11
- non appealable, instances of, 12
- orders to be in writing 411 [s 142]
- order under s 144 (restitution) is a decree, 5 [s 2 (2)], 11, 421
 - s 47 (execution proceedings) is a decree, 5 [s 2 (2)]
- Political Agent, order of, deposing high priest from his *gad*, 92
- Privy Council, what amounts to a "final order" to entitle party to appeal to, 352, 353
- receiver, order appointing or refusing to appoint, and appeal, 353
- rejecting plaint deemed to be a decree 5-10
- res judicata, interlocutory order and, 86
- review, order refusing leave to sue as pauper and, 1148
 - whether order granting leave to appeal to Privy Council is open to, 368
- revision, order made on application for leave to sue as pauper and, 376
 - order, refusing issue of commission to examine witness and, 915
 - order sanctioning or refusing sanction to prosecute and, 391
- service of, 1156 [O 48, r 2]
- transfer of suit, order for, without notice, 132

Particulars—530 535 [O 6, rr 4, 5]

- amendment of, 535
- application for, 533
- breach of trust, in case of, 530 [O 6, r 4] 531
- defence of, 532 533
- delivery of further particulars, 535
- discovery before particulars, 533 534
- fraud etc, in case of, 530 [O 6, r 4], 531
- further and better, when required, 535 [O 6, r 5]
- libel suit and discovery before particulars, 534
- material facts only may be ordered, of, 535
- misrepresentation, in case of, 530 [O 6, r 4] 531
- non compliance, penalty for, 535

533

Parties—446 479 [O 1] *See* Plaintiff Defendant Cause of Action

- adding of, 469 [O 1, r 10]
 - improper, 475
 - in second appeal, 1092
 - respondent, 1091 [O 41, r 20].
- adjourned hearing, procedure where parties fail to appear at, 655 [O 17, r 2 656]

Order—*contd*

- decree, distinguished from, 5, 6
- definition of, 15 [s 2 (14)]
- dismissal for default, order for, is not a decree, 6 [s 2 (2) (b)]
 - of appeal for default, order for, and second appeal, 339
- distinguished from decree, 6, 7
- disposing defendant's claim to set off, and appeal, 581
- error in order may be ground of objection in appeal from final decree, 347 [s 105]
- execution of orders, provisions relating to, 151 [s 36]
- inherent power of Court to amend orders, 439, 440
- interlocutory—*See* Interlocutory Orders.
- judgments under cl 15 of the Charter and appealable, what orders are, 1354, 1355
- memorandum of appeal, order returning, 11
- non appealable, instances of, 12
- orders to be in writing, 411 [s 142]
- order under s 144 (restitution) is a decree, 5 [s 2 (2)], 11, 421
 - s 47 (execution proceedings) is a decree, 5 [s 2 (2)]
- Political Agent, order of, deposing high priest from his *gadi*, 92
- Privy Council, what amounts to a "final order" to entitle party to appeal to, 352, 353
- receiver, order appointing or refusing to appoint, and appeal, 353
- rejecting plaint deemed to be a decree, 5-10
- res judicata, interlocutory order and, 86
- review, order refusing leave to sue as pauper and, 1148
 - whether order granting leave to appeal to Privy Council is open to, 368
- revision, order made on application for leave to sue as pauper and, 376
 - order, refusing issue of commission to examine witness and, 915
 - order sanctioning or refusing sanction to prosecute and, 391
- service of, 1156 [O 48, r 2]
- transfer of suit, order for, without notice, 132

Particulars—530 535 [O 6, rr 4, 5]

- amendment of, 535
- application for, 533
- breach of trust, in case of, 530 [O 6, r 4], 531
- defence of, 532 533
- delivery of further particulars, 535
- discovery before particulars 533 534
- fraud, etc, in case of, 530 [O 6, r 4] 531
- further and better, when required*, 533 [O 6, r 5]
- libel suit and discovery before particulars, 534
- material facts only may be ordered, of, 535
- misrepresentation, in case of, 530 [O 6, r 4] 531
- non compliance, penalty for, 535
- object of, in pleadings, 530
- objections to delivery of, 535
- when to be given, 530 [O 6, r 4], 531 533

Parties—446 470 [O 1] *See* Plaintiff Defendant Cause of Action.

- adding of, 469 [O 1, r 10]
 - improper, 475
 - in second appeal, 1092
 - respondent, 1091 [O 41, r 20]
- adjourned hearing, procedure where parties fail to appear at, 655 [O 17, r 2]

Parties—*contd*

administrators, joinder of, 910 [O 31, r 2]
agreement of, proceedings on, 1027, 1028 [O 36]
appeal who may, 321, 322
appearance, 589, 590
appellants, joinder of, 323
arrest, exemption from, while going to and returning from Court, 403 [s 135]
assignment of interest pending suit, and substitution of parties, 879
beneficiaries, 939 [O 31, r 1]
bills of exchange, parties liable on, 460.
cause of action, parties cannot be added so as to introduce new, 472, 473
charity suit, whether alienage from trustee necessary party to, 307, 308
commissioner, appearance of parties before, 922 [O 26, r 18 (1)]
 examination of parties by, 921 [O 26, r 16 (a)]
common ground, and reversal of decree in appeal, 1075 [O 41, r 4]
consent on behalf of parties, under disability, 428 [s 147]
 " " " " " " " " "
ment

unnecessary parties as, 498
ejectment, suit, who may be joined as defendants in, 498
evidence, refusal of party to give, when required by Court, 654 [O 16, r 20]
examination of, by Court, at first hearing, 606, 607 [O 10]
 in order to frame issues, 640 [O 14, r 1 (5)]
execution, questions in, between parties to suits, 167 [s 47]
executors, joinder of, 940 [O 31, r 2]
foreclosure, suit for, and parties, 977 [O 34, r 1]
fraudulent transfer of property, parties to a suit relating to, 464
hearing, party appearing by pleader at, 589
inherent power of Court to add a party, 435
insolvent, Official Assignee whether necessary party to suit against, 474
insolvent plaintiff and continuance of suit by Official Assignee, 871 [O 22, r 8]
joinder of appellants, 323
joinder of plaintiff, 446 [O 1, r 1] See Joinder
 defendant, 452, 453 [O 1, r 3]
judgment debtor whether necessary party to suits regarding claims to attached
property, 784
legal representative of plaintiff, when to be brought on record, 851, 854 [O 22, r 3],
 defendant, when to be brought on record, 861 [O 22, r 4]
limitation, addition of parties and, 475, 476
 substitution of plaintiff and, 471
 suit by member of a joint Hindu family and, 477
 newly added defendant and, 470 [O 14, r 1 (5)]
marriage of female party, no abatement of suit by, 811 [O 33, r 3]
meaning of "parties to the suit" in s 47, p 104 [s 47, p 104]
misdescription of, effect of, 477,
misjoinder of parties—See Misjoinder
mortgage, parties to suits in, 977 [O 34, r 1]
mortgagor, parties to suit by mortgagee to get out his money, 978,
negotiable instrument, joinder of parties to suits in, 450 [O 1, r 6]
non joinder of parties—See Non joinder
numerous parties having same interest, how dealt with [O 1, r 8]
of section as to misjoinder suit in [O 1, r 1] as to be taken, 470 [O 1, r 5]

Parties—contd

Official Assignee whether necessary party to suits on mortgage, 980
oral examination of party or companion of party, 606 [O 10, r 2]
partition suit, parties to, 474
personal appearance of, when can or cannot be ordered, 512, 513 [O 5, rr 3, 4, 5]
plaint to be amended when defendant added as a party, 469 [O 1, r 10 (4)]
plaintiffs, who may be joined as, 446 [O 1, r 1] See Plaintiff
power of Court to strike out or add parties, 469 [O 1, r 10 (2)]
prior mortgagees, when necessary parties, 977 [O 34, r 1, Explan]
promisors, joinder of, 459 [O 1, r 6], 459
rateable distribution, suit to set aside order for, and necessary parties, 474
receiver for insolvent mortgagor or mortgagee, necessary party to mortgage suit, 980
redemption, parties to suit for, 977 [O 34, r 1]
reference, application by parties to suit for order of, 1258 [Sch II, para 1]
relators as parties to charity suits, 293, 294 [s 92]
to suits relating to public nuisance, 289 [s 91]
res judicata, dismissal of suit for misjoinder or non joinder of parties and, 79
parties not expressly named in former suit and, 66
same parties and, 62
respondents who have not filed cross objections or cross appeal, power of Court
to make order for or against, 1113 [O 41, r 33]
restitution by, 412 [s 144]
sale of mortgaged property, parties to suit for, 977 [O 34, r 1]
suits, questions between and execution proceedings, 173
subsequent, parties in, claiming under parties in former suit, 65
trustees, joinder of, 940 [O 31, r 2]
unnecessary, as defendants, 498
witnesses, rules as to, to apply to parties, 654 [O 16, r 21]

Partition—

suit for, is a suit for land within meaning of cl 12 of the Charter, 1341
of land of which a part only is within jurisdiction [Charter, cl 12], 1338
of movables and lands the lands being outside jurisdiction, 1338
[Charter, cl 12]

Partners—928 939 [O 30] See Firm

accounts on attachment of a partner's share, 759, 760 [O 21, r 49]
appeal from preliminary decree for dissolution of partnership, 684
appearance of, 935 [O 30 r 6]
under protest, 937 [O 30, r 8]
attachment partnership property when liable to, 759, 760 [O 21, r 49], 761, 762 [ib.
r 50],
of partner's share, 759, 760 [O 21, r 49]
before judgment in suits for partnership accounts, 1038

Partners—*contd*

- co-partners, suits between, 938 [O 30, r 9]
 - costs in partnership suits, 146
 - Court sale, property purchased at, by a partner with partnership money 248
 - disclosure of names of partners in defendant's firm, 928 [O 30, r 1 (s)] 931
 - in plaintiff's firm, 931 [O 30 r 2 (1)]
 - dissolution of partnership, decree in suit for, 654 [O 20, r 15]
 - suit in firm name after 930
 - documents, production of, in case of partners 623
 - execution in suits between co partners 938 [O 30, r 9]
 - of decree against a firm, 761, 762 [O 21, r 50]
 - of decree against a partner, 759, 760 [O 21, r 49]
 - firm name, partners may be sued in, 928 [O 30, r 1]
 - partners may sue in, 928 [O 30 r 1]
 - leave of Court, to execute decree in suits between co partners, 938 [O 30 r 9]
 - to execute decree against a partner personally, 761, 762 [O 21, r 50 (2)]
 - legal representative of deceased partner not necessary party, 934 [O 30, r 4]
 - manager not to appear though served unless he is a partner, 937 [O 30, r 7]
 - minor partner, and execution, 761, 763
 - liability of, 929 930
 - notice to accompany summons in suits against firm, 934 [O 30, r 5]
 - persons entitled to appear in suits against firms, 935, 936
 - served, when deemed to be served as partners, 934 [O 30, r 5]
 - place of suing and partnership, 121
 - receiver, in partnership suits, 1062 1063
 - on attachment of a partner's share, 759 [O 21, r 49 (2)]
 - Court can appoint, though there is arbitration clause in partnership deed, 1062
 - service of summons on firm, how effected, 932 [O 30, r 3]
 - firm which has been dissolved, 932 [O 30, r 3, proviso]
 - manager, subsequent service on partner, 933
 - signature and verification of pleadings in suit by firm, 928 [O 30, r 1 (2)]
 - stay of suit on failure to disclose names of partners, 931 [O 30 r 2 (2)]
 - suits by or against individual partners, 931.
 - written statement of, in suit against a firm in firm name, 935
- Pauper**—[O 33, pp 966 977, O 44, pp 1122 1124]
- agreement, champertous by, 966 [O 33, r 5 (e)]
 - appeal from order on question between Government and party as to court-fees, 973, 974
 - refusing to make an order for payment of court fees, 973
 - rejecting application for leave to sue as a pauper, 968
 - to Privy Council by pauper, 1124
 - appeals, pauper, 1122 1124 [O 44]
 - when Court may admit, 1122 [O 44 r 1, proviso]
 - application for leave to sue as, 963 [O 33, r 2]
 - presentation of, 963 [O 33, r 3]
 - procedure on granting of, 971 [O 33, r 6]
 - subsequent, when not allowed, 976 [O 33, r 15]
 - application for leave to appeal as, 1122 [O 44, r 1]
 - rejection of, 1122 [O 44, r 1, proviso].
 - inquiry into pauperism, 1124 [O 44, r 2].
 - cause of action, when none shown in application, 963 [O 33, r 5 (d)]

Pauper—*contd*

- Collector, when copy of decrees to be sent to, 976 [O 33, r 14]
- commission, examination of applicant by, 966 [O 33, r 4 (2)]
- costs of application and inquiry into pauperism, 977 [O 33, r 16]
 - of successful defendant in a pauper suit, Court may award, 975
 - where pauper succeeds, 971, 972 [O 33, r 10]
 - where pauper partly succeeds and partly fails, 974
- court fees to be first charge on subject matter of suit, 971 972 [O 33, r 10]
 - when pauper fails, or is dispaupered 974 [O 33 r 11]
 - when pauper succeeds, 971, 972 [O 33, r 10]
- Crown's prerogative of precedence in respect of court fees, 973
- death of pauper applicant and abatement, 859
 - plaintiff and continuation of suit 963
- decree, refusal of leave to sue *in forma pauperis* not a, and not appealable, 7
- defendant, pauper, 435 964
- definition of, 962 [O 33, r 1, Explan]
- dismissal of pauper application for default, effect of, 977
- dispaupering, 971 [O 33, r 9]
- equity of redemption whether subject matter of suit, 963
- Government, charge of, for court fees, on subject matter of suit, 971 972 [O 33, r 10]
 - application by, for payment of court fees, 975 [O 33, r 12]
 - mode of realization of court fees by, 972
 - to be deemed a party, 976 [O 33 r 13]
- hearing of application for leave to sue as pauper, 968, 969 [O 33, r 7]
- inherent power of Court to allow a defence *in forma pauperis*, 435
- inquiry into pauperism of appellant, 1122 [O 44, r 2]
- legal representative of deceased pauper, suit by, 964
- limitation for leave to appeal as a pauper, 1124
 - where application converted into suit by payment of fees, 970
 - where application granted or refused, 969, 970
- married woman as, 964
- minor pauper, 964
- official liquidator of company and application to sue as, 964
- order allowing applicant to sue as cannot be questioned in appeal from decree, 969
- pardanishin* women application by, for leave to sue as, 965
- plaintiff may prosecute as pauper suit instituted in ordinary way, 964
- Privy Council appeal to, by pauper, 1124
 - security for costs in appeal to, by pauper, 1125
- recognised agent, application to sue *in forma pauperis* cannot be made by, 505
- refusal of application to sue as pauper, effect of, 976 [O 33, r 15]
- rejection of application for leave to sue as, 966 [O 33, r 5]
- review, order refusing leave to sue as pauper and 969, 1148
- revision of order rejecting application for leave to sue *in forma pauperis*, 968 970
- revision order made on application for leave to sue *in forma pauperis* and, 376
- security for costs in appeal to Privy Council by pauper, 1125
 - where leave granted to plaintiff to sue as 909, 910
 - whether pauper appellant can be called upon to furnish, 1084
- transfer of interest, by, in subject matter of proposed suit 966 [O 33, r 5 (e)], 968

Payment—*See* Payment into Court Payment out of Court.

decree conditional on, of dower, 47

to be specially pleaded in defence, 570 [O 8, r 2]

Payment into Court—905 907 [O 24]

costs where amount claimed deposited in Court, 906, 907 [O 24, r 4]

deposit by defendant in Court of amount in satisfaction of claim, 905 [O 24, r 1]

may be paid to plaintiff, 906 [O 24, r 2]

interest on deposit not allowed to plaintiff after notice, 906 [O 24, r 3]

money under decree, of, 690, 691 [O 21, r 1]

money held as trustee for another, of, 1055 [O 39, r 10]

money admitted to belong to another, of, 1055 [O 39, r 10]

notice of deposit to plaintiff, 906 [O 24, r 2]

procedure where plaintiff accepts deposit—in full or part satisfaction of his claim, 906 [O 24, r 4]

property admitted to belong to another, deposit in Court of, 1055 [O 39, r 10]

suit for debt or damages *together with* other relief, 905

Payment out of Court—

certified, to be, 692 [O 21, r 2 (2)]

joint decree, to one of several holders of, 711, 712

money payable under decree, of, 692 [O 21, r 2]

Pecuniary jurisdiction—*See* Valuation of Suits

of Courts, 21 [s 6]

Pending suit—

assignment, 878, 879

when a bar to trial of subsequently instituted suit, 33 [s 10]

Pension—

High Court judges, pension of, 1307 [Charter Act, s 6]

political, not attachable, 215 [s 60 (g)], 223

private, attachable, 223

Performance—

to be specially pleaded in defence, 570 [O 8, r 2]

Personally work for gain—

meaning of, 115

Place of suing—*See* Jurisdiction

acquiescence of defendant, and, 111 [S 20 (b)]

agency contract, and, 118

carries on business, 114

Chartered High Courts, suits cognizable by, and, 1338 [Charter, cl 12]

compensation for wrong to immovable property, suits for, 103 [s 16 (e)].

Person or movables, suits for, 110 [s. 19]

conjugal rights, restitution of, suits for, 121

contract as to, 36

contracts, suits on, 116 121 [s 20]

corporation, where suit against, 122

debtor, 119

Place of suing—*contd*

- effect of instituting suit in Court of wrong grade, 100, 101.
- maxim "debtor must find his creditor," and, 110
- foreclosure, suit for, 103 [s 16 (c)], 104
- fraud, suit to set aside decree obtained by, 122
 - to set aside sale in execution of decree obtained by, 122
- Government, suits against, 274
- grade, suits to be instituted in Court of lowest, when, 98 [s 15]
- immovable property, suits for recovery of, 103 [s 16 (a)] 104
- injunction to restrain sale in execution suit for, 122
- in personam*, suits, 107
- jurisdiction of different Courts, where land is situated within, 107 [s 17]
- land, suits for determination of any right to or interest in, 103 [s 16 (d)], 105
 - within meaning of cl 12 of the Charter, 1338 1342
- land situate within jurisdiction of different Courts, 107 [s 17]
- local limits of jurisdiction of Courts, where uncertain, 109 [s 18]
- movable property under attachment, suit relating to, 103 [s. 16], 106
- negotiable instruments, suit on, and 119
- non resident foreigners, suits against, 123
- partition, suit for, 103 [s 16 (b)], 104
- partnership suits and, 121
- place means place in British India, 98
- redemption, suits for, 103 [s 16 (c)] 104
- residence of defendant and, 111 [s 20] 112
- sale of mortgaged property, suit for, 103 [s 16 (c)], 104
- suits under cl 12 of the Charter, 1338
- temporary residence 113

Plaint—555 569 [O 7]

- alternative and inconsistent allegations in 529
 - relief, 561
- amended copy of, to be served on newly added defendant, 469 [O 1, r 10 (4)]
- amendment of, 544 554 [O 6, r 17] 544
 - when defective for multifariousness, 495, 496
- breach of trust, allegation of, in 530 [O 6, r 4] 531
- claiming more or less than what is due, 559
- company may authorise person to sign, 541
- concise statement, 562 [O 7, r 9 (1)]
- condition precedent, specification of, in, 535, 536 [O 6, r 6]
- copy of, to accompany summons, 512 [O 5, r 2]
- court fee and return of, 563
- documents, list of, to be annexed to 562 [O 7, r 9 (1)]
 - relied on, 568 [O 7, r 14 (2)]
 - inspection of, mentioned in *plaint*, 624, 625 [O 11, r 15]
 - not in possession of plaintiff, statement in *plaint* as to 568 [O 7, r 15]
 - not produced when *plaint* filed, inadmissibility of, 569 [O 7, r 18]
 - production of, on which plaintiff sues, 568 [O 7, r 14]
- evidentiary facts, not to be stated in, 528
- facts which law presumes in plaintiff's favour need not be stated in, 540 [O 6, r 13]
- failure to amend within times specified by Court, effect of, 554 [O 6, r 18]
- forms of, and their use, 529 [O 6, r 3] See *Forms of Plaints*
- fraud, allegations of, in, 530 531 [O 6, r 4]
 - plaint* cannot be amended by substituting another kind of fraud, 550
- fraudulent intention how to be pleaded in, 539 [O 6, r 10]

Plaint—*contd.*

- further or other relief need not be claimed, 559, 560 [O 7, r 7]
- general relief, need not be asked for, 559, 560 [O 7, r 7]
- immovable property, where suit is for, 556 [O 7, r 3]
- implied contract, allegation of, in, 540 [O 6, r 12]
- inconsistent allegations of facts, adding of, in plaint, 537 [O 6, r 7]
- interpleader suits, plaint in, 1024 [O 35, r 1]
- issue where case disclosed in evidence is different from that disclosed in plaint, 612
- knowledge, how to be pleaded, 539 [O 6, r 10].
- law, plaint not to state, 525
- leave to amend, where given, 544 546
- leave to amend where may be refused, 546 553
- liability, of defendant, plaint must disclose, 558 [O 7, r 5]
- limitation law, plaint must show grounds of exemption from, 558, 559 [O 7, r 6]
- malice, how to be pleaded, 539 [O 6, r 10]
- material facts only, plaint to contain, 524 [O 6, r 2]
- misconduct, allegation of, in, 531.
- misrepresentation allegation of, in, 530 [O 6, r 4]
- money suit, in, 556 [O 7, r. 2]
- negligence allegation of, in, 531
- negotiable instrument, suit on lost, 568 [O 7, r 16]
- new ground of claim in plaint raising, 537 [O 6, r. 7]
- notice, how to be pleaded, 539 [O. 6, r 11]
- omission to sign, 541.
- particulars to be contained in plaint, 555 [O. 7, r 1]
- presentation of, after office hours, 511.
- procedure on admitting plaint, 562 [O 7, r 9]
 - rejecting plaint, 567 [O. 7, r 12]
 - returning plaint, 562 [O. 7, r. 10 (2)].
- rejection of, 564, 565 [O. 7, r. 11]
 - appeal from order directing, 567.
 - may be at any stage of suit, 564.
 - where particulars of fraud not stated in plaint, 531.
 - where does not preclude presentation of fresh plaint, 567 [O. 7, r. 13]
- relief claimed, plaint must state specifically, 559 [O. 7, r. 7]
 - alternative, 561.
 - general relief need not be asked for, 559, 560 [O. 7, r. 7].
 - when found on separate grounds, 562 [O. 7, r. 6].
- representation, where verbal or in writing, must be stated in plaint, 531.
- representative, where plaintiff sues as, 556 [O. 7, r. 4]
- return of plaint, an appealable order, 563, 1119 [O. 43, r. 1, cl. (a)]
 - for presentation to proper Court, 563 [O. 7, r. 10 (1)]
- shop book, production of, 563 [O. 7, r. 17]
- signing of, 541 [O. 6, r. 14].
- signing and verifying in suit, by corporations, 526 [O. 29, r. 1]
 - by firm in firm name, 528 [O. 30, r. 1].
 - by Government, 525 [O. 27, r. 1]
- stamped, written on paper insufficiently, 565, 566.
- striking out unnecessary, amendments or stipulating matters in, 542 [O 6, r. 16]
- suits instituted by joint plaintiffs, 135 [s. 26], 510 [O 4, r. 1]
- undue influence, allegation of, in, 540, 541 [O 6, r. 4]
- verification of, 541 [O. 6, r. 14]
- wilful default, allegations of, in, 540 [O 6, r. 4]

Plaintiff—See Parties Plaintiff

- abandonment of part of claim by, 882, 883 [O 23, r 1]
- added, when, may, or may not be, 472, 473
- affidavit of documents when there are two or more plaintiffs, 622
- alternative claim, 452
- amendment of plaintiff—See Plaintiff
- appearance of one of several plaintiffs for others, 478 [O 1, r 12]
- appearance of plaintiff in person, when may be ordered, 512 [O 5, r 3]
- assignment by, of interest in suit, 876 [O 22, r 10]
- causes of action, several plaintiffs having separate, in one suit, 448 450
- claiming more or less than what is found due, 559
- club, who should be joined as plaintiffs in suit by, 463
- commission to a examine plaintiff 914
- co plaintiffs, *res judicata* between, 64
- consent of person added as plaintiff, 469 [O 1, r 10 (3)], 471 473
- consequence of non attendance of, when ordered to appear in person 595 [O 9, r 12]
- cost of postponement through not serving summons in due time, 585 [O 9, r 6 (2)]
- cost payable by plaintiff prior to his insolvency, 872
- death of—See Abatement
- dismissal of suit when plaintiff does not appear at the hearing*, 587 [O 9, r 8]
- fresh suit, decree against plaintiff by default bars, 588 [O 9, r 9]
- inherent power to enquire whether a plaintiff entitled to sue as an adult, 435
- insolvency of, when bars suit, 871 [O 22, r 8]
- interests different and joinder of, 450
- joinder of plaintiff, 446 [O 1, r 1]—See Joinder
- joint claim, 451
- judgment for one or more of the plaintiffs, 458 [O 1, r 4 (a)]
- legal representative of deceased when to be brought on record, 853, 854 [O 22, r 3 (1)]
- legatee, suit by, on behalf of himself and other legatees, 462
- limitation, substitution of plaintiff where suit brought in wrong name and, 471, 472
- limitation, addition of plaintiff and 475 477
- marriage of female, suit not abated by, 871 [O 22, r 7]
- misjoinder of, 446—See Misjoinder
- name, description and residence of, must be stated in plaint, 555 [O 7, r 1 (b)]
- non attendance of one of several, 594 [O 9, r 10]
- non joinder of, 447—See Non joinder
- numerous plaintiffs having same interest, 460 [O 1, r 8]
- omission to sue for all reliefs*, 480 [O 2, r 2 (3)] 489 491
- in respect of portion of a claim 480 [O 2, r 2 (3)]
- 538 (O 5, r 3) 607 (O 10, r 4 (1))
- remedies of, on *dismissal of suit*, 588
- representative character, suit brought in, 556 [O 7, r 4]
- right to begin, 659 [O 18, r 1]
- ' same interest,' 460 [O 1, r 8]
- security for costs, when may be required from plaintiff, 907, 908 [O 25, r 1]
- severally interested and joinder of, 451
- substitution of plaintiff, 469 [O 1, r 10 (1)]
- withdrawal of suit by, 882, 883 [O 23, r 1]

Plaintiff—*contd*

- worship, suit to assert right of, 464
- written statement, when plaintiff may file, 524
- wrong plaintiff, suit in name of, 469 [O 1, r 10 (1)]

Pleader—

- adjournment, application for and "appearance," 589, 590
- appearance of party by, 505 [O 3, r 1] 589, 590
- appointment of [O 3, r 4] 507, 508
 - to act, 508, 509
 - to plead, by a pleader appointed to act, 508, 509
- arrest, when exempt from, 403 [s 135 (2)]
- authority of
 - to bind client by admissions, 17
 - to compromise, 16
 - to refer to arbitration, 17
 - to withdraw suit, 17
 - determination of 509, 510
- costs liability for, in suit for minor without next friend, 943 [O 32 r 2 (1)], 944
- costs, lien for, 574 [O 8 r 6 (2)], 579
- definition of 15 [s 2 (15)]
- delegation of authority by, 509
- disciplinary jurisdiction over, 1336
- Government, for—*See* Government Pleader
- High Court judgeship, when pleader eligible for, 1306 [Charter Act, s 2]
- issues, power to abandon, 17
- law, abandoning point of, or omitting to argue 17
- leave of Court for discharge, of, 507 [O 3, r 4 (2)]
- pleadings when to be signed by, 541 [O 6, r 14]
- refusal or inability of, to answer questions relating to suit, 607 [O 10, r 4]
- service of process on, 510 [O 3, r 5]

Pleadings generally—523 555 [O 6] *See* Plaint Written Statement

- accounts, particulars of in, 532
- admissions made by mistake in, and amendment of, 545
 - by opponent should not be pleaded, 528
- agreement how pleaded, 532
- alternative and inconsistent allegations in, 529
- amending particulars, 535
- amendment of, 544 [O 6 r 17], 544 555
- application for particulars, 533
- ascertainment whether allegations in, are admitted or denied, 606 [O 10, r 1]
- breach of trust, particulars of, to be stated in, 530 [O 6, r 4]
- company may authorise person to sign plaint, 541
- condition precedent, when to be distinctly specified in, 535 [O 6, r 6]
- contract, denial of [O 6, r 8] 538
 - implied, how to be pleaded, 540 [O 6, r 12]
- costs, unnecessary matters in pleadings and 542
- damages, matters affecting 526, 527
- defamation, particulars of, 532
- defence, particulars of, 532, 533
- defendant to plead facts to show that he is not liable, 525, 526
- definition of, 523 [O 6, r 1]
- delay, mere, is no ground for refusing leave to amend, 534
- delivering further particulars, 535

Pleadings generally—*contd*

- departure in pleadings by new ground or inconsistent allegation, 537 [O 6, r 7], 537, 538
- discovery before particulars, 533, 534
- document, when effect only of, to be stated, 539 [O 6, r 9]
- donatio mortis causa* plaintiff claiming under a, 525, 526
- draft of, privileged from discovery and inspection, 619
- embarrassing pleadings, 542 [O 6, r 16], 543
- evidence, pleadings to state facts and not, 528
- "*facta probanda*" and "*facta probantia*," 528
- facts giving rise to a right or creating a duty, 525
 - not yet material to a case, 527
 - pleadings to state, and not law, 525, 526
 - presumed by law in plaintiff's favour need not be alleged, 540 [O 6, r 13]
 - upon which plaintiff relies as showing act complained of was wrongful, 525
- failure to amend within time fixed by Court, 534 [O 6, r 18]
- forms, of, and their use, 529 [O 6, r 3]
- fraud particulars of, to be stated in, 530 [O 6, r 4]
 - pleadings not to be amended by substituting another kind of, 550 552
 - right of principal to inspect agent's books before giving particulars of, 534
- fraudulent intention how to be pleaded [O 6, r 10], 539
- function of, 524
- fundamental rules of, 525
- general principles on which system of pleading in England is founded, 536
 - rules, relating to, 524, 525
- inconsistent allegations must be by amendment, 537 [O 6, r 7]
- infringement of trade mark particulars in case of, 530, 531
- inherent power of Court to strike out scandalous matter from, 542, 543
- inheritance, plaintiff claiming by, and, 526
- inspection of documents referred to in, 624 [O 11, r 15]
- issues must be inconsistent with 643
- judgment upon admission in, 631 [O 12, r 6]
- knowledge, how to be pleaded, 539 [O 6, r 10]
- malice, how to be pleaded 539 [O 6, r 10]
- material facts only, pleadings to state, 524 [O 6, r 2], 526
 - in a concise form, pleadings to state, 528
- meaning of, 523 [O 6, r 1]
- misconduct, particulars of, 531
- misrepresentation, particulars of, 530 [O 6, r 4]
- negligence how to be pleaded 531
 - particulars of, 531
- notice, how to be pleaded 539 [O 6, r 11]
- object of particulars in pleadings, 530, 531
- objection to application for particulars, 535
- omission by party to plead a material fact, 526
 - to sign pleadings, 541
 - to verify pleadings, 541
- onus, and facts which need not be pleaded, 540 [O 6, r 13]
- particulars, when necessary to be given in, 530 [O 6, r 4]
 - further and better statement of, 533 [O 6, r 5]
- pedigree, facts in, when to be set out in pleadings, 528
- power of Court to order whole pleading to be struck out, 542
- privilege from inspection, and draft pleadings, 619

Pleadings generally—*contd*

- rejection of plaint where particulars of fraud not stated in plaint, 531
- relief not founded on, 612
- representation, whether verbal or in writing, must be stated 531
- rules of, 524, 525
- scandalous matter in, 542 [O 6, r 16], 542, 543
- signing of, 541 [O 6, r 14]
- signing and verifying in suits by corporations 926 [O 29, r 1]
 - by firm in firm name, 928 [O 30 r 1]
 - by Government 923 [O 27, r 1]
- subsequent pleadings, when allowed 582 [O 8 r 9]
- time within which pleadings, should be amended 554 [O 6 r 18]
- title, facts showing plaintiff's, to be pleaded 525
- trade mark, infringement of, particulars in case of, 530, 531
- undue influence particulars of, 530 [O 6, r 4]
- unnecessary matter in, 542 [O 6 r 16]
- variance between pleading and proof, 642
- verification of, 541 [O 6, r 15]
- wagering contract, defence of, 538
- wilful default, particulars of, 530 [O 6, r 4]

Political Agent—

- foreign judgment, order of, deposing high priest from *gadi* is not, 92
- Prince, whether Political Agent can sue on behalf of, 233
- service of summons through, 521 [O 5, r 26]

Political questions—

- suit involving, 33

Possession (of immovable property)—

- actual or *lhas*, when to be given, 743
- decree for possession and for rents and mesne profits, 673 [O 20, r 12]
- effect of giving symbolical, where actual possession ought to be given, 743 746
- ex parte* order for delivery of, 848
- immediate delivery of, order for, of certain lands, 1055 [O 39, r 9]
- limitation, symbolical possession and 743 746
- suit for, by auction purchaser, 241, 242
- symbolical, when to be given, 743

Delivery of, to holder of decree for possession—

- application, fresh under O 21, r 97, pp 843 844
- actual, where decree is for exclusive possession, 742 [O 21, r 35 (1)]
- building, of, and breaking open of door, 742 [O 21, r 35 (3)]
- symbolical, where decree is for joint possession, 742 [O 21, r 35 (2)]
- where property is in tenant's occupation, 746 [O 21, r 36]

Delivery of, to purchaser in execution—

- actual, where property is in occupation of judgment-debtor, 842 [O 21, r 95]
- distinction between actual and symbolical possession, 743
- symbolical, where property is in tenant's occupation, 843 [O 21, r 96]

Dispossession—

- Collector, under order of, 847
- of person claiming to be in possession on his own account, 846, 847 [O 21, rr 100, 101]
- of transferee *pendente lite* from judgment-debtor, 848 [O 21, r 102]
- regular suit to establish right of possession, 848 [O 21, r 103]

Possession (of immovable property)—*contd***Resistance to delivery of—**

- decree holder, right of, to bring a regular suit, 844
- ex parte* order for delivery of possession, 848
- occasioned by—
 - judgment debtor, 270 [s 74], 844 [O 21, r 98]
 - person claiming in good faith to be in possession, 845 [O 21, r 99]
 - purchaser from judgment debtor after attachment, 845
 - sub tenants, 845 [O 21, r 99]
 - transferee *pendente lite* from judgment debtor, 848 [O 21, r 102]
- resistance or obstruction to possession, complaint on 843 [O 21, r 97]
- time within which application complaining of, to be made, 844

Post—

- corporations, service of summons by post in suit by or against, 928 [O 29, r 2 (b)]
- letter substituted for summons sending by post of, 523 [O 5, r 30]
- packet sent by, returned marked "refused" and sufficiency of service, 519, 520
- service of summons by, 521 [O 5, r 25]

Postage—

- Payment of, chargeable on notice, summons, etc., 412 [s 143]

Postponement—See Adjournment

r 58 (2)]

- payment of amount of decree, postponement of, 671 [O 20, r 11 (1)]

Powers—

- inherent powers of Courts, 433 [s 151]
- of appellate Court 350 [s 107] 1113 [O 41, r 33]
- arbitrators 1262 [Sch II, para 6]
- Court pending appeal to Privy Council, 1132 [O 45, r 13]
- High Court—*See* Chartered High Court
- of umpires, 1266 [Sch II, para 6]
- receiver, agreement restricting powers of, 1059 [Case 5]
- cannot delegate his powers to others, 1066

Power of attorney—

- person holding, not bound to accept service of summons, 507
- recognized agents, and 506 [O 3, r 2]

Prayer—

- and relief claimed in plaint, 559 [O 7, r 7], 560

Preamble—

- to the Code, 2

Precept—

- attachment under, 166 [s 46]

Pre-emption—

- contract, by, 683
- customs, by, 683
- death of pre-emptor pending suit for, 683
- decree in suit, for, 681 [O 20, r 14], 683
- where rival pre-emptors, 681 [O 20, r 14 (2)], 683

Pre emption—*contd.*

- extension of time by appellate Court for making payment, 683
 - fixed by decree for payment for purchase money in suits for, 429.
- Mahomedan Law, under, 683
- right of, nature and extent of, 682, 683
- sale of share in immovable property and bid of co-sharer, 811 [O 21, r 88]
 - movable property and bid of co-sharer 805 [O 21, r 77 (3)]
- title to pre-empted property when vests in pre-emptor, 682-683
- transfer of right of, by pre-emptor, pending suit for, 682
- vendor's title in pre-emption suit, 683

Preliminary decree—

- appeal from, 324 [s 97]
 - from, if not perfected effect of, 9 324 [s 97]
 - when not drawn up, 325
- assignment of mortgagee's interest after, but before final decree, 878 [Ill 3]
- attachment under, 731
- compromise of suit after passing of, 904
- definition of, 5 [s 2 (2) Expln.]
- death of defendant after, effect of, 863
- explained, 9, 10
- final decree, passing of, during pendency of appeal from, 325
- final decree superseded, if preliminary decree set aside, 9
- illustrations of, 9, 10
- in suit for accounts between principal and agent, 684 [O 20, r 16]
 - administration, 680 [O 20, r 13]
 - dissolution of partnership, 684 [O 20, r 15]
 - foreclosure, 987, 988 [O 34, r 2]
 - partition, 685 [O 20, r 18]
 - possession and mesne profits, 673 [O 20, r 12]
 - redemption, 1008-1010 [O 34, r 7].
 - sale of mortgaged property, 997, 998 [O 34, r 4]
- suits in which preliminary decree may be passed, 10

Prescribed—

- definition of, 17 [s 2 (16)]

Presidency Small Cause Courts—

- application of Orders and Rules to, 1158 [O 51, r 1]
 - of sections of Code to, 23 [s 8].
- pecuniary limit of jurisdiction of, 99
- power to attach immovable property, 1044 [O 38, r 13]
- reference to High Court by, 1139
- stay of suits, pending in, 1049
- transfer of certain decrees for execution to, 703 [O 21, r 4]
 - of suit from, to High Court, 1346.

Presumption—

- documents, non-disclosure of, and, 621, 622
- foreign judgment, as to, 283 [s. 86]
- of law, and pleadings, 540 [O 6, r 13]

Price—

- deficiency of, on resale, 798, 799 [O 21, r 71]

Princes and Chiefs—See Chiefs (ruling) and Princes

Privy Council—*contd*

- security for costs, on grant of certificate, 1128, 1129 [O 45, r 7]
 - change of, 1129
 - costs in England paid out of, 1130.
 - in appeal to, by pauper, 1125
 - order for further, before transmission of record, 1131 [O 45, r 10]
 - effect of failure to give further security, 1131 [O 45, r 11]
- special leave by Privy Council, when granted, 305, 1126
- stay of execution of decree, 1132, [O 45, 13 (2) (c)] 1133
 - in view of application for special leave to appeal, 436, 1133
- stay of further execution, when ordered, 1132 [O 45, r 13 (2) (b)]
- surety, enforcement of liability of, in Privy Council appeal, 1136
- time within which security and deposit to be given 1128, 1129 [O 45, r 7 (1)]
- value dispute as to, 1127 [O 45, r 5]
 - of subject matter of suit or in appeal, 357 [s 110]
 - as laid in the plaint, 360
 - indirectly involved, 362 364
 - and costs, 359
 - and mesne profits and interest, 358 360
 - in Court of first instance, 358
 - in dispute in appeal, 360 361
 - not capable of valuation, 364
- valuation consolidation of suits for purposes of, 1126 [O 45, r 4]
 - date of, for purposes to, 357
 - where matter is under appealable value or is not capable of, 364

Probate—

- abatement, and 852
- arbitration, cannot be referred to, 1261
- compromise of probate proceedings, 899 900
- costs on probate proceedings, 146
- executor, suit by, and, 506 558
 - who has not joined in probate need not be made party, 940 [O 31, r 2]
- injunction, whether can be granted in probate proceedings, 1049
- necessary, when, 556, 557
- procedure in Code in regard to suits applies to probate proceedings, 410
- reference to High Court in matter of probate, 1139
- res judicata*, dismissal of suit for failure to produce probate and 79
 - decision of Probate Court and, 38, 87

Procedure—

- adjourned hearing, where parties fail to appear at, 655 [O 17, r 2], 657
- appeals from orders, procedure in, 351 [s 108], 1121 [O 43, r 2]
- application for execution of decrees, what procedure applies to, 409, 410
- consent decree, for setting aside, 324
- defendant only appearing at hearing, 587 [O 9, r 8]
 - refusing to accept service, 515 [O 5, r 17]
- execution, on receiving application for, 722 [O 21, r 17]
- interrogatories, omission to answer, 616 [O 11, r 11]
- issue where parties are at, 646 [O 15, r 3]
- judge vacating office before signing decree, 704 [O 21, r 8]
- judgment debtor, on appearance of, upon notice or after arrest, 749, 750 [O 21 r 40]

Procedure—contd

jurisdiction, when objection is taken to, 127

for arrest or attachment outside, not in execution 400 [s 136]

lunatics, in suits by or against, 961 [O 32, r 15]

memorandum of appeal, on rejecting 567

minors, in suits by or against 941 962 [O 32]

miscellaneous proceedings in, 408 [s 141]

neither party appearing 583 [O 9, r 3]

non attendance of one of several defendants in case of 594 [O 9, r 11]

plaintiffs in case of, 594 [O 9, r 10]

notice for execution against legal representative, after issue of, 732 [O 21 r 23]

pauper, at hearing of application for leave to sue as, 968 969 [O 33, r 7]

payment into Court, acceptance of, by plaintiff, 906 907 [O 24, r 4]

plaint, on admitting, 562 [O 7, r 9]

rejecting, 567 [O 7, r 12]

returning, 563 [O 7, r 10 (2)]

restitution under s 144, p 412

rules of, in Schedule I, effect of, 395 [s 121]

powers of Courts to frame—*See* Rules

second appeals, in, 351 [s 108], 1118 [O 42, r 1]

summary suits in, 1034 [O 37, r 7]

witness failure of, to appear, 651, 652 [O 16 rr 10 13]

where insufficient, sum paid in Court for expenses of 649 [O 16 r 4]

written statement, when party fails to present, called for by Court, 582 [O 8 r 10]

Process—See Summons Warrant

civil, exemption from arrest under, 405

endorsement on process for execution 733 734 [O 21, r 25]

execution, issue of process for, 732, 733 [O 21, r 24]

return of, with endorsement, to Court, 733 [O 21, r 25 (1)]

Secretary of State, agent to receive process against, 924 [O 27, r 4]

service of, and expenses, 1156 [O 48, r 1]

of Chartered High Courts 1157 [O 49, r 1]

on pleader 510 [O 3, r 5]

on recognised agent, 506 [O 3, r 3]

on special agent to accept service, 510 [O 3, r 6]

witnesses, issue of process to, on application of commissioner, 921 [O 26, r 17 (2)]

Proclamation—

of sale by public auction—792 [O 21, r 66]

non compliance with provisions for making proclamations 791

omission as to—*See* Material irregularities in conducting sale

order settling proclamation is ministerial, 794 795

purchaser, rights of, when mere notice given of mortgage in, 782

resale in default of purchase money and fresh proclamation, 810 [O 21, r 67]

sale adjournment of, and fresh proclamation, 792 [O 21, r 63 (2)]

Proclamation—*contd*of case by public auction—*contd*

- separate proclamation unnecessary where sale of property in lots, 797 [O 21, r 67(3)]
- value of the property, 793
- variance between sale certificate and proclamation, 840, 841

In other cases—

- attachment of immovable property, proclamation of order of, 772 [O 21, r 54(2)]
- tenant, where property is in occupation of—
 - (a) and possession to go to holder of decree for possession, 746 [O 21, r 36]
 - (b) and possession is to be delivered to execution purchaser, 843 [O 21, r 96]
- witness, proclamation requiring attendance of, 651 [O 16, r 10(2)]

Production—*See* Documents.

Pro forma defendant—

- meaning of, 64
- res judicata* between plaintiff and, 64.

Promissory note—*See* Negotiable instrument Summary Suit.

- costs, recovery of, of noting non-acceptance of dishonoured, 1034 [O 37, r 6]
- definition of, 1031
- instalments, omission to sue for, 482
- joinder of parties liable on same, 459 [O 1, r 6]

Property—*See* Movable Property Immovable Property

- ancestral, liability of, in execution, 204 [s 53].
- attachment, what property liable to, 214 216 [s 60]
- injunction, temporary, when—in regard to property in dispute, 1044 [O 39, r 1], 1046
- private transfer of, pending attachment in execution, 230 [s. 64], 231, 232
- pending attachment before judgment, 1039

Protest—

- jurisdiction of foreign Court, protest against, 95

Provincial Small Cause Courts —

- application of Order and Rules to, 1158 [O 50, r 1]
- of sections of Code to, 22 [s 7]
- compensation for wrongful arrest or attachment, jurisdiction to award, 317
- jurisdiction of, 100
- mesne profits, suit for, and jurisdiction, 341.
- power of, to direct injunction, 22 [s 7]
 - to order attachment of immovable property, 22 [s 7], 1044 [O 38, r 13]
 - to appoint receiver of immovable property, 22 [s 7]
 - to pass orders under s 94, p 22 [s 7]

Public charities—293 314 [ss 92, 93]

- accounts, claim for, in suits relating to, 294 [s 92 (1) (d)], 301
- Advocate General, consent of, in suits relating to, 293, 294 [s 92] 297, 298
- apportionment of income of trust, 301.
- arbitration without intervention of Court in matters relating to, 1290, 1291
- Charitable and Religious Trusts Act, 1920, 293.
- Collector's consent to suit, 314 [s 93]

Public charities—*contd.*

- Courts competent to try suits relating to*, 293 [s. 92], 308
- cy pres* doctrine, power of Courts to apply, 313.
- death of party pending suit relating to, 312, 313.
- decree for possession, whether it can be passed against alienee from trustee, 305 307.
- limitations as against Advocate General, 313
- Local Government, sanction of, 314.
- Madras Hindu Religious Endowments Act, 1927, 312.
- mandatory, section 92 is, 309, 310.
- public purposes of a religious or charitable nature, 298
- relators cannot appeal in their own right, 313.
 - who may be, in suits relating to, 295, 296.
- reliefs, what, may be claimed in suits relating to, 299 304
- Religious Endowments Act, applicability of, 310 312.
- scheme may reserve liberty to apply, 302.
- settling a scheme for, 294 [s. 92 (g)], 301.303.
- Specific Relief Act, section 42 of, inapplicable to suits under s. 92, 313
- suits against alienees from trustees for possession of trust property, 305, 306.
 - between two persons each claiming rights as trustees, 304 [Case 3]
 - brought to remedy a particular infringement of an individual right, 304, 305
 - for declaration that plaintiff entitled to joint management of trust property, 304
 - for mere declaration that certain property is *wakf* property, 305.
 - relating to, 293, 294 [s. 92].
 - outside Presidency towns, 314 [s. 93]
- relating to mosques, 305 [Case 5]
- suits outside the scope of s. 92, 304 307.
- trustee *de son tort*, 300.
 - of, appointing new, 294 [s. 92 (1) (b)], 301
 - removal of, 294 [s. 92 (1) (a)], 299, 300
 - vesting property in, 294 [s. 92(1) (d)]
- when s. 92 applies, 304.
- who may bring suits relating to, 295.

Public religious trust—*See* Public Charities.

Public nuisance—289 293 [s. 91].

- acts which merely offend sentiments of a class, not a public nuisance, 293.
- convenience or advantage* not excused on ground of, 292 [Case 7].
- damage, special, not necessary to institute suit relating to, 289 [s. 91].
- definition of, 289, 290.
- injunction restraining, 291, 292.
- instances of, 290, 291 293.
- interest of persons suing, 291.
- nature of proceedings in suits relating to, 291.
- Presidency towns suits, outside, 314 [s. 93].
- private action by person suffering special damage from, 290 [Case 3].
- private nuisance, 293.
- relators' interest in suits relating to, 291.
- remedies for, 289, 290.
- suits relating to, 289 [s. 91]
 - by Advocate General acting *ex-officio*, 291.
 - by Advocate-General at the relation of others, 291.
- taboos*, suit by Mahomedans for carrying of, in procession along a public road, 292.
- time, whether length of, can legalize, 292 [Case 6].

Public officer—

- attachment, allowances (being less than salary) of, not liable to 215 [s 60, (1) (h)], 224
 - of property in custody of, 765 [O 21, r 52]
 - of salary of, 215 [s 60 (1) (i)], 224
 - mode of, 758, 759 [O 21, r 48]
 - of salary of officer of His Majesty's Regular Forces, 226
- Cantonment Committee, whether is, 279
- death of complainant after notice but before suit against, 279
- definition of, 17 [s 2 (17)]
- execution, salary of public officer and jurisdiction in, 758, 759 [O 21, r 48]
 - of decree against, 280 [s 82]
- exemption from mesne arrest, 280 [s 81 (a)], 925 [O 27, r 8]
 - mesne attachment of property of, 280 [s 81 (a)], 925 [O 27, r 8]
 - personal appearance in certain cases, 280 [s 81 (b)]
- extension of time to enable, to make reference to Government, 925 [O 27, r 7]
- Government undertaking defence of suit against, 925 [O 27, r 8]
- jurisdiction in execution proceedings against, 758, 759 [O 21, r 48]
- notice before suit, 274 [s 80]
 - whether necessary in suit against public officer for injunction, 278
 - whether should be given to, and in what cases, 276 279
- official capacity, act purporting to be done by a public officer in his, 276
- procedure in suit against, 925 [O 27, r 8]
- public official document, objection to produce for inspection, 619
- service of summons on, 522 [O 5, r 27]
- stay of execution, no security from public officer on, 1082 [O 41, r 7]
- suits by or against, 923 925 [O 27]
- who is, 17 [s 2 (17)]

Public rights—

- explained 67
- res judicata*, litigation for and public rights 37 [s 11, Explan VI], 67

Purchaser—See Auction purchaser

Purda ladies—

- arrest of, in execution of civil process in certain cases, 402 [s 132 (2)]
 - of person in a room in occupation of, 208 [s 55 (1)]
- commission, examination on, 912 [O 26 r 1], 965
- delivery of possession when property in occupation of, 742 [O 21, r 35 (3)]
- decree *ex parte* against, and service of summons, 599
- dismissal of suit for non compliance with order for discovery, 628
- exemption from personal appearance in Court, 402 [s 132]
- pauper, application for leave to sue as, 965
- seizure of property where room is in occupation of 228 [s 62 (3)]
- service of summons where serving officer cannot obtain access to, 518

Questions—

- appeal, new questions of fact raised for the first time in, 1074
- Court executing decree, questions relating to execution are for, 167 [s 47]
- execution proceedings, questions between parties to suit in, 172, 173
- inherent power of Court to decide one question and reserve another, 435
- of law, in appeal to Privy Council, 357 [s 110]
 - in second appeal, 331, 332 [s 100]

Railway servant—

- arrest of, procedure as to, 209 [s 55 (2)], 210
- attachment, allowances (being less than salary) of, not liable to, 215 [s 60 (1)(h)], 224
 - bonus sanctioned to a railway servant whether liable to, 219
 - salary of, when liable to, 215, 216 [s 60 (1) (i)], 224
 - mode of attachment of salary of, 758 759 [O 21, r 48]
- service of summons on, 522 [O 5, r 27]

Rateable distribution—255 270 [s 73]

- appeal from order made under s 73 for, 270
- assets available for, 260, 261
- assets not available for, 261 266
- assets held by a Court, 260 266
- attachment before judgment, and, 268, 269
- attorney's lien, and, 270
- claims for rateable distribution of assets, 268
 - enforceable under an attachment, 235, 236.
- conditions for, 257
- Court to which application for execution should be made for a share in, 258
- decree holders, when entitled to rateable distribution of assets, 255, 256 [s 73], 257
- deposit of amount of decree after sale, whether subject to rateable distribution, 816

- fraudulent, where decree obtained by one of the claimants is, 269
- Government, rights of, to rateable distribution, 256 [s 73 (3)]
- immovable property sold and distribution of sale proceeds, 255, 256 [s 73 (1)]
- inquiry as to validity of decree and, 269
- insolvency of judgment-debtor, and order for, 270
- legal representative of judgment-debtor, decree against, and, 268
- money, decree for payment of, and, 266, 267.
- money voluntarily paid by judgment-debtor into Court or under arrest, and, 261 266.
- mortgage, where property is affected by, 255, 256 [s 73 (1)]
- receipt of assets by Court, 258 260
- refund of assets, suit for, from person not entitled to receive same, 256 [s 73 (2)], 269
- sale proceeds of property attached but sold by a private sale, 262
- "same judgment debtor," and, 267, 268
- suit, declaratory as to right of, 269
- summary inquiry when decree obtained by one of claimants is fraudulent, 269

Receiver—201 [s 51 (d)], 315 [s 94 (d)], 1055 1070 [O 40]

- account, liability of receiver to, 1068 [O 40, r 3 (b)]
- agreement restricting powers of, 1059 [Case 5]
- appeal from directions given by Court in passing receiver's accounts, 1065.
 - order directing receiver to advance moneys to guardian *ad litem*, 1066
 - directing attachment and sale of receiver's property, or, 1069, 1070, 1120 [O 43, r 1, cl (s)]
 - granting or rejecting an application to appoint a receiver, 1065, 1120 [O 43, r 1, cl (s)]
- appointment of, in execution proceedings, 201 [s 51 (d)]
 - in open Court, 1057
 - in other cases, 315 [s 94 (d)], 1055, 1056 [O 40, r. 1]

Receiver—*contd*

appointment of new receiver, 1064

pendente lite, 1063

arbitration, reference to, in partnership suit, no bar to Court appointing receiver, 1060

attachment of property in hands of, 763 [Case 1], 1037

of receiver in enforcement of his duties, 1039 [O 40, r 4].

cases in which a receiver may be appointed, 1061 1063

charity suits, in, 1062.

Collector when may be appointed, 1070 [O 40, r 5]

contempt, proceedings for, 1064

Court which may appoint a receiver, 1037 1039

Criminal Court cannot interfere with possession of, 1039 [Case 7], 1033.

debts contracted by, in course of business, 1039 [Case 3]

decree, realization of execution, and appointment of, 201 [s 51 (d)]

receiver after, 1064

delegation of powers by receiver, 1066

duration of office of, 1064, 1065

duties of, 1068 [O 40, r 3]

enforcement of receiver's duties, mode of, 1069 [O 40, r 4]

execution proceedings, and, 201 [s 51 (d)]

executor in possession, 1030

future earnings of judgment debtor, receiver of, 1063

maintenance of, 202

garnishee, denial of debt by, and appointment of, 756

joint, 1065

judgment debtor, of future earnings of, 1063.

leave of Courts, receiver cannot sue or be sued without, 1037 1038 [Case 2]

lien of, 1065

loss occasioned by default of, 1063 [O 40, r 3 (d)]

maintenance, in a decree for, 1063

future, of, 202

mortgage property, of in suit for foreclosure or sale, 1061

officer of Court, is, 1057

partner's share of where it is attached, 759 760 [O 21, r 49 (2)]

partnership suits, in, 1062, 1063

party, receiver for insolvent mortgagor or mortgagee necessary, to mortgage, suit,

980

ne cessary, to suit for possession of property of which he is receiver, 1037, 1038

payment out of state of pressing claims, 1060

powers of, 1059 [O 40, r 1 (d)]

1063 1065

prosecution of, 1059 [Case 8]

remuneration of, 1039 [Case 6] 1063 [O 40, r 2]

rent suit, and, 1063

security, furnishing of, by, 1068 [O 40, r 3 (a)]

for costs by receiver on plaintiff's insolvency, 871 [O 22, r 8]

suit when receiver may bring in his own name, 1064

temporary injunction and appointment of receiver, distinction between, 1060, 1061.

testamentary suit, in, 1062

Recognized agent—*See* Agent

Record—

evidence taken on commission to form part of record of suit, 916
 power of Court to sent for record of any suit or proceeding, 639, 640 [O 13, r 10]

Redemption—

beneficiaries, whether necessary parties to suit for, brought by trustees, 981
 charges, provisions respecting redemption and sale apply to, 1023 [O 34, r 15]
 equity of redemption, persons interested in, 980
 final decree in suit for, 1011, 1012 [O 34, r 8]
 finality of decree in redemption suits, 82
 foreclosure, decree for, in redemption suit, 1011, 1012 [O 34, r 8 (2)]
 parties to suit for, 977 [O 34, r 1] 980
 place of suing in suits for redemption governed by the Code, 103 [s 16 (c)]
 governed by the Charter, 1339.
 possession, claim for, in suit for redemption, 500 [O 2, r 4, proviso]
 preliminary decree in suit for redemption, 1008 1010 [O 34, r 7]
 res judicata and suit for redemption, 56, 57, 82
 right of redemption, what is, 990.
 time, power to enlarge fixed for payment in decree, 1010 [O 34, r 7 (2)], 1011

Reference—1138 1142 [O 46]

application for reference to High Court, 1138 [O 46, r 1]
 Court trying suit or appeal, reference to High Court by, 1138 [O 46, r 1]
 costs of reference to High Court, 1140 [O 46, r 4]
 decree contingent upon decision of High Court, Court may pass, 1139 [O 46, r 2]
 District Court, reference by in certain cases, 1140, 1141 [O 46, r 7]
 execution of decree not allowed pending reference to High Court, 1139 [O 46, r 2]
 High Court, no reference to, in matter in which appeal lies to High Court, 1139
 to, when lies, 1138 [O 46, r 1]
 jurisdiction in small causes, doubt as to, and, 1140 [O 46, r 6]
 in small causes, mistake as to, and, 1140, 1141 [O 46, r 7]
 opinion of High Court, power to refer case for, 371 [s 113]
 powers of High Court on reference 1140 [O 46, r 5].
 Presidency Small Cause Court, reference by, 1139
 probate, matter of, and reference to High Court, 1139
 procedure after judgment of High Court, 1139 [O 46, r 3]
 reasonable doubt on question of law, 1139
 stay proceedings, power of Court making reference to, 1139 [O 46, r 2]
 to arbitration—*See* Arbitration

Refund of stamp duty—

inherent power to order, 437

Registered post—

fee for registering and posting, 412 [s 143]
 service by, 519 520 [O 5, r 21]

Registrar—

delegation of judicial and non judicial work to, 400 [s. 124 (2) (i)].

Registration—

compromise affecting land in suit, registration of, 904
 documents, of, by judge or officer of Court, 742 [O 21, r 34 (6)].

Rejection—

of appeal where security for costs not furnished within time, 1003 [O 33, r 13 (2)]

Rejection—*contd*

- of application for execution, 722 [O 21, r 17 (1)]
 - for leave to sue as pauper, 966 [O 33, r 5]
- documents, irrelevant or inadmissible, 636 [O 13, r 3]
- memorandum of appeal, 1074 [O 41, r 3]
- plaint, 564 567 [O 7, rr 11, 12]
 - appeal from order rejecting, 567
 - deemed to be decree, 6, 10
 - procedure on, 567 [O 7, r 12]
 - where particulars of fraud are not stated in plaint, 531
- review, rejection of application for, 1151 [O 47, r 4 (1)], 1153 [O 47, r 6 (1)]

Relators—

- affidavit of documents from, 622
- appeal by, 313
- public charities, in suit for, 293, 294 [s 93], 295, 296
- nuisance, in suits for, 289 [s 91], 291

Release—

- attachment, effect of order of release from, 780, 781
- of property from attachment, 779, 780 [O 21, r 60]
- or judgment debtor from jail, 212 [s 53] 214 [s 59]
- private transfer of property by claimant after order of release from attachment, 780, 781
- release to be specifically pleaded, 570 [O 8, r 2]

Relief—

- alternative, 561
- amendment of plaint by adding new reliefs, 553
- events after institution of suit, and granting appropriate relief, 561, 562
- further or other, need not be claimed, 559 [O 7, r 7]
- general or other, 560 561
- in personam* and jurisdiction, 106 107
- omission to sue for one of several reliefs, 480 [O 2, r 2 (3)]
- plaint must state specifically relief claimed, 555 [O 7, r 1 (g)] 559 [O 7, r 7]
- rejection of plaint when relief claimed is under valued 564 [O 7, r 11 (b)]
- res judicata*, relief claimed in plaint but not granted and 36 [s 11, Explan V] 84.
- specific ground in plaint, where relief claimed upon, 559
- splitting of reliefs, exception to rule against, 491
- when founded upon separate grounds, 562 [O 7, r 8]

Religious ceremonies—

- suits relating to, 26
- to recover fees for performing 27, 28

Religious office—

- suit by holder of, to which fees are attached against a usurper, 27.
- for, 27 29

Religious trusts—See Public Religious Trusts**Relinquishment—**

- amount relinquished to be stated in plaint 555 [O 7, r 1 (h)]
- of portion of claim by plaintiff, 480 [O 2, r 2 (2)]

Remand—

- appeal from order of remand, 347 [s 105 (2)], 1101, 1102
- appellate Court, by remand of case, by, 1097 [O 41, r 23]

Remand—*could*

- decree *ex parte*, remand, in appeal from, 597
 - remand in appeal from order refusing to set aside, 1101
- High Court, powers of, in appeal from order of remand, 1102
- improper order of remand, 1103
- inherent power of Court to remand, 1099 1100
 - of High Court to remand in second appeal, 1119
- irregularity or error not affecting merits of jurisdiction, 329 [s 99]
- issues, remand by appellate Court for trial of, 1104 [O 41, r 25]
- jurisdiction, plea of want of, after remand in second appeal, 127
- limitation, period of, for appeal from order of remand, 1101

Removal—

- of attachment after satisfaction of decree, 773 [O 21, r 53]
 - before judgment when security furnished, 1041 [O 38, r 9]
- guardian *ad litem*, of, 959 [O 32, r 11]
- next friend, of, 957, 958 [O 32, r 9]
 - stay of proceedings on, 958 [O 32, r 10 (1)]
- of person from possession or custody of property, 1056 [O 40, r 1 (b)], 1063
- of trustee, appointed under a scheme, by application in execution, 300
 - in suit relating to public charities, 293 [s 92 (1)], 299, 300

Rent—

- attachment before amount of rent ascertained, 751 [O 21, r 42]
- cause of action, each year's rent is in itself a separate and entire, 44
- claim for arrears of, may be joined with suit for recovery of land, 499 [O 2, r 4a]
- decree for possession and for rent, 673 [O 20, r 12]
- jurisdiction, suits as to rent, 105
- omission to sue for portion of arrears of, 480 [O 2, r 2, III]
- receiver, collection or rents by, 1055, 1056 [O 40, r 1 (d)]
- res judicata*, claim in rent suits and, 42 45
- special provisions enabling landlord to recover, not affected by Code, 20 [s 4 (2)].
- suit for, and Small Cause Court, 342

Repeal—

- continuance of orders under repealed enactments, 445 [s 157]
- enactments repealed, 445 [s 156]
- reference to Code of Civil Procedure and other repealed enactments, 445 [s 158]

Representative—See Legal representative

- decree in a representative suit, 66, 466
- execution, "representatives" of parties to suit for purposes of, 174 176
- holder of decree to be executed by attachment of another decree, 763 [O. 21, r 53 (3)].
- meaning of, for purposes of execution, 174
- proceedings by or against, 427 [s. 146].
- representative suit, 66, 461, 466
 - abatement of, 467
 - abatement of appeal in, 467
 - adding parties in, 466
 - compromise of, 466
 - costs in, 467
 - decree in, 466
 - devolution of interest, and, 676
 - leave of Court, 464

Representative—*contd.*

representative suit, notice of suit, 465

numerous parties having same interest, 461 [O 1, r 8]

Resale—

in default of deposit of 25 per cent by purchaser, 809 [O 21, r 84]

in default of payment of purchase money, by purchaser, 810 [O 21, r 86]

Reside—

"actually and voluntarily resides," 112, 113

arrest of person residing outside jurisdiction in cases other than execution, 406
[s 136]

Charter, same as 'dwell' in cl 12 of, 113, 114

meaning of, in ss 16, 19 and 20, p 113.

residence and appearance of party in person, 512 [O 5, r 4]

attendance of witness in person, 651 [O 16, r 19]

security for costs in case of residence outside British India, 907 908 [O 25, r 1]

Res judicata—36 91 [s 11]

Act of state, 92

administrator, decree against, and, 67 68

amendment of decree, application for, and, 90, 91

appellate Court and jurisdiction, 76

appellate decree and, 82

award, decree on an award, 79

cause of action, different, erroneous decision, 60

decision not to operate as, 60

collusion, judgment obtained by, 78.

competence of Court not dependent on right of appeal, 36 [s 11, Explan II] 76, 77
to deliver judgment, and, 77

conditions of, 40

consent decree and estoppel, 84

conflicting decrees, and 91

in a 'representative suit,' 70.

Court competent to try subsequent suit, 72

Court of exclusive jurisdiction and, 72

Court of concurrent jurisdiction and, 73

Criminal Court, decision of, and, 75

custom, and, 47

decree conditional on payment, 47

conditional on payment of dower, 47

conflicting, 91

defendants, *res judicata* as between, 62

decision on merits, 79

Duchess of Kingston's case, 37

estoppel, 38

against statute, 69

and consent decree 84

Evidence Act, s 44, p 78

execution proceedings, 87, 88, 89

consent orders in, 90

ex parte orders in, 90

ex parte decree, 45, 79

foreign judgment and, 91 [s 13], 92—See Foreign judgment

former suit, meaning of 38.

fraud, judgment obtained by, 78

Res judicata—contd

- heard and finally decided, 78, 79
- Hindu widow, decree against, 68, 69
 - joint family suit against members of, 68
- income tax proceedings, 91.
- injunction, 46
- insolvency proceedings, and, 90
- issue of fact, 58
- issue of law and, 58 62
- issue, mixed of law and fact, 58
- judgment in rem, 70
 - delivered by Court not competent to deliver it, 77
- karnavan, decree against and, 67
- Land Acquisition proceedings and, 86
- liberty to bring a fresh suit, and, 84, 85
- limitation issue of, and, 60.
- litigating under same title, 70, 71, 72
- maintenance and, 45
- manager of joint Hindu family, decree against, 68
- matter collaterally or incidentally in issue, 41
- matter collaterally or incidentally in issue distinguished from 'matter directly and substantially in issue,' 42
- matter constructively in issue, 48 51.
- matter directly and substantially in issue, 40
 - distinguished from 'cause of action,' 40, 41
- matter which might and ought to have been made ground of attack or defence, 48 62
- meaning of, 37, 38
- mesne profits and, 85, 86
- minor, decree against, 70
- mortgage suits, 56 58
- partition, suit for, 58.
- party in subsequent suit claiming under parties in former suit, 65, 66
- parties, identity of, 62.
- plaintiffs, *res judicata* as between, 64
- pleadings, examination of, and judgment, 42
- possession, claim of person dispossessed by decree holder, 846
- Probate Court, decree of, 38, 87
- pro forma defendant, 64, 65
- recurring liability, 42-45
- redemption suits and, 82.
- Registration Act, s 77, suit under, 46
- relief claimed but not expressly granted, 36 [s 11, Explan. iv], 84
- rent suits and, 42 45
- representative suit and, 66, 295
- restitution of conjugal rights and, 46
- res judicata* in same suit, 87, 88
- Revenue Court, decision of, and, 74, 75, 77
- reversioners and, 68, 69
- review, application for, and, 91
- rules as to concurrent jurisdiction, 73 77
- rules as to matter constructively in issue, 48 56
- section not exhaustive, 86
- shebait, decree against, and, 67, 68

Res judicata—*contd*

- stare decisis and, 61
- statute, estoppel against, and, 62
- subject matter of suit, identity of, not a test of *res judicata*, 47, 48
- suit, dismissal of, under O 17, r 3, p 79
 - liberty to bring fresh suit, 84, 85
 - meaning of, 38
- suit under O 1, r 8, 66, 67
- suits tried together, one judgment, 39, 40
 - separate judgments, 40
- suspension of rent, suit for, 47
- test, as to whether matter might have been ground of attack or defence, 51-56.
- title, litigating under same, 70-72
 - suit for, 43
- trustee, decree against, and, 67, 68
- waiver of plea of, 91.

Resistance—

- to delivery of possession in execution—*See Possession*

Respondent—

- cross objections by, 1093, 1094 [O 41, r 22] *See Cross objections*
- dismissal of appeal without serving notice on, 1086 [O 41, r 11 (1)]
- power of appellate Court, to—
 - (1) add person interested in result of appeal as, 1091 [O 41, r 20]
 - (2) vary decree as regards all respondents, 1113 [O 41, r 33]
- right to begin when preliminary issue raised that appeal does not lie, 659
- security for costs, at what stage respondent should apply for, 1084

Res sub judice—

- decree under appeal is, 82-83

Restitution—*See* Restitution of conjugal rights

- appeal from order passed on application for, 421
- application for, 412 [s 144]
- auction purchaser, and, 417
- claim for, splitting of, 414-415
- decree, whether a determination of a question of, 14 a, 11
- doctrine of 412, 413, 414
- inherent power of Court to grant restitution, 415, 416
- interest, when appellate decree is silent as to, 414
- jurisdiction, where damages claimed exceed pecuniary limits of, 420
- limitation in claims for, 421
- of property sold in execution pending appeal to Privy Council, 1136, 1137
 - when sale is set aside, 170 [Case 3]
 - taken in execution, when decree is amended, 170 [Case 2]
 - pending application for stay, 734 [O 21, r 26 (2)]
- of uncertified payment on reversal of decree, 700
- persons entitled to apply for, 416, 417
 - against whom restitution may be claimed, 417, 418
- reversal of decree, and restitution, 410, 420
- separate suit for, when barred, 418, 419
- suit for restitution of property taken in execution of decree, 422 [s 145 (b)]
 - 418, 423
- transferee of decree passed or reversed in appeal, and, 417, 418
- who may apply for, 416, 417

Restitution of conjugal rights—

- Chartered High Courts jurisdiction of for 1366
- discretion of Court in execution decree for, 740 [O 21, r 33]
- execution of decree for, 737, 738 [O 21 r 32]
- periodical payments in execution of decree for, 740 [O 21, r 33 (2) (3)]
- place of suing in suits for, 121
- power of Court to vary order for periodical payments, 740 [O 21, 33 (3)]
- res judicata* and, 46
- valuation of suit for, 102

Restoration of suit—

- application for revival of an application for, 594

Retirement—

- guardian *ad litem*, of, 959 [O 32, r 11]
- next friend, of, 957 [O 32, r 8]
- stay of proceedings on 958 [O 32, r 10 (1)]

Re transfer—

- of suit, appeal or other proceedings from one Court to another, 130 [s 24(1b)(iii)]

Return—

- memorandum of appeal, of, 1074 [O 41, r 3]
- plaint, of, to be presented to proper Court, 563 [O 7, r 10]

Revenue—See Government Revenue Revenue Court**Revenue Court—**

- application of Code to, 20 [s 5]
- decision of, when to have force of decree in civil suit, 74, 75
- definition of, 20, 21 [s 5 (2)]
- res judicata*, decision of Revenue Court and, 74, 75

Reversioner—

- compromise or consent decree in case of Hindu widow, how far binding on, 68, 69
- continuation of suit on death of Hindu widow or reversioner, 856
- decree against Hindu widow, how far binding on, 68, 69
- “legal representative,” whether Hindu reversioner is, 14

Review—1142 1156 [O 47], 371 [s 114]

- appeal, dismissal of, a bar to review of judgment appealed from, 1149
 - does not lie from order rejecting application for review, 1154
 - effect on, of reversal of decree on review, 1149
 - filing of, pending application for review, 1149
 - from order granting application for review, 1151, [O 47, r 7] 1154
 - of one party, and application for review by another, 1143 [O 47, r 1 (2)].
 - withdrawal of, no bar to review of judgment, 1149
- applications for, 371 [s 114] 1142, 1143 [s 47, r 1]
 - and *res judicata* 91,
 - form of, 1151 [O 47, r 3]
 - hearing of, 1152 [O 47, r 8].
 - to whom to be made, 1142, 1143 [O 47, r 1], 1150 [s 4, r 2].
 - when granted 1151 [O 47, r 4 (2)]
 - when rejected, 1151 [O 47, r 4 (1)] 1153 [s 4, r 6].
- bar of certain applications for review, 1156 [O 47, r 9].
- commercial importance questions of and review 1146
- compromise decree, setting aside of, by application for review, 934

Review—*contd*

- decree passed by High Court Judge, and application for, 1151.
 - by Judge other than High Court Judge, and application for, 1151
 - discovery of new and important matter, or evidence, 1142 1143 [O 47, r 1 (1)], 1144, 1145
 - ex parte* decree, setting aside of by application for review, 593, 596
 - final decree, order granting application may be challenged in appeal from, 1153 [O 47, r 7 (1)], 1155
 - ground of, must be something existing at date of decree, 1146
 - inherent power to review an order of dismissal of application under O 9, r 9, p 437
 - interlocutory order, in, inherent jurisdiction, 1144
 - jurisdiction, where review granted without, 1156
 - misapprehension as to contents of documents and review, 1146
 - mistake or error apparent on face of record, 1142 1143 [O 47, r 1], 1145, 1146
 - notice to opposite party on granting of application, 1057 1058 [O 47, r 4 (2) (a)]
 - ' other sufficient reason, 1146 1148
 - pauper, review of order refusing to sue as, 969, 1148
 - power to hear whole case, though review granted on a specific ground, 1148.
 - Privy Council, review of order granting leave to appeal to, 363
 - registry of application granted and order for rehearing 1156 [O 47, r 8].
 - rehearing of case, order for, 1156 [O 47, r 8]
 - res judicata*, and application for review, 91
 - reversal of decree by P C on construction of a document, when *new matter*, 1144, 1145.
 - of earlier decisions by Full Bench, whether *new matter*, 1145
 - revision of order, granting, 390
 - refusing, 390
 - rulings, production of, which might have altered judgment, not *new matter*, 1145
 - second appeal from order in appeal from order granting application, 1154, 1155
 - no review allowed on question of fact after decision of, 1149, 1150
 - no review allowed when second appeal summarily dismissed, 1087
 - second application for review, 1155
 - taxation of, rules as to, 148, 149
- Revision—371 392 [s 115]
- Aden, Court of Resident at how far subordinate to Bombay High Court 380
 - Amir Hassan Khan's case*, different interpretations put upon decision in, 383 386
 - amendment of decree, and revision, 442
 - appeal from orders in revision, 391
 - no revision where appeal lies, 373
 - power of Court to treat an appeal as an application for revision, 373
 - award decree, on whether subject to revision, 1231
 - order setting aside or refusing to set aside whether subject to, 1276
 - Bombay Regulation 2 of 1827, 373
 - case decided, meaning of, 379
 - Collector acting under s 18 of Land Acquisition Act, not a Court 380
 - acting under Mamlatdar's Courts Act, not a Court, 380
 - acting in the course of execution proceedings under sec 70, p 252 [s. 70 (2)], 253 254.
 - commission, order refusing issue of, to examine person outside British India, 915
 - decision of single judge of chartered High Court, and 380
 - of Chief Court of Oudh, and, 380
 - decision, wrong as to jurisdiction, and 389

Revision—contd.

- District Registrar, whether subordinate to High Court, 379
 expediency or in expediency of order no ground for revision, 372
 gross miscarriage of justice, condition precedent to revision, 391
 grounds on which revision may be granted, 371, 372 [a 115]
 High Court, cases in which, will not interfere in revision, 382 386
 decision of single judge of, and, 380, 381
 powers and functions of, as to, 371 [a 115], 372
 whether can call for record of its own motion, 378
 "illegality or irregularity," instances of, 386 389
 injunction, temporary refusal of, by lower appellate Court, and, 1047
 inspection of documents produced before Court, order refusing and, 623
 interlocutory, orders, whether subject to revisions, 373 377
 jurisdiction, non-exercise or wrong exercise of, 381, 382
 order passed without, when not set aside in revision, 127
 wrong decision of first appellate Court as to, and, 383
 laches, 392
 leave to plaintiff to withdraw suit, order granting, and, 892, 893
 legal representative of plaintiff, failure of Court to bring on record, and, 859, 860
 lunatic, against order on inquiry whether person is a, 961
 multifarious, decision whether suit bad for, and revision, 409
 party, order refusing to add, and, 478
 pauper, order made on application for leave to sue as, and revision, 376, 377
 order rejecting application for leave to sue as, is open to revision, 963
 plaintiff order directing making up deficiency of Court fees 567
 remedy, revision where party has got another 377
 review, order granting, and 390
 refusing, and, 390
 sanction to prosecute, revision of order granting or refusing, 390
 stay of suit under s 10, and, 36
 subordinate Court, meaning of, 379
 withdrawal of plaintiff from suit, and, 892, 893
 Zanzibar Court subordinate to Bombay High Court for purposes of revision, 380

Right to sue—See Abatement.

Right to begin—

- appeal, at hearing of, 1089 [O 41, r 16] |
preliminary issue raised that suit or appeal does not lie and, 659
suit, at hearing of, 659 [O 18, r 1]
where burden of proving some of the issues lies on the other side, 660 [O 18, r 3]

Rules—

- definition of, 19 (s 2 (18))
High Court to frame rules for subordinate Courts 1309 [Charter Act s 15]
Lahore, High Court of rules made by, under s 122, p 1492
limitation cannot be altered by, 393
Madras High Court, rules made by, under s 122, pp 1453 1491
matters for which rules may provide 393 400 (s 122).
Patna High Court, rules made under s 122 pp 1511 1520
pleading of, 521 529

Review—*contd*

decree passed by High Court Judge, and application for, 1151

by Judge other than High Court Judge, and application for, 1151
discovery of new and important matter, or evidence, 1142 1143 [O 47, r 1 (1)],
1144, 1145

ex parte decree, setting aside of by application for review, 593, 596

final decree, order granting application may be challenged in appeal from, 1153
[O 47, r 7 (1)], 1155.

ground of, must be something existing at date of decree, 1146

inherent power to review an order of dismissal of application under O 9, r 9,
p 437

interlocutory order, in, inherent jurisdiction, 1144

jurisdiction, where review granted without, 1156

misapprehension as to contents of documents and review, 1146

a)].

pauper, review of order refusing to sue as, 969, 1148

power to hear whole case, though review granted on a specific ground, 1148.

Privy Council, review of order granting leave to appeal to, 368

registry of application granted and order for rehearing, 1156 [O 47, r 8]

rehearing of case order for, 1156 [O. 47, r 8]

res judicata, and application for review, 91

reversal of decree by P C on construction of a document, when *new matter*, 1144,
1145.

of earlier decisions by Full Bench, whether *new matter*, 1145

revision of order, granting 390

refusing, 390

— *see also new matter* 1145

)
7

second application for review, 1155

taxation of, rules as to, 148, 149

Revision—371 392 [s 115].

Aden, Court of Resident at, how far subordinate to Bombay High Court, 380

Amir Hassan Khan's case, different interpretations put upon decision in, 383 386

amendment of decree, and revision, 412

appeal from orders in revision, 391

no revision where appeal lies, 373

power of Court to treat an appeal as an application for revision, 373

award decree, on, whether subject to revision, 1251

order setting aside or refusing to set aside whether subject to, 1270

Bombay Regulation 2 of 1827, 373

case decided meaning of, 379

Collector acting under s 18 of Land Acquisition Act, not a Court, 380

acting under Mamlatdar's Courts Act, not a Court, 380

acting in the course of execution proceedings under sec 70, p 252 [s. 70
(2)] 253, 254

commission, order refusing issue of, to examine person outside British India, 915

decision of single judge of chartered High Court, and, 380

of Chief Court of Oudh, and, 380

decision, wrong, as to jurisdiction, and 380

Revision—*contd.*

- District Registrar, whether subordinate to High Court, 379
- expediency or inexpediency of order no ground for revision, 372
- gross miscarriage of justice, condition precedent to revision, 391
- grounds on which revision may be granted, 371, 372 [s 115]
- High Court, cases in which, will not interfere in revision, 382 386
 - decision of single judge of, and, 380, 381
 - powers and functions of, as to, 371 [s 115], 372
 - whether can call for record of its own motion, 378
- "illegality or irregularity," instances of, 386 389
- injunction, temporary refusal of, by lower appellate Court, and, 1047
- inspection of documents produced before Court, order refusing and, 623
- interlocutory, orders, whether subject to revisions, 373 377
- jurisdiction, non-exercise or wrong exercise of, 381, 382
 - order passed without, when not set aside in revision, 127
 - wrong decision of first appellate Court as to, and, 383
- laches, 392.
- leave to plaintiff to withdraw suit, order granting, and, 892, 893
- legal representative of plaintiff, failure of Court to bring on record, and, 859, 860
- lunatic, against order on inquiry whether person is a, 961
- multifarious, decision whether suit bad for, and revision, 499
- party, order refusing to add, and, 478
- remedy, revision where party has got another, 377
- review, order granting and 390
 - refusing, and, 390
- sanction to prosecute, revision of order granting or refusing, 390
- stay of suit under s 10, and, 36.
- subordinate Court, meaning of, 379
- withdrawal of plaintiff from suit, and, 892, 893
- Zanzibar Court subordinate to Bombay High Court for purposes of revision, 380

Right to sue—*See* Abatement.

Right to begin—

- appeal, at hearing of, 1089 [O 41, r 16].
- preliminary issue raised that suit or appeal does not lie, and, 659
- suit, at hearing of, 659 [O 18, r 1].
- where burden of proving some of the issues lies on the other side, 660 [O 18, r 3].

Rules—

- Allahabad High Court, rules made by, under s. 122, pp. 1432 1457
- Bombay High Court, rules made by, under s. 122, pp. 1424 1431
- Calcutta High Court, rules made by, under s. 122, pp. 1410 1423
- definition of, 19 [s. 2 (18)].
- High Court to frame rules for subordinate Courts 1399 [Charter Act, s 15].
- Lahore, High Court of, rules made by, under s. 122, p. 1492.
- limitation cannot be altered by, 393.
- Madras High Court, rules made by, under s. 122, pp. 1453 1491
- matters for which rules may provide, 393-400 [s. 125].
- Patna High Court, rules made under s. 122, pp. 1511 1520
- precedence, of, 524-529

Rules—*contd*

power of Chartered High Courts to make rules regulating—

(1) their own procedure on the original side, 400, 401 [s. 120, 131]

(2) their own procedure other than on the original side, 395 [s. 122]

Rule committee for such rules, 396, 397 [s. 123, 124]

such rules to be subject to sanction, and published, 398 [s. 126], 398 [s. 127]

(3) procedure of Courts subject to their jurisdiction, 395 [s. 122], 398, 400 [s. 128]

Rule committee for such rules, 396, 397 [s. 123, 124]

such rules to be subject to sanction, and published, 398 [s. 126, 127]

power of Chief Courts of Punjab and Lower Burma to make rules, 395 [s. 122], 398, 400 [s. 128]

Rule committee for such rules, 396, 397 [s. 123, 124]

such rules to be subject to sanction, and published, 398 [s. 126], 398 [s. 124]

..... 397 [s. 123], 398, 400 [s. 128]

cl 37]

Rule Committee—

constitution of, 396 [s. 123]

functions of, 397 [s. 124]

Ruling Chief—*See* Chiefs (ruling) and Princes

Sale—

auction purchaser, rights of—*See* Auction purchaser, and sub head (5) below

Collector, by, how to be conducted, 1307 [Sch III, para. 10] *See* Collector

Court sale, when purchaser at, not bound to inquire into correctness of decree or

order of sale, 243 *See* Auction purchaser

execution of decree, sale in, when void and when voidable, 242, 243

execution purchaser, rights of—*See* Auction purchaser, and sub head (5) below.

execution proceedings, sale set aside, decree obtained by fraud, 185.

exemption from, of certain property, 215, 216 [s. 60 (1), proviso]

fraud, suit to set aside, of property in execution of decree obtained by, 122, 183.

immediate sale of movable property subject to speedy decay, 1033 [O 39, r. 6]

immovable property, of—*See* sub head (4) below

interim, of securities, where state of market requires such sale, 1013

limitation for setting aside, in execution proceedings, 186

mortgaged property, of—*See* sub head (1) below

movable property, of—*See* sub head (7) below.

partner's interest in property, sale of, in execution, 759 [O 21, r 49 (2)]

purchaser at Court sale, rights of—*See* Auction purchaser, and sub-head (5) below

rateable distribution of proceeds of sale in execution, 253, 256 [s. 73].

..... 242, 244

..... Collector, 254 [s. 72]

witness, sale of property of defaulting, 652 [O 16, r 12]

(1) In suits relating to Mortgages of immovable property—

beneficiaries, whether necessary parties to suit for sale brought by trustees, 981

charge, provisions respecting redemption and sale apply to, 1023 [O 34, r 15]

final decree in suit for sale, 1000, 1001 [O 34, r 5]

foreclosure suit, power to decree sale in, 997 [O 34, r 4 (3)], 1000.

interest where decree is for sale of mortgaged property, 1015 [O 34, r 11], 1016, 1018

mortgage decree, effect of sale under, 1003, 1004

Sale—*contd*

- (1) *In suits relating to Mortgages of immovable property—contd*
 mortgage, sale of property subject to prior, 1018 [O 34, r 12]
 mortgaged property, effect of sale of, without instituting a regular suit for sale, 1020, 1021
 mortgagee, second, rights of, in suit for sale by first mortgagee, 999, 1000
 parties to suits for sale, 977 [O 34, r 1], 980, 981
 personal decree against mortgagor for balance due after sale, 1004, 1005 [O 34, r 6]
 preliminary decree in suit for sale, 997, 998 [O 34, r 4]
 receiver of mortgaged property in suit for sale, 1061, 1062
res judicata, suits for sale and, 57, 59
 sale proceeds in mortgage suits, application of, 1018, 1019 [O 34, r 13]
 suit for sale, when it may be brought, 989, 990
 when mortgaged property not to be sold without, 1019 [O 34, r 14]
 transferee of money decree from mortgagee, whether, can bring mortgaged property to sale in execution of decree, 1023
- (2) *Of property under attachment—generally—*
 acceptance of bid, 791
 adjournment and stoppage of sale, 797, 798 [O 21, r 69]
appeal from order on applications for recovery of loss by resale, 800
 refusing permission to decree holder to purchase at Court sale, 801
 setting aside or refusing to set aside sale to decree holder, 801
 attached property, power of Court to order sale of, 791 [O 21, r 64]
 attachment before judgment no bar to applying for sale, 1042 [O 38, r 10]
 conduct of sale of attached property 791 [O 21, r 65]
 Court duty of in execution sales, 794
 decree holder not to bid for or buy property without leave of Court, 800 [O 21, r 72]
 purchase by, without leave of Court, not *ipso facto* void, 801
 duty of Court in sales by Court, 794
 leave to bid, to decree holder, 800 [O 21, r 72]
 non compliance with provisions relating to time of sale, 797
 officers not to bid for or purchase, 803 [O 21, r 73]
 postponement of sale pending investigation of claims or objections, 775, 776 [O 21, r 58 (2)] *See* Attachment sub head 'Investigation of claims and objections'
 private sale, to decree holder, effect of, 237
 proclamation of sale, 792 [O 21, r 66]
 mode of making, 796, 797 [O 21, r 67]
 resale, defaulting purchaser answerable for loss on, 798, 799 [O 21, r 71]
 sale of attached property, power of Court to order, 791 [O 21, r 64]
 sale of goods belonging to a third person, who liable for damages, for, 791
 time of sale, 797 [O 21, r 68]
 value of property to be sold, specification of, in proclamation, 793
- (3) *Of Movable property under attachment—*
 agricultural produce, sale of, 803, 804 [O 21, r 74]
 bid of co-owner to have preference, 805 [O 21, r 77 (3)]
 delivery of movable property, debts and shares, 806 [O 21, r 79]
 growing crops, special provisions relating to, 804 [O 21, r 75]
 immediate sale of movable property subject to decay—
 (1) where it is property attached before judgment, 1053 [O 39, r 6].
 (2) where it is property attached in execution 751 [O 21, r 43, proviso]
 irregularity not to vitiate sale, but person injured may sue, 805 [O 21, r 78].
 negotiable instruments, sale of, 804 [O 21, r 76]
 transfer of, 806, 807 [O 21, r 80].

Sale—*contd*(3) *Of Movable property under attachment—contd*

public auction and payments of purchase money, 805 [O 21, r 77 (1)]

sale when becomes absolute, 805 [O 21, r 77 (2)]

shares in a corporation sale of 804 [O 21, r 76]

transfer of, 806, 807 [O 21, r 80]

vesting order in case of movable property not specially mentioned, 807 [O 21, r 81]

(4) *Of Immovable property under attachment—*

absolute sale when to become 833 [O 21, r 92]

appeal from order made on application to set aside sale on deposit, 817, 818

setting aside or refusing to set aside sale, 831, 1120 [O 43, r 1
cl (j)]

attach, omission to, before sale, 824

bid of co owner to have preference, 811 [O 21, r 88]

confirmation of sale, 833 [O 21, r 92]

limitation, plea of, not available after, 835

Courts by which sales of immovable property may be ordered, 807 [O 21, r 82]

deposit by purchaser, 809 [O 21, r 84]

of decretal amount, and setting aside of sale 811 [O 21, r 89]

estoppel of judgment debtor from impeaching sale, 829

fraud in publishing or conducting sale, setting aside for, 818 [O 21, r 90] 825

fresh proclamation on resale in default of payment in time, 810 [O 21, r 87]

irregularity in attaching property, effect of, 824

publishing or conducting sale, effect of, 818 [O 21, r 90] 82a.

judgment debtor when estopped from impeaching sale, 829

limitation, period of, for return of purchase money, 838

for application to set aside sale for fraud or irregularity, 830, 831

omission to attach property before sale, 824

order confirming or setting aside sale, 833 [O 21, r 92]

parties, necessary, to application to set aside sale on deposit, 817

to set aside sale for fraud or irregularity, 828, 829

postponement of sale for judgment debtor to raise decretal amount, 807, 808
[O 21, r 83]

resale on default, in payment of deposit by purchaser, 809 [O 21, r 84]

in payment of purchase money, 810 [O 21, r 86]

return of purchase money when sale set aside, 835 [O 21, r 93]

sale, when set aside on deposit, 811 [O 21, r 89]

when set aside on ground of irregularity or fraud, 818 [O 21, r 90]

when set aside for absence of saleable interest, 832 [O 21, r 91]

when to become absolute, 833 [O 21, r 92 (1)]

when to be set aside, 833 [O 21, r 92 (2)]

saleable interest, when judgment debtor has none, 832 [O 21, r 91]

of mortgagor, 832

substantial injury, and setting aside of sale, 818 [O 21, r 90], 826 828

suit for return of purchase money where no saleable interest, 834

suit to set aside order confirming sale, 834

stay of sale pending appeal, 1081 [O 41, r 6 (2)]

time for payment in full of purchase money, 809 [O 21, r 85]

(5) *Purchaser's title and his rights—See Auction purchaser*

Court sale what passes to purchaser at, 839, 840

delivery of property in occupancy of judgment debtor, 842 [O 21, r 93]

of tenants, 843 [O 21, r 96]

joint mortgage decree, property purchased by one of several holders of, 248, 249

Sale—*contd*

(5) *Purchaser's title and his rights—See Auction purchaser—contd*

jurisdiction, where none, sale void, 242.

law, effect of new interpretation of, on sale, 841.

money decrees, successive purchasers at sales in execution of, 241.

mortgage, when property sold subject to, 782.

where mere notice of, given in proclamation, 782.

mortgage decree, successive purchasers at sales in execution of, 241.

what passes on sales of mortgaged property in execution of, 840

partner, purchase by, in his name but with partnership funds, 248.

reversal of decree, effect of, on sale, 243, 244.

sale certificate, 839 [O 21, r 94]

successor in title of certified purchaser, 250

suit against purchaser by beneficial owner in possession, 247.

by third person on the ground of benami, whether barred,

244 [s 66], 247

against beneficial owner in possession, 249.

whether maintainable without certificate, 241, 242.

validity of decree or order for sale, purchaser not bound to inquire into, 243

variance between proclamation of sale and sale certificate, 840, 841

vesting of property sold in purchaser, date of, 239 [s 65]

waiver by certificated purchaser of right of possession, 249

Sale certificate—*See Certificate*

Sale proceeds—

rateable distribution of, 235, 236 [s 73] *See Rateable distribution.*

Saleable interest—

absence of, and setting aside of sale, 832 [O 21, r 91]

return of purchase money when no saleable interest, 835 [O. 21, r 93], 836-838

Saleable Property—214 217 [S 60]

bonus to Railway servant, 219

equity of redemption, 217

instances of property liable or not liable to attachment and sale, 219, 220.

objection to attachment because property not saleable when to be raised, 226, 227

Salvage—

assessors in case of, 408 [s 140].

Satisfaction—

attachment, removal of, after satisfaction of decree, 773 [O 21, r. 55]

costs where deposit accepted in part or full satisfaction of debt, 906, 907 [O. 24 r 4].

cross claims, in case of, under same decree 727 [O 21, r 19]

cross-decrees, in case of, 724 [O 21, r 18].

decree, of, out of Court, 691, 692 [O 21, r 2].

when said to have been fully satisfied, 198, 199

decree *ex parte*, of, under protest, no bar to application to set aside the decree, 603

deposit by defendant in Court of amount in satisfaction of claim, 905 [O 24, r 1].

question as to satisfaction of decree is for Court executing decree, 167 [s. 47].

Scandalous—

- interrogatories, power of Court to disallow scandalous, 611
- objections to scandalous, 613 [O 11, r 6]
- pleadings and striking out scandalous matter, 542 [O 6, r 16]
- appeal from order, 544
- relevant, nothing can be scandalous which is, 543, 613

Scheduled districts—4

Scheme—

- cy pres* doctrine, application of, in schemes of public charities, 313
- liquidation of decrees for payment of money, for, 1300, 1301 [Sch III, para 7]
- public or religious charities, setting schemes in suits relating to, 294 [s 92 (1) (g)]

Second appeal—331 344 [ss 100 103], 1118, 1119 [O 42]—

- amendment of pleadings in, 554
- award, second appeal from appellate decree on, 1281
- case, new, in, 339
- changing nature, of suit in, 339
- construction of deed, question of, and, 334, 335
- cross objections may be filed in, 1097
- second appeal from decree of first appellate Court disallowing, 1097
- custom, 336, 337
- fact, findings of, erroneous or without any evidence to support them, and, 337
- undetermined issues of, when may be determined in second appeal, 343 [s. 103]
- fraud in publishing or conducting sale, and 825, 826
- High Court, lies only to, 331, 332 [s 100]
- in second appeal may refer issues of fact to lower appellate Court, 1106
- jurisdiction, when objection as to, may be taken for first time in, 127, 339
- law, where decision is contrary to, and 331, 332 [s 100] 334 335
- conclusions of, drawn from findings of fact, and, 335, 336
- issue of, when not determined, and, 331, 332 [s 100]
- leave to amend pleadings may be granted in, 554
- misconception of the real question, to try by lower Court and, 338
- order dismissing appeal for default, second appeal does not lie from, 339
- made in appeal from orders, does not lie from, 344 [s 104 (2)]
- from orders under s 47, lies from, 185
- parties, adding of, in second appeal, 1092
- plea which may be taken for the first time in 339 340
- Privy Council, no appeal lies to, when no second appeal lies, 369 [s 111 (b)]
- procedure in second appeal, 351 [s 108] 1118 [O 42, r 1]
- substantial error or defect in and, 331, 332 [s 100]
- refusal by Court of first appeal to extend time for filing an appeal, and, 339
- remand, inherent power of High Court to, in second appeal, 1119
- order of, made by a single Judge in second appeal, 1102
- res judicata*, plea of, in second appeal, 339
- review, no second appeal from order in appeal from order granting 1154
- revision, no, where second appeal lies, 372
- rules relating to first appeal to apply to second appeals, 1118 [O 42, r 1]
- sections relating to first appeal to apply to second appeals, 351 [s. 108]
- Small Cause Court suits and execution proceedings, no second appeal in certain, 340 [s 102], 342
- substantial error or defect in procedure, and, 331, 332 [s 100] 337 339
- suit to enforce a call, 342
- usage having the force of law, and, 331, 332 [s 100], 336
- when second appeal will lie 331, 332 [s 100]

Secretary of State—

agent to receive process against, 924 [O 27, r 4]
 claims or liabilities enforceable by or against, 273
 death of complainant after notice but before suit against, 279
 execution of decree against, 280 [s 82]
 notice before institution of suit against, 274 [s 80] 275, 276
 place of suing in suit against, 274
 plaint in suits by or against, 924 [O 27, r 3]
 security not required from pending appeal, 1032 [O 41, r 7]
 signature and verification of pleadings, 923 [O 27, r 1]
 suits by or against, 273 [s 79]
 waiver of notice by, 275

Secular Office—

suit for, 27
 by the secretary of an Association, 27

Security—**(1) For costs of suit—**

appeal under cl 15 of Charter from order requiring plaintiff to give, 910
 from order refusing to set aside dismissal of suit for failure to give, 911
 British India, residence outside, and, 908 [O 23, r 1 (2)] 908
 cross claim by defendant residing outside British India, and 910
 failure to furnish effect of, 911, [O 25 r 2]
 insolvency of plaintiff on 871 [O 22, r 8]
 minor plaintiff and 910
 next friend retiring to give security for costs already incurred 957 [O 32 r 8
 (1)]
 non resident plaintiffs discretion of Court in requiring security for costs from 908
 Official Assignee, failure of, to give security 871 [O 22, r 8 (2)]
 pauper, where leave is granted to plaintiff to sue as 909, 910
 plaintiff, when taken from, 907, 908 [O 25 r 1]
 insolvency of, and security for costs 871 [O 22, r 8 (2)]
 poverty no ground for requiring 909
res judicata, dismissal of suit for failure to furnish security for costs and 70 911
 time within which application lies to set aside dismissal for failure to furnish 911
 trustees of public charity and order for 299
 woman, in suit for money by, 908 [O 23, r 1 (3)], 910

(2) For costs of appeal—

at what stage respondent should apply for 1084
 Charter, appeal under cl 15 of and security for costs, 1085
 consequence of not furnishing 1083 [O 41, r 10 (2)]
 extension of time for furnishing 1085
 High Court rules inconsistent with provisions of Code, effect of, 1083
 insolvent, pauper or poor, appellant and, 1084

(3) For costs of appeal to Privy Council—

admission of appeal on furnishing security 1130 [O 45 r 8]
 appeal from order refusing to extend time for furnishing 1130
 appellant to furnish security for costs of respondent, 1128 [O 45, r 7 (1)]
 certificate, security on grant of 1128 [O 45 r 7 (1) (a)]

Security—*contd*(3) For costs of appeal to Privy Council—*contd*

- further security before sending of record of Privy Council, 1131 [O 45, r 10]
- failure to give, 1131 [O 45, r 11]
- pending appeal to Privy Council, 1134 [O 45, r 14]
- pauper, where appeal preferred by, 1125
- revocation of acceptance of security, 1130 [O 45, r 9]

(4) Where execution is either stayed or allowed—

- appellant, security from, where execution stayed pending appeal, 1076, 1077 [O 41, r 5]
- pending appeal to P C, 1132 [O 45, r 13 (2) (c)]
- respondent, security from, where execution allowed pending appeal, 1081 [O 41, r 6]
- pending appeal to P C, 1132 [O 45, r 13 (2) (b)]

(5) In other cases—

- appellate decree, security, for performance, 423
- attachment before judgment, removal of, on furnishing of security, 1041 [O 38, r 9]
- attached property, to produce, 732
- condition, security for fulfilling, imposed on any person, 424
- decree security for performance of, 1079
- defendant, from, for appearance, 315 [s 94 (a)], 1034, 1035 [O 38, r 1] 1036 [ib, r 2]
- for production of property, 1037 1038 [O 38, r 5] 315 [s 94 (b)]
- ex parte decree, security for carrying out, on rehearing, 423
- failure to furnish security for appearance, effect of, 1037 [O 38, r 4]
- guardian *ad litem*, when security required from, 951 [O 32, r 6 (2)]
- judgment debtor, when security required from, 734 [O 21, r 26 (3)]
- money, security for payment of, instances, 424
- next friend, when security required from, 951 [O 32, r 6 (2)]
- public officer, when security could not be required from, 1082 [O 41, r 7]
- receiver, security from, 1068 [O 40, r 3 (a)]
- restitution, security for, of property taken in execution of decree, 423
- Secretary of State, when security not to be required from, 1082 [O 41, r 7]
- summary suit, from defendant on granting of leave to defend, 1033 [O 37, r 3 (2)].
- witness, security from, for his attendance, 603 [O 16, r 16 (2)]

Service—

- dismissal of suit where plaintiff after summons returned unserved fails for three months to apply for fresh summons, 584 [O 9, r 5]
- when plaintiff fails to pay for service, 583 [O 9, r 2]
- of foreign summons, 135 136 [s 29]
- orders, notices and other documents, 1156 [O 48, r 2]
- process issued under the Code, 1156 [O 48, r 1]
- of Chartered High Courts, 1157 [O 49, r 1]
- on pleader, 510 [O 3, r 5]
- on recognized agent, 506 [O 3, r 3]
- on special agent to accept service, 510 [O 3, r 6]
- object of, 514
- of summons when defendant resides in another province, 135, [s 28]
- on corporation, 928 [O 29, r 2]
- firm, 932 [O 30, r 3]
- guardian *ad litem*, 947
- minor, 947
- persons authorized by military men to sue or defend for them, 926 [O 23, r 3]
- registered post, service by, 519, 520

Service—*contd***(1) of summons on Defendant—511 523 [O 5]**

- acknowledgment, person served to sign, 515 [O 5, r 16]
 refusal to sign, 516, 517
- adult male member of defendant's family, service on, 515 [O 5, r 15]
- agent by whom defendant carries on business, service on, 514 [O 5, r 13]
 empowered to accept service, 514 [O 5 r 12]
 in charge, service on in suits, for immovable property, 515 [O 5, r 14]
- declare that summons has been duly served, 518 [O 5, r 19], 518
- defendant refuses service or cannot be found, procedure when, 515-516 [O 5 r 17]
 in person, service to be on, when practicable, 514 [O 5, r 12]
 in prison, service on, 521 [O 5, r 24]
 keeping out of way for purpose of avoiding service, 518 519 [O 5 r 20]
 residing out of British India 521 [O 5 r 25]
 residing within jurisdiction of another Court, where, 519 [O 5, r 21]
- delivery of summons for service where defendant within jurisdiction, 513, 514 [O 5, r 9]
- duty of Court to which summons is sent for service, 520 [O 5, r 23]
 of persons to whom summons is delivered or sent for service, 523 [O 5, r 29]
- endorsement of time and manner of service, 518 [O 5, r 18]
- examination of serving officer, 518 [O 5, r 19]
- foreign territory, service in, through Political Agent or Court, 521, 522 [O 5, r 26]
- letter, substitution of, for summons, 523 [O 5, r 30]
- manager or agent personally carrying on business, service on, 514
- master of a ship, service on, 514 [O 5 r 13 (2)]
- minor defendant on 947
- mode of service on defendant within jurisdiction 514 [O 5, r 10]
- object of, 514
- Presidency towns service of within summons from Courts outside 520 [O 5, r 22]
- public officer, service on, 522 [O 5, r 27]
- punda nisha* woman and substituted service, 518
- railway servant service on, 522 [O 5, r 27]
- registered post, by, 519, 520
- return by serving officer form of 518
 of summons where from any cause service is impossible 523 [O 5, r 29 (2)]
- servant is not a member of family for purposes of service 515 [O 5, r 15, *Explan*]
- serving officer, when deemed to have used all due and reasonable diligence, 517
- several defendants service on, 514 [O 5 r 11]
- soldiers, service on, 522 [O 5, r 28] 926 [O 28, r 3]
- substituted service 518, 519 [O 5 r 20]
- sufficiency of service 520, 521
- temporary absence of defendant from home, and service of summons, 517

(2) of summons on Witness—

- time for serving summons, 650 [O 16, r 9]
- to be made in same manner as summons to a defendant, 650 [O 16, r 8]

Set off—

- amount claimed as to be legally recoverable, 573 574 [O 8, r 6], and ascertained, 575
 not to exceed pecuniary jurisdiction, 578
- appeal from decree relating to set off 656 [O 20, r 19 (2)¹]
- costs to be set off, Court may direct, 670 [O 20, r 6 (3)]
- Court fee, 578
- cross decrees when, may be set-off against each other, 724 [O 21, r 14], 725, 726

Set off—*could*

- decree for payment of money may be set off against mortgage, 726
- defendant, when set off claimed, 686, 687
- when set off is allowed, 686 [O 20, r 19 (1)]
- decree-holder purchaser, right of, to set off purchase money, 800 [O 21, r 72 (2)].
- effect of set-off, 574 [O 8, r 6 (2)]
- equitable set off, 575, 576
- garnishee's right of set-off, 756
- insolvency proceedings set off in, 579
- joint and several debt, separate debt cannot be set off against, 578
- jurisdiction, pecuniary limits of, not to exceed, 573, 574 [O 8, r 6], 575
- "legally recoverable," 577, 578
- lien of pleader for costs where set off is claimed, 574 [O 8, r 6 (2)]
- new grounds of defence arising after claiming a set off, 581, 582 [O 8, r 8]
- omission to claim, and *res judicata*, 581
- order disposing of defendant's claim to set-off, appeal from, 581.
- particulars of, to be given in written statement, 573, 574 [O 8, r 6]
- parties must fill same character, 573, 574 [O 8, r 6 (1)], 578
- pauper suits, set-off in, 572
- pecuniary limits of Court, amount of set-off not to exceed, 573, 574 [O 8, r 6 (1)], 578
- plaintiff, set off allowed by, to be mentioned in plaint, 535 [O 7, r 1 (A)]
- right of equitable set off does not exist when cross demand relates to different transaction, 576
- set-off founded on separate grounds, 581 [O 8, r 7].
- suit must be one for recovery of money, 575
- when set off may be claimed, 573, 574 [O 8, r 6]
- winding up proceedings, set off in, 579
- written statement in answer to a claim of set off, 574 [O 8, r 6 (3)]

Share—See Shares in a Corporation, Co sharer

- attachment of a share in movables, 758 [O 21, r 47]
- execution, share in immovable property how delivered in, 742 [O 21, r 35 (2)].
- sale of share and bid of co-sharer, 805 [O 21, r 77 (3)], 811 [O 21, r 85]

Shares in a Corporation—

- attachment, liable to, 214 [s 60]
- mode of, 754 [O 21, r 46 (1) (b)]
- definition of, 19 [s 2 (19)]
- delivery of, in execution, 806 [O 21, r 79 (3)]
- sale of, in execution, 804 [O 21, r 76]
- transfer of, in execution, 806, 807 [O 21, r 80]

Sheriff—

- conversion, not liable for, 791

Shop book—

- evidence, receiving in, copies of entries in, 637, 638 [O 13, r 5].
- production of, 569 [O 7, r 17].

Signed—

- award to be signed and filed, 1268 [Sch. II, para. 10].
- definition of, 19 [s 2 (20)].
- execution, application for, by whom to be signed, 706, 707 [O 21, r 11 (2)].
- judgment to be dated and signed, 663 [O 20, r 3].

Signed—*could*

- pleadings by whom to be signed in ordinary cases, 541 [O 6, r 14]
 - suits by or against Corporation, 926 [O 29, r 1]
 - suits by or against Government, 923 [O 27, r 1]
 - suits by or against firms, 923 [O 30, r 1]
- summons, by whom to be signed, 511 [O 5, r 1 (3)]

Slander of title—

- malice how pleaded in suit for, 539

Small Cause Courts—See Presidency Small Cause Courts Provincial Small Cause Courts

- application of sections of Code to Provincial and Presidency 22, 23 [ss 7, 8]
- attachment, no, of immovable property of witness by, 651 [O 16, r 10, proviso]
- contents of judgments of, 663 [O 20, r 4 (1)]
- execution proceedings included in 'suit,' for sec 102, p 342
- reference to High Court in regard to jurisdiction of, 1140, 1141 [O 46, rr 6, 7]
 - case of doubt as to jurisdiction of, 1140 [O 46, r 6]
 - of mistake as to jurisdiction of, 1140, 1141 [O 46, r 7]
- rent, suit for, in, 342
- sale of immovable property in execution of decree, cannot order, 807 [O 21, r 82]
- suit includes execution proceedings for sec 102, p 342.
- summons in Small Cause suits, to be for final disposal, 513 [O 5, r 5, proviso]
- title, suit for, in, 342
- transfer of certain decrees for execution to, 703 [O 21, r 4]

Soldier—See Military men

- service of summons on 522 [O 5, r 24]

Solicitor—See Attorney**Sovereign—See Chiefs (ruling) and Princes****Special appeal—See Second appeal****Special Case—**

- agreement to state case for Court's opinion and procedure thereon, 1027, 1028
 - [O 36, rr 1 5] to be filed and registered as suit, 1028 [O 36, r 3]
- arbitrator or umpire, statement of, by, 1268 1269 [Sch. II, para 11]
- opinion of Court, power to state case for, 289 [s 90], 1027 [O 36, r 1].
- value of subject matter to be stated in certain cases, 1027 [O 36, r 2]

Specific performance—

- mode (ordinary) of enforcing decree for, 737 [O 21, r 32 (1)]
 - (special) of enforcing decree for, 738 [O 21, r 32 (5)], 739, 740
- temporary injunction not to issue against breach of contract, if case not one for, 1050 1052

Specific Relief Act—

- exclusion of certain words in s 21 of, 1294 [Sch. II, para 22]
- perpetual injunction regulated by ss 55 57 of, 1050
- section 42 of, does not apply to suits relating to public charities 313

Splitting—

- of claim, 481

Stamp—

- appeal from decision rejecting memorandum of appeal for insufficient stamp, 1074.
- deficiency of Court fees, power to make up 430 [s. 149].
- plaint where, insufficiently stamped, 504 [O 7, r 11 (c)].

State—*See* Foreign State.

Statute—

construction of, 24.
estoppel against, 62

Stay—

appeal does not operate as stay of proceedings under decree, 1076, 1077 [O 41, r 5 (1)]

arbitration, stay of suit where there is an agreement to refer to, 1235 [Sch II, para 18]

execution, stay of—*See* sub head "Stay of execution."

inherent power of Court to stay—

(1) cross suits and other proceedings, 435.

(2) criminal proceedings under sec 476 of Criminal Procedure Code, 437

(3) execution, pending decision in another suit, 735.

(4) suit which is an abuse of process of Court, 129.

(5) suit even in cases not covered by sec. 10, p 437.

interlocutory orders, pending stay of suit under sec. 10, p. 35.

interpleader suit, stay of suit brought against plaintiff in, 1025 [O 35, r 3]

[Sch II,

in firm name where names of partners not disclosed, 931 [O. 30, r 2 (2)]

partnership firm, stay of suit brought in name of, 931 [O. 30, r 2 (2)].

public sale of land, stay of, 254 [s 72].

reference to High Court, stay of proceedings on, 1139 [O. 46, r 2].

subject matter, identity of, 34, 35.

summary suit, stay of execution of decree in, 1034 [O. 37, r. 4].

Stay of execution—

appeal from order made by Appellate Court refusing stay of execution, 1080.

made by High Court refusing stay pending appeal to P C, 1134

award, stay of execution of, 735.

by Appellate Court, or by Court which passed decree 1076, 1077 [O 41, r. 5]

Court to which decree is sent for execution, 734 [O 21, r. 26]

Court pending appeal to Privy Council, 1132 [O 45, r 13 (2) (c)].

execution stay of—

(1) before appeal is preferred, or pending, 1076 1077 [O. 41, r 5].

(2) pending or in view of, appeal to Privy Council, 1132 [O 45, r 13 (2) (c)]

(3) by Court to which decree is sent for execution, 734 [O. 21, rr. 26 28]

(4) pending suit between decree holder and judgment debtor, 735 [O 21, r 28]

Government, no security from, 1082.

Stipends—

allowed to Government pensioners, attachment of, 216 [s. 60 (1) (g)].

Striking out—

execution proceedings, effect of, 774 [O 21, r 57].

interrogatories when prolix, oppressive, unnecessary or scandalous, 615 [O 11, r 7]

Suits—*contd*

- dead person, suit against, 475
- deed of gift or trust made in fraud of creditors, to set aside, 464
- disposal of—*See* Sub head (1) below
- ejectment suit and interrogatories, 609
- foreign firm, by or against, 926, 927
- frame of—*See* Sub head (2) below
- Government, by or against, to be instituted against Secretary of State, 273 [s 79]
- hearing of—*See* Hearing
- Hindu, debtor, to administer the estate of a living, 31
- immovable property, by decree holder against person obstructing him as to, 844
for recovery of, 556 [O 7, r 3]
- Income Tax Act, to set aside assessment made under, 31
- inherent power to postpone hearing of a suit pending decision of a selected action 435.
- in personam, 107
- interference with right of burial, 31
 - right of worship, 30
 - temple property, 30
- instituted, how, 135 [s 26], 511 [O 4, r 1]
- institution of suit, events happening after, and granting relief, 561
- interest subsequent to decree, no separate suit for, 137 [s 34 (2)]
- interpleader suits, 286 [s 88] *See* Interpleader suits
- jurisdiction of Courts—*See* Jurisdiction
- lunatics, by or against, procedure in, 961 [O 32, r 15] *See* Lunatics
- major, suit against, treating him as minor, 942
sued as minor, 942
- mesne profits for, 556 [O 7, r 2]
- minor plaintiff or co plaintiff on majority, may repudiate suit, 960 [O 32, r 13, 14]
- money, for recovery of 556 [O 7, r 2]
- Native Prince, to settle, right of succession to throne, 33
- negotiable instrument, on lost, 568 [O 7, r 16] *See* Negotiable instrument
- no fresh suit when suit abates or is dismissed under O 22, p 873 [O 22, r 9]
- partition, suit for, and *res judicata*, 58
- pauper, by legal representative of deceased, 964
- Pension Act, where suit relating to pension barred by, 31
- person carrying on business in name not his own, suit against, 938 [O 30, r 10]
- political questions, relating to 33
- possession by purchaser at sale of property in execution of decree, suit for, 241
of property to establish right to, 849 [O 21, r 103]
- public charities or nuisance relating to—*See* Public Charities Public Nuisance
- rateable distribution and declaratory suit as to right of, 269
- register of, 511 [O 4 r 2]
- religious office, for, 27
- religious rites and ceremonies, 26
- religious processions, 31
- rent, for, and Small Cause Court, 342
- representative character, by plaintiff in a, 556 [O 7, r 4]
- special suits—*See* Sub head (3) below
- specific performance for, against certified purchaser, 249
amendment of plaint in, 553
- stay of certain suits, 33 [s 10]
- summary—*See* Summary suits

Suits—*contd*

surety, to enforce liability of, 426
 title of, 558
 title for, and Small Cause Court, 342
 transfer of—*See* Transfer of suits
 transferee of decree, for declaration that transfer is valid, 721
 trust property—*See* Public Charities
 uncertified adjustments suits on, 696
 unregistered and unincorporated society, suits by, 927
 withdrawal of, by next friend 956.
 by plaintiff, 882 [O 23, r 1]
 worship, to assert right of, 464

(1) Disposal of suit at first hearing—

defendants, where all or one or several, not at issue with plaintiff, 646 [O 15, r 1, 2]
 evidence failure to produce at first hearing, 647 [O 15, r 4]
 parties at issue, where, 646 [O 15 r 3]

(2) Frame of suit—479 505 [O 2]

appeal from order rejecting application to join a claim with claim for land 501
 arrears of rent, joinder of claim for with claim for land, 499 [O 2, r 4 (a)]
 cause of action, different, arising out of same transaction, 488
 claims in which relief sought is based on same cause of action, 501

 omission of portion of a claim against one of several promisors, 482
 relinquishment of part of 480 [O 2 r 2 (2)]

 splitting of 481 483

 successive arising under same obligation, 480 [O 2 r 2, Explan] 483

 suit to include whole claim 480 [O 2, r 2 (1)]

counterclaims and suits for recovery of land, 502

Deccan Agriculturists Relief Act and splitting of remedies by mortgagor, 491

decree for balance, when sale proceeds not sufficient to pay mortgage debt, 1005

ejectment suit, who may be joined as defendants in, 498

foreclosure, suit for, and joinder of claim for possession, 499 [O 2, r 4]

 ' heir as such, meaning of, 503

Hindu widow, suit by, for ornaments and for share in husband's estate, 504

instalments, effect of omission to sue for those already due, 482

joinder of cause of action, 492 [O 2, r 3]

 of claims, 500

 by or against executor, administrator or heir, 502 [O 2, r 5].

jurisdiction where several causes of action are united, 492 [O 2, r 3 (2)]

land, suit for recovery of, and joinder of claims, 499 [O 2, r 4].

leave of Court and omission to sue for some reliefs, 480 [O 2, r 2]

mesne profits, joinder of claim for, with suit for land, 499 [O 2, r 4 (a)]

misjoinder—*See* Misjoinder

multifariousness—*See* Multifariousness

next friend, suit by, recover portion of claim bars fresh suit by minor, 491

omission of portion of claim against one of several promisors, 482

 to sue for one of several reliefs, 480 [O 2, r 2 (3)], 489

redemption, suit for, and joinder of claim for possession, 499 [O 2, r 4]

reliefs exception to the rule against splitting of, 491

separate trials of causes of action 504 [O 2, r 6]

setting off part of claim and omitting to counterclaim for the balance, 482 [ill 5]

unnecessary parties added as defendants 498

Suits—*contd*(3) *Special suits*

- aliens, by, 281 [s 83]
- ambassadors, against, 283 [s 86]
- corporations, by or against, [O 29] *See* Corporation.
- firms, by or against, 926 928 [O 30] *See* Firm Partners
- foreign and Native Rulers, by or against, 281 286 [ss. 83 87] *See* Chiefs (ruling) and Princes.
- Government and Public officers, by or against, 273 280 [ss 79 82], 923 925 [O 27]
See Government Public Officer
- Government and public officers, against, for injunction, notice in, 278
- Interpleader suits, 1024 1027 [O 35] *See* Interpleader.
- military men, by or against, 925, 926 [O 28] *See* Military men
- minors and persons of unsound mind, by or against, 941 942 [O 32] *See* Minors.
 Lunatics
- mortgages, relating to, 977 1024 [O 34] *See* Mortgage Foreclosure Redemption.
- paupers, by, 962 977 [O 33] *See* Pauper.
- public charities relating to, 293 [s 92] *See* Public Charities
- nuisance, relating to, 289 [s 91] *See* Public Nuisance
- summary suit on negotiable instruments, 1029 1034 [O. 37] *See* Summary Suits
- trustees' executors, and administrators, by or against, 939 941 [O 31] *See* Trustees
 Executors

Summary Suit—

- arrest, privilege from, before granting of leave to defend, 404.
- costs of noting non acceptance or non payment, recovery of, 1034 [O 37, r 6]
- counterclaim for wrongful arrest before judgment in, 317
- Courts in which summary suits may be brought, 1029 [O 37, r 1]
- decree, leave to appear and defend after passing of, 1034 [O 37, r 4]
- defendant not entitled to defend unless leave obtained, 1029 [O 37, r 2 (2)]
- deposit of bill, hundi or note, power of Court to order, 1034 [O 37, r 5]
- interest not to be awarded in, unless specified in promissory note, 1032
- leave to appear and defend, when granted, 1033 [O 37, r 3] 1034 [ib, r 4]
- negotiable instrument, summary suit upon, 1029 [O 37, r 2 (1)]
- procedure in, 1034 [O 37, r 7]
- stay of execution and granting of leave to defend, 1034 [O 37, r 4]
- summons in, 1029 [O 37, r 2 (1)]
 form of, 1032 118.
- time fixed in summons, Court has no power to extend, 1032
 within which summary suit must be brought, 1032
 defendant in, should apply for leave to defend, 1032

Summons—*See* Service Witness

Summons to defendant to appear and answer claim, 511 523 [O 5]

- amended copy, of, to be served on newly added defendant, 460 [O 1, r 10 (4)]
- appearance of defendant, 511 [O 5, r 1 (2)]
- copy of plaint or concise statement to accompany summons, 512 [O. 5, r 2]
- day for appearance of defendant how fixed, 513 [O 5 r 6]
 to be specified, 511 [O 5, r 1] 513 [ib, r 6]
- decree without issue of summons 512
- defendant residing in another province service on, 135 [s 28]
- dismissal of suit where plaintiff after summons returned unserved fails to apply for
 fresh summons for three months, 594 [O 9, r 5]
- documents relied on by defendant, order on defendant to produce, 513 [O 5 r 7]

Summons—*contd*

duty of persons to whom summons is delivered or sent for service, 523 [O 5, r 29]
 expense of serving summons, 1156 [O 48, r 1]
 foreign, service of, 135 [s 29]
 issue, of, 511 [O 5, r 1], 135 [s 27]
 letter, substitution of, for summons, 523 [O 5, r 30]
 option to defendant to appear in person or by pleader, 512 [O 5, r 1 (2)]
 penalty for default of compliance with, 136 [s 32]
 personal appearance of parties, when can or cannot be ordered, 512 [O 5, rr 3, 4]
 return of, when from any cause service is impossible, 523 [O 5, r 29 (2)]
 service of, 513 523 *See Service*
 settlement of issues or final disposal, summons to be for, 513 [O 5, r 5]
 Small Cause Court suits, in, to be for final disposal only, 513 [O 5, r 5, proviso]
 summary suit, form of summons in, 1032 1185
 witnesses, direction to defendant to produce his, 513 [O 5, r 8]

Summons to witness—647 651 [O 16] *See Witness*

arbitrator, summoning of witnesses before, 1266 [Sch II, para 7]
 attendance, to specify time, place and purpose of, 650 [O 16, r 5]
 Court, power of, to summon strangers to suit as witnesses, 653 [O 16, r 14]
 documents, summons to produce, 647 [O 16, r 1]
 only, summons to produce, 650 [O 16, r 6]
 evidence, summons to give, 647 [O 16, r 1]
 mode of service of, 650 [O 16, r 8]
 no fresh summons necessary where hearing postponed, 650
 parties, provisions as to witness to apply to 651 [O 16 r 21]
 personal attendance of witness when cannot be required 651 [O 16, r 19]
 power of Court to issue summons to witness, 136 [s 30 (b)]
 to require person present in Court to give evidence 650 [O 16 r 7]
 procedure where witness fails to comply with summons, 651, 652 [O 16, rr 10 11]
 service of, 650 [O 16, r 8] *See Service*
 time for serving, 650 [O 16, r 9]

Superintendence—

High Court's power of, 372, 1316
 Board of Revenue not subject to 1317
 not subject to emergency legislation, 1372

Surety—

appeal against order enforcing liability of 127
 appellate decree, and enforcement of liability of 121
 decree, surety for performance of, 122 [s 145 (c)] 127
discharge of surety, 429
 for appearance of defendant 1010 [O 18 r 7]
 judgment debtor 201 [s 55 (4)] 210
 enforcement of liability of surety 122 [s 145]
ex parte decree and liability of, 423
 fulfilment of condition imposed on a person by Court surety for 122 [s 145 (c)] 421
 limitation of enforcing liability of 127
 notice to surety, 422 [s 145 proviso 1] 426
 payment of money under order of Court surety for 122 [s 145 (c)] 121
 Privy Council appeal liability of surety in how enforced 1156
 substitution of property taken in execution of decree surety for 122 [s 145 (b)] 121
 security for payment of money 424
 suit for enforcement of liability of 426
 summary decree for enforcement of liability of, 421

Tenant—

delivery of property in occupancy of—

(1) to holder of decree for possession, 746 [O 21, r 36]

(2) to execution purchaser, 843 [O 21, r 96]

interpleader suit, when tenant may institute, 1026 [O 35, r 5]

suit by, against Ruling Chief or Prince, 284 [s 86 (5)]

Tender—

of expenses to witness, 649 [O 16, r 3]

Title

auction purchaser, 242

suit for, and Small Cause Court, 342

of, and correction in case of minor, 960

Time—

Act prescribed or allowed by Code, extension of time for doing, 428 [s 148]

agreement to give time to judgment debtor, 692

amendment of pleadings, for, 554 [O 6, r 18]

appeal, whether lies from order extending, 430

appearance of defendant for, to be specified in, summons, 511 [O 5, r 1 (1)]
when service substituted, 519 [O 5, r 20 (3)]

application for extension of, to be made to which Court 430

award, extension of time for making 1267 [Sch II para 8]

consent order and enlargement of time by Court 430

Court to which application should be made for extension of time, 430

decree, effect of appeal on time fixed for payment in, 152

execution, amendment of application for, and extension of time by Court, 429
limit of time for, 186 [s 48]

time for sale in, 797 [O 21, r 68]

extension of, 428 [s 148]

for filing appeal, refusal of, 339

for giving security and making deposit in Privy Council appeals, 1129

failure to amend pleadings, etc., and extension of time by Court, 429

foreclosure decree, enlarging of time fixed for payment in 987 [O 34, r 2] 992

inspection, time for, when notice given, 625 [O 11, r 17]

7]

mortgage suits, effect of appeal on time fixed for payment in, 995

power of Court to enlarge time, 428 [s 148]

pre-emption, extension of time fixed for payment of money in suits for, 429

Privy Council, time for security and deposit on appeal to, 1128 [O 45, r 7]

purchase money, time for payment of, 809 [O 21, r 85]

redemption decree, enlarging of time fixed for payment in, 1008 [O 34, r 7]

refusal to extend, for filing appeal, 339

respondent, for appearance of, in appeal, 1087 [O 41, r 12 (2)]

Secretary of State or public officer, for satisfaction of decree against, 280 [s 82]

written statement or additional written statement, extension of time for, 429

Tort—

British India, tort committed beyond, and place of suing, 110

immovable property, tort in respect of, and place of suing, 103 [s 16 (c)], 106

Tort—contd.

- joint tortfeasors, suit against, 456
- movables, tort in respect of, and place of suing, 110 [s 19]
- person, tort in respect of, and place of suing, 110 [s 19]

Trade mark—

- particulars in case of infringement of, 530

Transfer of business—

- of one Court to another, 432 [s 150]

Transfer of decree for execution—159 162, 703 705 [Secs 39 42, O 21, rr 5 9]

- appeal from order rejecting application for transfer of decree, 161
- attachment under precept, how long to continue, 46 [s 46, proviso]
- Collector, transfer of certain decrees for execution by, 251 [s 63]
- company in liquidation against, 721
- Court passing decree, power of, to send it to a Subordinate Court, 159 [s 39 (2)]
 - to which decree is sent to certify result of proceedings, 162 [s 41]
- decree, when, may be transferred for execution, 159 [s 39]
 - filing of, by Court to which it is transferred, without proof, 704 [O 21, r 7]
- dismissal of application for execution for decree holders failure to prosecute, 163
- documents, Courts receiving, to file same without proof, 704 [O 21, r 7]
 - to be sent to Court to which decree is transferred, 703 [O 21, r 6]
- execution by Court to which decree is transferred, 704 [O 21, r 8]
- foreign territory, execution in of decrees of Courts of British India, 165 [s 45]
- fresh application not necessary after transfer, 708
- High Court execution by, of decree transferred by other Courts 703 [O 21, r 9]
- jurisdiction of Court executing transferred decree continuance of 162
 - passing decree, proof of, 704 [O 21, r 7]
- limitation on powers of transferee Court, 163
 - whether Court executing transferred decree can go into question of, 163
- mode of transfer, 703 [O 21, r 5]
- Native States execution in British India of decrees of Courts of, 165 [s 44]
- objections to execution what can or cannot be entertained 162
- powers of Court in executing transferred decrees 162 [s 42]
- precepts, 166 [s 46]
- Presidency Small Cause Courts, transfer of decrees for execution to, 703 [O 21, r 4]
- rejection of application for execution on ground of informality, 161
- rules by *Local Government* as to by Collector, 251 [s 70]
- simultaneous execution in several places 161
- subordinate Judge by, to Small Cause Court, 161
- transfer of decree to Court in another province, 161 [s 40]
 - for execution, 160
- transfer pending execution of transferred decree, 721
- transferor Court does not altogether surrender control, 164

Transfer of Property—

- fraudulent transfer parties to suit relating to 464
- private, pending attachment effect of 232 235
 - under O 21 r 53, effect of, 236

Transfer of Property Act—

- charge definition of 1022
- lis pendens* doctrine of 880
- res judicata, and suits on mortgage 76 58
- saving of powers conferred by s 57 of, 1019 [O 34, r 13 (2)].

Transfer of suits—

application, to what Court, 129

not maintainable unless suit in Court having jurisdiction. 131

whether notice necessary. 132

Court of Small Causes, from, 134

Charter, under cl 13 of, 1346 [Charter, cl 13]

District Court, general power of, as to transfer and withdrawal, 130 [§ 24]

Governor General in Council, power of, transfer from one High Court to another, 134 [s 25]

grounds of, 131

High Court, by, from one Court to another, 1348 [Charter Act, s. 15]

general power of, respecting transfer and withdrawal, 130 [s. 241]

Presidency Small Cause Court, from, to High Court, 1346

re transfer of suits and appeals, 130 [s. 24 (1) (b) (iii)]

transfer of suits which may be filed in more than one Court, 129 [s. 22]

transferee Court need not have territorial jurisdiction, 131

Transferee of decree—

application for execution by, 713 [O 21, r 16]

equities of judgment debtor, transfer subject to, 196 [s. 49]

execution, transferee entitled to as of right, 718

law, by operation of who is, 714

maintenance transfer of decree awarding, 716

money decree, whether transferee of, from mortgagee, can bring mortgaged property to sale in execution of the decree. 1023

transfer of money decree to one of several judgment debtors, 718

who is, 714 716

Trusts (public, religious or charitable)—

suit for administration of 293 [s. 92] See Public Charities

breach of 293 [s. 92] *See* Public Charities

possession of trust property against trespassers or alienees 305

removal of trustee and against alienees from trustees 307

Trustee—

1 2 - 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1

liable to, 214 [s. 60 (1)]

17

whether necessary parties to suit brought by trustees for redemption,
foreclosure or sale. 981

costs of, 146

death of defendant trustee pending suit relating to public charities, 313

deposit in Court, order for, of moneys, etc., held as trustee 1055 [O 39 r 10]

husband of married trustee need not join in suit by or against her, 941 [O 31, r 3]

joinder of, in suits, 940

182

Trust property—

authorizing sale, etc., of, in suits relating to public charities, 294 [s. 92 (1) (f)]

declaring allocation of, to any particular object of trust, 201 [a 92 (1) (c)]

vesting of, in trustees of a public charity, 293 [s. 92]

Umpire—See Arbitration

- appointment of, 1263 [Sch II, para 4 (1) (a)]
 - of new, 1264 [Sch II, para 5]
- corruption or misconduct of, 1272 [Sch II, para 15 (1) (a)]
- death of, 1264 [Sch II, para 5 (b) (i)]
- leaving British India, 1264 [Sch II, para 5 (b) (iii)]
- notice for appointment of new, 1264 [Sch II, para 5]
- power of Court to appoint new, may be limited by agreement, 1265
- statement of special case by, 1268 [Sch II, para 11]
- umpire, when may arbitrate, 1267 [Sch II, para 9]

Undue influence—

- particulars of, to be stated in pleadings, 530 [O 6, r 4]

Unsound mind—

- interrogatories, and person of, 611
- plaint, statement in, where party is of unsound mind, 555 [O 7, r 1 (d)]
- suits by or against persons of, 961 [O 32, r 15] *See Lunatics*

Usage—

- having the force of law and second appeal, 331 [s 100 (1)], 335
 - and reference to High Court, 1138 [O 46, r 1]
 - and pauper appeal, 1122 [O 44 r 1]

Valuation of suits—

- jurisdiction of appellate Court, and, 331
 - rules relating to valuation of suits for determining 101
 - undervaluation of claim and objection as to 101 124
- overvaluation and undervaluation, 101
- plaint, statement in, of value of subject matter of suit 555 [O 7, r 1 (i)]
- Privy Council, appeal to, and consolidation of suits 1126 [O 45 r 4)]
 - and matter not capable of valuation 364
 - and remitting dispute to lower Court 1127 [O 45 r 5]
 - date of valuation, for purposes of, 357
 - decree, single in several appeals and valuation, 361
- rejection of plaint where relief claimed is undervalued, 364 [O 7 r 11 (b)]
- special case for Court's opinion, and valuation 1027 [O 36 r 2]
- subject matter not capable of valuation, 102
- undervaluation and effect on appeal to District Court instead of High Court 101

Verification—

- application for execution, of, 706 [O 21 r 11 (2)]
 - leave to sue as pauper, of, 961 [O 33 r 2]
 - order for sale, of, 792 [O 21 r 66 (3)]
- defective, and its effect, 541
- pleadings in general of 541 [O 6, r 15]
 - in suits against Government, of, 923 [O 27, r 1]
 - in suits by or against corporations of 926 [O 29 r 1]
 - firm, of 925 [O 30 r 1 (2)]

Vesting—

- of property in trustees of a public charity, 294 [s 92 (1) (c)]
 - purchaser of movable property at a Court sale, 807 [O 21 r 81]

Vesting order—

- attachment after judgment, effect of adjudication order on 238
- before judgment, effect of vesting order on, 1042

Wagering—

- defence of wagering contract to be specifically pleaded, 538
 - under Gaming Act and question of costs, 141
- interrogatories in cases where defence of, is set up 614

Waiver—

- beneficiary purchaser, by, of right of possession, 249
- jurisdiction, waiver of objection to, 125
- objection as to misjoinder and non joinder, waiver of, 479 [O 1, r 13]
 - to grant of leave under cl 12 of Charter, waiver of, 1345
 - to want of consent under s 86, waiver of, 284
- privilege, waiver of, relating to documents, 623
- Secretary of State, waiver of notice by, 275

Warrant—

- affixing copy of, and delivery of joint possession, 742 [O 21, r 35 (2)]
- arrest of defendant before judgment, 315 [s 94 (a)], 1034 [O 38, r 1]
 - outside jurisdiction in cases other than execution of decrees, 406 [s 136]
 - without warrant, illegal, 733
 - or attachment in execution, for, 732 [O 21, r 24]
- delegation of authority to execute, 733
- endorsement on 733 [O 21, r 25]
- specification of day on or before which warrant should be executed, 733
- warrant for arrest to direct judgment debtor to be brought up, 748 [O 21, r 38]
- witness, for arrest of defaulting, 651 [O 16, r 10(3)]

Will—See Executors

- executors who have not proved, not necessary parties, 940 [O 31, r 2]
- probate, when necessary, 557

Withdrawal—

- appeal from granting leave to withdraw a suit or abandon part of claim, 891
- arbitration and withdrawal of suit, 891
- cross objections, effect of withdrawal of appeal on, 1094 [Q 41, r 22 (4)]
- formal defect, and leave to withdraw suit, 882 [O 23, r 1] 884
- from suit 882 [O 23 r 1 (3)], 884
 - pending arbitration, 891
- grounds sufficient for withdrawal of suit, 885
- leave withdrawal of suit without, 882 [O 23, r 1 (3)] 889
- limitation governing second suit after withdrawal of first suit, 882 [O 23, r 2]
- of admissions, 634
 - application for execution, 410, 884
 - withdrawal of suit, 883
- application to file an award made without intervention of Court, 1304
- attachment before judgment, 1040 [O 38, r 6 (2)]
 - on property of defaulting witness, 651 [O 16, r 11]
- suit, with liberty to bring a fresh suit, 882 [O 23, r 1]
 - without permission to bring fresh suit, 884
 - appeal, etc., by High Court from subordinate Courts, 130 [s 24 (1) (b)]
- suit by next friend, 956
 - one plaintiff without consent of others, 883 [O 23, r 1 (4)]
 - plaintiff, 883
 - appellant, 883
 - respondent, 883

Withdrawal—contd

- suit by pauper, and payment of Court fees, 974 [O 33, r 11]
- pending appeal, 883
- with consent of defendant, but without leave of Court, 890
- suit, terms as to costs, 887.

Witness—

- admissibility of evidence of a foreign witness taken on commission, 915
- arbitrator, summoning of witnesses before, 1266 [Sch II, para 7]
- arrest, witness when exempt from, 403 [s 135 (2)]
- commission to examine witnesses, 912 916 [O 26, rr 1 8] See Commission
- commissioner, attendance and examination of witness before, 921 [O 26, r. 17 (1)]
- issue of process to witness on application of, 921 [O 26, r 17 (2)]
- contempt proceedings against, 652
- costs of suit, when witnesses of successful party are guilty of exaggeration, 145
- credibility of, 1072
- cross-examination of witnesses on commission, 915
- penalty for default of compliance with summons, 135 [s 32]
- power of Court to issue summons to witness, 136 [s 30 (b)]
- remedy of party when witness summons refused, 648
- summons to defendant to direct defendant to produce his witnesses, 513 [O 5, r 8]

Summoning and attendance of—

- appal from order of attachment of property of witness, 651, 1120 [O 43, r 1, cl (g)]
- pronouncing judgment against party refusing to give evidence, 654 1120 [O 43, r 1, cl (h)]
- application for issue of summons, when may be made 647 [O 16, r 1]
- attachment of property of witness, 651 [O 16, r 10 (3)]
- Court may summon stranger to suit as witness, 653 [O 16, r 14]
- documents, where summons is for production of, 650 [O 16, r 6]
- duty of persons summoned to give evidence, 653 [O 16, r 15]
- examination of serving officer when witness fails to appear, 651 [O 16, r 10 (1)]
- expenses of witness detained more than a day, 649 [O 16, r 4 (2)]
- travelling, 648 [O 16, r 2 (2)]
- suit to recover, 648
- expenses, scale of, 648 [O 16, r 2 (3)]
- tender of, to witness, 649 [O 16, r 3]
- default of witness in appearing remedy, 652 [O 16, r 12]
- insufficient sum paid in for expenses, procedure where 649 [O 16, r 4]
- power of Court to refuse summons where application not made *bona fide*, 648
- to require persons present in Court to give evidence, 650 [O 16, r 7]
- procedure when witness fails to appear, 652 [O 16, rr 12, 13]
- where witness apprehended cannot give evidence 653 [O 16, r 18]
- fails to comply with summons, 651 [O 16, r 10]
- proclamation requiring witness to attend, 651 [O 16, r 10 (2)]
- refusal to give evidence when required by Court consequence of, 654 [O 16, r 20]
- remedy of party when witness summons refused 648
- witness if travelling expenses not paid 649
- remuneration payable to experts, 648 [O 16, r 2 (2)]
- rules as to witness to apply to parties summoned, 654 [O 16, r 21]
- security for attendance from witness, 657 [O 16, r 16 (2)]
- Small Cause Court, no attachment of immovable property of witness by, 651 [O 16, r 10, proviso]

Witness—*contd*Summoning and attendance of—*contd*

- suit to recover travelling expenses of witness, barred, 649
- summons how served, 650 [O 16, r 8]
 - may be to give evidence or produce documents, 647 [O 16, r 1]
 - not to be refused except on ground of abuse of process of Court, 648
- time for serving summons, 650 [O 16, r 9]
 - place and purpose of attendance to be stated in summons, 650 [O 16, r 5]
- travelling and other expenses of witness, 648 [O 16, r 2]
- warrant of arrest, issue of, 651 [O 16, r 10 (3)]
- witness, when, cannot be ordered to attend in person, 654 [O 16, r 19]
 - may depart, 653 [O 16, r 16]

Examination of—

- commissioner, by, 921 [O 26, r 16 (a)]
- issues, examination of witness before framing, 644 [O 14, r 4]
- power to examine witness immediately, 661 [O 18, r 16]
 - to recall and examine witness, 665 [O 18, r 17]
- remarks on demeanour of witness, 663 [O 18, r 12]
- witness about to leave jurisdiction of Court, 664 [O 18, r 16 (1)]
 - to be examined in open Court, 660 [O 18 r 4]

Woman—

- decree against wife, when may be executed against husband, 871 [O 22, r 7 (2)]
- exemption of, from arrest in execution of money decrees, 212 [s 56]
 - in certain cases, from personal appearance, 402 [s 132]
- guardian *ad litem*, married woman as, 948
- marriage of female, party, suit not to abate by, 871 [O 22, r 7]
- ornaments of, and attachment, 215 [s 60 (1) (a)]
- substituted service in case of Hindu women of rank, 519
- suit for money by, and security for costs, 908 [O 25, r 1 (3)]

Written statement—570 582 [O 8] See Pleadings

- additional written statement 582
- amendment of, 544 [O 6, r 17]
- decree against defendant when no written statement filed, 582
- defence founded on separate grounds, 581 [O 8, r 7]
 - of one joint contractor enures for both, 570

- evasive denial, 571 [O 8, r 4]
- facts not denied in, to be taken as admitted, 572 [O 8, r 5]
- fact deemed to be admitted, power of Court to require proof of, 573 [O 8, r 5, proviso]
- failure to amend within time fixed by Court, 554 [O 6, r 18]
- firm, in suit brought against, 936
- fraud, defence of, to be set forth in, 570 [O 8, r 2]
- illegality, defence of, 570 [O 8, r 2]
- inspection of documents mentioned in, 624 [O 11, r 15]
- leave to amend when granted, 511
 - may be refused, 516
- limitation, defence of, 570 [O 8, r 2]

Written statement—*contd*

- new facts must be specially pleaded, 570 [O 8, r 2]
- ground of defence, which has arisen after written statement, 581 [O 8, r 8]
- omission to file, 573
- payment, or performance, defence of, 570 [O 8, r 2]
- plaintiff, when, may file, 524
- pleading includes, 523 [O 6, r 1]
- presentation of, 570 [O 8, r 1]
- procedure where party fails to present, called for by Court, 582 [O 8, r 10]
- relief claimed by defendant must be specifically stated, 559 [O 7, r 7]
- set off founded on separate grounds, 581 [O 8, r 7]
- set off particulars of, to be given in written statement, 573 [O 8, r 6]
 - when, may be claimed in, 573, 574 [O 8, r 6] *See* Set off
- signing of, 541 [O 6, r 14]
- striking out unnecessary, scandalous or embarrassing matter in, 542 [O 6, r 16]
- subsequent pleadings, 582 [O 8, r 9]
- surprise, to state grounds which would take opposite party by, 570 [O 8, r 2]
- verification of, 541 [O 6, r 15]

Wrong—*See* Tort**Zamindari—**

- grant of, by Government, and attachment, 223
-

EASTERN LAW HOUSE,
15, College Square, Calcutta.

MULLA & PRATT'S

THE INDIAN STAMP ACT, 1899

Third Edition

In Preparation

Price Rs. 7 (nett)

THE MOST EXHAUSTIVE COMMENTARY ON STAMP ACT

It contains cases reported both in authorized and unauthorized series. References are given throughout to "Indian Cases" and to the "All India Reporter."

PRINCIPLES OF MAHOMEDAN LAW

BY

THE RIGHT HONOURABLE
SIR DINSHAH F. MULLA, Kt.

10th Edition

Price Rs. 5-8-0.

RATANLAL AND DHIRAJLAL'S

INDIAN PENAL CODE

THIS book is prepared specially to meet the needs of the student of law. The comments are first set out shortly with a view to help to a thorough understanding of the principles underlying a given section.

The application of these principles to concrete facts is illustrated by a selection of typical cases decided under the Code. A number of questions are grouped together in the appendix, which will assist the student in testing his progress. The summary, which is a special feature of this edition, is meant to help the students in revising this subject for his examination.

No better and more reliable text book exists on the subject.

12th Edition, 1928.

Price Rs. 5.

RATANLAL AND DHIRAJLAL'S
ENGLISH AND INDIAN

LAW OF TORTS

(Prescribed as a text book in various Law Examinations)

THIS treatise contains a lucid exposition and methodical arrangement both of the principles of the English Common Law and of the Indian case law pertaining to the Law of Torts. The principles are first set out *in extenso*. These are followed by cases illustrative of their application and effect, and are further supplemented by cognate cases explanatory of their precise meaning. The present edition has undergone a thorough and searching revision and has been carefully brought up to-date. It is the only treatise which calls attention to all important English cases and at the same time contains a complete congery of Indian cases.

10th Edition, 1928.

Price Rs. 5.

JURISDICTION OF COURTS

IN

MATTERS OF CASTE

BY
D. F. MULLA, M.A., LL.B.

| | | | | |
|-------------|----|----|----|---------------------|
| In English | .. | .. | .. | Out of Print. |
| In Gujarati | .. | .. | .. | Price Rs. 3. |

THE KEY TO INDIAN PRACTICE

BEING A SUMMARY OF

THE CODE OF CIVIL PROCEDURE

IN 14 LECTURES

BY
D. F. MULLA, M.A., LL.B.

1929. **3rd Edn.** **Price Rs. 2.**

INDIAN LIMITATION ACT

ON THE

STARLING'S COMMENTARIES

As adapted to Act IX of 1908.

Sixth Edition, 1918, with Supplement

(BRINGING THE WORK DOWN TO 1922)

BY
R. S. BROOMFIELD, I.C.S., *Joint Judge, Ahmedabad.*
Price Rs. 14-8 0.

